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Public Works for a Better Government

June 26, 2012

Professor Michael E. Herz, Chair
American Bar Association
Section of Administrative Law and Regulatory Practice
740 15th Street NW
Washington, DC 20005-1022

Dear Professor Herz:

We appreciated the comments that the Section of Administrative Law and Regulatory Practice recently submitted to the Office of the Federal Register and the Office of Management and Budget regarding standards incorporated by reference. We wanted to share with you our own submission, attached, and to offer a few reactions to yours. We would be grateful for the opportunity to meet with the section to discuss these issues.

The section's comments do an excellent job making the case that (1) under the Supreme Court's precedents, "public ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it," quoting *Veeck v. Southern Bldg. Code Cong. Int'l,* 293 F.3d 791, 799 (5th Cir. 2002) (en banc); and (2) that standards incorporated by reference are the law.

Given those compelling legal points, as well as the opportunities presented by genuine reform in this area, we encourage the section to reconsider its assertion that the requirement of making materials incorporated by reference available to the public "could be satisfied by read-only digital access, either on the agency's website or that of the private standards development organization."

A standard incorporated by reference either is the law, or it isn't. Your own analysis compels the conclusion that standards that are incorporated in a manner that makes compliance with them mandatory are the law. Pursuant to case law, then, such standards must be available for whatever use citizens choose to make of them. Read-only digital access, whether on a government site or an SDO site, would not provide such availability.

Nor would such read-only access advance the interests of efficient, open government or economic opportunity. The Internet gives government and others the opportunity to offer the public access to proposed regulations and final regulations, as well as any standards incorporated into such regulations, in a manner that allows people to see the entire picture, and all its details, in clear, organized, and searchable formats. Seizing this opportunity will benefit government officials, first responders, business operators, public policy advocates, and citizens as they seek to understand, debate, analyze, obey, and improve our laws. Allowing people to access and offer standards freely also will allow creative entrepreneurs to build new businesses that create jobs and new innovations for society.

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Some SDOs may be required to alter their business models for the Internet age, but that has been the case for many, many business in the past two decades. As we discuss in our attached comment, SDOs have other sources of revenue and will retain strong incentives to produce standards in a world where people can freely access those standards that government incorporates by reference.

By contrast, a world where citizens must hunt down various standards incorporated by reference on a multitude of websites, with continued warnings from industry groups not to make use of these standards beyond looking at them on a website, and without search capacity or opportunities to present the information in new creative and useful ways, undermines the promise that technology—and democracy—offers.

We note that a wide range of advocacy organizations and trade groups have filed comments in the OMB and OFR proceedings urging strong public availability of standards incorporated by reference. For example (our emphasis added):

- A group of national advocacy and membership organizations, including AFL-CIO, AFSCME, American Association of Law Libraries, Association of Research Libraries, Electronic Frontier Foundation, National Women's Health Network, OMB Watch, OpenTheGovernment.org, Public Citizen, Sierra Club, Sunlight Foundation, US PIRG, and United Steelworkers, as well as Public.Resource.Org, submitted a comment to OMB stating, "we strongly agree that standards incorporated by reference into federal regulations should be widely available to the public, without charge, and that such standards should be deemed in the public domain rather than subject to copyright restrictions…. Allowing free access to standards incorporated by reference will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges. Such open access to standards will help protect public safety, promote economic opportunity, increase access to justice, and strengthen citizen participation in our democracy. We ask the Administration to implement reforms that make standards incorporated by reference in proposed rules and in final rules available for free on the Internet."
- Consumer Federation of America, representing 280 groups with a membership of 50 million people, submitted a comment to OMB stating, "Standards that are incorporated by reference into federal regulations must be widely available and easily accessible to the public and must be available without charge…. It is imperative that both within the voluntary standards process and when a standard is incorporated by reference into a federal regulation, that the standard must be free of charge and easily accessible. Without unfettered access to these standards, our democratic system will be severely limited and important constituencies such as individual consumers and public interest and consumer organizations will be unable to participate in these proceedings…. Access to these standards must be available through the internet, through clear and accessible mechanisms that are free of charge to the public."
- The Aviation Suppliers Association, a trade group for the aviation parts distribution industry, wrote in a comment in the OFR proceeding, "In the age of the internet, 'reasonably available' should mean that mandatory regulations, and by extension any material incorporated by reference therein, should be accessible for free via the internet, just as the United States Code or the Code of Federal Regulations are available…. It should be the goal of each agency to make regulations as easily

