



October 21, 2011

John Cooney, Chairman
Committee on Administration and Management
Administrative Conference of the United States
Committee of Administration and Management
1120 20th St., NW, Suite 706
Washington, D.C. 20036

RE: Comments on "Incorporation by Reference in Federal Regulations"

Dear Mr. Cooney:

Thank you for the opportunity to submit comments in response to the Committee of Administration and Management's report entitled "Incorporation by Reference in Federal Regulations" ("the Report").¹ We welcome the chance to share our feedback with you, and we hope our comments – which will focus exclusively on the issue of access to copyrighted materials – will be useful in the development of the Report's recommendations.

Introduction

Fundamental principles of American democracy dictate that "citizens must have free access to the laws which govern them."² Indeed, it is well-settled that "secret law is

¹ The undersigned are aware that a revised draft Report was submitted on the evening of October 19, 2011. Given the time constraints we were unable to adequately review the revisions. Our initial review did prompt some concerns, which are described below at p. 8. All citations to the Report are to the Oct. 19th version.

² *Building Officials & Code Admins. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980). See also, *Baldwin v. Hale*, 68 U.S. 233 (1863) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."); *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (noting that the "authentic

an abomination.”³ This principle is reflected in constitutional law,⁴ a range of judicial decisions,⁵ and federal and state statutes.⁶ And, it has recently been reinforced: one of President Obama’s first official acts as president was to order executive agencies to reassess and improve their commitment to transparency and open governance in order to “strengthen our democracy and promote efficiency and effectiveness in Government.”⁷

Consistent with these principles, a primary goal of a federal agency generally – and any recommendations regarding incorporation by reference, more specifically – should be to increase transparency in government regulations and to increase the broad, public availability of the law. Unfortunately, the incorporation by reference of copyrighted material into federal regulations can have the opposite effect, limiting public access to the law in the name of copyright protection. Standards organizations can use their purported copyrights to demand hefty fees for access to essential regulatory materials, such as standards, data, or techniques, and limit the public’s ability to use those materials. Such limits are both antithetical to our democratic principles and sadly ironic, given that new technologies could make it easier than ever for the public to inspect the laws that affect them in innumerable ways.

We urge ACUS to reject any suggestion that access to the law may be limited where the regulation in question happens to incorporate copyrighted materials. All material incorporated by reference – regardless of the stage in the regulatory process, the subject matter of the regulation, or the identity of the regulated entity – should be made freely available and downloadable on a government agency’s website.

Access to Copyrighted Materials Incorporated By Reference

Materials incorporated by reference in federal regulations must be “reasonably available to the class of persons affected thereby.”⁸ When an agency incorporates

exposition and interpretation of the law, which, binding every citizen, is free for publication to all.”)

³ See, e.g., *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298 (D.D.C. 1973) (quoting K. Davis, *Administrative Law Treatise* (1970 Supp.) § 3A.12).

⁴ See e.g., *Richmond Newspapers, Inc. v. Virginia*, 44 U.S. 555 (1980) (First Amendment right to access criminal trials); *Connally v. General Construction Co.*, 296 U.S. 385 (1926) (Fifth Amendment right to clear notice and elucidation of the law).

⁵ See, e.g., *Hawkes v. IRS*, 467 F. 787, 795 (6th Cir. 1972) (“Far from impeding the goals of law enforcement, in fact, the disclosure of information clarifying an agency’s substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law.”); *Cox v. United States Department of Justice*, 576 F.2d 1302, 1309 (8th Cir. 1978) (citing *Hawkes*).

⁶ See, e.g., Freedom of Information Act, 5 U.S.C. § 552.

⁷ Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

⁸ 5 U.S.C. § 552(a)(1).

copyrighted material into its regulations, subsequent access to that material may be significantly compromised. Without agency policies that foster broad availability, incorporation of copyrighted materials permits copyright holders to serve as gatekeepers of public access to federal law. Documents incorporated by reference can cost hundreds of dollars per copy, a prohibitive barrier to public access. Small business owners, consumer advocates, and even government lawyers simply do not have the budget to purchase expensive technical standards incorporated by reference – many of which are crucial to an understanding of the regulations they must obey, understand, and enforce.

We appreciate that the Report proposes some procedures for making copyrighted materials incorporated by reference available to regulated parties and to the general public. However, we believe these suggestions are far too modest, particularly given the legal cloud that necessarily hangs over any copyright claim where the material in question has been incorporated into federal law.⁹

*Copyrighted Materials Incorporated by Reference Should Be Available
at All Stages of the Regulatory Process*

The Report states that “[d]uring the rulemaking process, broad access to copyrighted materials may be of particular importance,” but “once a regulation that incorporates by reference has been promulgated, the access needs of regulated parties [as opposed to those of the general public] may take on particular importance.”¹⁰ While broad access to copyrighted materials incorporated by reference is vitally important during the rulemaking process, that importance is in no way diminished – and, in fact, may be increased – once the regulation becomes part of federal law.

