William & Mary Bill of Rights Journal

Volume 22 | Issue 2 Article 12

Private Standards Organizations and Public Law

Peter L. Strauss

Repository Citation

Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013), http://scholarship.law.wm.edu/wmborj/vol22/iss2/12

Copyright c 2013 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/wmborj

PRIVATE STANDARDS ORGANIZATIONS AND PUBLIC LAW

Peter L. Strauss*

> Legal information institutes of the world, meeting in Montreal, declare that:
>
> - Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
> - Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;
> - Organizations such as legal information institutes have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties.[1]

---

* Betts Professor of Law, Columbia Law School. Thanks are due to many others, including: the participants in the Comparative Administrative Law symposium in Luxembourg, June 5–6, 2012; Joe Bhatia and Scott Cooper of the American National Standards Association; Rae McQuade of the North American Energy Standards Board; Carl Malamud of Public.Resource .org; Emily Schleicher Bremer of the Administrative Conference of the United States; Professor Bruce Ackerman; and my colleagues Jane Ginsberg, David Pozen, William Simon, and Timothy Wu. Jared Miller, J.D. 2014, provided indispensable research assistance. Extraordinary, too, has been the work of the staff of the *William & Mary Bill of Rights Journal*, who have doubled the number of footnotes in this Article and, in the course of that effort, updated much of its supporting data. The text, virtually unchanged from my submission, is entirely my own.

Readers should be aware that, although attempting a balanced account here, I am an interested party, having filed the petition for rulemaking discussed at some length within, and which lies behind the body of commentary to the National Archives and Records Administration (NARA) and to the Office of Information and Regulatory Affairs (OIRA) often called in following footnotes. These are FDMS dockets NARA-12-0002 and OMB-2012-0003, which may be found at http://www.regulations.gov. (Note that subsequent footnotes omit the location of the FDMS dockets, and take the form FDMS Docket XXXX-2012-YYYY or, for specific documents in the docket, FDMS Docket XXXX-2012-YYYY-ZZZZ.) I am an active member of the Administrative Law and Regulatory Practice section of the American Bar Association; though my efforts contributed to its interest in the matter, I did not significantly contribute to its comments filed in these dockets.

While some editorial revisions have been more recently made, substantive changes in this Article ended in early October 2013. To permit its publication here, developments subsequent to the Office of Federal Register's Notice of Proposed Rulemaking, published on October 2, 2013, have not been addressed.

[1] WORLD LEGAL INFO. INST., http://www.worldlii.org/worldlii/declaration/montreal_en .html (last visited Dec. 12, 2013).

> We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.[2]

ABSTRACT

Simplified, universal access to law is one of the important transformations worked by the digital age. With the replacement of physical by digital copies, citizens ordinarily need travel only to the nearest computer to find and read the texts that bind them. Lagging behind this development, however, has been computer access to standards developed by private standards development organizations, often under the umbrella of the American National Standards Institute (ANSI), and then converted by agency actions incorporating them by reference into legal obligations. To discover what colors the Occupational Safety and Health Administration (OSHA) requires for use in work-place caution signs, one must purchase from ANSI the standard OSHA has referenced in its regulations, at the price ANSI chooses to charge for it.

The regulations governing incorporation by reference as a federal matter have not been revised since 1982, and therefore do not address the changes the digital age has brought about in what it means for incorporated matter to be "reasonably available," as 5 U.S.C. § 552(a)(1) requires. This Article seeks to bridge that gap, suggesting a variety of approaches that might bring the use of incorporation by reference into conformity with modern rulemaking practices and respect the general proposition that documents stating citizens' legal obligations are not subject to copyright, while at the same time both honoring clear federal statutory policy favoring the use of privately developed standards in rulemaking and respecting the needs standards organizations have to find reasonable means to support the costs of their operations. Business models created in the age of print need to change; the challenge is to find ways to permit the market in privately developed voluntary standards to thrive, without thereby permitting the monopoly pricing of access to governing law.

INTRODUCTION 499
A. *Voluntary Consensus Standards* 499
B. *Their Occasional Conversion Into Legal Obligations* 502
C. *And Hence the Problem to Be Discussed* 507
I. THE UNCERTAIN STATE OF THE CASELAW ON THE COPYRIGHTABILITY OF STANDARDS THAT HAVE BEEN CONVERTED INTO LAW 511

---

[2] JEREMY BENTHAM, JUSTICE AND CODIFICATION PETITIONS 4 (Fred B. Rothman & Co. 1992) (1829). Erwin N. Griswold used this as the epigram to his *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 198 (1934).

II. FEDERAL REGULATION OF INCORPORATION BY REFERENCE 518
A. *The Office of the Federal Register* 518
B. *Copyright Preservation as Affirmative Federal Policy? Congress, the NTTAA, the NIST, and the OMB* 524
C. *Possibilities of Change: An Administrative Conference Study, Rulemaking Proposal, and Reconsideration of OMB Circular A-119* 529
III. CAN THE PUBLIC HAVE ITS ACCESS-TO-LAW CAKE AND STANDARDS DEVELOPERS EAT REVENUE FROM STANDARDS SALES TOO? 537
A. *Proposed Rulemaking and Digital Rights Management* 537
B. *Standards Developed in the Expectation of Incorporation* 543
C. *Standards Developed Independently of Any Expectation of Their Incorporation* 546
D. *Must Incorporation by Reference Create Legal Obligations?* 549
IV. CHANGING PART 51 555
CONCLUSION 559

INTRODUCTION

A. Voluntary Consensus Standards

This Article addresses the public/private confusions over standards developing organizations' work. Standards Developing Organizations (SDOs) are private non-governmental bodies that have long existed to create voluntary private standards by which to declare or measure the characteristics of goods on the marketplace. Throughout the world, manufacturing and markets are greatly aided, and consumers offered protection, by the application of uniform industrial standards created independent of law, as means of assuring quality, compatibility, and other highly desired market characteristics. They define what is meant by U.S. Hard Red Spring wheat,[3] reflect railroads' agreement on track widths permitting interchangeability,[4] establish threading conventions for nuts and bolts,[5] or fix the characteristics of the fittings that attach fire hoses to

---

[3] GIPSA, Subpart M—U.S. Standards for Wheat (2006), *available at* http://www.gipsa.usda.gov/fgis/standards/810wheat.pdf (now defining the U.S. standards for wheat by the Department of Agriculture).

[4] *See* Robert N. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1332–33 & nn.5–6 (1978). *See generally* Douglas J. Puffert, *The Standardization of Track Gauge on North American Railways, 1830–1890*, 60 J. ECON. HIST. 933 (2000) (discussing the standardization of railroads).

[5] For the British Eighth Army, fighting Rommel in North Africa:

> British replacements for worn-out parts on their American-made tanks reached the British armed forces just in time—only to be unusable due to literally incompatible nuts and bolts. Differences in British and American

hydrants.[6] Independent of any legal force they might have, Underwriters Laboratories (UL) tags on electric appliances offer buyers assurance of their safety.[7] The thousands of "voluntary consensus standards" that SDOs develop for industrial conduct are undeniably beneficial to the operation of markets in complex goods and to public safety.

Hundreds of private SDOs exist in the United States alone. Under the umbrella of the American National Standards Institute (ANSI),[8] one finds professional organizations of individual engineers such as the American Society for Testing and Materials (ASTM),[9] corporate-membership trade associations such as the American Petroleum Institute (API),[10] and corporations in the business of certifying safety, such as UL.[11] Abroad, there is a greater tendency to coordinated national bodies,[12] like the British Standards Institute (BSI),[13] or international bodies, such as the European Committee for Standardization (CEN),[14] the European Committee for Electrotechnical Standardization (CENELEC),[15] and the International Organization for Standardization (ISO).[16]

This Article is particularly concerned with American SDOs, primarily ANSI and the SDOs it has accredited for the generation of "voluntary consensus standards."[17] Not all standards fit the description "voluntary consensus standards"; some (for example, the

---

> threading standards—established in the 1840s and 1860s, respectively—thus forced the British commanders to abandon tanks and equipment in the North African desert . . . add[ing] some Ł25 million to the cost of war.

TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 130 (2011).

[6] The great Baltimore fire of 1904 became worse when fire companies called in from Washington, D.C., Philadelphia, and other cities found they could not attach their hoses to the city's hydrants. *See* Tyler R.T. Wolf, *Existing in a Legal Limbo: The Precarious Legal Position of Standards-Development Organizations*, 65 WASH. & LEE L. REV. 807, 808 (2008).

[7] *See UL Product Safety*, UL, http://www.ul.com/global/eng/pages/offerings/businesses/productsafety (last visited Dec. 12, 2013).

[8] *About ANSI Overview*, ANSI, http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1 (last visited Dec. 12, 2013).

[9] *About ASTM Int'l*, ASTM, http://www.astm.org/ABOUT/overview.html (last visited Dec. 12, 2013).

[10] *About API*, API, http://www.api.org/globalitems/globalheaderpages/about-api (last visited Dec. 12, 2013).

[11] *See UL Product Safety*, *supra* note 7.

[12] Tim Büthe and Walter Mattli offer a comprehensive and engaging view of global standards and their impact. *See generally* BÜTHE & MATTLI, *supra* note 5.

[13] *About BSI*, BSI GRP., http://www.bsigroup.com/en-Gb/about-bsi (last visited Dec. 12, 2013).

[14] CEN—EUROPEAN COMM. FOR STANDARDIZATION, http://www.cen.eu/cen/AboutUs/pages/default.aspx (last visited Dec. 12, 2013).

[15] *About CENELEC—Who we are*, CENELEC, http://www.cenelec.eu/aboutcenelec/whoweare/ (last visited Dec. 12, 2013).

[16] *About ISO*, ISO, http://iso.org/iso/home/about.htm (last visited Dec. 12, 2013).

[17] *See About ANSI Overview*, *supra* note 8.

standards for Blu-ray computer discs[18]) may simply be created by a manufacturer hopeful of capturing a certain market; others may be the product of organizations addressing compatibility issues in rapidly developing technologies without seeking to engage wide participation in their work. As the name may suggest, "voluntary consensus standards" are developed using procedures whose breadth of reach and interactive characteristics resemble governmental rulemaking, with adoption requiring an elaborate process of development, reaching a monitored consensus among those responsible within the SDO.[19] ANSI's "Essential Requirements: Due Process Requirements for American National Standards"[20] provides, in twenty-six detailed pages, a set of procedures both for accreditation and audit of SDOs wishing to develop American National Standards and for the consideration of individual standards. Standards, once adopted, are copyrighted as the intellectual property of the developing SDO and offered for sale through ANSI, SDO websites, or third-party publishers.[21] Although SDOs are generally nonprofit organizations and rely heavily on the voluntary work of engineers or others versed in the technical issues involved, fulfilling the required procedures imposes administrative costs that must somehow be financed.[22] For the professional societies, if not for the trade associations or corporate developers of standards, these costs are substantially financed through membership dues paid to participate in their processes and through the sale of their copyrighted standards.[23]

Although anti-competitive uses of standards are not unknown, and success in establishing one's preferences as an international standard, especially, may have significant

---

[18] *General Info*, BLU-RAY DISC ASS'N, http://www.blu-raydisc.com/en/association/generalinfo.aspx (last visited Dec. 12, 2013).

[19] *See* Mark I. Marpet, *An Ethical Issue in Voluntary-Consensus Standards Development: A Decision-Science View*, 17 J. BUS. ETHICS 1701, 1701 (1998).

[20] See ANSI's "Essential Requirements" for standards generation. *ANSI Essential Requirements: Due Process Requirements for American National Standards*, ANSI (last updated Jan. 2013) [hereinafter *ANSI Essential Requirements*], *available at* http://www.ansi.org/essentialrequirements.

[21] *See, e.g.*, *infra* notes 75, 138, 343 and accompanying text.

[22] "Not-for-profit" indicates an accepted public-serving purpose, freedom from taxation, and the absence of shareholders (owners) who might be paid dividends out of a surplus resulting from an excess of revenue over expenditures. Expenditures, however, may include compensation packages that, for high-ranking executives or for university football coaches, can reach seven figures. *See, e.g.*, Comment from Carl Malamud, President, Public.Resource.org, NARA-12-0002-0082 (Mar. 26, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0082 (listing table of salaries for executives at leading SDOs, ranging from $420,960 to $2,075,984). The possibility that the prices set by SDOs are self-serving, then, cannot be excluded.

[23] *See, e.g.*, *Content Strategy*, NFPA, http://www.nfpa.org/codes-and-standards/nfpa-digital-products/nfpa-product-development-and-innovation (last visited Dec. 12, 2013) (remarking in one breath: "We have had great success over the years using a business model in which the principal source of revenue was the sale of print editions of our codes and standards." The document next observes "[t]hat business model is no longer sustainable."). This is the reality with which this Article is concerned.

financial consequences for participants in international markets—favoring some and imposing additional costs on others[24]—standards are, on the whole, both necessary and beneficial. Complex markets could not operate without them. The processes ANSI and other organizations have developed to ensure consensus and provide safeguards against their abuse seem generally effective and, within the industrial community as a whole, there is every motivation to support them. This Article takes no issue with their development and use as voluntary consensus standards and accepts that, at least where standards may compete with one another,[25] market forces may work to control owners' exploitation of copyrights in them.

B. Their Occasional Conversion Into Legal Obligations

Increasingly, American governments—federal, state, and local—have been adopting part or all of some of these standards—e.g., what standardized colors should be used for caution signs in a work-place—as regulatory requirements.[26] Incorporation by reference at the state and local level greatly eases the work of both governments and arms markets. If the Southern Building Code Congress International[27] and its competitors[28] had not drawn up model building codes, each small town would have been obliged to develop its own, at high cost and low efficiency; as a result, builders and manufacturers of building materials might have found their markets extraordinarily complex. With a model code in place, builders will know that materials meeting its standards are acceptable for construction, and material suppliers will learn what qualities in their goods will likely satisfy the market as a whole. For example, what benefits the village of Hastings on Hudson may also benefit the maker and users of nuclear power plant equipment with standards developed by the American Nuclear Society (ANS)[29]—as well, it may be hoped, as neighbors to the plant wishing assurance of its safety. For a commercial builder, too, the cost of acquiring copies of the relevant adopted codes is likely trivial in relation to its other expenses; but for the homeowner who wishes himself to make code-compliant alterations in his own home, this may not be true, and in that possibility lies much of the impulse for this Article.

At the federal level, the conversion of standards into legal obligations through incorporation by reference had its origin primarily in a wish to protect the utility of the Federal Register and the Code of Federal Regulations, reducing their otherwise necessary size by thousands of printed pages, and secondarily in the hope of giving a

---

[24] *See* BÜTHE & MATTLI, *supra* note 5.

[25] *Id.*

[26] *See infra* notes 232–33.

[27] *About ICC*, ICC, http://www.iccsafe.org/aboutICC/pages/default.aspx (last visited Dec. 12, 2013).

[28] Competitors include the Building Officials Code Administrators International (BOCA), *id.*, the International Conference of Building Officials (ICBO), *id.*, International Code Council (ICC), *id.*, and the National Fire Protection Association (NFPA), *Content Strategy*, *supra* note 23.

[29] *Standards*, ANS, http://www.ans.org/standards (last visited Dec. 12, 2013).

kick-start to new federal safety programs, by converting to legal obligations consensus standards already in place. The American Administrative Procedure Act (APA)[30] has long required the publication of legally binding agency regulations in both the federal daily journal of record, the Federal Register, and the compendium of regulations, the Code of Federal Regulations (CFR).[31] No one would claim that the material thus published is subject to copyright; but when industry standards are incorporated by reference, they are merely identified by name and source. Their contents are not published—that is, indeed, the point in protecting the volume of the Federal Register and the CFR—and to know those contents one must ordinarily purchase them from their copyright owner. Section 552(a)(1) of the APA states a procedure for incorporation by reference, that offers no direct guidance on the question whether an SDO's standard incorporated not as *a possible* technical means for compliance, but *as law*, remains in the copyright control of its creator:

> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— . . .
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. *For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register*.[32]

The Director has implemented this provision by regulations discussed within that at present do not define what it means for matter to be "reasonably available" beyond requiring single copies to be deposited with the National Archives and retained in agency libraries.[33]

More recent measures, and the realities of shrinking federal regulatory resources, have both encouraged the practice of incorporation, and created a federal framework

---

[30] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559 (2006)).

[31] *See* 5 U.S.C. § 552 (2006).

[32] § 552(a)(1) (emphasis added). This section is now referred to as the Freedom of Information Act.

[33] *See infra* notes 147–49 and accompanying text; *infra* notes 264–66 and accompanying text.

for participation and oversight. The Reagan administration, noted generally for its deregulatory emphasis, formulated an OMB Circular, A-119,[34] strongly encouraging a preference for privately generated standards over agency-generated standards where the former were available.[35] In 1988, the transformation of the National Bureau of Standards—the guardian of national standards for weights, measures, and the like—into the Commerce Department's National Institute of Standards and Technology (NIST) provided a bureaucracy to implement this preference.[36] During President Clinton's administration, passage of the National Technology Transfer Advancement Act of 1995 (NTTAA)[37] gave Circular A-119 statutory force by requiring federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities," absent a specific finding of their inadequacy.[38] Although "technical standards" are defined in a way that focuses on interoperability[39] and appears to suppose the existence of independently stated regulatory requirements and consequent likely diminished interest outside regulated communities, even before the NTTAA, it was estimated that ten percent or more of ANSI standards related to the health and safety of industrial products and processes.[40] The most recent revisions to Circular A-119 in 1998 instruct agencies to take steps to assure openness, balance, transparency, consensus and due process in the procedures SDOs use to develop qualifying standards,[41] and, like the NTTAA

---

[34] *See* OMB, Circular No. A-119, 63 Fed. Reg. 8546 (Feb. 19, 1998).

[35] *See* H.R. REP. NO. 104-390, at 25 (1995) (recounting the history of Circular A-119).

[36] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5111–5115, 102 Stat. 1427 (1988).

[37] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775 (1996).

[38] *Id.* § 12(d)(1).

[39] *Id.* § 12(d)(4). Subsection (4) defines "technical standards" as "performance-based or design-specific technical specifications and related management systems practices." *Id.*

[40] *See* ROSS E. CHEIT, SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS 22 (1990) (stating that 900 out of 8,500 ANSI standards then-existing were considered to relate to health and safety).

[41]

> 4. What Are Voluntary, Consensus Standards?
>
> a. For purposes of this policy, "voluntary consensus standards" are standards developed or adopted by voluntary consensus standards bodies, both domestic and international. These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties. For purposes of this Circular, "technical standards that are developed or adopted by voluntary consensus standard bodies" is an equivalent term.
>
> (1) "Voluntary consensus standards bodies" are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. For purposes of this Circular, "voluntary, private sector, consensus standards bodies," as cited in Act, is an equivalent term. The Act and the Circular encourage the participation of federal representatives in these bodies to increase the

itself,[42] provide support for federal agency participation in those activities.[43] The result is to give further impetus to the ANSI "Essential Requirements."[44]

Although Circular A-119 states its application only to "technical standards," contemporary reports of the use of standards afford no ready means of determining what proportion of them effectively do impose regulatory requirements, and the OFR, in administering § 552(a)(1), insists that incorporated matter *must* be a "requirement."[45] The use of standards in lieu of independent federal rulemaking is indeed widespread. In its most recent report for Fiscal 2012,[46] NIST found that only one agency, the Department of Labor, had reported adopting a government-unique rather than an SDO standard in the preceding year (and that one incorporated nine SDO standards into a

---

> likelihood that the standards they develop will meet both public and private sector needs. A voluntary consensus standards body is defined by the following attributes:
>
> (i) Openness.
>
> (ii) Balance of interest.
>
> (iii) Due process.
>
> (iv) An appeals process.
>
> (v) Consensus, which is defined as general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties, as long as all comments have been fairly considered, each objector is advised of the disposition of his or her objection(s) and the reasons why, and the consensus body members are given an opportunity to change their votes after reviewing the comments . . . .

OMB Circular A-119, 63 Fed. Reg. 8546, 8554 (Feb. 19, 1998).

[42] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(2), 110 Stat. 775 (1996).

[43]

> 7. What Is The Policy For Federal Participation In Voluntary Consensus Standards Bodies?
>
> Agencies must consult with voluntary consensus standards bodies, both domestic and international, and must participate with such bodies in the development of voluntary consensus standards when consultation and participation is in the public interest and is compatible with their missions, authorities, priorities, and budget resources . . . .

OMB Circular A-119, 63 Fed. Reg. 8546, 8555–56 (Feb. 19, 1998).

[44] *See ANSI Essential Requirements*, *supra* note 20.

[45] Its view apparently rests on § 552(a)(1)'s obligation on agencies to "publish in the Federal Register . . . (D) substantive rules of general applicability adopted as authorized by law . . . ." 5 U.S.C. § 552(a)(1) (2006). The same subsection, however, also refers to the Federal Register publication of "statements of general policy or interpretations of general applicability formulated and adopted by the agency," so that the subsection explicitly permits agencies to incorporate by reference soft, as well as hard, law instruments. *Id.*; *see infra* note 177. Incorporation by reference of soft law, as will be developed within, would avoid most, if not all, of the difficulties currently experienced.