accessible to the public as possible. This is especially true when a standard incorporated by reference is deemed mandatory, rather than simply advisory. … Moreover, a requirement that individuals must pay to know the law has the potential to disproportionately affect lower income persons and small businesses. They may have difficulties in allocating the funds to pay to know the law in a way that large corporations and wealthy individuals do not."

- Consumers Union submitted a comment to OMB arguing that "U.S. citizens should not be required to pay for access to U.S. laws… Free public access to laws is an essential component of any democratic society."
- Owner-Operator Independent Drivers Association, representing truck drivers, filed a comment with OFR arguing that "the interest of public safety" calls for giving the public "unfettered access to the standards it [is] being held to."
- National Grain and Feed Association, representing companies that handle most of the nation's grain and oilseed crop, submitted a comment to OFR arguing that the Freedom of Information Act's "reasonably available" standard, 5 U.S.C. section 552 (a)(1), means that material "should be made available free-of-charge to anyone who has access to the internet."
- The National Propane Gas Association, representing over 3000 companies in the propone industry, submitted a comment to OMB stating, "when an agency incorporates certain standards by reference into the regulations, it will often have a more dramatic impact on the costs of regulatory compliance for … small businesses…. [T]he regulated entity should not be forced to pay for the contents of that standard upon which they will be required, by law, to comply."

On a number of occasions in its history, the American Bar Association has played a critical role in advancing the cause of justice and progress by championing a principled position demanded by American law. The ABA has the opportunity to do so again in the current debate – by standing up strongly for a position that in our democratic society, citizens own the law and must have unfettered access to it, without monetary charges or artificial obstacles. We cannot demand that citizens obey laws that they can only access in limited ways. We cannot ration or restrict information critical to public safety. We urge you to move to a position that would truly put the law back in the hands of the people.

Sincerely yours,

David Halperin
Of Counsel
Public.Resource.Org

Carl Malamud
President and Founder
Public.Resource.Org

cc: Mr. Robert A. Armitage, Chair, ABA Section of Intellectual Property Law

The Honorable Paul R. Verkuil, Chairman, Administrative Conference of the U.S.

The Honorable Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

Mr. Michael White, Acting Executive Director, Office of Federal Register

enc: *Submission of Public.Resource.Org to the Office of Management and Budget, 4/11/2012*

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Public Works for a Better Government

April 11, 2012

Hon. Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20503

Re: Request for Information 2012–7602, 77 FR 19357

Dear Mr. Sunstein:

We submit this comment in response to your March 30, 2012, Request for Information, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," and, in particular, to the following two questions included therein:

- What are the best practices for providing access to standards incorporated by reference in regulation during rulemaking and during the effective period of the regulation while respecting the copyright associated with the standard?
- What are the best practices for incorporating standards by reference in regulation while respecting the copyright associated with the standard?

We believe that the fundamental law of the United States *requires* that the government make standards that are incorporated by reference into federal regulations widely available to the public, without charge, and that such standards be deemed in the public domain rather than subject to copyright restrictions. Citizens have the right to read, speak, and disseminate the laws that we are required to obey, including laws that are critical to public safety and commerce. Open, effective, and efficient government and robust democracy require such free availability of standards incorporated by reference. The private sector and economic development will benefit greatly from free access to these standards, as will critical initiatives such as the President's campaign to revitalize science, technology, engineering, and mathematics (STEM) education. All of these benefits substantially outweigh the potential costs and risks of denying copyright protections for such standards when the government incorporates them by reference.

This comment will address each of these points in turn.