Indeed, many of the case studies discussed in the Report underscore this very point. For example, the Report notes that the American Petroleum Institute (“API”) provided access to all standards that had been incorporated into federal regulation in the wake of the Deepwater Horizon oil spill.¹¹ This disclosure did not stem from heightened interest in the standards by regulated parties, but from increased scrutiny by the press, public interest organizations, and the general public after the spill. Fortunately, API voluntarily disclosed its standards, but the public’s access to the law should not be conditioned on the benevolence of a single industry organization.

⁹ We assume in these comments, purely *arguendo*, that incorporated materials could be protected by copyright. In our opinion, any copyright claim over material incorporated into federal law would be dubious. *See* Report at 21-24; *See also* *Veeck v. Southern Building Code Congress*, 293 F.3d 791 (5th Cir. 2002) (en banc) (“It is hard to see how the public’s essential due process right of free access to the law (including a necessary right freely to copy and circulate all or part of a given law for various purposes), can be reconciled with the exclusivity afforded a private copyright holder.”) (citing *Building Officials & Code Admins. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980)).

¹⁰ Report at 30.

¹¹ *Id.* at 28.

Similarly, after “a [natural gas] pipeline explosion in San Bruno, CA, the House of Representatives considered whether relevant pipeline safety standards should have been more freely accessible to first responders . . . , indicat[ing] growing congressional discontent with restrictions on the free availability of incorporated standards.”¹² While first responders undoubtedly have an interest in pipeline standards, so too does any person living in an area with natural gas pipelines governed by those standards.

In both examples, heightened interest from the general public in copyrighted materials incorporated by reference occurred well after the rulemaking process had ended. As both the Deepwater Horizon spill and San Bruno explosion demonstrate, agencies cannot anticipate unexpected surges in regulatory interest from the general public. Given this unpredictability, access to the law cannot hinge on the preferences of standards organizations or on congressional action regarding particular regulations. Instead, the law should be available to the general public at all stages in the regulatory process.

Copyrighted Materials Incorporated by Reference Should Be Available Regardless of Subject Matter and Regardless of the Identity of the Regulated Entity

The Report suggests that, because “[m]any standards incorporated by reference consist of technical specifications of interest only to a small number of regulated entities,” the need for broad accessibility to copyrighted material may be diminished in certain circumstances.¹³ The recommendation attempts to distinguish between “safety standards, particularly those that first responders may need,” and other types of technical specifications.¹⁴ A separate recommendation encourages agencies to identify entities that “must have access to the incorporated material” and to adjust the burden for providing copyrighted materials depending on the regulated party.¹⁵

The Report’s recommendations significantly underestimate public interest in regulatory materials generally and the important contributions individuals with broad access to the law can make.

First, the distinction the Report attempts to draw between the interests of “regulated parties” and “the general public” is an artificial one: any number of non-regulated parties, such as journalists, public interest law firms, consumer advocates, and government officials – indeed, the entire general public – may be affected by and interested in government regulations. Documents incorporated by reference implicate some of the most important regulations that directly affect our daily lives: construction firms must understand workplace safety, dry cleaners must understand toxic chemical regulations, and food manufacturers must understand FDA standards for food processing. Even “ordinary” citizens have compelling reasons to be able to read and understand the

¹² *Id.* at 26.

¹³ *Id.* at 31.

¹⁴ *Id.*

¹⁵ *Id.* at 32.

law if they are to exercise their right and responsibility to be part of their government. For example, contractors doing work in schools are responsible for adhering to a large number of safety regulations. A parent who is concerned about that work, such as the use of asbestos or lead paint, should be able to read the specific standards that regulate the use of such materials.

Second, as described above, agencies may not be well-equipped to anticipate public interest in their regulatory actions. Natural disasters, unforeseeable economic changes, and/or political movements can all influence public interest in a given regulation. Factors such as these cannot be predicted with any assurance, and limiting the availability of the law to materials involving “safety standards” is likely to exclude many materials of general interest to the public.

Third, the public interest in a particular regulation or standard may be significantly shaped in the first instance by that standard’s accessibility. Thus, prior experience with public inspection of copyrighted materials is unlikely to be a useful metric for gauging interest in those materials. While the Report noted that “OFR and individual agencies consistently reported that there is little interest in viewing documents held for public inspection,”¹⁶ that supposed lack of interest may simply reflect a reluctance to travel significant distances in order to view government documents. Public engagement would almost assuredly be greater if the materials were easier to access. For example, as noted in the Report, OASIS’s open-source technical standards, which are available online, “are downloaded an average of four times per second.”¹⁷

As these examples demonstrate, agencies may not anticipate which materials are sufficiently valuable to warrant broad access to the general public. Agencies are similarly poorly positioned to judge which class of entities or individuals warrant full access to the law. Consequently, copyrighted materials incorporated into law should be made available regardless of subject matter or the identity of the regulated party.