[46] Nathalie Rioux, *Sixteenth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment*, NIST (Apr. 2013), *available at* http://nvlpubs.nist.gov/nistpubs/ir/2013/NIST.IR.7930.pdf.

single rule).[47] In contrast, NIST reported the adoption of 423 new SDO standards, many as substitutes for existing, government-unique standards.[48] Nor have agencies been standing by as standards are developed. In Fiscal 2012, NIST reported, agency personnel participated in 552 SDOs.[49] As of this writing, a "Standards Incorporated by Reference" database maintained by NIST[50] lists 10,613 standards referred to in the CFR,[51] and 363 organizations (largely but not exclusively SDOs[52]) whose standards are referred to[53]—ranging from 2,254 times for the American Society for Testing and Materials[54] to 107 whose standards are referred to only once.[55]

It is important to be aware that most of the standards referred to in the CFR and converted into legal obligations no longer reflect prevailing voluntary consensus standards. ANSI generally requires that standards it certifies be revisited at least every five years, and their modification through its voluntary consensus process is common. But OFR is firmly of the view, understandable in the context of American rulemaking law, that once agency rulemaking has converted a standard into a binding requirement, as it insists must be done to incorporate it by reference,[56] it can be changed only by fresh rulemaking; and OFR permits incorporation only of particular, precisely identified and existing standards, so that a rule cannot validly incorporate future revisions. Although rulemaking changes would inevitably lag a bit behind the voluntary consensus process, the costs of rulemaking and limitations on agency resources have resulted in incorporated standards being left in place as legal obligations long after they have been abandoned by their creators as voluntary standards. Thus, the majority of standards incorporated into federal regulations were incorporated before 1996—some, even decades before.[57] Comments in the FDMS dockets of two recent inquiries into incorporation by reference issues identify numerous incorporated standards, still law, that are unavailable[58] or have subsequently been revealed to be inadequate or even dangerous.[59]

---

[47] *Id.* at 1.

[48] *Id.*

[49] *Id.*

[50] *Standards Incorporated by Reference (SIBR) Database Homepage*, NIST, http://standards.gov/sibr/query/index.cfm?fuseaction=home.main (last visited Dec. 12, 2013).

[51] *Standards Incorporated by Reference (SIBR) Database: Regulatory SIBR (R-SIBR) Statistics*, NIST, https://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total_regulatory_sibr (last visited Dec. 12, 2013).

[52] This includes government bodies.

[53] *Standards Incorporated by Reference (SIBR) Database: List of Standards Developing Organizations (SDO) listed in the CFR*, NIST, https://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.complete_regulatory_sibr (last visited Dec. 12, 2013).

[54] *Id.*

[55] *Id.*

[56] *See infra* note 177.

[57] *See infra* note 247 and accompanying text.

[58] *Id.*

[59] *Id.*

SDOs' copyright claims on standards do not lapse with their abandonment as voluntary consensus standards, so if a standard has been incorporated by reference its ostensible copyright endures for the life of the rule incorporating it. Circular A-119 specifically calls on agencies to respect SDO copyrights,[60] and, indeed, the behavior of American governments in relation to incorporated standards has generally worked to preserve those claims. Rather than publishing the standards' texts in their regulations, they simply refer the readers of their regulations to the standards which they have "incorporated by reference."[61] Under a regime that requires only two print copies to be kept in government depositories in Washington D.C. or its near suburbs, and makes no current provision for internet access,[62] the only practical course for someone in Minnesota, California, or Alabama who is affected by and wishes to learn the resulting law, will usually be to purchase the standard from the SDO whose intellectual property it is, at whatever price that organization chooses to set.

C. And Hence the Problem to Be Discussed

This fact frames the basic concern of this Article, raising a question that to lawyers might appear simply rhetorical: If standards have been made into law, don't they have to be public? Don't American citizens and companies have a right to read laws governing their conduct without having to pay the monopoly price a valid copyright would permit a private organization "owning" that legal obligation to charge for permitting access to it, on such terms as it chose to require? As the U.S. Copyright Office well knows,[63] law is not subject to copyright.[64] The Information Age now makes it trivial to provide access that may have been more difficult in the age of print, and federal agencies in particular have for almost two decades been under a statutory duty to make all regulations and other matter affecting private conduct available in the electronic reading rooms they are obliged to maintain.[65] All materials placed there are freely available to anyone with access to the Internet.

---

[60] OMB Cir. A-119, 63 Fed. Reg. 8546, 8555 (Feb. 19, 1998).

[61] *Standards Incorporated by Reference (SIBR) Database*, NIST, http://standards.gov/sibr/query/index.cfm?fuseaction+rsibr.total_regulatory_sibr (last visited Dec. 12, 2013).

[62] *See* 49 C.F.R. § 192.7(b) (1993).

[63] U.S. COPYRIGHT OFFICE, COMPENDIUM II, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 206.01 (1984) [hereinafter COMPENDIUM II] ("Edicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and similar official legal documents are not copyrightable for reasons of public policy."); PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.2 (3d ed. 2005 & Supp. 2013) ("[I]t is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less [than for standards generation].").

[64] *See* Wheaton v. Peters, 53 U.S. (8 Pet.) 591, 668 (1834); *see also* COMPENDIUM II, *supra* note 63, at § 206.01.

[65] *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4, 110 Stat. 3048, 3049 (1996) (codified at 5 U.S.C. § 552(a)(2) (2012)); *see also* E-Government Act of 2002, Pub. L. No. 107-347, § 207(f)(1), 116 Stat. 2899, 2918 (2002).

Yet the question is not rhetorical. If we were to impair the SDOs' markets for their standards, how would they support their undeniably beneficial work? With good reason, moreover, many SDOs will assert that those directly governed by a particular standard should find the cost of obtaining it comparable to a law school casebook's cost and—similarly—both trivial in relation to their other costs and beneficial to them in avoiding the otherwise substantial cost of personally obtaining the same information. These assertions, however, overlook two important countervailing considerations: (1) the interests many who are not affected businesses may have in knowing what the standards are[66] and (2) the way in which conversion of a voluntary standard into a legal requirement can distort the market for that standard.

The first of these considerations may be illustrated by the recent request of a House of Representatives committee to obtain for its review a standard governing required public warnings about pipeline safety that the API had developed, and that the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) had incorporated by reference into its regulations.[67] The API asked the committee to pay it $1,195 for the privilege.[68] In the PHMSA's required notice of proposed rulemaking, the Federal Register had provided to its readers only the identity of the API standard it was proposing to make a legal obligation—neither its text nor any supporting data or reasoning.[69]

---

[66] Comment from Bill Taylor, Legislative and Regulatory Representative, Pub. Agency Safety Mgmt. Ass'n–S. Chapter, NARA-12-0002-0117 (May 23, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0117.

[67] *Introduction to Standards Incorporated by Reference*, PHMSA, http://phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=d5af714769382310VgnVCM1000001ecb7898RCRD&vgnextchannel=f0b8a535eac17110VgnVCM1000009ed07898RCRD&vgnextfmt=print (last visited Dec. 12, 2013).

[68] David Halperin, *VIDEO: Industry Group Insist on Charging You $1,195 to Read a Public Law*, HUFFINGTON POST (May 18, 2012), http://www.huffingtonpost.com/davidhalperin/video-industry-group-ins_b_1527397.html.

[69] Comment from David Halperin & Carl Malamud, Public.Resource.org, OMB-2012-0003-0008, at 14 (Apr. 26, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0008 [hereinafter Halperin & Malamud, OMB Comment]; *see also* Comment from David Halperin & Carl Malamud, Public.Resource.org, NARA-12-0002-0109 (Apr. 12, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0109 [hereinafter Halperin & Malamud, NARA Comment]. Although the API eventually retracted this demand, it catalyzed the passage of section 24 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011, which provides that in the future "the Secretary [of Transportation] may not issue guidance or a regulation [concerning pipeline safety] that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site." Pub. L. No. 112-90, 123 Stat. 1919 (2012), *available at* http://www.gpo.gov. The PHMSA's and industry's distress over this statute occasioned a July 13, 2012, conference on the issues; until fall 2013 its files are online. *See Public Workshop: Implementing Incorporation by Reference Requirements of Section 24 of the Pipeline Safety Act of 2011*, PHMSA, http://phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=3c76b62089ce7310VgnVCM1000001ecb7898RCRD&vgnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnextfmt=print (last visited Dec. 12, 2013).

Once the standard had been incorporated into the PHMSA's regulations, all the CFR told readers was that they must obey the identified API standard, which they could either inspect at the National Archives or the agency, or purchase from the API.[70] In addition to the House committee, many persons not "in the business" could have a significant interest in knowing the content of a standard that was important, and perhaps inadequate, to assuring public safety. For them, a "trivial cost of doing business" argument is unconvincing.[71]

The "trivial cost of doing business" argument is also challenged by settings that may require the purchase of numerous standards. Purchasing Underwriters Laboratories' (UL) fifty-two-page Standard UL38, "Standard for Manual Signaling Boxes for Fire Alarm Systems,"[72] incorporated by reference in many municipal codes,[73] costs $502 for a hard copy ($998 if one also wishes a three-year subscription to its future revisions, interpretations, etc.).[74] If one were also to purchase all the other UL standards referred to in those fifty-two pages as elements of the standard—five of which are referred to secondarily and an additional twenty-seven of which are referred to in one of those secondary standards—the total cost would exceed $10,000.[75]

As for market distortion and monopoly pricing, consider the electronic bookshop of the American Herbal Products Association (AHPA).[76] The AHPA publishes *Herbs of Commerce*,[77] a book setting standards "by which all plant common and scientific names will be determined on all products containing herbs."[78] After the AHPA published the first edition of this book in 1992, the U.S. Food and Drug Administration (FDA) incorporated it by reference as one element of its regulation specifying the

---

[70] 49 C.F.R. § 192.7 (2012).

[71] Nor is it convincing for small businesses when these costs are considered in the aggregate. Even if the cost of particular standards is slight, the cumulative costs of the standards they must be aware of can be quite forbidding. *See infra* note 90 and accompanying text.

[72] *UL 38 Standard for Manual Signaling Boxes for Fire Alarm Systems*, UL, http://www.ul.com/global/eng/pages/solutions/standards/accessstandards/catalogofstandards/standard/?id=38_8 (last visited Dec. 12, 2013).

[73] *See, e.g.*, NEW REQUIREMENT UNDER UL 38 MANUALLY ACTUATED SIGNALING BOXES, CALIFORNIA STATE FIRE MARSHAL (Oct. 15, 2007), http://osfm.fire.ca.gov/informationbulletin/pdf/2007/ul38.pdf.

[74] *See Product Details: UL 38*, COMM 2000, http://www.comm-2000.com/productdetails.aspx?sendingPageType=BigBrowser&CatalogID=Standards&ProductID=UL38_8_S_20080704(ULStandards2) (last visited Dec. 12, 2013).

[75] UL sells its standards online. COMM 2000, http://www.comm-2000.com (last visited Dec. 12, 2013). This website may be searched for UL Standard 38. *See id.* UL standard 746C, Standard for Polymeric Materials—Use in Electrical Equipment Evaluations, one of the five standards referenced in UL 38, in turn references twenty-eight unique other UL standards, whose individual prices are often hundreds of dollars higher. *See id.*

[76] AHPA, http://www.ahpa.org (last visited Dec. 12, 2013).

[77] *Bookstore*, AHPA, http://www.ahpa.org/Default.aspx?tabid=357 (last visited Dec. 12, 2013) (search for "Herbs of Commerce 2nd edition").

[78] *Id.*

required nomenclature for the ingredients of dietary supplements.[79] The AHPA offers this edition on its website for $250,[80] on condition that it is "[a]vailable only in PDF format . . . [and] may not be printed, transferred or sold."[81] In 2000, it published a second edition considering 2,048 different items,[82] which it understandably characterizes as "[a] must-have for anyone who writes about or manufactures herbal products."[83] One would think this more modern edition commercially more valuable, but the FDA has not yet incorporated *its* terms into law by reference. The AHPA offers this edition on the same web page for $99.99 for non-members, without stated use restrictions.[84] Thus, it charges $150 more for an out-of-date standard that nonetheless is law than for its "must-have edition for anyone who writes about or manufactures herbal products."[85] This is monopoly pricing of law, not copyright pricing to the market for voluntary consensus standards. It is a price utterly dependent on the fact that the outdated first edition is still law that the FDA can enforce and manufacturers are therefore obligated to obey.

The API and AHPA are trade associations;[86] UL is a not-for-profit corporation in the business of certifying the safety of electrical goods, whose standards state the conditions a good must satisfy to earn the UL certified label.[87] Professional societies like the American Society of Mechanical Engineers (ASME)[88] seem, in general, to charge those who purchase their standards lower prices, even though these societies are more dependent on the resulting revenues to support their standard-generating work.[89] Yet the number of standards a small business must know and comply with may still make the purchase a substantial economic burden.[90] Although the OMB's Memorandum A-119

---

[79] *See* 21 C.F.R. § 101.4(h) (2013) ("The common or usual name of ingredients of dietary supplements that are botanicals (including fungi and algae) shall be consistent with the names standardized in *Herbs of Commerce*, 1992 edition, which is incorporated by reference in accordance with 5 U.S.C. § 552(a) and 1 C.F.R. part 51. Copies may be obtained from the American Herbal Products Association, 8484 Georgia Ave., Suite 370, Silver Spring, MD 20910, 301-588-1171 , FAX 301-588-1174, e-mail: *ahpa@ahpa.org*, or may be examined at the Center for Food Safety and Applied Nutrition's Library, 5100 Paint Branch Pkwy., College Park, MD 20740, or at the National Archives and Records Administration (NARA)."). That two physical copies may be available for inspection in Washington, D.C. or its near suburb seems unlikely to mean much to an herbalist in Minnesota, California, or Alabama.

[80] *Bookstore*, *supra* note 77.

[81] *Id.* (listing *Herbs of Commerce*, 1st Edition, at a non-member price of $250).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *About API*, API, http://www.api.org (last visited Dec. 12, 2013); AHPA, *supra* note 76.

[87] *About UL*, UL, http://www.ul.com (last visited Dec. 12, 2013).

[88] *About ASME*, ASME, https://www.asme.org/about-asme (last visited Dec. 12, 2013).

[89] *See, e.g.*, *Books*, ASME, https://www.asme.org/shop/books?cm_re=Home-_-Global Heade_-_Books (last visited Dec. 12, 2013) (listing prices from as low as $20).

[90] *See* Comment from Jerry Call, Executive Vice President, Am. Foundry Soc'y, NARA-12-0002-0147, at 1–2 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0147 ("$75 is not much for a standard, but a typical small manufacturer, including

characterizes voluntary consensus standards as characterized by "provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a non-discriminatory, royalty-free or reasonable royalty basis to all interested parties," no mechanism exists for registration or oversight of royalty reasonableness—indeed for monitoring any aspect of standards' marketing once incorporation by reference has occurred. Even at the outset, no law or regulation controls the prices that may be asked, or distinguishes among the types of SDO generating a standard that happens to have been adopted into law.

The paragraphs that follow take up a series of interrelated issues and suggestions: (1) the uncertain state of the caselaw on the copyrightability of standards that have been converted into law; (2) the existing federal regime for regulation incorporation by reference and suggestions for its modernization; techniques for preserving the viability of copyright; and (3) techniques for avoiding monopoly pricing of standards converted into law.

I. THE UNCERTAIN STATE OF THE CASELAW ON THE COPYRIGHTABILITY OF STANDARDS THAT HAVE BEEN CONVERTED INTO LAW

No doubt attends the copyrightability of voluntary consensus standards as such. But when they cease to be voluntary, when all or part of a standard has been converted into legal obligation, do the words that are now law remain under copyright? One issue here is the copyrightability of law; a secondary issue would be whether, if enactment of elements of a standard as law converts them, in effect, into public property that is a taking requiring just compensation.

The U.S. Copyright Office states forthrightly that "[e]dicts of government, such as judicial opinions, administrative rulings, legislative enactments, public ordinances, and

---

a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg . . . ."); *accord* Comment from David J. Osiecki, Senior Vice President, Policy & Regulatory Affairs, Am. Trucking Ass'n, NARA-12-0002-0152, at 4 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0152; Comment from Jess McCluer, Director of Safety and Regulatory Affairs, Nat'l Grain & Feed Ass'n, NARA-12-0002-0153, at 2 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0153; Comment from James J. Johnston, President, Owner-Operator Indep. Drivers Ass'n, Inc., NARA-12-0002-0156, at 7 (June 4, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0156. The burden is that much greater when one considers the desirability of purchase at the proposal stage. *See* Comment from John L. Conley, President, Nat'l Tank Truck Carriers, NARA-12-0002-0145, at 2 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0145 ("One of the most challenging aspects . . . was that as published in the Advanced Notice of Proposed Rulemaking, any party wishing to comment on the petition would first have to purchase the publications in order to determine what changes would be made to existing regulations and to determine the impact of the proposal."). The other challenge is the arguable need to purchase not only the standard that has been incorporated, but its subsequent revisions. *See* Comment from Jerry Call, *supra*.

similar official legal documents are not copyrightable for reasons of public policy."[91] The proposition that public law is not subject to copyright first emerged in American law (before the age of statutes *or* the Internet) in conflicts over the reporting of judicial opinions. For example, in *Wheaton v. Peters*: "[T]he court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."[92] Also, in *Banks v. Manchester*:

> [T]here has always been a judicial consensus . . . that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute.[93]

Nash, the cited case, grew from the first days of national law publishing houses—Little, Brown, and Company; West Publishing; and Lawyers' Cooperative Publishing.[94] Beyond its emphatic reaffirmation of "the public and common right to examine and procure copies of the opinions of the justices,"[95] *Nash* laid the groundwork for a distinction commonly observed: That although documents constituting the law itself are not subject to copyright, still copyright protection can be obtained for compendia that include these documents, along with other elements that are not, as such, the public's property. And thus, West's headnotes secure sale of its reporters (as, today, Lexis's capacity to charge for access to its resources).

In addition to the general proposition of "law . . . free for publication to all,"[96] cases arising from the judicial opinions, rendered well before federal agency incorporation by reference of SDO standards began, relied on the fact that because judges were salaried public servants paid by the public for their work, judges could properly claim no property in its output. The authors of legislation and regulatory outputs, too, have already been paid for their work. On the other hand, some argue, since SDOs' *only* compensation for intellectual output comes from some combination of membership fees and copyright revenues, giving mandatory status to their standards through incorporation by reference does not carry the same implication.[97]

---

[91] COMPENDIUM II, *supra* note 63.

[92] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834).

[93] Banks v. Manchester, 128 U.S. 244, 253–54 (1888) (citing Nash v. Lothrop, 142 Mass. 29, 35 (1886)).

[94] *Nash*, 142 Mass. at 30–31.

[95] *Id.* at 38.

[96] *Banks*, 128 U.S. at 253.

[97] *See, e.g.*, Veeck v. S. Bldg. Code Cong. Int'l, 293 F.3d 791, 816–17 (5th Cir. 2002) (en banc) (Wiener, J., dissenting), *cert. denied*, 539 U.S. 969 (2003).

These arguments, however, do not distinguish between the indisputably retained right to publish one's own intellectual work product[98] and the right to publish, precisely and only to that extent, such elements of those texts as have been converted into legally binding obligations.[99] Nor have they distinguished between the elements of value created by a contemporary voluntary consensus standard, as such, and the additional value that inheres in its having been converted into a legal obligation. As in the case of *Herbs of Commerce*,[100] the market for a standard will persist even after the standard has been modified or displaced by its sponsoring SDO as a voluntary consensus standard, if the governing law incorporating the earlier version of the standard has not changed. But now the price for the standard is a price for law, plain and simple. First editions of other law-bearing works, treatises or casebooks for example, go off the new-goods market once second editions appear; certainly (save possibly for collectibles) their value is much less. But this is not reflected in SDO pricing of displaced voluntary standards; if they are still law, their value *as law* may even exceed the market value they had as just voluntary consensus standards.[101]

As Professor Lawrence Cunningham suggested in a thoughtful analysis of accounting standards,[102] it can be useful to address the copyrightability issue in terms of a typology.[103] Some standards may be created precisely in the expectation that they will be adopted as law—on analogy, say, to the Uniform Commercial Code (UCC), which was drafted by private and quasi-governmental bodies—the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL)[104]—directly for consideration and use by law-makers.[105] Other copyrighted works may be referenced in legal obligations but themselves play no part in law as such—a novel listed as a required element of English classes for public school tenth graders or a publication placing values on used cars that state law anoints as valid in state tort actions.[106] In between these poles lie most voluntary consensus standards that have been converted into legal obligations through incorporation by reference; they may not have been created in the expectation or hope that they would be used in this way, but their incorporation converts their terms into the very stuff of legal obligation. A

---

[98] *See* 17 U.S.C. § 102(a) (2006); *see also Veeck*, 293 F.3d at 794, 802.

[99] *See Veeck*, 293 F.3d at 802–03.

[100] *See supra* notes 76–85 and accompanying text.