However, first we want to state that Public.Resource.Org, whose mission is to make law available to all citizens, feels so strongly about these principles that we are taking action. Public.Resource.Org recently spent $7,414.26 to purchase 73 technical public safety standards that are incorporated by reference into the Code of Federal Regulations—standards that govern a wide range of activity, from how bicycle helmets are constructed, to how to test for lead in water, to the safety characteristics of hearing aids and protective footwear. Prices to purchase these components of United States law ranged from $20 to $849 for a 48-page 1968 standard from Underwriters' Laboratories required as part of the OSHA workplace safety standards in 29 CFR § 1910.

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We made 25 print copies of each of these standards and bound each document in a patriotic Certificate Of Incorporation stating that the documents are legally binding on citizens and residents of the United States. Last month, we collected these copies in boxed sets, and added letters that offered 21 relevant points of law. We sent 10 sets to the relevant Standards Development Organizations (SDOs) with a Notice of Incorporation, stating that comments must be received by Public.Resource.Org by May 1, 2012. The recipients include the American National Standards Institute, American Society of Mechanical Engineers, American Society for Testing and Materials, British Standards Institute, IEEE, International Organization for Standardization, National Fire Protection Association, National Sanitation Foundation, Society of Automotive Engineers, and the Underwriters' Laboratories. Other sets were sent to U.S. government offices, including the Senate (Senators Charles Grassley and Sheldon Whitehouse), House (Representatives Darrell Issa and Zoe Lofgren), National Archives, Administrative Conference of the United States, Federal Trade Commission, the Copyright Office, and to you, Mr. Sunstein, at OMB / White House. (Your package was returned to Public.Resource.Org without comment, which we consider unusual for a submission from a citizens group to the government; you were the only government official who declined to accept this package.) The remaining copies were reserved for public exhibition and legal defense.

Public.Resource.Org intends to post these 73 standards on the Internet in HTML and begin the process of providing a unified, easy-to-use interface to all public safety standards in the Code of Federal Regulations.

1. **The fundamental law of the United States requires that the government make standards that are incorporated by reference into federal regulations widely available to the public, without charge, and that such standards be deemed in the public domain rather than subject to copyright restrictions**.

The law cannot be copyrighted. In *Wheaton v. Peters*, 33 U.S. 591 (1834), one of the Supreme Court's own official reporters claimed copyright in his annotated collections of the Court's opinions. The Court declared that "no reporter has or can have any copyright in the written opinions delivered by this Court. . ." 33 U.S. at 668. In the course of argument, counsel for the court reporter conceded, even while asserting copyright over his client's volumes of opinions, that statutes cannot be copyrighted:

> It is attempted to put judicial decisions on the same ground as statutes. It is the duty of legislators to promulgate their laws. It would be absurd for a legislature to claim the copyright; and no one else can do it, for they are the authors, and cause them to be published without copyright. Statutes never were copyrighted.... It is the bounden duty of government to promulgate its statutes in print.

Id. at 615–16. Counsel for the respondent agreed:

> [L]aws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect.... If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by which we guide our actions.

Id. at 620–21.

Similarly, in *Banks v. Manchester*, 128 U.S. 244 (1888), the Court rejected a copyright claim by a court reporter for a collection of the opinions of the Ohio Supreme Court. "*Banks* represents a continuous understanding that 'the law,' whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright." *Veeck v. Southern Bldg. Code Congress International, Inc.,* 293 F.3d 791, 796 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003).

The U.S. Copyright Office has emphasized this principle:

> 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.

Compendium II of Copyright Office Practices § 206.01 (1984).

The en banc 5th Circuit held in *Veeck* that technical standards incorporated by reference into the law *are* the law and thereby enter the public domain and cannot be subject to the exclusive prerogatives of the copyright holder. 293 F.3d at 791.

In *Veeck*, two Texas small towns, Anna and Savoy, had enacted into their local laws the 1994 version of the Standard Building Code published by a private organization, SBCCI. SBCCI included a notice in its building code instructing that the code could be adopted only by reference, rather than printing it verbatim in an enacting law, Brief of the United States, *Southern Bldg. Code Congress International, Inc., v. Veeck*, No. 02–355, May 2003, and that is what the two towns did. Peter Veeck, operator of a non-commercial website that provided information about north Texas, purchased the model code on computer disk from SBCCI for $72. The code came with a license agreement and copyright notice instructing users not to copy or distribute it. Nevertheless, Veeck posted on his site this building code, identifying it, correctly, as the building code of Anna and of Savoy.