*Copyrighted Materials Incorporated by Reference Should Be Available,
Without Cost, to the General Public*

The Report’s recommendations suggest that agencies take into account the “cost to obtain a copy of the copyrighted material,” noting that “regulated entities, and even members of the public, may reduce the costs of accessing standards by becoming members of the relevant standard-development organizations.”¹⁸ While cost certainly should be taken into account, the calculus is a simple one: copyrighted materials, once incorporated into law, should be available for free. Again – like limiting access to copyrighted materials based on the stage of the regulatory proceeding, the subject matter of the regulation, or the regulated entity – limiting access to the law conditioned on the

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 25.

¹⁸ *Id.* at 31.

payment of a fee necessarily impedes public access to regulations and the ability of interested parties to contribute meaningfully to the public's benefit.

The Report bases its conclusion that the payment of fees is an acceptable precondition on access on two premises: first, that Circular A-119 "directs agencies to use voluntary consensus standards in lieu of government-unique standards," and, second, that these voluntary standard-development organizations rely heavily on revenue from the sales of copyrighted standards.¹⁹ While Circular A-119 does encourage reliance on voluntary standards, it is unlikely that standard-development organizations would stop creating standards if copyright rents were unavailable.²⁰ These organizations have numerous other means of support, including membership fees, conferences, charging for access to certified printed versions, and other "value added products or services," such as annotated versions of the documents, tutorials, or documents comparing different standards in different jurisdictions.²¹

Agency incorporation of a standard into federal law is a fundamentally valuable occurrence for a standard-setting organization. In recognition and in exchange for that value, copyrighted materials incorporated by reference should be available without cost to the general public.

*Copyrighted Materials Incorporated by Reference Should Be Available
Online, Without Restriction*

Governmental entities that make the law should also make those laws available. New technologies improve government's ability to realize that commitment; once material is available online, it can be accessed from any location, at any time, by many people at once. Agencies should take advantage of these technologies to make materials incorporated by reference available via the Internet (or require standards organizations to do so).

The report cites the use of "[t]echnological innovations that enable controllable electronic access to copyrighted standards" as an "opportunity to improve access for regulatory purposes without destroying the value of copyrights."²² We assume that this is a suggestion that materials be made available subject to some form of digital rights management ("DRM"). The undersigned urge ACUS to take a crucial additional step and make materials incorporated by reference available without such restrictions.

¹⁹ *Id.* at 7, 24-25.

²⁰ *See, e.g.*, Pamela Samuelson, Questioning Copyrights in Standards, 48 B.C. L. REV. 193, 222 ("It is simply not credible to claim that organizations like the AMA and ADA would stop developing standard nomenclature without copyright protection.").

²¹ *Id.*

²² Report at 28.

Unrestricted access will enable interested parties to use the materials in new and unexpected ways. A motivated citizen could download electronic copies of incorporated materials and, because they are not restricted, easily run programs utilizing the incorporated standards or data, thus adding value to both the public and to an agency's regulatory mission. For example, the Media Standards Trust²³ has developed a tool, call SuperFastMatch, that quickly parses large amounts of text to search for instances of similarity and overlap. If incorporated material was available without restriction an interested party could use this program to compare the use of terms in different regulatory contexts, or to compare federal and state standards to find instances of overlap, oversight, or omission.

Indeed, projects using SuperFastMatch to analyze federal regulations are already in development. The Sunlight Foundation,²⁴ a non-profit dedicated to harnessing the power of technology to provide greater government transparency, is currently developing software that scans and copies the text of comments submitted on regulations.gov, then cross-references those comments with the regulations' final versions. Using the data obtained, users can then analyze which commenters' suggestions were adopted most frequently into final regulations, facilitating the detection of undue or untoward influence in the regulatory process and guarding against agency capture by regulated parties. If materials incorporated by reference were made freely available for download, similar analyses could be performed to assess the relationships between standard-setting organizations, regulated parties, and agencies, as well as the relationships between incorporated materials and their substantive regulations.

Further, DRM is likely to inhibit fair uses by citizens of the materials in question, an outcome that is surely inconsistent with the intent and purposes of copyright as well as government transparency.²⁵

Finally, as the experience of the media industries has shown, DRM is ineffective in stopping copyright infringement.²⁶ Thus, the cost of its use is not outweighed by any meaningful benefit, especially where the use-restriction is aimed at the public's access to federal law.

The use of DRM technologies to inhibit free access is fundamentally inappropriate where, as here, the material involved has been made part of a regulatory framework. ACUS should promote and endorse access to, and innovative uses of, regulatory standards, not limits on that access.