[101] *See id.*

[102] *See generally* Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291 (2005) (providing a framework for analyzing copyright to standards and proposing implementation mechanisms).

[103] *Id.* at 297–98, 301.

[104] *See* U.C.C. at 11 (2011); Cunningham, *supra* note 102, at 332 n.212; Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995).

[105] *See* Cunningham, *supra* note 102, at 332 & n.212.

[106] *See, e.g.*, *id.* at 298, 334–35.

dietary supplement is lawful *only* if its ingredient list conforms to the nomenclature to be found in the AHPA's incorporated first edition of *Herbs of Commerce*.[107]

When standards are written explicitly in the contemplation of their use as law, they may themselves be copyright eligible; an extension of copyright protection to the form in which they are in fact made law, however, would be troublesome. Private development of the Uniform Commercial Code by the ALI and NCCUSL greatly facilitated state-by-state legislative adoptions that produced an essentially uniform national law of commerce.[108] The UCC itself is copyrighted,[109] as are materials reflecting the history of its drafting, and accompanying commentary;[110] but when Minnesota adopted its terms as Minnesota law[111]—publishing the adopted text, as amended perhaps, in its statutory collections—any claim that Minnesotans must pay the ALI or NCCUSL to see the text their state had enacted would convert the law into private property.[112] If the standard has been designed to become law, the claim of the public to know it is strong, and the SDO is more likely to be disappointed if its work is not converted into legal obligations than surprised if it is. So too, it would seem to follow, for the SBCCI model housing code.[113] That code would itself be copyrighted, giving the SBCCI the exclusive right to sell it as such, in a compilation that might include any accompanying commentary. But if a Texas town accepted the implicit invitation to convert its terms, perhaps changed in a few particulars, into the set of local ordinances governing home construction in its jurisdiction, might not those ordinances be published as the law of that town, without violating the SBCCI's copyright?

This was the question presented in *Veeck v. SBCCI*,[114] a judgment of the Fifth Circuit sitting en banc that is the strongest recent voicing of the principle that law is not subject to copyright. While the SBCCI had a valid copyright in its model code, conferring on it exclusive rights to sell that code as such, what the Fifth Circuit held it could not prevent was the publication online of what had been adopted as the law of the jurisdiction that adopted it: "'[T]he law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright."[115]

---

[107] *See supra* notes 76–79 and accompanying text.

[108] *See* Schwartz & Scott, *supra* note 104, at 596.

[109] *See* U.C.C., at ii (2011).

[110] *Id.* at ii–iii.

[111] 2004 Minn. Laws 101.

[112] Whether the ALI and/or NCCUSL could demand payment from Minnesota for its "taking" of their property is a formal question, and takings issues are to some extent considered within. The very nature of their enterprise, however, suggests its answer.

[113] In 2003, the SBCCI and other code-writing bodies merged into the ICC. The ICC's 2012 International Residential Code for One- and Two-Family Dwellings is available for purchase. *See Store*, ICC, http://shop.iccsafe.org/2012-international-residential-code-for-one-and-two-family-dwellings.html (last visited Dec. 12, 2013).

[114] 293 F.3d 791 (5th Cir. 2002) (en banc).

[115] *Id.* at 796 (citing Banks v. Manchester, 128 U.S. 244 (1888)).

The court rejected the proposition that this idea depended on the salaries paid to public authors of opinions, laws, and regulations.[116] "[T]he 'authorship' question ignores the democratic process . . . . In performing their function [by choosing a voluntary consensus standard], the lawmakers represent the public will, and the public are the final 'authors' of the law."[117] Yet, the *Veeck* court reasoned, the SBCCI's copyright in its *model code* was indisputable, and no one could print it, *as such*, without a license from the SBCCI.[118] What governed the case was that Veeck had copied only "the law" of two Texas towns.[119] "The basic proposition was stated by [the first] Justice Harlan, writing for the Sixth Circuit: 'any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book.'. . ."[120]

The "model code" character of the SBCCI's work carries with it considerations one might think particularly supportive of a denial of copyright protection for whole sets of standards that, as in *Veeck*, are converted into law by some particular jurisdiction. First, code developers who seek incorporation, like the ALI and NCCUSL or the developers of model building codes, face no difficulty in preserving the market value of their product. It may include explanatory materials, examples, and other matter that will *not* be enacted; it will be presented in a format that is relatively cheap to buy and easy to carry about for reference. For such a document, rather than destroying a market, a requirement that what has been enacted must be public could be expected to enhance the value of the SDO's product, enlarging if not in fact creating the market for it. Incorporation would also confer satisfying prestige on the SDO (likely a substantial motivation for creation in the first place), adding to the value of its other works. These offsetting benefits make it unlikely that incorporation will have diminished the value of the SDO's property.[121]

Second, the motivation specifically to create a work to be given the force of law suggests that recognizing copyright protection carries considerable risks of exploitation not of the intellectual merits of the work, as such, but of the necessities created by its status as law. If it did not anticipate sufficient reward from the satisfaction and prestige accompanying having the merits of its work thus recognized, or from the possibilities incorporation would open up of commercial exploitation of supplementary—but nonessential—instructive or explanatory materials, an SDO could require an adopting jurisdiction to pay it up front for its efforts—that is, it could contract for the work of producing it.

---

[116] *Id.* at 796–97.
[117] *Id.* at 799.
[118] *Id.* at 794.
[119] *Id.* at 794, 800 n.14.
[120] *Id.* at 800 (quoting Howell v. Miller, 91 F. 129, 137 (6th Cir. 1898)).
[121] United States v. Miller, 317 U.S. 369, 376 (1943); *see also* GOLDSTEIN, *supra* note 63, at § 2.53 ("[I]t is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less [than for standards generation].").

Practice Management Information Corp. v. American Medical Association,[122] extensively discussed in *Veeck*,[123] seems at first to be in tension with it but rather, as *Veeck* recognizes, reflects this economic reality.[124] The American Medical Association (AMA) had developed and copyrighted a comprehensive coding system for physicians to use in identifying their services and medical procedures.[125] In return for a promise to use no other system, it granted the Federal Health Care Financing Administration (HCFA) a "non-exclusive, royalty-free and irrevocable license."[126] This license was free of any restrictions on the government's right to reproduce or distribute the codes, but reserved copyright in relation to possible private competitors.[127] The HCFA then developed the Health Care Common Procedure Coding System (HCPCS) as a mandatory common procedure coding system for physicians' use on Medicare and Medicaid claims;[128] it included *both* the copyrighted the AMA Code *and* additional codes the HCFA had itself developed.[129] After the AMA denied Practice Management Information (PMI) a volume discount for purchase of its code—that is, *not* the HCPCS—PMI sought a declaratory judgment that the AMA's copyright was invalid, intending to publish the AMA code in an alternative, perhaps cheaper form than the AMA itself sold.[130] While the court rejected that claim, adopting the limited judges-are-paid-for-their-work understanding of the earlier Supreme Court cases,[131] it had no occasion to rule on PMI's right to publish the federal standard *as such*—that is, the HCPCS including its non-AMA codes. Just as Veeck could not properly have published the SBCCI model building code as such—but was within his rights publishing the uncopyrightable building codes of two Texas towns[132]—PMI could not publish, as such, the copyrighted the AMA coding system.[133] In the end, in fact, PMI prevailed, on the ground that in extracting the HCFA's promise to use no other coding system, the AMA had abused its copyright.[134]

---

[122] 121 F.3d 516 (9th Cir. 1997).

[123] 293 F.3d 791, 796–97 & n.7 (2002).

[124] *Id.* at 805.

[125] *Practice Mgmt. Info. Corp.*, 121 F.3d at 517.

[126] *Id.*

[127] *Id.* at 517–21.

[128] *Id.* at 517–18.

[129] *Id.*

[130] *Id.* at 518 (citing Banks v. Manchester, 128 U.S. 244, 253 (1888)).

[131] *Id.*

[132] Veeck v. SBCCI, 293 F.3d 791, 794, 800 n.14 (5th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 969 (2003).

[133] *See Practice Mgmt. Info. Corp.*, 121 F.3d at 520. Consider, in this respect, the Delaware State Fire Prevention Commission's recent adoption of the 2011 National Electric Code as law for Delaware, but with two amendments it itself made, and permission granted to localities to adopt improving (and not inconsistent) amendments. *See Implementation of the National Electrical Code*, NEMA, http://www.nema.org/Technical/FieldReps/Documents/Combined-NEC-Adoption-Report-No-IRC.pdf (last visited Dec. 12, 2013).

[134] *Practice Mgmt. Info. Corp.*, 121 F.3d at 521.

Another case discussed and distinguished in *Veeck* is *CCC Information Services v. Maclean Hunter Market Reports, Inc.*,[135] which falls at Professor Cunningham's other pole[136]—both because the alleged copyright violator had sought to republish the copyrighted work as such, and because the law's reference to that work had not had the effect of converting it itself into a legal obligation.[137] A New York statute required insurance companies to include "The Red Book" as one of several privately prepared and copyrighted lists of projected automobile values when they were determining payments for the loss of a vehicle.[138] CCC Information Services simply appropriated parts of The Red Book for its customers.[139] Unprepared "to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright,"[140] the Second Circuit equated CCC's claim with the proposition that novels would lose copyright once assigned as part of a mandatory school curriculum.[141] The *Veeck* court wrote:

> If a statute refers to the Red Book or to specific school books, the law requires citizens to consult or use a copyrighted work in the process of fulfilling their obligations. The copyrighted works do not "become law" merely because a statute refers to them. See 1 GOLDSTEIN COPYRIGHT, § 2.49 at n. 45.2 (noting that *CCC* and *Practice Management* "involved compilations of data that had received governmental approval, not content that had been enacted into positive law"). Equally important, the referenced works or standards in *CCC* and *Practice Management* were created by private groups for reasons other than incorporation into law. To the extent incentives are relevant to the existence of copyright protection, the authors in these cases deserve incentives. And neither CCC nor AMA solicited incorporation of their standards by legislators or regulators. In the case of a model code, on the other hand, the text of the model serves no other purpose than to become law. SBCCI operates with the sole motive and purpose of creating codes that will become obligatory in law.[142]

Neither *Veeck* nor cases like *CCC Information Services* directly control the setting in which a voluntary consensus standard has, through incorporation by reference, become law, itself binding on citizens. On the one hand, it *is* law in the strong sense that

---

[135] 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).
[136] *See* Cunningham, *supra* note 102, at 334.
[137] *See id.*
[138] *CCC Info. Servs.*, 44 F.3d at 63–64.
[139] *Id.* at 64.
[140] *Id.* at 74.
[141] *Id.*
[142] Veeck v. SBCCI, 293 F.3d 791, 804–05 (5th Cir. 2002) (en banc).

underlies the belief that citizens are entitled unconstrained access to the standards that govern their conduct at risk of possible penalty for violation. On the other, the authors of voluntary consensus standards generated to that end—that is, *not* for the "motive and purpose of creating codes that will become obligatory in law"[143]—deserve incentives to support their socially valuable conduct. On the one hand, the creation of a voluntary consensus standard can be valued by a market; it may be in competition with other standards bearing on similar issues, and the price it can command may be a function of its intrinsic worth to its purchasers. On the other hand, if it is converted into a legal obligation, not only may the price it can command be artificially inflated by that fact, as in the case of the first edition of the AHPA's *Herbs of Commerce*,[144] but the public's stake in knowing what standard has been proposed and on what basis, and having the chance to participate in its consideration, is greatly heightened. This is Professor Cunningham's difficult middle ground.[145]

Are there means, then, to avoid undermining the financial viability of SDOs, as they fear simple rejection of copyright in their incorporated standards would do, while facilitating citizen access to binding legal obligations and controlling against the possibility of monopoly pricing of law? Before turning to this ultimate question, it will be useful to set forth the current statutory and regulatory regimes affecting incorporation by reference and proposals that have been made for altering them.

II. FEDERAL REGULATION OF INCORPORATION BY REFERENCE

A. The Office of the Federal Register

As earlier shown,[146] 5 U.S.C. § 552(a)(1) specifically authorizes incorporation by reference of materials that the Director of the Office of the Federal Register (OFR) finds to be "reasonably available to the class of persons affected thereby."[147] When § 552(a)(1) was enacted in its present form, the Federal Register and the Code of Federal Regulations (CFR), like statutes, were available only as print documents.[148] Permitting the incorporation by reference in them of bulky, numerous standards protected their size, and it was primarily for that reason that incorporation by reference of material

---

[143] *Id.* at 805.

[144] *See supra* notes 76–85 and accompanying text.

[145] *See* Cunningham, *supra* note 102, at 335–38.

[146] *See supra* notes 32–33 and accompanying text.

[147] 5 U.S.C. § 552(a)(1) (2006).

[148] Section 552 was enacted in 1976 by Pub. L. No. 94-409. *See id.* § 552(b). The first electronic version of the Federal Register was published June 8, 1994, and on September 19, 1996, the online version of the Federal Register and its companion publications became official editions. NARA, THE FEDERAL REGISTER MARCH 14, 1936–MARCH 14, 2006, at 15 (Mar. 14, 2006), *available at* http://www.archives.gov/federal-register/the-federal-register/history.pdf.

that might state binding legal obligations was permitted. Section 552(a) requires the Director to determine for each standard he approves for incorporation by reference, case by case, that it is "reasonably available."[149] Congress would have had reason to believe that, by virtue of office, the Director would be institutionally committed to public awareness of law. And those supporting the measure acknowledged the public's need to know the law.[150] Its legislative history seems to have assumed that the incorporated material would not be copyrighted; but that the texts of standards made law by incorporation would be published by commercial law publishers operating in the competitive market for their services—West, CCH, Prentice Hall.[151] The texts just would not be published in the Federal Register or the CFR.[152] Given these expectations, Congress's members could have believed the law would be widely available in law libraries open to public use; providing for "reasonable availability"[153] thus entailed neither the need personally to pay for access to the law nor, especially, the risk of monopoly pricing.

The OFR adopted its regulations governing incorporation by reference that are in effect at this writing, Part 51 of Title 1 of the CFR, in 1982, before the Information Age.[154] Whatever the enacting Congress might have expected, the text and administration of these regulations revealed a remarkable indifference to actual public knowledge of the law. Under them, agencies need not inform the OFR of their intention to incorporate a given standard as a legal obligation until twenty working days before its submission for publication in the Federal Register as a *final* rule.[155] Thus, Part 51 paid no attention to providing the interested public an opportunity for comment—that is, to a standard's public availability, reasonable or not, at the time when it is *proposed* to be incorporated in a regulation. Imagine that the PHMSA (or for that matter the Nuclear Regulatory Commission) were to propose a rule to deal with the problem of possible corrosion in pipes, and that its proposal said only that it proposed to incorporate by reference "A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe," a standard developed by the Pipeline Research Council International (PRCI).[156]

---

[149] § 552(a)(1).

[150] *See* S. REP. NO. 88-1219, at 5 (1964).

[151] Thus, Senate Report 1219 anticipated ready availability in terms of material "publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc." *Id.*

[152] *Id.* at 4–5.

[153] § 552(a)(1).

[154] *See* 1 C.F.R. § 51 (2013). As this Article enters final editing, the Office has just published a notice of proposed rulemaking to effect some changes, extensively discussed in the following pages. Proposed Rules, 78 Fed. Reg. 60,784 (proposed Oct. 2, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-24217.pdf. The comment period for the proposal, when last seen, permitted comments to be filed until January 31, 2014, and it appears likely new regulations will then be published. *Id.*

[155] § 51.5(a)(1).

[156] *PRCI Publications Document Details*, PRCI, http://prci.org/index.php/pmlpubs_localdetails/?docid=346 (last visited Dec. 12, 2013).

The PRCI is "a community of the world's leading pipeline companies,"[157] and sells this standard for $995.[158] One wishing to comment on this proposal, a matter of considerable interest to anyone who might be affected by pipe failure—not only pipeline companies, as recent catastrophes have amply demonstrated[159]—would be obliged to make this purchase if she wished to understand the proposal on which she had been invited to comment.[160] If she were able to view the proposed standard, moreover, it is highly uncertain she would have access to the data, studies, and discussions on which it had been based.

Having to purchase access to the proposal and the likely unavailability of its supporting materials has conflicted sharply with both the contemporary law of rulemaking and the developments that have made access to supporting data costless and immediate for all, once material is placed online. How can one comment persuasively on a standard whose content and underlying basis are unknown? Judge Harold Leventhal persuasively asked that question four decades ago,[161] and ever since then, judges have understood the statutory requirement to publish a notice of proposed rulemaking in the Federal Register also to require agencies simultaneously to release important materials on which the proposal relies.[162] This understanding is at some tension, to be sure, with a statute worded in very general terms,[163] but it has won

---

[157] *Welcome*, PRCI, http://prci.org/index.php/about/ (last visited Dec. 12, 2013) (welcome by President Cliff Johnson).

[158] *PRCI Publications Document Details*, *supra* note 156.

[159] *See* Andrew W. Lehren, *Millions of Miles of Pipe, and Years of Questions*, N.Y. TIMES, Sept. 25, 2010, at A1; Associated Press, *Corrosion in Pipe May Have Caused Fire*, WASH. POST, Aug. 12, 2012, at A4.

[160] As another example, consider the Department of Transportation's Pipeline Hazardous Materials Safety Administration (PHMSA)'s implementation of the Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 5, 116 Stat. 2985, 2988–89 (codified at 49 U.S.C. § 60116 (2006)), which charged it to issue standards for public education about pipeline hazards. For this task, hardly an NTTAA "performance-based or design-specific technical specification[ ]," Pub. L. No. 104-113, 110 Stat. 775, 783 (1996), the PHMSA turned to the American Petroleum Institute (API), which produced a fifty-plus-page standard which the PHMSA proposed to incorporate by reference. PUBLIC AWARENESS PROGRAMS FOR PIPELINE OPERATORS: API RECOMMENDED PRACTICE 1162 (2003), *available at* http://www.api.org/publications-standards-and-statistics/government-cited-safety-documents. The PHMSA then did incorporate the API's standard by reference, after a public rulemaking process that was devoid of access to the proposed standard or its supporting materials. *See supra* note 69 and accompanying text.

[161] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data that, critical degree, is known only to the agency.").

[162] *Id.* at 394.

[163] As the U.S. Code describes the substance of the required notice, it is to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (2006). Judge Leventhal's extension of this to scientific data and reports in *Portland Cement* is perhaps best understood as a response to the changes worked by the 1964

near-universal acceptance.[164] Executive Order 12,866,[165] which since 1993 has constituted the President's instructions to agencies for their conduct of the more important rulemakings, embodies both this obligation *and* an obligation (also hard to connect with statutory language) actually to provide a draft of the proposed regulation, by which means a proposal to incorporate by reference can be seen.[166] In the Computer Age, a Federal Data Management Service (FDMS) provides the site on which all this material is to be posted, readily searchable by any interested member of the public.[167]

As currently constituted, Part 51's controls do operate at the point of *final* rulemaking,[168] but they have been slight. To accompany its request for permission to incorporate standards by reference, the agency must provide the OFR with one physical copy of the material to be incorporated;[169] that copy is then stored in the National Archives where the public might find it.[170] The agency must persuade the OFR that the material to be incorporated is "usable" (a manageable print file),[171] a "requirement,"[172] and "substantially reduces the volume of material published in the FEDERAL REGISTER";[173] and

---

Freedom of Information Act under which such information would almost inevitably have to be supplied in response to a request. *See* § 552; *see also* Peter L. Strauss, *Statutes That Are Not Static: The Case of the APA*, 14 J. CONTEMP. LEG. ISSUES 767 (2005).

[164] *See, e.g.*, Am. Radio Relay League v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity to comment."). *But see id.* at 246 (Kavanaugh, J., concurring in part and dissenting in part) ("[T]he *Portland Cement* doctrine cannot be squared with the text of § 553 of the APA."); Comment from Winslow Sargeant, Chief Counsel for Advocacy, SBA, OMB-2012-0003-0066, at 7 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0066 ("Data and analysis that support a private technical standard used by a Federal agency should be held to the same standard [of quality, objectivity, utility and integrity] . . . . If an agency is unable to provide reasonable access to the data and analysis or unable to resolve significant Information Quality challenges to a standard, it should not use that standard.").

[165] Exec. Order No. 12,866—Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *reprinted as amended in* 5 U.S.C. § 601 (2006). E.O. 12,866 has been amended by President Obama. *See* Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

[166] Exec. Order No. 12,866, § 6(a)(3)(B), 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006) ("For each matter . . . , the issuing agency shall provide to OIRA: (i) the text of the draft regulatory action . . . ."); *id.* § 6(a)(3)(E) ("After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall: (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C) . . . .").

[167] FDMS, http://www.fdms.gov (last visited Dec. 12, 2013).

[168] 1 C.F.R. § 51.5(a)(1) (2013).

[169] § 51.5(a)(2).

[170] *See Research Our Records*, NAT'L ARCHIVES, http://www.archives.gov/research/ (last visited Dec. 12, 2013).

[171] § 51.7(a)(4).

[172] § 51.9(b)(3).