Veeck filed suit seeking a declaratory judgment that he did not violate the Copyright Act, and SBCCI counterclaimed. The en banc 5th Circuit held that "as *law*, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives…. As governing law, pursuant to *Banks*, the building codes of Anna and Savoy, Texas cannot be copyrighted." 293 F.3d at 791, 796.

The court in *Veeck* reasoned that once a standard is incorporated into the law, the people become its owner:

> Lawmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by "the people," in an infinite variety of individual and organizational capacities. Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of "the law." In performing their function, the lawmakers represent the public will, and the public are the final "authors" of the law….
>
> [P]ublic ownership of the law means precisely that "the law" is in the "public domain" for whatever use the citizens choose to make of it.

Id. at 799.

The U.S. Solicitor General filed with the U.S. Supreme Court a brief concluding, "The court of appeals reached the correct result in this case," Brief of the United States, *Southern Bldg. Code Congress Internatl., Inc., v. Veeck*, No. 02–355, May 2003, and the Supreme Court denied review.

Similarly, in *Building Officials and Code Adm. v. Code Technology, Inc.*, 628 F.2d 730 (1st. Cir. 1980) ("*BOCA*"), the Court vacated a preliminary injunction issued to the creator and copyright holder of a model building code that had been adopted into law by Massachusetts. The Court remanded for further proceedings and stated:

> [I]t 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 ….
>
> The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process…. [C]itizens must have free access to the laws which govern them.

628 F.2d at 730, 734.

In *Veeck*, the two Texas towns expressly incorporated by reference a specific version, the 1994 edition, of the SBCCI Standard Building Code. Similarly, all incorporations by reference into the Code of Federal Regulations require identification of the precise "title, date, edition, author, publisher, and identification number of the publication" and explicit, affirmative approval of the incorporation by the Director of the Federal Register. 1 CFR 51.

As in *Veeck*, standards incorporated by reference into the CFR, such as the 73 public safety and other standards distributed by Public.Resource.Org, are now the law. That is, agencies have imposed on the citizens the obligation to comply with these standards as if they are provisions of the regulations. For example:

- Federal labor regulations at 29 CFR provide "Safety and Health Regulations for Construction." Section 1926.302 specifies requirements for power-operated hand tools. After laying out a range of provisions, the regulations state:

  > (12) Powder-actuated tools used by employees shall meet all other applicable requirements of American National Standards Institute, A10.3–1970, Safety Requirements for Explosive-Actuated Fastening Tools.

  In order for businesses to comply with federal regulations, they must comply with the provisions of this ANSI standard. In order for government, media, and citizens to know whether businesses are complying with the law, they must know the ANSI standard.

- Part 250 of CFR Title 30 governs "Oil And Gas And Sulphur Operations In The Outer Continental Shelf" and subpart D covers "Oil and Gas Drilling Operations, Hydrogen Sulfide." The regulations provide, at 30 CFR 250.490(g)(4)(iv), that all employees must be trained on:

> Restrictions and corrective measures concerning beards, spectacles, and contact lenses in conformance with ANSI Z88.2, American National Standard for Respiratory Protection (as specified in §250.198).

In order for businesses to comply with federal regulations, they must know and teach their workers the provisions of this ANSI standard. In order for government, media, and citizens to know whether businesses are complying with the law, they must know the ANSI standard.

- 49 CFR § 571.108, a provision of the Federal Motor Vehicle Safety Standards governing "Lamps, reflective devices, and associated equipment" provides

> (2) For a light source using excited gas mixtures as a filament or discharge arc, seasoning of the light source system, including any ballast required for its operation, shall be made in accordance with section 4.0 of SAE Recommended Practice J2009 FEB93 Discharge Forward Lighting Systems.

In order for businesses to comply with federal regulations, they must comply with the provisions of this SAE standard. In order for government, media, and citizens to know whether businesses are complying with the law, they must know the SAE standard.