²³ <http://mediastandardstrust.org/>

²⁴ <http://sunlightfoundation.com/>

²⁵ See, e.g., <https://www.eff.org/wp/fair-use-and-digital-rights-management-preliminary-thoughts-irreconcilable-tension-between-them>

²⁶ See, e.g., Bruce Schneier, *Quickest Patch Ever*, *Wired* (Sept. 2006) (noting "that trying to make digital files uncopyable is like trying to make water not wet"), available at <http://www.wired.com/politics/security/commentary/securitymatters/2006/09/71738>

Additional steps, such as furnishing print and electronic copies to libraries that are members of the Federal Depository Library Program can also enhance access to the law.

Fair Use of Materials By Government Agencies

Two days before the deadline to file these Comments, the undersigned received a revised draft Report. The undersigned have not had an adequate opportunity to review these revisions and, therefore, cannot provide detailed comments. Based on our initial review, however, we are concerned about certain statements offered in the context of the fair use analysis.²⁷

First, with respect to the purpose and character of the use, while we agree that copying a small portion of a standard is likely to be found transformational, we note that the Report suggests that the reproduction of an entire standard is unlikely to be transformational in character. Depending on the context of a reproduction, that suggestion may not always be accurate. For example, a court might find reproduction of an entire standard within the context of the publication of a regulation to be transformational because it is giving the standard a new purpose and frame, particularly if the context can be understood to comment on the standard. So while the Report's conclusion may be correct in many instances, it should not be taken as certain.

Second, with respect to the nature of the work, the Report indicates, based on a case about test questions, that standard-development involves a creative process similar to that involved in developing test questions. We question whether the analogy holds: standards, presumably, are primarily driven by empirical facts. In addition, we do not believe a court should consider whether a "substantial investment of time and labor" was made "in anticipation of a financial return." The Supreme Court has long since rejected such "sweat of the brow" theories.²⁸

Third, with respect to the portion used, we wish to emphasize that the analysis of this factor turns on whether the secondary user has taken more than *necessary for its purpose*. If reproduction of an entire work is necessary to accomplish an appropriate purpose, this factor may favor fair use. The Report acknowledges this in the footnotes, but it bears highlighting.²⁹

Fourth, with respect to market harm, the Report states that if a secondary use "destroys the value of the work by publicizing it" the third factor will weigh against fair use. We wish to clarify that, as the Supreme Court has recognized, harm to a work as a result of publicity is not a harm cognizable under copyright law.³⁰

²⁷ Again, our comments here assume, purely *arguendo*, that the materials at issue are protected by copyright.

²⁸ *Feist Pubs. v. Rural Tel. Svc.*, 446 U.S. 340 (1991).

²⁹ See Report at 20, n. 126.

³⁰ *Campbell v. Accuff Rose*, 410 U.S. 569 (1994).

The undersigned do not suggest that fair use will necessarily protect an agency's publication of entire standards documents. The answer to that question will vary in light of the nature and context of the use. But it strikes us as important that ACUS consider the question with a fuller understanding of the fair use factors.

Conclusion

While the Report's recommendations attempt to balance the scales of access to the law and encouragement of private standards development, the recommendations tip the balance too far in the wrong direction. A "presumption of openness" should be the rule,³¹ and our government should make every effort to make the law available to those affected, directly and indirectly, by the standards government agencies promulgate. Following the principles of transparency and accessibility to the law that should animate agency decisions in this arena, materials incorporated by reference should be made freely available, online and off, at all times – regardless of the stage of the regulatory proceedings, the subject of the regulation, or the identity of the regulated entity.

Respectfully submitted,



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(Statements of Interest on Following Page)

³¹ See Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).



The Association of Research Libraries, a North American association of 126 research libraries and archives in national, state, public, university, has long advocated for effective access to information in all formats. Effective access includes ensuring that few if any barriers stymie users from utilizing needed information. Such access also entails providing the services and tools that allow users to search, text and data mine, and link to information resources.



The Electronic Frontier Foundation (EFF) is a donor-supported, nonprofit civil liberties organization working to protect and promote fundamental liberties in the digital world. Through direct advocacy, impact litigation, and technological innovation, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support free expression, privacy, and transparency in the information society.

As part of its mission to foster openness and accountability, EFF frequently serves as counsel or amicus in key cases addressing the scope and application of state and federal freedom of information laws and procedures. EFF also regularly serves as counsel or amicus in cases concerning the appropriate balance between the interests of copyright owners and the general public.



OpenTheGovernment.org is a coalition of consumer, good government and limited-government groups, environmentalists, journalists, library groups, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust through government accountability, and support our democratic principles. Our coalition transcends partisan lines and includes progressives, libertarians, and conservatives.