[173] § 51.7(a)(3).

the agency must state in the regulation's language of incorporation "where and how copies may be examined and readily obtained with maximum convenience to the user."[174] In practice, however, "maximum convenience to the user"[175] is satisfied by the presence of one physical copy of the standard in the NARA archives, and another in the incorporating agency's Washington, D.C.–area reading room.[176] That the incorporated material must be a "requirement," not an element of the statute,[177] entails that the material once successfully incorporated will impose legal obligations. Otherwise undefined in the regulation, the OFR's attention to "reasonably available" in Part 51 has involved no consideration whatever of the price the standard's owner may be charging for access to it, now or in future years, or the conditions being placed on that access.[178]

Neither has the OFR's regime given any assurance about the *continued* availability of the incorporated standard, other than through the two printed copies in storage at different locations in or near Washington, D.C., which might in practice become quite difficult to access. Doubtless, responding to concerns about delegation of lawmaking authority to private bodies, the OFR regulation is emphatic that incorporation "is limited to the edition of the publication that is approved [that is, to the edition that the agency has itself identified and decided to make legally obligatory]. Future amendments or revisions of the publication are not included."[179] Because revising an incorporated standard

---

[174] § 51.9(b)(4).

[175] *Id.*

[176] *See, e.g.*, *supra* note 79.

[177] The greater part of 5 U.S.C. § 552(a)(1) requires Federal Register publication of material (e.g., "descriptions of its central and field organization") that does not qualify as a "requirement." 5 U.S.C. § 552(a)(1) (2006). Even subsection (D) requires publication not only of "substantive rules of general applicability," but also of "statements of general policy or interpretations of general applicability formulated and adopted by the agency"—i.e., soft, not hard, law. § 552(a)(1)(D). It does not appear from the pages of the Federal Register that these obligations have been rigorously enforced—understandable enough from the perspective of protecting its volume—and in any event in the age of the Internet the right place for these documents is not on the pages of one day's printed and imperfectly indexed Federal Register, but on agency websites where later statutes require them to be maintained and Boolean searches are generally available.

[178] 1 C.F.R. § 51.1(a) (2013).

[179] § 51.1(f). State courts have rejected regulations giving legal force to future versions of standards as improper delegations of public authority into private hands. *See, e.g.*, Blitch v. City of Ocala, 195 So. 406, 408 (Fla. 1940) (holding that a municipal ordinance, requiring roofing shingles corresponding to National Board of Fire Underwriters standards, would be invalid if it included future changes); Brookhaven Baymen's Ass'n v. Town of Southampton, 926 N.Y.S.2d 594, 596 (N.Y. App. Div. 2011) (invalidating a law that gave a private Board of Trustees the ability to change shellfish regulations in the future); Hillman v. N. Wasco Cnty. People's Util. Dist., 323 P.2d 664, 672–73 (Or. 1958), *overruled by* Maulding v. Clackamas Cnty., 563 P.2d 731 (Or. 1977) (finding unconstitutional the adoption of the national electrical code that changes from time to time); City of Chamberlain v. R.E. Lien, Inc., 521 N.W.2d 130, 133 (S.D. 1994) (invalidating law that delegates to the American Institute of Architects the authority to require public contracts include provisions from an AIA standardized form). It seems

would require a fresh round of notice-and-comment rulemaking, adopted standards often remain law long after the organizations that initially drafted them have updated them—as in the case of the AHPA standards discussed above.[180]

Thus, although creating legal obligations through incorporation by reference has saved agency resources at the *initial* stage of incorporation, it has done so at the cost of making change expensive. The result, as already noted, is that although ANSI's "Essential Requirements"[181] require standards organizations revisit their standards every few years, to keep them current; but the majority of standards incorporated into federal regulations were incorporated before 1996.[182] Comments in the FDMS dockets of two recent inquiries into incorporation by reference issues identify numerous incorporated standards, still law, that are unavailable[183] or have subsequently been revealed to be inadequate or even dangerous.[184]

The arrival of the Internet and the creation of agency electronic reading rooms have both eliminated the space-saving rationale for incorporation by reference and created new obligations of government transparency. Both developments have called into particular question the financial side-effect of incorporation by reference, that people might be made to pay private organizations to obtain access to the standards governing their conduct. The electronic reading rooms have no real limits on size; they can readily hyperlink to documents maintained on other web sites; and standard search engines permit rapidly focusing on materials of interest. The Electronic Freedom of Information Act of 1996,[185] in requiring the creation of electronic reading rooms,[186] brought to light and ready public access the enormous range of agency materials other than regulations that might influence their regulatory conduct. Now the effect of 5 U.S.C. § 552(a)(2) was to oblige agencies to make all their guidance materials that did *not* have to be published

---

a different question, though, whether an incorporation by reference is permissible *only* if it is a requirement—that is, only if it carries mandatory force. *See* § 51.9(b)(3).

> Since the 1970s, the Federal Register has refused to provide copyright protection to private standards *unless the agency incorporates them into a formal rule in the CFR* . . . [which] greatly complicates the most minor revision . . . . [T]he inability to accommodate frequent change is a particular obstacle to broader implementation of conformity assessment and complex technology standards.

Comment from Scott Rafferty, OMB-2012-0003-0049, at 4–5 (May 8, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0049 [hereinafter Rafferty, OMB Comment]; *see also* Comment from Scott Rafferty, NARA-12-0002-0118 (May 25, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0118.

[180] *See supra* note 79 and accompanying text.

[181] *See supra ANSI Essential Requirements*, note 20.

[182] *See infra* notes 247–50 and accompanying text.

[183] *Id.*

[184] *See infra* notes 247, 256.

[185] Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified as amended at 5 U.S.C. § 552 (2012)).

[186] *Id.* § 4.

in the Federal Register available in their electronic reading rooms, if the agencies wished them to have any impact on private conduct.[187] Strikingly, the qualities of guidance documents are just those generally associated with voluntary consensus standards. They identify means for achieving a certain result, such as one that regulations may require, without in themselves limiting the possibility of achieving that result by other means. The E-Government Act of 2002 carried this transparency impulse one step further.[188] It not only requires the migration of rulemaking activities to the more accessible and transparent web, but also makes clear that the electronic docket it mandates for all rulemaking is to be comprehensive, containing *all* materials relevant to the rulemaking process.[189] In consequence of these developments, today only SDO copyright claims obstruct ready public access to rulemaking proposals and to resulting legal obligations. The strong general impulse of federal law is to require transparency of measures that will affect public obligations.

B. Copyright Preservation as Affirmative Federal Policy? Congress, the NTTAA, the NIST, and the OMB

Perhaps the strongest case to be made for the current state of affairs is that in recent years Congress has consistently relied on voluntary consensus standards as a preferred source of regulatory standards. When in 1970 it created OSHA, Congress instructed OSHA to adopt consensual work-place safety standards in the absence of a showing of their inadequacy,[190] as a means to quickly establish a floor of enforceable legal obligation unlikely to prove controversial to industry (though perhaps less than optimal from

---

[187] 5 U.S.C. § 552(a)(2) provides, in relevant part:

> Each agency, in accordance with published rules, shall make available for public inspection and copying . . .
>
> > (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
> > (C) administrative staff manuals and instructions to staff that affect a member of the public . . . .
>
> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> > (i) it has been indexed and either made available or published as provided by this paragraph; or
> > (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a) (2006). It is perhaps noteworthy that this section permits excision of materials only "to prevent a clearly unwarranted invasion of personal privacy" and makes no provision for incorporation by reference. *Id.* § 552(a)(2).

[188] E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified in scattered sections of 44 U.S.C.).

[189] *Id.* § 206(d).

[190] *See* 29 U.S.C. § 655(a) (2006).

a labor perspective).[191] When the Consumer Product Safety Commission was established in 1972, it was similarly instructed.[192] Then in 1995, building on an OMB Circular (A-119), first issued in the Reagan Administration,[193] the NTTAA generalized the proposition, requiring a preference for both the use of voluntary consensus standards rather than self-generated rules and agency participation, where permitted, in their generation.[194] The statute rested on the perceptions that these standards embody greater technical expertise than the government is generally able to assemble; result from more efficient processes, are more acceptable—if consensual—to the industry involved than government imposition of mandatory standards would be; and are generated without significant cost to the public.[195] Its administration was assigned to the National Institute of Standards and Measures (NIST), an agency Congress established in 1988 in the Department of Commerce to take over the responsibilities previously held by its National Bureau of Standards.[196]

None of these statutes address the copyright question, and the absence of attention is perhaps especially striking in the NTTAA, which is primarily concerned with the treatment, including the financial treatment, of patents that result from shared government and private technology development.[197] The OMB's Circular A-119, which in its most recent revision to date (1998) is an implementation of the NTTAA,[198] does state that "[i]f a voluntary standard is used and published in an agency document, your agency must observe and protect the rights of the copyright holder and any other similar obligations,"[199] and copyright protection was clearly a matter of concern to those who had participated in the notice-and-comment process leading to the Circular's

---

[191] *Id.*

[192] 15 U.S.C. § 2056(b) (2006). This history, and much else of value in understanding the history and sweep of standards development, may be found in HARM SCHEPEL, THE CONSTITUTION OF PRIVATE GOVERNANCE 93–97 (2005).

[193] *See* H.R. REP. NO. 104-390, at 25 (1995), *reprinted in* 1996 U.S.C.C.A.N. 493, 511 ("OMB Circular A-119 was originally promulgated in 1982 and revised in 1993. It requires federal agencies to adopt and use standards, developed by voluntary consensus standards bodies, and to work closely with these organizations to ensure that developed standards are consistent with agency needs.").

[194] *See* National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 3(d)(2), 110 Stat. 775, 783 (1996).

[195] H.R. REP. NO. 104-390, pt. III (1995).

[196] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5111–5115, 102 Stat. 1107, 1427–33 (1988).

[197] *See generally* National Technology Transfer and Advancement Act, Pub. L. No. 104-113, 110 Stat. 775 (1996).

[198] As of October 4, 2013, OIRA had not yet undertaken the revision suggested by its notice in the spring of 2012. *See infra* note 233 and accompanying text. It was, however, expected "any day now." Conversation with Emily Schleicher Bremer, Attorney Advisor, ACUS (Oct. 2, 2013).

[199] OMB Circular A-119, 63 Fed. Reg. 8546, 8555 (Feb. 19, 1998).

promulgation.[200] Yet the discussion studiously avoids discussing just what those rights might be, and, of particular interest in this regard is a comment apparently limiting its intended scope to other than regulatory requirements:

> 35. A few commentators inquired whether the Circular applies to "regulatory standards." In response, the final Circular distinguishes between a "technical standard," which may be referenced in a regulation, and a "regulatory standard," which establishes overall regulatory goals or outcomes. The Act and the Circular apply to the former, but not to the latter. As described in the legislative history, technical standards pertain to "products and processes, such as the size, strength, or technical performance of a product, process or material" and as such may be incorporated into a regulation. [See 142 Cong. Rec. S1080 (daily ed. February 7, 1996) (Statement of Sen. Rockefeller.)] Neither the Act nor the Circular require any agency to use private sector standards which would set regulatory standards or requirements.[201]

If the NTTAA and the Circular, then, do not apply to "regulatory . . . requirements,"[202] it would appear that they do not apply to incorporations that set legal obligations, as distinct from incorporations establishing permitted means by which legal obligations may be met. Preserving copyright for the latter sort of incorporation, if the OFR permitted it—as it will be argued below they should[203]—would neither challenge the proposition that law is not subject to copyright, nor appear to confer on private parties the power to place a monopoly price on access to knowledge of one's legal obligations.

The strength of federal law in encouraging coordination between SDOs and national regulators is reflected as well in congressional limitations of the possibility of antitrust enforcement against SDOs, even when, as has happened, standard-setting is used by

---

[200] *Id.* at 8548, 8550.

[201] *Id.* at 8549. In offering the amendment that was adopted as § 12(d) of the NTTAA, Senator Rockefeller remarked that the NTTAA was limited to "standards pertaining to products and processes, such as the size, strength, or technical performance of a product, process, or material," differentiating those standards from "private sector attempts to set regulatory standards or requirements. For example, we do not intend for the Government to have to follow any attempts by private standard bodies to set specific environmental regulations." 142 CONG. REC. S1077 (daily ed. Feb. 7, 1996) (statement of Sen. Rockefeller). The earliest Administrative Conference attention to voluntary consensus standards, in 1978, recognized as well the preferability of standards "which specify nomenclature, basic reference units, or methods of measurement or testing, and which are primarily empirical in their formulation." ACUS Recommendation 78-4: Federal Agency Interaction with Private Standard Setting Organizations in Health and Safety Regulation, 44 Fed. Reg. 1357, 1358 (Jan. 5, 1979) [hereinafter Recommendation 78-4(6)].

[202] *See* OMB Circular A-119, 63 Fed. Reg. 8546, 8555 (Feb. 19, 1998).

[203] *See infra* Part III.D.

active participants in their processes to gain commercial advantage over competitors.[204] The market's awareness that one boiler does, and another does not, satisfy an AMSE safety standard can drive the maker of the latter out of business—and the maker of the first may be able to secure that determination by its position in the standards development organization.[205] So, too, if the makers of steel conduits for electric wiring are able to exclude polyvinyl chloride (PVC) conduit as an approved type of electrical conduit in the National Electrical Code,[206] or if the manufacturer of new tanks for containing hazardous materials is able to cause disapproval of a new technology that, by facilitating repair of leaky tanks already in place, would cut into its market.[207] The anti-competitive impact would be all the stronger, should the standards in question have been converted into legal obligations through incorporation by reference. Although one might suppose the antitrust laws offered control over such behaviors, a combination of Supreme Court judgments[208] and congressional actions[209] has seriously weakened, if not eliminated,

---

[204] Professor Christopher L. Sagers has extensively considered the antitrust issues in a series of law review articles. *See* Christopher L. Sagers, *Antitrust Immunity and Standard Setting Organizations: A Case Study in the Public-Private Distinction*, 25 CARDOZO L. REV. 1393, 1398–1402 (2004); Christopher L. Sagers, *The Myth of "Privatization,"* 59 ADMIN. L. REV. 37 (2007); Christopher L. Sagers, *Standardization and Markets: Just Exactly Who Is the Government, and Why Should Antitrust Care?*, 89 OR. L. REV. 785, 798–800 (2011) [hereinafter Sagers, *Standardization and Markets*]; *see also* Wolf, *supra* note 6, at 839; *infra* note 209.

[205] *See, e.g.*, ASME v. Hydrolevel Corp., 456 U.S. 556, 559–62 (1982).

[206] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 496–97 (1988) (noting that polyvinyl chloride conduit was rejected only after steel interests "recruited 230 persons to join the [National Fire Protection] Association and to attend the annual meeting to vote against the proposal"). The National Electric Code is a set of standards created under the aegis of the National Fire Protection Association, not itself law although its standards are often incorporated by reference in local building codes. *See generally* PAUL ROSENBERG, GUIDE TO THE 2011 NATIONAL ELECTRIC CODE (2011).

[207] Sessions Tank Liners, Inc., v. Joor Mfg. Co., 17 F.3d 295, 296–98 (9th Cir. 1994) (describing approval of revision of Uniform Fire Code that rejected plaintiff company's tank-lining operation after defendant company's president influenced subcommittee to reject the lining).

[208] Thus, the antitrust immunity for outcomes characterized as the result of successful petitioning of government for legal change, established by *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), *reversing* 325 F.2d 804 (6th Cir. 1963), while somewhat modified in *Allied Tube*, 486 U.S. 492, successfully defeated antitrust liability in *Sessions Tank Liners, Inc.*, 17 F.3d 295.

[209] Reactions to FTC efforts to use antitrust laws to control SDO anti-competitive activity include: the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 7, 94 Stat. 374, 376 (1980) (codified as amended at 15 U.S.C. § 57a(a)(1)(B) (2006)) (providing that "the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities"); The Standards Development Organization Advancement (SDO) Act of 2004, Pub. L. No. 108-237, § 103, 118 Stat. 661, 663 (2004) (codified as amended at 15 U.S.C. § 4301(a)(7) (2006)) (significantly limiting the antitrust exposure of SDOs that engage only in "developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary

that possibility. Yet, like the NTTAA and Circular A-119, what these measures address are "voluntary consensus standards"[210] creating "technical standards,"[211] and not any legal obligations—"regulatory standards or requirements"[212]—that might result from the manner of their incorporation by reference.

In practice, agencies and SDOs have understood both the NTTAA and Circular A-119 to preserve SDO copyrights past the point of incorporation.[213] Circular A-119's instruction to "observe and protect the rights of the copyright holder"[214] might have been understood as an instruction to secure in advance an SDO's permission to convert its privately generated standard into a public legal obligation. One can imagine bargained prices, or perhaps that this would constitute a taking that must be paid for. In either case, one suspects that the resulting prestige and the possibility of competition amongst standard-setters would keep prices down if not eliminate them.[215] Instead, the call for respecting copyright has been taken to permit keeping the law private and to let copyright holders charge those who must comply with their monopoly prices for knowledge of it. The fear has been that rendering the standards-made-law public would undermine the business model necessary to sustain the SDOs' important work.[216] This impulse has only been strengthened as agency budgets have shrunk (alongside, correspondingly,

---

consensus standard, or using such standard in conformity assessment"). The latter Act strongly expresses congressional approval of federal use of voluntary consensus standards, yet in doing so makes explicit reference to the provisions of the NTTAA and OMB Circular A-119 that appear to imagine their use as means to satisfy regulatory requirements rather than as the requirements themselves. *See* OMB Circular A-119, 63 Fed. Reg. 8546, 8555 (Feb. 19, 1998).

[210] OMB Circular A-119, 63 Fed. Reg. at 8554.

[211] National Technology Transfer and Advancement Act, Pub. L. No. 104-113, § 4(d)(4), 110 Stat. 783 (1996); *see also* Recommendation 78-4(6), *supra* note 201.

[212] OMB Circular A-119, 63 Fed. Reg. at 8549.

[213] *See, e.g.*, *infra* Part III.B (discussing NAESB's recently announced copyright practice).

[214] OMB Circular A-119, 63 Fed. Reg. at 8555.

[215] *Cf. supra* text accompanying notes 100–01.

[216] James A. Thomas, *A Business Model That Works*, STANDARDIZATION NEWS, May/June 2010, *available at* http://www.astm.org/PRESIDENT/mj10_a_business_model_that_works.html; *Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected*, AM. NAT'L STANDARDS INST., at 3 (2011), *available at* http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Critical%20Issues/Copyright%20on%20Standards%20in%20Regulations/Copyright%20on%20Standards%20in%20Regulation.pdf. Like other expressions of this fear, this argument does not consider the possibility that read-only digital access to standards would not threaten the SDO business model. At a recent conference, ANSI's president announced its creation of a strongly protected single source for free public access to incorporated standards, and James Shannon, CEO of the National Fire Protection Association (NFPA)—source of the National Electric Code, among others, and one of the country's larger SDOs—recounted NFPA's ten-year experience with such an approach, lacking significant adverse financial impact. Joseph Bhatia & James Shannon, Government Reliance on Voluntary Consensus Standards and Conformance Programs, Remarks at the ANSI World Standards Week 2013 Open Forum (Washington, D.C., Oct. 2, 2013) [hereinafter Bhatia & Shannon Remarks].

agency capacity to self-generate regulations or, for that matter, effectively to oversee private standard-setting). Little, if any, attention has been given to the impact of the Internet, and the increasing expectations about the availability of government information it has engendered, on the considerations at play. The effect, as has been widely observed,[217] has transferred wide swathes of law-making into private hands.

C. Possibilities of Change: An Administrative Conference Study, Rulemaking Proposal, and Reconsideration of OMB Circular A-119

In December 2011, the Administrative Conference of the United States (ACUS) considered and adopted a number of thoughtful recommendations on incorporation by reference practice,[218] building on extensive analysis by staff members, notably Emily Schleicher Bremer.[219] These recommendations, however, addressed themselves only to agency practice,[220] and neither to the responsibilities of the Director nor to the sufficiency of Part 51, in the Information Age, to govern the question of reasonable availability.

For example, the ACUS Recommendations urged agencies to address incorporation by reference issues at the stage of notice of proposed rulemaking.[221] They called attention to the need for proposed incorporations to be available at the rulemaking proposal stage, observing that the opportunity to comment on a proposal is illusory if one cannot know what it is that is being proposed.[222] They took approving notice of the practice of some federal agencies, which negotiate free read-only access on standards organizations' websites during comment periods to any standards that are proposed to be incorporated

---

[217] *See* BÜTHE & MATTLI, *supra* note 5; Cunningham, *supra* note 102; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Nina Mendelson, *Private Control over Access to Public Law: The Puzzling Federal Regulatory Use of Private Standards*, 112 MICH. L. REV (forthcoming 2013), *available at* http://ssrn.com/abstract=2264321; Pamela Samuelson, *Questioning Copyright in Standards*, 48 B.C. L. REV. 193 (2007); Katie M. Colendich, Note, *Who Owns "The Law"? The Effect on Copyrights When Privately-Authored Works Are Adopted or Enacted by Reference into Law*, 78 WASH. L. REV. 589 (2003).

[218] *See generally* ACUS, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-5: INCORPORATION BY REFERENCE (Dec. 8, 2011) [hereinafter ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-5], *available at* http://www.acus.gov/acus-recommendations/incorporation-by-reference/.