Federal departments and agencies declare through such incorporation that our citizens must live by these rules or face penalties. Accordingly, these standards are the law. Pursuant to case law, they cannot be subject to copyright infringement claims.

A copyrighted work does not become law simply because a statute refers to it. *Veeck*, 293 F.3d at 804–05. Compare *CCC Info Serv. Inc. v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2nd Cir. 1994) (privately prepared and copyrighted "Red Book" of projected automobile values did not enter public domain just because a New York statute required insurance companies to use "Red Book" as one of several standards in calculating payments); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516, 518 (9th Cir. 1997), opinion amended by 133 F.3d 1140 (9th Cir. 1998) (American Medical Association's coding system for physician services on Medicare and Medicaid forms did not enter the public domain just because the federal Health Care Financing Administration agreed with AMA to use this system, where there was no evidence that the AMA had restricted code's availability to anyone).

But as in *Veeck*, the 73 standards distributed by Public.Resource.Org and many other standards "are broadly applicable," Brief of the United States, *Southern Bldg. Code*, May 2003, providing detailed rules to govern the conduct of various parties. Such standards are not lists or tables or codes, as in *CCC Info Serv.* and *Practice Management Info. Corp*. They read like laws or regulations, and the federal government, by incorporating the standards, has directed citizens to obey their provisions or face penalties.

Indeed, those standards, adopted into our law by federal regulation, are very much the fundamental law that governs us. As much as landmark health care acts or Supreme Court civil rights decisions, these technical standards—for building, electrical, plumbing, transportation—touch our lives, every day. Business owners, workers, and consumers need to know these standards, these provisions of our law, in order to avoid penalties; to protect themselves from injury or toxic harm; to evaluate the adequacy or fairness of existing law; to determine whether neighbors, contractors, or competitors are in compliance. And yet under

the status quo they must pay fees, sometimes large fees, for the privilege of reading and discussing these laws.

In fact, a large number of the standards incorporated by reference carry onerous shrink wrap license agreements that attempt to convince consumers that they have agreed to give up rights normally available to purchasers of printed documents. For example, the Standards Incorporated by Reference (SIBR) database maintained by the National Institute of Standards and Technology (NIST) has 543 entries for the American Society of Mechanical Engineers (ASME). One may not purchase and read an ASME document without first ripping through a shrink wrap end-user license agreement (EULA) that purports to prohibit the user from giving the document they purchased to somebody else and attempts to imply that the reader has given up all fair use rights. Most users reading these documents, even if they understand that edicts of government have no valid copyright, will experience great trepidation in exercising their rights to read, copy, and speak the law of the land.

In his keynote address to the 54th Plenary Session of the Administrative Conference of the United States, Justice Stephen Breyer stated, "If a law isn't public, it isn't a law." There's no doubt that standards incorporated by reference into the CFR are the law, yet given these prices and warnings, SDOs act as if the standards are anything but public.

2. **Open, effective, and efficient government and robust democracy require free availability of standards incorporated by reference. The private sector and economic development also will benefit greatly from free access to these standards.**

    a. <u>The Code of Federal Regulations Was Created To Make The Law Accessible.</u>

To understand the imperative of public access to materials incorporated by reference, one needs to consider how and why the Federal Register and Code of Federal Regulations became a component of our law, how the practice of incorporation by reference developed, and how that practice relates to the requirements of the Freedom of Information Act. One also needs to grasp the opportunities created by modern technologies, especially the Internet.

The aim of the Federal Register was to take a disparate and increasingly unruly and inaccessible body of federal rules and aggregate them so citizens and institutions could better know, understand, and comply with the law. The catalyst for the creation of the Federal Register was a 1934 law review article by Professor Erwin Griswold entitled "Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation," 48 Harv. L. Rev. 198. See The Office Of The Federal Register, A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register May 14, 1936.[1]

Griswold opened his essay by declaring:

> Administrative regulations "equivalent to law" have become important elements in the ordering of our lives today. Many cases have reiterated the rule that executive regulations properly made have "the force and effect of law." The volume of these rulings has so increased that full, accurate, and prompt information of administrative activity is now quite as important to the citizen and to his legal advisor as is

[1] https://www.federalregister.gov/uploads/2011/01/fr_history.pdf

> knowledge of the product of the Congressional mill. There should consequently be no need to demonstrate the importance and necessity of providing a reasonable means of distributing and preserving the texts of this executive-made law.