[219] Emily Schleicher Bremer, DRAFT FOR COMMITTEE REVIEW, INCORPORATION BY REFERENCE IN FEDERAL REGULATIONS (Oct. 19, 2011), *available at* https://law.resource.org/pub/us/cfr/recommendation.acus/Revised-Draft-IBR-Report-10-19-11.pdf (subsequently revised and published at *Incorporation by Reference in an Open Government Age*, 36 HARV. J. L. & PUB. POL'Y 133 (2013)). Scott J. Rafferty, former Deputy General Counsel of ACUS, filed extensive comments in the NARA and OMB dockets, taking somewhat variant positions more supportive of the analysis offered in this article. *See supra* note 179.

[220] ADMINISTRATIVE CONFERENCE RECOMMENDATION 2011-5, *supra* note 218, at 5–10.

[221] *Id.* at 6.

[222] *Id.*

by reference, as a means of fortifying the comment process.[223] But they suggested only a preference for such measures, and did not recommend that the Director of the OFR make their public availability during the comment period a requisite element of "reasonably available."[224] Similarly, while encouraging the use of standards that can be accessed without the payment of a fee and acknowledging decisions supporting the proposition that law is not subject to copyright, the recommendations accepted the possibility that the public could still be required to pay copyright holders to learn the content of standards that by incorporation have been transformed into law governing their conduct.[225] Their acceptance of this state of affairs was grounded in the long period of usage and in readings of the legislation and presidential guidance that failed to note the differentiation between "technical standards" and "regulatory standards or requirements."[226] No consideration was given to the effect of continued copyright protection of what has become law, after it has ceased to represent a contemporary voluntary consensus standard. Thus, the ACUS Recommendations remained open to the possibility that, even when the incorporation of standards by reference has converted them into legal obligations, the "owner" of the standards might require the public to pay whatever license fees they might choose to charge, for access to them under whatever conditions of use and/or distribution they might choose to impose, well past their continued relevance as "voluntary consensus standards."

This author, with twenty-three others, subsequently filed a petition for rulemaking with the OFR urging it to revise Part 51 to reflect the changes brought about by the Information Age and to impose two new conditions on incorporation by reference: first, that any proposal must demonstrate that the standards had been made available without charge on commenter request during the comment period for the proposed rule; and second, that if and to the extent the proposed incorporation creates a legal obligation, the text of that obligation too must be available without charge to any member of the affected public.[227] The first condition reflected ACUS's advice to agencies to arrange access during the comment period, that might be restricted to commenters and protected

---

[223] *Id.* at 3.

[224] *Id.* at 5.

[225] The ACUS Recommendations do acknowledge that "[t]here is some ambiguity in current law regarding the current scope of copyright protection for materials incorporated into regulations, as well as the question of what uses of such materials might constitute 'fair use' under section 107 of the Copyright Act." *Id.* at 2 (citing Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791 (5th Cir. 2002) (en banc)); Whether Government Reproduction of Copyrighted Materials Is a Noninfringing "Fair Use," 23 Op. O.L.C. 87 (1999). But the resulting recommendation assumes that copyrights may be protected.

[226] *See, e.g.*, OMB Circular A-119, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998); Recommendation 78-4(6), *supra* note 201.

[227] The full submission was not published in the Federal Register, but may be found in the resulting FDMS Docket NARA-12-0002-0002. *See* Comment from Peter L. Strauss et al., Betts Professor of Law, Columbia Law Sch., NARA-12-0002-0002 (Feb. 28, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0002.

through digital rights management, but, in addressing, sought to make this a requirement. The second condition would require public availability of any incorporated standards that had become by incorporation "regulatory standards or requirements."[228]

The basic thrust of the petition was to urge revision of the federal practice to identify standards that would effect compliance with regulations independently stated, rather than constituting the standards themselves as law.[229] It associated this approach with the uniform practice in the European Union and its member states of independently stating regulatory requirements as obligatory performance standards, and identifying appropriate voluntary consensus standards as assured, but not obligatory, means by which those standards could be met.[230] Given contemporary American preferences for using regulations to set standards rather than proscribe specific rules, this approach appeared readily adaptable here. Using it, the petition urged, would avoid the problem of copyrighting law, while protecting the intellectual property of organizations able to identify effective means of compliance with law.[231] It would also solve the problem of stasis in incorporated standards. Agencies using soft rather than hard law techniques would be free to identify new means of compliance using guidance mechanisms, without having to undertake the formalities of notice-and-comment rulemaking.

A month after the OFR published this petition in the Federal Register with an invitation for comment,[232] the OMB's Office of Information and Regulatory Analysis (OIRA) published there an additional request for comment, in connection with its possible revision of Circular A-119.[233] This notice, too, raised questions about copyright protection for incorporated standards.[234] The resulting FDMS docket for the OFR petition[235] contained 162 items, and for the OIRA docket[236] seventy-four, exploring a wide range of issues and perspectives. These are captured as well in the growing literature addressing the importance of privately generated standards to an increasingly global economy.[237]

SDO comments generally invoked the necessity of financial support for their valuable work;[238] the difficulties government agencies would face if they themselves

---

[228] OMB Circular A-119, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998).

[229] *See* Comment from Peter L. Strauss et al., *supra* note 227.

[230] *See, e.g.*, BÜTHE & MATTLI, *supra* note 5, at 154–55.

[231] *Id.*

[232] Proposed Rules, 77 Fed. Reg. 11,414 (Feb. 27, 2012) (requesting comments).

[233] Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 77 Fed. Reg. 19,357 (Mar. 30, 2012).

[234] *Id.* at 19,359.

[235] DOCKET NARA-12-0002, http://www.regulations.gov (last visited Dec. 12, 2013).

[236] DOCKET OMB-2012-0003, http://www.regulations.gov (last visited Dec. 12, 2013).

[237] *See generally* BÜTHE & MATTLI, *supra* note 5; SCHEPEL, *supra* note 192.

[238] *See, e.g.*, Comment from Daniel Saphire, Assistant General Counsel, AAR, NARA-12-0002-0155 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0155 (discussing the Association of American Railroads reliance on funds generated by charging for standards).

attempted to generate standards;[239] the expense agencies would face, in times of budgetary stringency, if they themselves had to purchase licenses broadly to publish the standards they incorporate;[240] the federal policies encouraging the use of SDO standards and the protection of SDO intellectual property in them;[241] and the safeguards of the standards-generating processes that meet the ANSI "essential requirements"[242]—openness, lack of dominance, balance, coordination, public engagement through notice and the consideration of views and objections, and adoption by consensus.[243] While frequently asserting that the prices charged for standards are "reasonable," none of the SDO comments suggested a means for regulating prices, either at the moment of incorporation or thereafter. Nor did they address the rulemaking petition's suggestion that agencies identify voluntary consensus standards as acceptable means for achieving compliance with regulatory requirements independently stated, apparently preferring incorporation that would create legal obligations (and so undergird their markets).

Although many of the comments supporting the petition were brief, emphatic statements to the effect that legal obligations must be public, a number of NGOs, consumer groups, and trade associations representing small businesses wrote in some detail. Public.Resource.org,[244] an organization that has been conducting a self-help campaign to place standards on the Internet, defying the SDOs to sue it for copyright violation,[245]

---

[239] *See, e.g.*, Comment from Terrie S. Norris, President, Am. Soc'y of Safety Eng'rs, NARA-12-0002-0132 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0132 (discussing the limitation of OSHA's ability to generate standards).

[240] *See, e.g.*, Comment from Eric P. Loewen, President, ANS, NARA-12-0002-0093, at 2 (Mar. 28, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0093 (discussing the impact of costs on federal agencies).

[241] *See, e.g.*, Comment from August Schaefer, Senior Vice President and Public Safety Officer, UL, NARA-12-0002-0146 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0146.

[242] *See ANSI Essential Requirements*, *supra* note 20.

[243] *Id.*; *see also* Comment from ANSI, OMB-2012-0003-0024, at 7–8 (Apr. 30, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0024; Comment from June Ling, Associate Executive Director, ASME Standards & Certification, ASME, OMB-2012-0003-0010, at 4 (Apr. 27, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0010.

[244] PUBLIC.RESOURCE.ORG, http://public.resource.org/about/index.html (last visited Dec. 12, 2013).

[245] After the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) claimed in January 2013 that Public.Resource.org's publication of a federally mandated 1985 standard on air-duct leakage no longer sold on its website violated its copyright, Public.Resource.org sued it, asserting the copyright's invalidity. *See* Corynne McSherry, *EFF Fights Courtroom Shenanigans After Wrongheaded Copyright Claim Blocks Publication of Federal Law*, ELEC. FRONTIER FOUND. (May 29, 2013), https://www.eff.org/deeplinks/2013 /05 /eff-fights-courtroom-shenanigans-after-wrongheaded-copyright-claim-blocks. SMACNA then did not defend its claim. *Id.* In August, the NFPA, the ASTM International, and the American Society of Heating, Refrigerating and Air Conditioning Engineers brought a still-pending action in the United States District Court for the District of Columbia against Public.Resource.org,

filed numerous comments in both dockets.[246] In addition to strenuously insisting on the public's need for access to the law that governs it, these comments catalogued a wide range of problems in the incorporation by reference system: that of the 9,486 incorporated standards registered by NIST, 6,194 predate 1996;[247] that Underwriters Laboratories today charges $849 to obtain a 1968 standard made law by OSHA in 29 C.F.R. § 1910;[248] numerous—still mandatory—standards are unavailable for purchase, 536 standards are listed in the NIST database without a date (a fundamental requirement),[249] and others simply cannot be found.[250] The Section of Administrative Law and Regulatory Practice extensively addressed the proposition that law is not subject to copyright.[251] A variety of individuals and organizations involved with information technology stressed both the success of standards generation in that field without copyright enforcement and the undesirability of invoking the rulemaking rigidities that creation of legal

---

asserting that it had committed copyright violations when it published codes and standards of theirs that government entities had incorporated into law. *See Media Statement Regarding Lawsuit Against PublicResource.org*, NFPA (Aug. 6, 2013), http://www.nfpa.org/press-room/news-releases/2013/media-statement. For court documents, see Docket: ASTM v. Public .Resource.org, Inc., http://ia600902.us.archive.org/33/items/gov.uscourts.dcd.161410/gov.uscourts.dcd.161410.docket.html (last visited Dec. 12, 2013).

[246] Halperin & Malamud, OMB Comment, *supra* note 69; Halperin & Malamud, NARA Comment, *supra* note 69.

[247] *See* Comment from Carl Malamud, NARA-12-0002-0043, at 11 (Mar. 20, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0043 ("Of the 9,486 Regulatory Incorporations registered by the National Institute of Standards, 6,194 of the Incorporations are for standards from 1995 or earlier."). Poster children for this problem are a Coast Guard regulation dating from 1941, 46 C.F.R. § 160.041-4(b) (2012), requiring first aid kits to contain one-hundred tablets of phenacetin (a painkiller that is internationally recognized as a carcinogen and cause of kidney failure) and a PHMSA regulation, 49 C.F.R. § 173.32(c)(4) (2012), incorporating a 1943 standard for unfired pressure vessels. Comment from Carl Malamud, Public .Resource.org, NARA-12-0002-0106, at 2 (Apr. 9, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0106 ("Not only are such old standards unsafe, they are impossible to procure.").

Scott Rafferty, echoing this concern, invokes the FDA's insistence on a 1938 standard for sulfonated coal that is no longer available for purchase and was updated by the ASTM in 2005. "On average, a standard incorporated by reference in today's [CFR] is 24 years old. . . . [T]he benefits of consensus standard-setting are simply not consistent with the traditional cycle of formal rulemaking." Rafferty, OMB Comment, *supra* note 179, at 3. Nine agencies, he reports, cite thirty-two different annual editions of the ASME Boiler & Pressure Code. *Id.* "[T]he FDA cites to four out-of-print editions of the *Food Chemicals Codex* (1972–1996). Yet, it does not cite any of the four editions issued in the last 16 years." *Id.*

[248] Comment from David Halperin & Carl Malamud, Public.Resource.org, OMB-2012-0003-0008, at 1 (Apr. 26, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0008; *cf. supra* notes 76–85 and accompanying text.

[249] Comment from David Halperin & Carl Malamud, *supra* note 248, at 10.

[250] *Id.*; Comment from Carl Malamud, *supra* note 247.

[251] Comment from Michael Herz, Section Chair, ABA Section of Admin. Law & Regulatory Practice, NARA-12-0002-0157 (June 4, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0157.

norms through incorporation by reference entails.[252] Workers, small business entrepreneurs, and consumers are typically missing or under-represented in standards development organizations—and especially so from the working groups and subcommittees that perform the detail work on the generation of standards.[253] Small business trade

---

[252] *See, e.g.*, Comment from Daniel Trebbien, NARA-12-0002-0086 (Mar. 28, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0086; Comment from Daniel Trebbien, NARA-12-0002-0120 (May 29, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0120 ("In my current profession as a software developer, I have seen first hand how openness or closedness of technical standards affects the profession."); Comment from Ken J. Salaets, Director, Information Technology, OMB-2012-0003-0041, at 3–4 (May 1, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0041 ("Given the dynamic nature of innovation and ICT standards development, governments should be cautious about mandating adherence to any particular standard without demonstrating sufficient need and without support from the impacted industry and relevant stakeholders. . . . Technical regulations can limit manufacturing flexibility, inhibit innovation, delay time to market and distort product design. They can limit market choice and slow consumer price reductions."); Comment from Robert W. Holleyman, II, President and CEO, Business Software Alliance, OMB-2012-0003-0042, at 2, 6 (May 1, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0042 ("Voluntary processes have proven to be the most effective means of fueling innovation through standards. . . . On the other hand, government-mandated standards in the technology industry can often result in a number of unintended consequences. These consequences may include:

> i. unnecessarily freezing the development of new technologies and failing to reap fully the benefits of such quickly evolving technologies;
> ii. inadvertently disadvantaging certain market competitors;
> iii. hindering market acceptance and penetration; and,
> iv. precluding a multi-faceted competitive environment . . . .

Government agencies . . . have a role to play, but they are most effective when facilitating voluntary processes rather than imposing rigid mandates.").

[253] *Cf., e.g.*, ASME v. Hydrolevel Corp., 456 U.S. 556, 559–61 (1982) (describing committees and subcommittees). Writing in 1978, Robert G. Dixon, Jr., reported the deep concern expressed by Calvin J. Collier, then Chairman of the Federal Trade Commission, during hearings for the Voluntary Standards and Certification Act in 1975–1976 that the SDOs did not properly represent small businesses and consumers:

> It is of great importance that standards reflect a proper balance between the interests of all parties concerned, considering available technology. These interests are best represented when affected persons participate in the development process. Unfortunately, consumers and small businesses, for a variety of reasons, have often been unable to participate. It is understandable, then, when standards favor parties whose financial strength gave them a superior position in the process.

STANDARDS DEVELOPMENT IN THE PRIVATE SECTOR: THOUGHTS ON INTEREST REPRESENTATION AND PROCEDURAL FAIRNESS 7–8 (1978) (internal quotation marks omitted). Writing at about the same time, Robert Hamilton argued that:

> Because of the . . . industry orientation of most technical committees, the costs and complexity of increased safety or purity will almost certainly be weighted more heavily by these committees than by an individual whose primary concern is safety or health . . . . The welter of legislative

associations asserted both the difficulties they experienced in participating in standard-setting, and the financial burdens created by licensing fees.[254] Consumer groups criticize

---

> enactments vesting issues of safety or health in the governmental agencies suggests that for many people the balance provided by the private sector often fails to accommodate health or safety considerations satisfactorily.

Robert Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1378 (1978).

[254] *See, e.g.*, Comment from Michael A. Caldarera, Vice President, Regulatory & Technical Services, Nat'l Propane Gas Assoc., OMB-2012-0003-0058 (May 31, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0058 (discussing how the $645 cost to access standards proposed for incorporation by reference by the PHMSA was "extremely excessive" for its small business membership); Comment from Chris R. Calkins, TenderSpec, LLC, OMB-2012-0003-0026 (May 1, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0026 (commenting on the difficulties of securing timely notice); Comment from Jerry Call, *supra* note 90, at 2 ("$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg . . . ."); Comment from John L. Conley, *supra* note 90 (emphasizing the particular problem of purchasing standards not yet incorporated in order to comment on NPRMs and remarking that small businesses "have no option but to purchase the material at whatever price is set by the body which develops and copyrights the information. . . . [W]e cite the need for many years for the tank truck industry to purchase a full publication from the Compressed Gas Association just to find out what the definition of a 'dent' was . . . . HM241 could impact up to 41,366 parties and . . . there is no limit on how much the bodies could charge . . . ."); Comment from John Eichberger, Vice President, Government Relations, Nat'l Assoc. of Convenience Stores, OMB-2012-0003-0034 (May 1, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0034 (discussing how the domination of the Payment Card Industry Security Standards Council (PCISSC) by large electronic payment companies resulted in standards subjecting others "to an elevated risk of fraud"); Comment from Winslow Sargeant, *supra* note 164, at 4 ("'[C]onsensus,' as implemented by major SDOs, can be manipulated to achieve standards that advance a particular policy preference or create market opportunities for select providers but do not represent a consensus among regulated entities . . . . [C]ommittee leadership can identify a diversity of interests that serves to dilute the voice of those parties most directly affected . . . . [And] small entities often lack the opportunity to challenge the result.").

Particularly revealing of these problems are the comments of the National Grain and Feed Association (NGFA), addressing an OSHA proposal to amend its grain handling regulation associated with fires and explosions, 29 C.F.R. § 1910.272 (2012). Comment by Jess McCluer, *supra* note 90, at 2. OSHA had issued an Advanced Notice of Proposed Rulemaking suggesting that it would replace existing regulatory text by incorporating National Fire Protection Association Standard 61. Yet, as NGFA observed:

> NFPA standards offer a far more complex, stringent protocol that may be adopted in whole or in part by industry participants, voluntarily. These guidelines play an important role as voluntary practices that can enhance safety efforts. *But they are entirely inappropriate as a replacement for effective rulemaking* . . . . A review and comparison of 1910.272 and NFPA 61 reveals that there are more than 146 additional provisions addressing design, construction, and operation of affected grain handling facilities. Neither the NFPA technical committee, nor any other NFPA

safety issues posed by standards essentially developed by industries with incentives to minimize risks to save costs.[255]

The published literature about incorporation recognizes, in particular, the significant chance that standards will often favor the interests of established industry.[256] For example, housing codes may favor rigid water piping requiring the services of plumbers over flexible piping that both is more readily used by do-it-yourselfers and also could permit some uses to which rigid piping is not well adapted.[257] In this line of thought,

> industry representatives tend to dominate decisionmaking in many nonprofit organizations, and the standards that are produced tend to reflect the self-interest of the corporations for whom the participants work. The lack of non-industry representatives leads private standard-setting organizations to strike a different balance between

---

> committee, conducts [either] an economic impact study . . . [or] consider[s] the impact of the feasibility or cost of its detailed recommendations on industry and small businesses, in particular. . . . Only NFPA participants, who are required to pay to play, have the ability to comment in the development of consensus standards.

Comment from Jess McCluer, *supra* note 90, at 2–3.

[255] *See, e.g.*, Comment from Rachel Weintraub, Director of Product Safety and Senior Counsel, Consumer Fed'n of Am., OMB-2012-0003-0060 (May 31, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0060 (assuring the adequacy of voluntary safety standards requires not only consensus among participants, but also adequate consumer participation, a transparent process with shared, understandable information, agency participation in the consensus process *and* regulatory oversight for adequacy, such that the standard is not "wholly controlled by industry"); Comment from Rebecca Craven, Program Director, Pipeline Safety Trust, NARA-12-0002-0092 (Mar. 29, 2012), http://www.regulations.gov/#!documentDetail;D=NARA-12-0002-0092 (asserting that the PHMSA had incorporated by reference eighty-five standards privately developed by trade associations, "[d]eliver[ing] measurable value to AGA members" and *not* engaging the public). As an example, the Trust invoked the API's development of the Public Awareness standard, RP 1162—then incorporated by reference by the PHMSA—for which it attempted to charge a House Committee $1,195 for access. *See* Halperin, *supra* note 68 and accompanying text. Furthermore:

> The process was controlled by industry, even though industry has no particular expertise . . . [and] [t]he many possible independent experts and organizations in the field . . . were not sought and ultimately were not a part of the development of this standard . . . . [T]his is not a "voluntary *consensus* standard"—this is an industry standard developed by and for industry. Nor is it a "technical standard" as that term was defined by Congress in the NTTAA . . . . RP 1162 is a 50+ page long set of recommendations, options, considerations, and possibilities.

Comment from Rebecca Craven, *supra*, at 5, 9.

[256] *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 534, 640–42, 642 nn.403 & 406 (2000).

[257] *See, e.g.*, *Plumbing With PEX Tubing*, THE FAMILY HANDYMAN, http://www.familyhandyman.com/plumbing/plumbing-with-pex-tubing/view-all (last visited Dec. 12, 2013).

> cost and protection than that favored by non-industry actors. . . . [S]tandards provide limited protection for workers in many cases, because industry-dominated committees are more reluctant than OSHA to characterize a substance as a carcinogen, and less likely to rely on published scientific data instead of industry-supplied information.[258]

Movement has begun on these issues on several fronts, in response both to the petition and to a statute Congress enacted in response to the API's misjudgment in asking a House Committee to pay to see its pipeline safety warning standard,[259] which resulted in a number of meetings to address future directions.[260] On October 2, 2013, as this Article was entering the final editing process, ANSI announced its development of an incorporation by reference portal where standards could be viewed without payment, under stringent read-only protections,[261] and the OFR published a Notice of Proposed Rulemaking that, on initial impression, appears to attempt a response to the problems of transparency during the rulemaking proposal stage, but is considerably less promising in other respects.[262] The remainder of this Article looks at possibilities for SDOs to preserve at least the core of their business model, while permitting the public to comment on rulemaking proposals and learn about the law's obligations without having to pay what might be monopoly prices to do so.

III. CAN THE PUBLIC HAVE ITS ACCESS-TO-LAW CAKE AND STANDARDS DEVELOPERS EAT REVENUE FROM STANDARDS SALES TOO?

A. Proposed Rulemaking and Digital Rights Management

Given the current law of rulemaking, not to mention the transformations worked by the development of Regulations.gov and its associated FDMS, agencies have strong

---

[258] Sidney A. Shapiro, *Outsourcing Government Regulations*, 53 DUKE L.J. 389, 407–08 & nn.70 & 73 (2003) (citations omitted).

[259] *See supra* notes 67–69 and accompanying text. The statute, Public Law 112-90 section 24, has recently been amended to lessen somewhat its severity, but still has raised considerable anxiety in the SDO community. Pub. L. No. 113-30, 127 Stat. 510 (2013) (to be codified at 49 U.S.C. 60102(p)).

[260] *See, e.g.*, U.S. DEP'T OF TRANS., PUBLIC WORKSHOP: IMPLEMENTING INCORPORATION BY REFERENCE REQUIREMENTS OF SECTION 24 OF THE PIPELINE SAFETY ACT OF 2011, *available at* http://mediasite.yorkcast.com/webcast/Play/e8c2cc8919ef41a7821e7f6c85b35f111d.

[261] *See* Bhatia & Shannon Remarks, *supra* note 216.

[262] Proposed Rules, 78 Fed. Reg. 60,784 (proposed Oct. 2, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-24217.pdf. The comment period for the proposal, when last seen, permitted comments to be filed until January 31, 2014, and it appears likely new regulations will then be published. *Id.*

incentives to follow ACUS's Recommendation to assure commenters' access to SDO standards underlying their rulemaking proposals. Few agencies would wish to take the risk that an important rulemaking would be found invalid months—if not years—down the road because they had failed to give commenters adequate notice of the content of their proposals or the underlying studies.[263] For many would-be commenters, having to pay to learn the content of what is, at the moment, only a proposal for rulemaking would be a disabling obstacle. Yet for the SDO, having to make public what at the moment is *only* a voluntary standard, not yet a regulatory obligation, and thus unquestionably still under copyright, could threaten income necessary for its continued success. Might temporary access under digital rights management regimes that sharply reduces—if not eliminates—threats of misappropriation, encouraged by the ACUS recommendations, provide one means by which this dilemma might be softened?

In its recent rulemaking proposal,[264] the OFR acknowledged that it is not authorized formally to approve (or disapprove) *proposed* incorporations by reference, but proposed to return to the agency (i.e., without publication) any notice of proposed rulemaking involving incorporation that did not either: "(1) Discuss the ways in which it worked to make the materials it proposes to incorporate by reference reasonably available to interested parties in the preamble of the proposed rule, or (2) Summarize the material it proposes to incorporate by reference in the preamble of the proposed rule."[265]

In conjunction with the ACUS recommendations, this is certainly a push in the direction of disclosing information about incorporated matter that may permit reasonable comment, although it falls short of requiring disclosure of the standards themselves, and the proposal's continuing failure to suggest a definition of "reasonably available" (together with repeated discussion in the rulemaking preamble of the OFR's limited resources) leaves agencies on their own to decide what might satisfy this element. Part 51, in language not proposed to be changed, indicates that

> 51.7(a) A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it— . . .
>
> (4) Is reasonably available to and usable by the class of persons affected by the publication. In determining whether a publication is usable, the Director will consider—
>
> (i) The completeness and ease of handling of the publication; and
>
> (ii) Whether it is bound, numbered, and organized.[266]

Since usability is defined and indicated to be a matter that the Director will consider, it seems rather clear that beyond taking into custody one print copy of the matter to be

---

[263] *Cf. supra* note 179 and accompanying text.

[264] Proposed Rules, 78 Fed. Reg. 60,784 (proposed Oct. 2, 2013).

[265] *Id.* at 60,797 (proposing new language for 1 C.F.R. § 51.5(a)).

[266] 1 C.F.R. § 51.7(a) (2013).

incorporated, and requiring the agency to maintain another, the Director is eschewing any enforcement of "reasonable availability" standards.

SDOs appear increasingly to be recognizing the importance of making standards materials available during rulemakings, as well as encouraging participation in their own voluntary consensus processes. ANSI's announced creation of an IBR portal on which standards will be available without charge on a digital-rights-managed, read-only basis is one indicator;[267] individual SDOs have already been moving in this direction.

Consider in this regard the approach taken by the North American Energy Standards Board (NAESB),[268] which uses a commercial program, LockLizard Safeguard Secure PDF Viewer,[269] to permit requesters three days of one-time access to any standard the Federal Energy Regulatory Commission (FERC) may propose to adopt as a regulatory requirement.[270] The NAESB acts often in contemplation that FERC will adopt its standards as regulatory law, and its activities in support of FERC rulemaking may illustrate ways in which SDOs can then facilitate rulemaking development building on SDO standards. A trade organization of about 300 corporate members with some regulatory members as well,[271] the NAESB's work has become particularly important as "smart

---

[267] *See* Bhatia & Shannon Remarks, *supra* note 216.

[268] NAESB, http://www.naesb.org (last visited Dec. 12, 2013). Conventional sources about the NAESB and its operations include William P. Boswell & James P. Cargas, *North American Energy Standards Board: Legal and Administrative Underpinnings of a Consensus Based Organization*, 27 ENERGY L.J. 147 (2006), and Federal Energy Guidelines (FERC) discussions of its use of NAESB in rulemaking statements of basis and purpose, such as Order Providing Guidance on the Formation of a Standards Development Organization for the Wholesale Electric Industry, 97 F.E.R.C. ¶ 61,289 (Dec. 19, 2001), *on reh'g* 99 F.E.R.C. ¶ 61,171 (May 16, 2002), and Notice of Proposed Rulemaking, Standards for Business Practices of Interstate Natural Gas Pipelines, 70 Fed. Reg. 319 (Jan. 4, 2005). Extensive conversations and correspondence with Rae McQuade, President and Chief Operating Officer of the NAESB, during September and October 2012 have also added greatly to my understanding of the organization, and the paragraphs about it that follow. E-mails from Rae McQuade, President and Chief Operating Officer, NAESB, to author (on file with author). The NAESB is also relied upon by state utility commissions and other SDOs. Many of its roughly 3,000 standards have been incorporated by reference, and some are in use internationally. *Id.* Although the NAESB is an SDO credentialed by ANSI, because its standards are so likely to be incorporated by reference, few of them are made ANSI standards. *Id.*

[269] *Secure PDF File Viewer*, LOCKLIZARD LIMITED, http://www.locklizard.com/pdf_security.htm (last visited Dec. 12, 2013).

[270] The NAESB filed a detailed account of its copyright policy with the Federal Energy Regulatory Commission November 12, 2012. RAE MCQUADE, REPORT OF THE NORTH AMERICAN ENERGY STANDARDS BOARD: THE NAESB COPYRIGHT POLICY 3 (2012) [hereinafter NAESB COPYRIGHT POLICY], *available at* http://www.naesb.org/pdf4/ferc112012_naesb_copyright.pdf.

[271] *NAESB Membership List as of September 5, 2013*, NAESB, http://www.naesb.org/pdf4/memstats.pdf (last visited Dec. 12, 2013). While its corporate members must pay a $7,000 annual membership fee, *NAESB Membership Application*, NAESB (Apr. 30, 2013), http://www.naesb.org [hereinafter *NAESB Membership Application*], any state utility commission may become a member without fee under the umbrella of a single annual $500 payment by the

grids,"[272] consumer choice, and the possibility that some consumers will be both supplying power to and taking power from, electric transmission lines have become significant market realities. The NAESB has a particularly tight relationship with FERC's regulation of interstate markets in electricity and natural gas and often initiates standards development at its request,[273] without seeking FERC compensation for doing so.[274]

In line with, and perhaps exceeding in some respects, the ANSI "Essential Requirements,"[275] the NAESB's procedures for adopting standards engage those communities that will likely be directly affected by its work. Those opportunities to influence the standards are readily comparable to federal rulemaking procedures. It develops its working agenda on the basis of inputs from many sources, often non-members. That agenda and most materials considered in the course of standard development are readily viewed on its website.[276] Its leadership asserted in conversation,[277] although its web page does not seem to show,[278] that it regularly reaches out to non-member trade associations, consumer advocates, etc., and that it is possible to join distribution lists to assure active notice of developments of possible interest.[279] When the NAESB submits standards to FERC (or other public bodies) for possible incorporation by reference, its submission includes full documentation of the proposal's development—committee minutes, voting records, submitted comments, etc.[280] As distinct from the proposed standard itself, which may be purchased from the NAESB or briefly accessed under digital rights management, all this material is then publicly accessible during FERC's comment period, should FERC issue a notice of proposed rulemaking that would incorporate the standard by reference. In this respect, the material available to the public tracks much of

---

National Association of Regulatory Utility Commissioners (NARUC). NARUC, http://www.naruc.org (last visited Dec. 12, 2013). At least California, Connecticut, Maine, New York, Ohio, Pennsylvania, and Vermont have availed themselves of this possibility; the Department of Energy and NIST are also members.

[272] THE SMART GRID, http://www.smartgrid.gov/the_smart_grid#smart_grid (last visited Dec. 12, 2013) ("[T]he Smart Grid will consist of controls, computers, automation, and new technologies and equipment working together . . . with the electrical grid to respond digitally to our quickly changing electric demand."); *see also infra* note 291 and accompanying text.

[273] Letter from Jonathan Booe, Deputy Director, NAESB, to Dr. Patrick Gallagher, Director, NIST, at 3 (Feb. 7, 2011), *available at* http://www.nist.gov/standardsgov/upload/NAESB.pdf.

[274] E-mails from Rae McQuade, *supra* note 268.

[275] *See ANSI Essential Requirements*, *supra* note 20.

[276] *Quadrant Business Standards Implementation and Code Repository*, NAESB, http://www.naesb.org/materials/bscr.asp (last visited Dec. 12, 2013) (providing links to forms and information which allows members and non-members to view or request development activity for their business type).

[277] E-mails from Rae McQuade, *supra* note 268.

[278] NAESB, http://www.naesb.org (last visited Dec. 12, 2013).

[279] E-mails from Rae McQuade, *supra* note 268.

[280] *See* RAE MCQUADE, REPORT OF THE NORTH AMERICAN ENERGY STANDARDS BOARD: VERSION 003 OF THE NAESB WHOLESALE ELECTRIC QUADRANT BUSINESS PRACTICE STANDARDS (Sept. 18, 2012) [hereinafter NAESB BUSINESS PRACTICE STANDARDS], *available at* http://www.naesb.org/pdf4/ferc_091812_weq_version003_report.pdf.

what would be available to the public commenting on a direct federal agency rulemaking proposal. An electronic filing from September 18, 2012, respecting wholesale electric quadrant standards prints out at 345 pages.[281]

Yet the business model the NAESB has developed well illustrates the tensions that may exist between provision for open participation in standards generation and generation of the financial resources required to perform one's function effectively. Historically, non-members could freely participate and vote on NAESB committees as they worked on standards development, and sixty to seventy percent of participants on single topics were non-members.[282] The NAESB relied on its members' dues payments, together with sales revenues from standards, to finance its activities.[283] Recently, however, the NAESB found that some utilities and other energy corporations, on which it relied for these payments, had become free-riders, depriving the organization of needed dues revenues by availing themselves of its free access policy. Thus, the NAESB has recently joined the many SDOs requiring one to "pay to play" in an active sense. Non-members face charges for meeting participation by telephone or in person ($100 for a meeting of four hours or less; $300 for a longer one), or for a year's participation in the work of a given subcommittee ($1,000).[284] There is no charge to submit comments, however,[285] and any comments submitted must be considered.[286]

Perhaps also to protect its revenue streams from free-riding, or its standards from "unintended" display in official documents that would be freely available on agency websites, the NAESB has forcefully asserted its right to license (or refused to license) use of their standards in any agency proceeding.[287] In providing limited Digital Rights Management (DRM) access to its standards, as when they are proposed for incorporation by reference in FERC, it withholds any right to quote from those standards in comments it filed with FERC (much less elsewhere) beyond what "fair use" permits.[288]

---

[281] *Id.*

[282] E-mails from Rae McQuade, *supra* note 268.

[283] *See NAESB Membership Application*, *supra* note 271.

[284] *NAESB Current Committee Activities*, NAESB, http://www.naesb.org/committee_activities.asp (last visited Dec. 12, 2013) [hereinafter *NAESB Current Committee Activities*].

[285] NAESB, NAESB COPYRIGHT POLICY & PARTICIPATION SYNOPSIS (May 28, 2002), *available at* http://www.naesb.org/pdf4/bd_revenue032013w2.doc.

[286] *See* MCQUADE, NAESB BUSINESS PRACTICE STANDARDS, *supra* note 280.

[287] *See* MCQUADE, NAESB COPYRIGHT POLICY, *supra* note 270.

[288]
> Except under the limited circumstances specifically permitted by the Fair Use Doctrine, NAESB considers it a copyright infringement to quote any part of its standards as part of filings with the Commission. Such limited circumstances may include Commission proceedings such as complaints, rate cases, and protests to rate cases. However, parties should always consult with NAESB prior to the use of any verbatim quote of copyrighted material.

MCQUADE, NAESB COPYRIGHT POLICY, *supra* note 270, at 5. The September 18, 2012, NAESB filing contains no mention of rulemaking and appears to be principally concerned with quotations made in the course of compliance filings and/or tariffs—that is, filings likely to be

Anyone who wants to reason with FERC about whether they ought to convert that standard into a regulatory obligation or if, it has been converted, whether they have complied with the standard or if the standard bears on some action for which they require regulatory approval must now obtain the NAESB's permission to quote its language in their filings.

The NAESB is only one participant in a standards development activity that illustrates both the importance of assuring continuing support for standards development and its close relationship to the kinds of activities American-administrative law has long committed to fully open public notice and participation. The generation and consumption of electric power has become notably more complex as new sources dependent on variable inputs (e.g., wind farms, solar panels) and possibilities for cogeneration have been added,[289] national networks have expanded,[290] and our awareness of potential sources of disruption (e.g., solar storms, for example) has increased.[291] Assuring stable, reliable interoperability—what standards have long been about—has become the work of a Smart Grid Interoperability Panel (SGIP) operating under the aegis of NIST.[292] NIST's recent *Framework and Roadmap for Smart Grid Interoperability Standards, Release 2.0*[293] runs 225 tightly packed pages, citing thirty-seven already-identified standards, such as a suite of ANSI standards for data collection and transmission,[294] and an additional sixty-one standards still under review.[295] In general, the standards have been developed under the NIST's requirements for transparency, open participation, and

---

made by organizations whose membership it hopes to attract. *Cf.* MCQUADE, NAESB BUSINESS PRACTICE STANDARDS, *supra* note 280. Membership in itself confers access to standards, and while that access is limited to internal use it also creates a relationship within which external uses may be bargained out. MCQUADE, NAESB COPYRIGHT POLICY, *supra* note 270, at app. A-2.

[289] *See supra* note 272; *infra* note 292.

[290] *See supra* note 272; *infra* note 292.

[291] *E.g.*, LLOYD'S, ATMOSPHERIC & ENVT'L RESEARCH, SOLAR STORM RISK TO THE NORTH AMERICAN ELECTRIC GRID (2013), *available at* http://www.lloyds.com/~/media/Lloyds/Reports/Emerging%20Risk%20Reports/Solar%20Storm%20Risk%20to%20the%20North%20American%20Electric%20Grid%20.pdf.

[292]

> Today's electric power grid ranks as the single greatest engineering achievement of the 20th century. And tomorrow's smart grid will be one of the greatest achievements of the 21st century. By linking information technologies with the electric power grid—to provide "electricity with a brain"—the smart grid promises many benefits, including increased energy efficiency, reduced carbon emissions, and improved power reliability.

Smart Grid, WISI, http://www.nist.gov/smartgrid/ (last visited Dec. 12, 2013).

[293] *See* NIST, NIST FRAMEWORK AND ROADMAP FOR SMART GRID INTEROPERABILITY STANDARDS, RELEASE 2.0 (Feb. 2012) [hereinafter NIST ROADMAP], *available at* http://www.nist.gov/smartgrid/upload/NIST_Framework_Release_2-0_corr.pdf.

[294] *Id.* at 70–105.

[295] *Id.* at 107–38.

"reasonable" (but not free)[296] accessibility.[297] Importantly for the purpose of this Article, FERC appears to have accepted the NIST's advice that the standards are best used as "appropriate signals to the marketplace . . . without mandating compliance with particular standards. The NIST adds that it would be impractical and unnecessary for the Commission to adopt individual interoperability standards."[298] So long as this advice is followed, the "law" problem with which this Article is concerned would not be present; however, the fees the SGIP has found necessary to charge for participation in its deliberations,[299] as well as its impending conversion from the NIST dependency into an independent NGO, to be sustained by substantial dues requirements,[300] well illustrate the financial imperatives present in our reliance on SDOs for standards creation.

B. Standards Developed in the Expectation of Incorporation

Perhaps in rulemaking comments one could avoid the need to quote extensive language from the standard being proposed for incorporation. Any quotations might readily fit ideas of fair use and be brief enough to fit comfortably within the dimensions of fair use. And perhaps the temporal, one-time-only limit the NAESB imposes on the free DRM access it offers to its standard—at that moment still merely a voluntary standard—should be regarded as sufficiently enabling of the comment process. Once a standard has been converted into a legal obligation, however, needs that the regulated and regulatory beneficiaries may have for access to its terms are permanent, not time-limited, and may be frequent. Even more striking, the NAESB states it is prepared to enforce the proposition that its language may not be quoted in documents submitted to the regulator whose law it is without a license from it at the price it chooses to charge.[301] Even its members have free access to its standards only for their internal use.[302] They are not to be shared with others.

Perhaps the NAESB's concern is again with free-riding—that publication of its standards in public pleadings, or even the possibility of repeated access to them, might create a purchase substitute for those who could otherwise be steady customers. The

---

[296] It perhaps bears repeating that there appear to be neither standards nor enforcement mechanisms in place to determine what is a "reasonable" fee.

[297] *See* NIST ROADMAP, *supra* note 293, at 62–63.

[298] *Id.* at 8 (quoting 136 FERC ¶ 61,039, *available at* http://www.ferc.gov/EventCalendar/Files/20110719143912-RM11-2-000.pdf).

[299] SGIP membership costs, which vary depending on degree of participation, are available on its website. *Smart Grid Interoperability Panel, Membership*, SGIP, http://www.sgip.org/membership/ (last visited Dec. 12, 2013).

[300] Letter from John D. McDonald, P.E. Chair, SGIP Governing Board, to SGIP Members (July 11, 2012), *available at* http://collaborate.nist.gov/twiki-sggrid/bin/view/SmartGrid/July2012McDonaldLetter.

[301] MCQUADE, NAESB COPYRIGHT POLICY, *supra* note 270, at 3.

[302] *Id.* at app. A-2 (authorizing NAESB members in good standing to "reproduce material therein for internal reference and use").

concerns seem overdrawn. Neither participants before FERC, nor FERC itself, will likely have any need to quote standards *in extenso* in proceedings in which those standards may be at issue, just those aspects relevant to the case. The doctrine of "fair use"[303] seems well suited to situations in which quotation might reasonably be thought compelled. And the use of digital rights management for controlled access, at any time when access is needed, seems the modern equivalent of the law-library access Congress imagined in requiring a finding of reasonable availability when it enacted § 552(a)(1).[304]

At root of the issue here may be the nature of the NAESB's close relationship with FERC. If it is not quite the SBCCI,[305] nonetheless it is developing its standards not as voluntary standards that may prove persuasive in market operations, but precisely in the contemplation that they will be a useful product for FERC to incorporate in legal obligations.[306] Perhaps driven by budgetary considerations or by the statutory preference for voluntary standards embodied in the NTTAA,[307] FERC, in effect, has asked the NAESB to develop standards that it might have formulated through rulemaking of its own. Similarly, it appears, the PHMSA relied on the API to generate its public pipeline safety hazard warning standards.[308] Neither the NAESB nor the API standards are "technical" standards in NTTAA terms,[309] and self-evidently they are standards in which the public as well as the members of the NAESB or the API would have a considerable interest. It should be quickly apparent that the outsourcing is essentially contractual, making the opportunity to bargain for price, and the reasons for doing so, strong. If the NAESB or the API thought it needed compensation for the work an agency was effectively delegating to it, that could be agreed upon at the outset—with the result that the work product, as law, would be public.[310] And if this were a public contracting process with, say, a "request for proposal," (RFP) process, it is at least possible that a less "interested" applicant would appear. The prospect of competition to provide this service for the agency would be real (as would be the possibility that the agency would decide that self-production would be cheaper) and any opportunity for monopoly pricing of law would be eliminated.