48 Harv. L. Rev. at 198.

Griswold then walked the reader through a growing inventory of federal government regulations and concluded:

> No search of the statutes can be complete until the applicable executive pronouncements have been examined. When the legal effect of a statute depends on an administrative ruling, the order bringing the statute to life or tolling its existence should be as readily available as the statute itself.

Id., at 202.

Griswold proposed the creation of an "Official Gazette" that published all federal regulations, as well as a regularly published index of all regulations in force—the blueprint for the Federal Register and Code of Federal Regulations. He concluded:

> Until some such measure is adopted, it may well be said that our government is not wholly free from Bentham's censure of the tyrant who punishes men "for disobedience to laws or orders which he had kept them from the knowledge of ."

Id., at 213.

To paraphrase Gerald Ford, if Dean Griswold were alive today, he would be turning over in his grave. Because the work that Griswold inspired and that many others carried out to bring order to the law and make its provisions once again accessible to the people through the Federal Register and CFR has been undone. It has been undone not by the practice of incorporation by reference itself, but by the lack of reasonable public access to many of the standards and materials that the government has incorporated by reference into federal regulations. The CFR has been transformed from a mechanism to inform citizens into a profit opportunity for a few private organizations.

b. <u>The Freedom of Information Act and 1996 e-FOIA Amendments Require Materials Incorporated By Reference To Be Available to Affected Persons, and Doing So Would Make Government More Efficient.</u>

The Freedom of the Information Act allows the Director of the Federal Register to deem as effectively published in the Federal Register material that is incorporated by reference into a regulation, but only if such material is "reasonably available to the class of persons affected thereby." 5 U.S.C. § 552(a)(1). Title 51 of 1 CFR implements this provision. The Director of the Federal Register is charged with approving each instance of incorporation by reference requested by federal agencies. In carrying out this responsibility, the Director must assume that incorporation by reference is "intended to benefit both the Federal Government and the members of the class affected…" 1 CFR 51.1(c)(1). In order to be eligible for incorporation for a reference, a publication must meet standards including that the publication "substantially reduces the volume of material published in the Federal Register" and "is reasonably available to and usable by the class of persons affected by the publication." 1 CFR 51.7(a)(3) and (a)(4).

These provisions have not been amended in any respect since their promulgation on Aug. 6, 1982, at 47 FR 34108. In February 2012, a group of administrative law professors, along with Carl Malamud of Public.Resource.Org, sent a petition to the Director of the Federal Register seeking amendment of 1 CFR part 51, and wrote in part:

> Subsequent statutory and social developments have transformed what it might mean for matter to be "reasonably available," and this petition seeks the redefinition of "reasonably available" in the light of those changes. In the pre-digital world, it may have seemed reasonable to require persons wishing to know the law governing their activities to pay private standard-setting organizations for access to standards made mandatory by government regulations incorporating those standards by reference. These standards were sometimes voluminous, could be presented only in print, and could be made available to concerned parties only at some expense to the provider. Developments in both law and technology over the last two decades have undermined that rationale, however, transforming what it should mean for these standards to be "reasonably available."
>
> In particular, when section 552(a)(1) was enacted and at the time 1 CFR part 51 was adopted, substantive rules of general applicability, statements of general policy or interpretations of general applicability, as well, could be made available to the public only in printed form. Since the "published data, criteria, standards, specifications, techniques, illustrations, or similar material" made eligible for incorporation by reference in § 51.7(a)(2) were often voluminous in character, permitting their incorporation by reference would "[s]ubstantially reduce[] the volume of material published in the Federal Register." § 51.7(a)(3). That effect was the primary impetus for permitting incorporation by reference. Again, this effect has been eliminated by the implementation of agency electronic reading rooms, under which unlimited volumes of materials may be stored or hyperlinked, and made readily searchable by common web-based tools.