---

[303] 17 U.S.C. § 107 (2006).

[304] 5 U.S.C. § 552(a)(1) (2006).

[305] *See supra* notes 113–21 and accompanying text.

[306] *Cf.* MCQUADE, NAESB COPYRIGHT POLICY, *supra* note 270, at 3.

[307] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, 110 Stat. 775, 783 (1996).

[308] *See supra* note 69 and accompanying text.

[309] *See* National Technology Transfer and Advancement Act § 12.

[310] One might also believe that when entering into such an agreement, the PHMSA should insist that the API achieve the levels of openness for data relied upon, views submitted, and reasoning that the PHMSA itself would be held to in notice-and-comment rulemaking—considerably more, as has been suggested, than ANSI's "Essential Requirements" entail—but that is an argument for another day.

Effectively outsourcing rulemaking not only suggests a level of trust in the disinterestedness of the standard-setter that not all persons affected by its standards might find warranted; but it also has the potential of defeating many of the procedural safeguards of federal notice-and-comment rulemaking, hiding from public (and agency) view the data, formative private inputs, and even reasoning that FDMS dockets reveal to all.[311] Negotiating in advance the terms of what is in effect contracted-out rulemaking would permit the rulemaking agency to specify the procedures by which the desired standards will be generated: what and how notice will be given; whether persons wishing to participate can be required to "pay to play," as is often SDO practice;[312] lodging the full records of the standards-generation process with the rulemaking agency as a public record that will be available during the agency's own notice-and-comment process; the nature of explanations the SDO should give for controverted policy choices made; etc. The NAESB's procedures seem reasonably to have met these standards;[313] the API's procedures leave more room for doubt.[314] Without such measures, an agency's reduction of the cost of conducting its own subsequent rulemaking can have the consequence of considerably reducing the visibility of, and the public's access to, the standards-generation process.

Moreover, the NAESB's approach post-adoption, when its standards have been converted into legal obligation, is indeed questionably justified, for an SDO that has created its standards in coordination with an agency and in expectation of their incorporation. Here, *Veeck*[315] has its clearest application, as does Professor Cunningham's persuasive typology.[316] Unhindered digital right management access might, in this context, be seen as an acceptable middle ground, preserving the print market likely to be used by those having to consult the standards as a whole and with regularity. And it marks an approach with a history of successful implementation in the SDO community. As the SDO community heard at a recent conference,[317] for ten years, the National Fire Protection Association (NFPA) has permitted access to all of its standards under digital rights management at any time, without charge.[318] Its codes as a whole, rendered in portable

---

[311] *See, e.g.*, *supra* notes 254–55 and accompanying text.

[312] *See* NAESB CURRENT COMMITTEE ACTIVITIES, *supra* note 284 and accompanying text.

[313] *See supra* note 275 and accompanying text.

[314] *See, e.g.*, *supra* notes 67–71 and accompanying text.

[315] *See* Veeck v. SBCCI, 293 F.3d 791 (5th Cir. 2002).

[316] *See supra* notes 102–06 and accompanying text.

[317] James M. Shannon, CEO, NFPA, Government Reliance on Voluntary Consensus Standards and Conformance Programs, Remarks at the ANSI World Standards Week 2013 Open Forum (Washington, D.C., Oct. 2, 2013).

[318] James M. Shannon, CEO, NFPA, *Remarks at the 2012 NFPA Conference & Expo*, YOUTUBE, at 15:04 (June 11, 2012), http://www.youtube.com/watch?feature=player_embedded&v=DdLgV-nEg3g#t=16 ("More than ten years ago we put all of our codes and standards on our website and made them available to anyone who wants to review them. On our RealRead site, the standards can't be downloaded or printed but anyone can read all of our codes and standards online without paying a fee. We were the first standards developing organization to do that.").

form, are what have sustaining value in the market—and, of course, their incorporation creates that market.[319]

C. Standards Developed Independently of Any Expectation of Their Incorporation

The preceding paragraphs have largely concerned standards created in direct contemplation of their immediate use by government bodies. Matters are somewhat different for voluntary consensus standards that have been created without expectation of their possible incorporation as legal obligations—particularly in cases where the agency wishes or needs to incorporate only a part of the standard. Unlike the SBCCI or the API, the ASME would in some sense be surprised by the conversion of all or part of one of its voluntary standards into a legal obligation. In the commercial-use context for which it was created, its copyright is entirely unexceptional, and its market depends on its utility, not at all on compulsions that may have been created by its (perhaps surprising) conversion into a legal obligation. On this assumption, there could have been no bargained price, no prior contractual arrangement to develop the standard. If incorporation by reference served to lift the copyright and thus damage the market for the standard, that unexpected conversion would appear to be a taking that—as with all governmental expropriations of private property—should be properly compensated.[320] One might think, too, that requiring the government to assess in advance the value of what it would be taking, rather than leaving that value to be reaped from others on the subsequent market for knowledge of the law, had the potential to control the most problematic characteristic of private standard-setting, the appearance that public power has been placed in private hands. When agencies discover useful standards, rather than seek their creation, this concern is subdued.

It is worth emphasizing, however, that a "takings" rationale would not take one so far as to permit the prior owners to charge members of the public to know the law. When the government takes private property for use as a public park there is a

---

[319] That portable form, the NFPA realizes, increasingly must be digital, and its business model is being changed to reflect the realities of the Information Age—including the questions now being raised about the copyright protection available for standards that have been converted into law. *Content Strategy*, *supra* note 23 ("We have had great success over the years using a business model in which the principal source of revenue was the sale of print editions of our codes and standards. That business model is no longer sustainable."). On September 10, 2012, it announced that it was converting the terms of electronic sales of its standards into a "social" digital rights form making purchased standards usable on all of a purchaser's digital equipment; they will now be sold with an embedded watermark identifying the purchaser. Press Release, NFPA, NFPA Removes DRM on PDFs (Sept. 10, 2012), *available at* http://www.nfpa.org/press-room/news-releases/2012/nfpa-removes-drm-on-pdfs.

[320] U.S. CONST. amend. V ("Private Property [shall not] be taken for public use without just compensation.").

single payment for the property taken; not a retained right to charge anyone who might subsequently want to use the park, such admission fee as the prior owner cared to set. This argument is the stronger, considering that no one is compelled to use a park that the government has chosen to create, whether by expropriation or not. Like the fees charged for obtaining those standards that remain voluntary, park fees are controlled by the possibility of substitutions in the market. Substitutions are not possible for standards that have been converted into legal obligations. Moreover, if incorporation by reference preserves copyright in what previously was just a voluntary standard, that creates for the SDO an exclusive market for publication that might otherwise have been served by one of its competitors;[321] this anti-competitive impact, not merely a private organization's unusual power to set monopoly prices for learning the law, further undercuts copyright-preserving alternatives.

The "takings" possibility, then, warrants some attention. The standard argument of the SDOs, and a concern of government agencies, is that this would be unacceptably expensive for the agencies. In effect, the income stream from sale of incorporated standards is taken as a substitute for direct payment of "just compensation."[322] It seems problematic, however, to transform the prospective price for a taking—unmistakably a governmental obligation that may be judicially fixed if agreement on it cannot be reached—into a price unilaterally set by monopolists on private parties with little choice about purchase. Congress has in other contexts set its face against "unfunded mandates,"[323] and that concern seems equally applicable here. Nor is it clear that agencies would in fact be obliged to pay high prices for their use of SDO standards if a takings analysis were in place.

The agency can control, if not entirely eliminate, that value if it incorporates only those elements of a standard that it finds regulation to require, and not the whole of the SDO's work product. As already noted, voluntary consensus standards often go into much more detail than would be necessary, or even appropriate, to require by regulation.[324] If an agency incorporates by reference only the definition of a "dent" from complex standards on tank truck safety,[325] making that definition public—the only publication that would be required—could hardly diminish the commercial value of the standards as a whole. Whether or not conceptualized as fair use, such care to incorporate no more of a set of standards than its needs entail might thus control the takings question. A database to which access was free, but under digital rights management control, would meet the statutory test of "reasonable availability" in the Computer Age, and seem likely to reinforce, not undercut, the value of the full standard in print.

---

[321] *See, e.g.*, *supra* notes 80–85, 204 and accompanying text.

[322] U.S. CONST. amend. V.

[323] Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified as amended in scattered sections of 2 U.S.C.).

[324] *See supra* note 254.

[325] *See* Comment from John L. Conley, *supra* note 254, at 2.

Moreover, SDO claims to finance their operations through sale of their "voluntary consensus standards"[326] are time-limited in a way that arguments for continuous government protection of their intellectual property rights do not respect. ANSI's "Essential Requirements" include frequent reassessment of any voluntary consensus standards it accredits—in general, no less frequently than every five years.[327] Since it will take some time for an accredited voluntary standard to be transformed into a legal obligation, one can have some confidence that the price initially asked for the standard will be a market price. It is a voluntary standard; there are at best market compulsions to purchase it. Since it takes time to incorporate the standard by reference, when that happens only two or three years may be left before, in its existence as a voluntary consensus standard, it has been replaced by a revised version.[328] That revised version is now the voluntary consensus standard, and that is the standard whose price will in some sense be dictated by the market for such standards. Any claim of right to compensation for the loss of sales of superannuated standards that an SDO has in fact changed on its own books seems outside a business model premised on sales of voluntary standards. Independent of its conversion into law by incorporation, a standard's commercial value will have been eliminated, or at the very least greatly reduced, by its revision.[329] Any price an SDO might be able to charge for access to that displaced standard would owe its value just to the standard's transformation into law, and not to its copyright as such.[330] And the great majority of standards that remain legal requirements today are more than fifteen years old.[331]

One of the ways, then, that SDOs might protect their appropriate business model—that is, their reliance on sales into the market for voluntary consensus standards—would be simply to abandon claims that superannuated standards may not be made public. If the claim for the right to sell access to the standard were limited to the period between its adoption as a voluntary consensus standard and its revision, one could have some confidence that the price charged would be that for a standard, and not for law. One would not encounter situations like that presented by the American Herbal Products Association (AHPA), selling the contemporary version of its standards as a copyable and transferable physical book for forty percent of the price charged for the older, but incorporated standards, sold under tightly restrictive digital rights management.[332] Correspondingly, whatever an agency's reluctance to place in its electronic reading room the text of a contemporary standard it had only recently incorporated by reference, it could with confidence place that text there once the voluntary standard, but not yet its regulation, had been revised.

---

[326] *See About ANSI Overview*, *supra* note 8.
[327] *See ANSI Essential Requirements*, *supra* note 20, § 4.7.1.
[328] *See supra* Part II.A.
[329] *See, e.g.*, *supra* notes 79–85, 101 and accompanying text.
[330] *See, e.g.*, *supra* text accompanying notes 79–85.
[331] *See supra* note 247 and accompanying text.
[332] *See supra* text accompanying notes 79–85.

D. Must Incorporation by Reference Create Legal Obligations?

Part 51, the OFR regulations on incorporation by reference,[333] currently insists that incorporation is proper *only* if it entails a legal obligation and, doubtless for this reason, goes on to provide that future revisions of the incorporated standard cannot be referred to.[334] The recent rulemaking proposal suggests no purpose to soften this restriction, which bears much of the responsibility for the failure of incorporated standards to keep up with voluntary consensus standards.[335] Rulemaking requires resources that agencies have in short supply; changing an incorporated standard is expensive. But the OFR position is not required by the APA's text[336] and runs contrary to the expectation under the NTTAA that standards will be "technical" and not "regulatory standards or requirements."[337] One readily imagines rules that directly state regulatory requirements and invoke standards as illustrative but not required means of compliance, permitting agencies to use guidance documents at lower procedural cost, and without creating law, to identify alternative means of compliance as standards evolve. Such an approach would appear to be better both for SDOs—their copyrights are not threatened when their standards are not converted into legal obligations—and for agencies acquiring flexibility for change.

Consider, in this regard, 29 C.F.R. § 1926.200(c), an element of OSHA's safety and health regulations for construction section:

> (c) Caution signs. (1) Caution signs (see Figure G-2) shall be used only to warn against potential hazards or to caution against unsafe practices.
>
> (2) Caution signs shall have yellow as the predominating color; black upper panel and borders: yellow lettering of "caution" on the black panel; and the lower yellow panel for additional sign wording. Black lettering shall be used for additional wording.

---

[333] 1 C.F.R. § 51 (2013).

[334] *See* 1 C.F.R. § 51.1(f); *supra* note 179 and accompanying text.

[335] *See supra* note 172 and accompanying text.

[336] *See supra* note 177 and accompanying text.

[337] *See supra* note 201 and accompanying text. Emily Schleicher Bremer, whose research and report underlay the ACUS recommendations discovered in interviews with career rule writers who have worked on incorporations by reference for decades that the limitation to technical material used to be more rigidly enforced. *See* Bremer, *supra* note 219; *see also* E-mail from Emily Schleicher Bremer, Attorney Advisor, ACUS, to author (Dec. 14, 2012) (on file with author). Scott J. Rafferty, who worked at the ACUS while her report was under development, made a similar observation in his comments to the OMB docket. *See* Rafferty, OMB Comment, *supra* note 179.

> (3) Standard color of the background shall be yellow; and the panel, black with yellow letters. Any letters used against the yellow background shall be black. The colors shall be those of opaque glossy samples as specified in Table 1 of American National Standard Z53.1-1967.[338]

This regulation states a mandatory standard, putting a caution sign using some other colors than those of "opaque glossy samples as specified in Table 1 of American National Standard Z53.1-1967"[339] in violation, however minor, and exposing the company posting it to sanctions, however slight. Adopted in 1967, Standard Z53.1-1967 is now defunct,[340] having apparently been displaced by ANSI standard Z535 SET;[341] it cannot be found in ANSI's electronic library of standards.[342] Yet, because it remains under copyright, one would have to pay ANSI to obtain access to it, if it could be found in print form. And if OSHA wished to bring its regulation up to date, incorporating ANSI standard Z535 SET, it would have to go to the trouble (and expense) of convening notice-and-comment rulemaking proceedings to do so.[343] As an alternative, imagine a regulation taking this form:

> (c) Caution signs. (1) Caution signs (see Figure G-2) shall be used only to warn against potential hazards or to caution against unsafe practices.

---

[338] 29 C.F.R. § 1926.200(c) (2012). Part 1926 runs 695 pages in the print version of the latest Code of Federal Regulations, but that dimension seriously understates its effective volume. In them, one regularly encounters formulas like 200(c).

[339] § 1910.145(d)(4).

[340] ANSI, U.S. FED. REG. UPDATE: JUNE 11, 2013–JUNE 17, 2013 (June 2013) [hereinafter U.S. FED. REG. UPDATE], *available at* http://publicaa.ansi.org/sites/apdl/Documents/Government%20Affairs/Federal%20Register%20Notices/Standards%20_%20CA%20Notices/2013/06%2017%2013.pdf.

[341] *Id.*

[342] *See ANSI Online Document Library*, ANSI, http://www.ansi.org/library/overview.aspx?menuid=11 (last visited Dec. 12, 2013).

[343] *See* U.S. FED. REG. UPDATE, *supra* note 340. Note in this respect that Z535 SET is a complex collection of six different collections of standards, revised every five years, that both ANSI and the National Electrical Manufacturers Association (NEMA), the responsible SDO, offer for sale on their websites for $518. *ANSI/NEMA Z535 SET*, NEMA, http://www.nema.org/Standards/Pages/ANSI-Z535-Set.aspx (last visited Dec. 12, 2013). The associated color chart can be purchased separately for $36. *ANSI Z535 Color Chart*, NEMA, http://www.nema.org/Standards/Pages/ANSI-Z535-Color-Chart.aspx (last visited Dec. 12, 2013). A September 2012 NEMA publication discusses in some detail marketing strategies and a continuing effort to get OSHA to update its 1968 standard. ANSI, NEMA STANDARDS STRATEGIC MARKETING PLAN (Sept. 18, 2012), *available at* http://workspaces.nema.org/public/temp/Shared%20Documents/Z535%20Business%20Plan_2013_Final.pdf.

> (2) Caution signs shall have yellow as the predominating color; black upper panel and borders: yellow lettering of "caution" on the black panel; and the lower yellow panel for additional sign wording. Black lettering shall be used for additional wording.
>
> (3) Standard color of the background shall be opaque glossy yellow; and the panel, opaque glossy black with opaque glossy yellow letters. Any letters used against the yellow background shall be opaque glossy black.
>
> (4) Compliance with this regulation may be assured by the use of opaque glossy yellow and opaque glossy black colors as defined by ANSI standard Z535 SET, or such other standards as may be listed from time to time as "compliance standards" in OSHA's electronic reading room.

Subsection (4) identifies one safe harbor and permits OSHA readily to identify others; because it does not convert ANSI standard Z535 SET into a legal obligation, it does not threaten ANSI's copyright.[344] Indeed, writing the regulation in this way would, quite desirably, preserve possible competition among SDOs, protect SDO copyright revenues (subject to market competition in standards), and avoid any need for further rulemaking. OSHA's list would constitute a form of guidance, and by itself making the listing determination, any issue of delegation of lawmaking into private hands would be avoided.[345]

Indeed, the distinction between legal requirements and standards identifying means of compliance characterizes other systems that have faced these issues. The British Standards Institute (BSI), for example, presents the more than 30,000 standards it offers for sale on its website as "designed for voluntary use"[346] and do not impose any regulations, by law. In comments to the OMB Federal Register notice[347] it associated this approach with one generally followed in Europe, strongly supporting a "distinction between mandatory Regulations and the voluntary standards that provide a useful but non-exclusive, means of compliance with them . . . essential requirements and voluntary means of compliance."[348] The use of standards *as law* is simply refused and privately

---

[344] *Cf.* 29 C.F.R. § 1926.200 (2012).

[345] *Cf. supra* Part II.B.

[346] *What is a Standard?*, BSI, http://www.bsigroup.com/en-GB/standards/Information-about-standards/what-is-a-standard/ (last visited Dec. 12, 2013).

[347] Comment from Dr. Scott Steedman, BSI, OMB-2012-0003-0063 (June 1, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0063.

[348] *Id.* at 2 ("Compliance with a 'harmonized standard' gives a presumption of compliance with some or all of the essential requirements of a Directive but anybody is free to choose alternative routes to demonstrating compliance. [Standards are created] through a process that will have involved industry, consumers and government representatives, and all standards are submitted to a period of open public enquiry during which any person may submit a comment.").

developed standards are instead identified as means for compliance with separately stated regulatory obligations. European courts regularly refuse the status of law to standards generated by private organizations as inconsistent with democratic principles.[349] The "New Approach" of the European Union uses law (directives) to establish the essential requirements that European products must meet to be marketable in its single market;[350] one can then demonstrate compliance with those requirements independently *or* by showing the satisfaction of standards developed by European or national standards organizations to identify complying products.[351] And the adequacy of those standards to meet the "Essential Requirements" is itself open to question. They are not, in themselves, legally binding, but rather have a force similar to that of "guidance" in American administrative practice.[352] In such a context, the issue of copyrighting "law" does not arise. One may be certain that most—if not all—persons faced with the need to comply with essential requirements will choose the "standards" route to satisfaction; yet as they are not compelled to do so, they are free to compare the price of that route with such alternatives as may be available to them.

In requiring publication in the Federal Register not only of "substantive rules of general applicability" but also "statements of general policy and interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1) clearly opens the door to incorporation by reference of the latter instruments, and one readily imagines a means for the Code of Federal Regulations (CFR) to present such incorporations.[353] The agency would publish a notice in the Federal Register that it is incorporating by reference ASME Standard XYZ–2013 as one that it has determined will satisfy the requirements of an identified one of its regulations. As appropriate, the CFR

This approach is desirable in focusing regulators on identifying the essential needs, yet not freezing the means of getting there—thus both reducing their need for technical expertise and permitting ready change with developing technology. "Because standards referenced in regulations are not mandatory they are not official documents and their ownership (including copyright) usually rests with private standards organizations." *Id.* at 3.

The BSI comments also address issues of public availability, and the importance to the BSI of a private status that would be compromised by law-creation. The BSI places its standards with educational institutions and libraries on favorable terms, permitting free access by students and the public for reference purposes. *Id.* at 3. The BSI would strongly resist government conversion of standards into regulations, as it would then lose its independent status; and, it is not elected. *Id.* at 4. Its comments assert that this is, indeed, the general European view, citing a Dutch case and German law and providing a British example about baby carriages. *Id.* at 4–5. Better practice is for agencies to maintain website lists of standards they find to meet the requirements of their regulations (as distinct from providing that the most current standard will always suit, which would be an excessive delegation). *Id.* at 6.

[349] BÜTHE & MATTLI, *supra* note 5, at 17, 66 n.25.

[350] *Id.*

[351] *Id.* at 17.

[352] *Id.*

[353] 5 U.S.C. § 552(a)(1) (2006).

presentations of a regulation would be annotated with a simple list of those voluntary consensus standards the agency had concluded would meet its requirements.

A recent book, Tim Büthe and Walter Mattli's *The New Global Rulers: The Privatization of Regulation in the World Economy*,[354] explores contrasts between American and international standards practices in considerable detail. In a global economy, technical standards that differ across countries can become substantial trade barriers—the proposition that lies behind the World Trade Organization's (WTO) continuing concern with non-tariff barriers to trade.[355] Whereas in the United States standards development organizations are many—potential competitors, with only some of them under the relatively loose supervisory aegis of the American National Standards Institute (ANSI)[356]—standards organizations in other economies are typically national or, like the European Committee for Standardization (CEN) or the International Organization for Standardization (ISO), multinational.[357] The BSI's tight hierarchical control over the work done by subordinate groups, CEN's ability to set single standards for the European market, both assure national—or international—uniformity and, given its resulting political significance, result in more balanced representation in its deliberations[358] than ANSI can assure across the hundreds of competing American standards developing organizations, many of which are not within its aegis or choose on occasion not to submit their standards to its certification.[359]

---

[354] BÜTHE & MATTLI, *supra* note 5, at 17.

[355] *Id.* at 6, 134.

[356] *See* Sagers, *Standardization and Markets*, *supra* note 204, at 795–97.

[357] BÜTHE & MATTLI, *supra* note 5, at 15, 57.

[358]

> [In Europe,] most national standard bodies are subject to governmental regulation. In exchange for usually providing partial public funding, these rules require each national standards organization to have representatives from a wide range of interests on technical committees . . . [including] trade unions, consumer groups . . . socioeconomic interest groups, ministries, and public agencies . . . . In short, a standard adopted in Europe typically is the result of the involvement of representatives of a broad range of social interests . . . . Such broad-based involvement, however, is neither easy nor automatic because participation in standardization can be quite costly and is non-remunerative . . . . Europeans therefore recognize a need for subsidies to weaker groups; such assistance is viewed as a prerequisite for genuine openness and due process. In sharp contrast, most American standards organizations contend that willingness to pay is the best measure of interest in the process and see no need for financial assistance.

Id. at 154–57.

[359]

> Coordination and cooperation do not arise spontaneously among competing standard-setters, and . . . [there is] a long tradition of keeping government at arms' length. . . . In the absence of government control or any other central monitoring and coordinating agent, the American system for product standardization is characterized by extreme pluralism and contestation . . . . ANSI remains a weak institution, even though it formally

American standards organizations repeatedly assert the superiority of the competitive, loosely organized American system, yet what it gains domestically it may lose in the international context. Büthe and Mattli seem able to demonstrate that with the growth of Europe as a single market, the tightly coordinated standards have often prevailed.[360] National standards organizations speak in CEN or ISO with an authority that ANSI cannot command.[361] And the result, they assert, is to disadvantage domestic American market participants.[362] American multinationals may learn about and be in a position to influence these standards, but wholly American firms will not[363]—another way in which standards processes may serve to favor the largest market participants. Thus, they report, a 1988 EU directive on the safety of toys led to development of standards by CEN which were then accepted verbatim as ISO standards, producing "not only a de facto requirement for exporting to the European market, but also for exporting to many other international markets."[364] American manufacturers lacking European

---

> is the sole representative of U.S. interests in international standards organizations . . . . Private U.S. standards organizations, which derive 50 to 80 percent of their income from the sale of their proprietary standards documents . . . fear that a more centralized system would rob them of these revenues and eclipse their power and autonomy.

Id. at 149–51; *see also* Comment from Michael J. Lynch, Vice President, Illinois Tool Works, Inc., OMB-2012-0003-0047 (May 7, 2012), http://www.regulations.gov/#!documentDetail;D=OMB-2012-0003-0047 (reporting that an ANSI-accredited body had withheld a possibly vulnerable standard from ANSI (so the ANSI appeal process was not available) yet used their ANSI accreditation as a basis for securing its inclusion in the International Building Code).

> [T]he financial benefits resulting from the sale of the standard in copyrighted materials published both by the SDO and the code body provided an undue incentive to have the standard accepted. . . . ANSI has discovered that this was not an isolated incident. In fact such claims are made often enough that ANSI has devised a name for the practice: the HALO Effect. To our knowledge, the conditions resulting in this phenomenon have not been reformed by ANSI.

Id.

[360] BÜTHE & MATTLI, *supra* note 5, at 148–58.

[361] *Id.*

[362] *Id.* at 148–51.

[363] "A U.S. multinational with a subsidiary in Germany, for instance, could send its standards experts via its subsidiary to sit on DIN technical committees and therefore on CEN committees." *Id.* at 160–61. Multinationals, too, may be at risk absent adequate measures to enforce WTO and ANSI standards of good practice. Illinois Tool Works, a global manufacturer, told the OMB that it had "experienced directly the manipulation of a U.S. standards development committee process leading to a standard created to benefit a single manufacturer and its European Union–patented product to the detriment of U.S. producers." Comment from Michael J. Lynch, *supra* note 359. The participating federal employee from the agency that would convert this voluntary standard to a legal requirement was under no duty to report the objections made.

[364] BÜTHE & MATTLI, *supra* note 5, at 163.

subsidiaries learned about the process too late to participate in ISO consensus procedures—many, not until after the ISO vote—resulting in lost market share and/or a costly need to retool.[365] In contrast, American firms seeking in the early 2000s to establish an ANSI/ASME standard for the optics industry as an ISO standard failed almost completely. "European manufacturers quickly learned of this proposal and realized that the changes would impose on them costs estimated at several billion euros for German industry alone," and their efforts in response resulted in an ISO standard "much closer to European preferences."[366] In 2009, the ASME withdrew its competing standard and "U.S. optics industry organizations started to adopt the ISO standard instead."[367]

One might note that, to the extent the existence of competing standards and standards development organizations *is* an asset of the American system, any incorporation by reference *that carries the force of law* undermines it. If each of three competing voluntary consensus standards may satisfy a given regulatory need, market forces will tend to control price even if we assume consumers will feel driven to purchase one or another of the three. If one of the competing standards developers is able to secure the incorporation of its standard *as law*, the result is not only both (1) to confer monopoly pricing power on that developer (if it is permitted to charge the public for access to it) and (2) to have the tendency to freeze the standard in place, given the obstacles to rulemaking change, but (3) it also is anti-competitive behavior vis-à-vis the other two SDOs.[368] An SDO's ability to continue to charge a premium price for an incorporated standard even after it has been superceded as a voluntary consensus standard—but before the governing law has been changed—is much harder to rationalize in terms of an appropriate SDO business model, than its ability to charge market prices for access to its voluntary consensus standards during their useful life as contemporaneous expressions of useful technical measures.[369] One perhaps understands SDO enthusiasm for converting their standards into law in these terms—so long as their ability to charge the public for learning them remains—but that makes the government's continued complicity in the process more striking.

IV. CHANGING PART 51

Although the ACUS Recommendations addressed only the practices of agencies using incorporation by reference in rulemaking,[370] 5 U.S.C. § 552(a)(1) places responsibility for the regulation of incorporation by reference practice in the hands of the Director of the Office of the Federal Register (OFR).[371] That statute permits the Director

---

[365] *Id.*
[366] *Id.* at 164.
[367] *Id.*
[368] *See supra* Introduction.C.
[369] *See, e.g.*, *supra* notes 76–85 and accompanying text.
[370] *See supra* note 221 and accompanying text.
[371] 5 U.S.C. § 552(a)(1) (2006).

to allow incorporation by reference of material otherwise required to be published in the Federal Register *only* on determining that it will be "reasonably available" to those affected by it[372]—a concept initially grounded in the expectation that commercial publishing houses would be including incorporated materials in their widely distributed, market-priced collections.[373]

Earlier pages sought to show the inadequacies of the OFR's 1982 regulations in establishing the framework for these judgments.[374] Unadapted to the Computer Age, Part 51 imagines that only print copies need be available and, as administered, availability in public sources need be in two places only—the National Archives and the adopting agency's own central library.[375] Beyond that, the regulations lack attention to *continued* availability, as they also lack attention to the price that copyright holders may ask for access to them from their hands.[376] Part 51 requires that for regulations to be incorporated, they *must* impose legal obligations, and only one identified version of the standard may be incorporated,[377] effectively requiring new rulemaking should the agency wish to follow SDO revisions over time.[378] Despite the impulses of the NTTAA and Circular A-119 to limit incorporations to "technical standard[s]" and not "regulatory standards or requirements,"[379] any voluntary consensus standard may incorporated; nor is there apparent concern whether, to access the incorporated material, a consumer may obtain only the matter incorporated from the adopting SDO, or rather must purchase the whole of the standard as the SDO may have packaged it.

The following paragraphs briefly address the notice of proposed rulemaking the OFR published just as this Article was entering its final editing process.[380] Better developed comments will doubtless be found in the FDMS docket established for the rulemaking, which, when last seen, permitted comments to be filed until January 31, 2014.[381] But it is already clear that the OFR's proposal will not meet the needs of the

---

[372] *Id.*

[373] *See supra* note 151 and accompanying text.

[374] *See supra* Part II.

[375] *See supra* note 176 and accompanying text. One might think "reasonably available" copies of municipal ordinance adoptions by reference maintained at the city clerk's office—and states' and local governments' too—are migrating from physical to digital records. To regard two copies—both located in Washington, D.C.—as reasonably available for inspection to the country is unsustainable.

[376] *See, e.g.*, *supra* notes 76–85 and accompanying text.

[377] 1 C.F.R. § 51 (2013).

[378] *See supra* Part II.A.

[379] OMB Circular A-119, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998).

[380] Proposed Rules, 78 Fed. Reg. 60,784 (proposed Oct. 2, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-24217.pdf.

[381] *See, e.g.*, *Recently Posted NARA Rules and Notices*, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=NARA_FRDOC_0001 (last visited Dec. 12, 2013); *see also Incorporation by Reference; Response to Petition and Notice of Proposed Rulemaking*, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=OFR-2013-0001 (last visited Dec. 12, 2013).

current day. The same reduction of governmental resources for regulation that has contributed to agencies' increasing reliance on privately generated standards—and reduced their capacity to monitor their creation[382]—may help to explain, if not excuse, its deficiencies; the preamble to the notice repeatedly invokes the OFR's resource limitations as well as making what, in the author's view, are incorrect disclaimers of legal authority.[383] When Part 51 was adopted in 1982, the legal affairs staff working on IBR—along with many other legal issues for the Federal Register—was three or four times the size it is today (three).[384] Yet Computer-Age-oriented changes in the Federal Register and in another of the National Archives' activities have won both of the annual awards for innovation in government services that the Administrative Conference has conferred to date;[385] accommodating incorporation by reference to the resources of the Computer Age seems an obvious further step, made the more imperative by the requirements of E-Government[386] and E-FOIA.[387] Strikingly, no reference to electronic documentation may be found in the changes the OFR has proposed to Part 51; in defining usability of material incorporated by reference, "[w]hether it is *bound*, numbered, and organized" remains a requirement.[388]

Like the current regulation, the proposed amendments fail as well to suggest any meaning for "reasonably available," the condition § 552(a)(1) *requires* the Director to find met before permitting any incorporation by reference.[389] As proposed, § 51.5(a)(2) would require agencies to discuss in the preamble to a final rule "the ways in which it worked to make the materials it incorporates by reference reasonably available to interested parties and how interested parties can obtain the materials."[390] Of course, it is useful to give agencies the incentive to think about the question of reasonable

---

[382] *See supra* Part II.B.

[383] Proposed Rules, 78 Fed. Reg. at 60,784–85.

[384] E-mail from Emily Schleicher Bremer, *supra* note 337.

[385] The first prize was for the transformed Federal Register. Press Release, National Archives, FederalRegister.gov Honored for Innovation and Best Practices in Government (Dec. 15, 2011), *available at* http://www.archives.gov/press/press-releases/2012/nr12-46.html. The second prize was for NARA's Citizen Archivist Initiative. Press Release, National Archives, National Archives Honored for Innovations and Practices in Government (Dec. 20, 2012) [hereinafter Dec. 20 National Archives Press Release], *available at* http://www.archives.gov/press/press-releases/2013/nr13-35.html.

[386] Pub. L. No. 107-347, 116 Stat. 2899 (2002).

[387] Pub. L. No. 104-231, 110 Stat. 3048 (1996). For digitizing the thousands of incorporated, but almost inevitably superannuated, standards that remain "law" today, and are available only in print form, one might create a citizens' archivist project, the initiative that won NARA's second Walter Gellhorn award for innovation. *See* Dec. 20 National Archives Press Release, *supra* note 385.

[388] 1 C.F.R. § 51.7(a)(4)(ii) (2013) (emphasis added).

[389] 5 U.S.C. § 552(a)(1) (2006).

[390] Proposed Rules, 78 Fed. Reg. 60,784, 60,797 (proposed Oct. 2, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-24217.pdf.

availability—but the failures to essay any definition that might guide those efforts, to address electronic availability, or temporal availability avoid legal responsibilities that the statute clearly places in the Director.[391] Creation of a digital archive of incorporated standards to replace (or supplement) the current physical archive, under digital rights management to the extent that might be necessary, would satisfy the self-evident minimum standard of reasonable availability in the Computer Age. It would assure a persisting resource for standards that can remain law long after they have been replaced in the compendia of the SDOs that have created them.[392] (Although, as remarked above,[393] ANSI has announced its own commendable efforts to create such a resource, having such a portal in the same electronic place as the CFR, with consequent ease of linkage, is preferable.) One advantage of such a portal would be the possibility of lifting any digital rights management regime that might be in place while the incorporated matter remained the active voluntary consensus standard of the SDO that created it, once that standard has been revised—the point at which the law "on the books" ceases to embody the contemporary voluntary consensus standard.

The OFR proposal also fails to propose eliminating the current standard that incorporated matter must be a "requirement." The straightforward language of § 552(a)(1) permits incorporation by reference of agency guidance documents,[394] and acting on that language would require little, if any, administration by the OFR. The problem of aging incorporations the "requirement" condition has generated would disappear were the OFR to permit, even express a preference for, incorporations that invoke the European model,[395] independently stating regulatory requirements and then identifying a voluntary consensus standard as one (but not necessarily the only) means by which those requirements can be met. Since agency rulemaking would not then be required to identify additional standards meeting those requirements, the modernity and flexibility of rules would be enhanced, and the need for rulemakings calling on the OFR for judgment reduced. Each year's edition (and the electronic version) of the CFR could then present as notes to particular regulatory requirements any standards the responsible agency had identified as permitting their satisfaction. Availability would then be assured, and because guidance is not law, the OFR would have no occasion to consider the reasonableness of SDO pricing or the problem of copyrighting law.

---

[391] For example, a definition of reasonable availability might require agencies to demonstrate in their submissions for the Director's approval that they had limited the material incorporated to the minimum extent required for their regulatory purposes. For instance, incorporating only the definition of "dent" contained in a much more extensive collection of voluntary consensus standards applicable to tank trucks. *See supra* note 325 and accompanying text. Doing so could permit inclusion of just that material in the electronic archive of incorporated standards, a fair use, without significant threat to SDO financial interests.

[392] *See supra* notes 325–27 and accompanying text.

[393] Bhatia & Shannon Remarks, *supra* note 216.

[394] *See* 5 U.S.C. § 552(a) (2006).

[395] *See supra* notes 346–59 and accompanying text.

At least one change proposed by the OFR's notice of proposed rulemaking would inappropriately ratify the use of voluntary consensus standards to substitute for agency regulation. Recall that the NTTAA and OMB Circular A-119 have in view "technical standard[s]," not "regulatory standards or requirements."[396] The current language of 1 C.F.R. § 51.7(a) correspondingly requires that incorporated matter be "published data, criteria, standards, specifications, techniques, illustrations, or similar material"[397] *as well as* that it "[s]ubstantially reduces the volume of material published in the Federal Register,"[398] albeit this limitation has been honored in the breach. This would tend to limit incorporated standards to matters generally in ways uninteresting to the public. Indeed, from that perspective, placing the incorporated matter outside the idea of "law" that citizens must be able to access to know their obligations. The OFR proposal would substitute "or" for "and" between the two quoted clauses, explicitly permitting—as to date no statute or regulation has—the incorporation by reference of regulatory obligations (so long as their incorporation would reduce the volume of materials in the Federal Register).[399] It is not only that the Electronic Age makes this criterion unnecessary; explicitly permitting the incorporation by reference of regulatory obligations would take us a step back into secret law.

To the extent incorporations by reference persist that do importantly take on the characteristics of "law," that are unmistakably "regulatory standards or requirements,"[400] it is hard to avoid the conclusion that knowledge of them is the citizen's right and that monopoly pricing power over that knowledge cannot properly be conferred by recognizing copyright in them after the fact of their incorporation. Placing that information in an electronic archive under digital rights management could succeed in preserving the responsible SDO's principal markets for its standards while accommodating that claim of right. That any financial consequences of being found to have taken private property by converting it into public law would fall on the adopting agency should operate as an incentive for the agency to bargain in advance, should it know this is the outcome it wishes, or to act in ways that maximally preserve SDO value when after the independent development of a voluntary consensus standard it discovers its regulatory relevance. Part 51 ought to be reconstructed in ways that reduce, if not eliminate, this field of conflict,[401] and that is the effort the OFR should undertake.

CONCLUSION

John Conley, the Washington lawyer who chaired the Committee responsible for the ACUS Recommendations, aptly described the central conflict that has animated

---

[396] *See supra* note 201.

[397] 1 C.F.R. § 51.7(a)(2) (2013).

[398] § 51.7(a)(3).

[399] Proposed Rules, 78 Fed. Reg. 60,784 (proposed Oct. 2, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-24217.pdf.

[400] OMB Circular A-119, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998).

[401] *See supra* Part II.C, Part III.

this discussion as a "wicked question."[402] The SDO community, valuable—essential—to effective regulation in the twenty-first century, requires the income generated by the sales of its uncontroversially copyrighted voluntary consensus standards to continue its work. And yet once such a standard has been converted into a legal obligation through its incorporation by reference, the proposition that law is not subject to copyright rears its head. If this conflict is not readily resolved, can it be eased? Can the abuses and failures set out in the preceding pages be avoided?

The preceding discussion has identified a number of measures by which ANSI or individual SDOs might improve their chances of preserving the income stream they receive from the sale of their voluntary consensus standards that are subject to agency conversion into legal obligations:

- Integrate with their standards explanatory materials or explanations that will not be incorporated elements and will enhance the value of the standards in users' hands;
- Avoid conflict with established federal rulemaking norms by assuring would-be commenters some form of free access to standards proposed for incorporation by reference during rulemaking notice-and-comment periods, and providing rulemaking agencies with complete records of their standards development process;
- Create an archive controlled by digital rights management techniques for access to standards once incorporated;
- Work with agencies to limit incorporations by reference where possible to relevant parts, and not the whole, of voluntary consensus standards, thus reducing the stakes in having the incorporated portions made public and arguably heightening the value of the standards as a whole;
- Price standards as voluntary consensus standards, making any standard that incorporation has converted into legal obligations freely available once the adoption of a revised voluntary consensus standard effectively converts any further sales of it into a sale of law;
- Encourage agencies to follow the European model, using standards as accepted means of compliance with regulation rather than as regulatory obligations per se.

Agencies, in turn, can take steps that minimize the threats to these valuable partners' proper claims to compensation for the public's use of their work product:

- When an agency effectively initiates the process by seeking the development of a standard to be incorporated, take the contractual route of purchasing the desired standard for an agreed price rather than permitting its price to be passed along to the affected public;

---

[402] John Conley, Partner at Venable LLP, Keynote Speech at the ANSI Legal Issues Conference Panel on Incorporation by Reference (Oct. 10, 2012), discussed in *Experts Discuss Incorporation by Reference at the ANSI Legal Issues Forum*, ANSI (Nov. 5, 2012), http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3412.

- Where at all possible, follow the European approach of stating regulatory requirements directly, and identifying incorporated standards as assured but not required means for complying therewith.
- Restrict the use of incorporation by reference, as the NTTAA and OMB Circular A-119 anticipate, to technical standards, and not "regulatory standards or requirements";[403]
- Implement the ACUS recommendations to develop measures permitting limited access during rulemaking comment periods;
- Obtain, and incorporate in agency records during the rulemaking comment period, full SDO and ANSI records of the development of the standard proposed to be incorporated, including the resolution of any conflicts occurring at the time;
- Incorporate by reference only those elements of a voluntary consensus standard essential to its regulation, then made public if they create legal obligations;
- Make incorporated standards public, as by posting them on agency websites, as soon as their status as voluntary consensus standards has been ended by SDO revision of them;

Most important, however, are the steps that the Office of Federal Register should take—and apparently will refuse to take—in revising and administering its regulations implementing 5 U.S.C. § 552(a)(1).

[403] OMB Circular A-119, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998).