Incorporation by Reference, A Proposed Rule by the Federal Register Office on 02/27/2012, quoting petition dated Feb. 21, 2012.[2] As the instant OMB Request for Information noted, the Director of the Federal Register requested comments on issues raised by the petition.

The practice of incorporating privately-created standards into federal regulations has been expressly endorsed by Congress. In the National Technology and Transfer Act of 1995, P.L. 104–113 §12(d), 110 Stat. 783 (1996), Congress directed that "Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies…" OMB, in a directive aimed at implementing the NTTA, instructed federal agencies to adopt privately created voluntary standards "whenever practicable and appropriate." OMB Circular A–119, 63 Fed. Reg. 8545, 8555 (Feb. 19, 1998).

The OMB directive requires 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," OMB Circular A–119, 63 Fed. Reg. 8545, 8555 (Feb. 19, 1998), ratifying a practice that evolved under this legal regime: The government has tolerated copyright holders—the SDOs—charging for access to their standards, so long as individuals can review a copy in person at the Office of the Federal Register.

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[2] https://www.federalregister.gov/articles/2012/02/27/2012-4399/incorporation-by-reference#p-43

But As Columbia Law Professor Peter L. Strauss has argued, the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA), Public Law No. 104–231, 110 Stat. 3048, which require that federal agency proposals, rules, and guidance be posted on agency websites, have "undermined any claim that public inspection at a physical site is adequate to make law 'reasonably available.'" Strauss, Agencies Should Pay For Any Copyrighted Materials They Incorporate by Reference, Dec. 1, 2011, Reg Blog.[3]

The widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees, a more legitimate argument when printed physical documents were the only means of transmission. Today, the only thing impeding the broader availability to the public of standards incorporated by reference into the law is the interest of SDOs in making money by charging for the standards.

The prices for these standards have made the principle of availability a charade. As noted, the Underwriters' Laboratories standard UL 42, Steel Above Ground Tanks for Flammable and Combustible Liquids, required in 49 CFR 1910, cost $849. The National Sanitation Foundation standard NSF 61, Health Effects of Drinking Water Components, required in 424 CFR 3280, costs $570. Prices like that make the standards unavailable for the vast majority of Americans, perverting the fundamental principles of notification and an informed citizenry that led to the establishment of the OFR.

The Internet era provides a tremendous opportunity for government to inform its citizens in a broad and rapidly updated manner about the legal standards they must meet in carrying out daily activities. It also allows for companies, non-profits, and citizens to utilize and organize this information to enhance compliance, better understand the provisions of law, and highlight opportunities for effective reform.

As we stated above, Public.Resource.Org intends to begin posting a set of standards incorporated by reference in HTML and begin the process of providing a unified, easy-to-use interface to all public safety standards in the Code of Federal Regulations. Such a capacity would help move the public availability and usefulness of federal law back toward the place advocated by Dean Griswold some 80 years ago and away from the confused, obscure mess that is the situation today.

Another strong advantage of widespread public availability of standards incorporated by reference would be to highlight the need for government to replace old, outdated standards with new ones. Public.Resource.Org has recently conducted an extensive examination of the text of the Code of Federal Regulations with specific focus on incorporations by reference, coupled with an extensive examination of the Standards Incorporated by Reference database maintained by the National Institute of Standards and Technology. Many standards incorporated by reference into the CFR, including some of the 73 of the standards that Public.Resource.Org has distributed, have been superseded by new standards from the SDOs. Greater public access to standards incorporated by reference into federal regulations might alert policy and industry communities to the fact that federal rules are too often connected to outdated private standards and are in need of updating to improve public safety. In Public.Resource.Org's submission in response to the Office of the

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[3] http://www.law.upenn.edu/blogs/regblog/2011/12/agencies-should-pay-for-any-copyrighted-materials-they-incorporate-by-reference.html

Federal Register's recent request for public comment, 77 FR 11414, Feb. 27, 2012, we noted that in the course of our audit, we found a number of anomalies in the Code of Federal Regulations, including:

1. Many of the standards Incorporated by Reference are simply unavailable for purchase. For example, the NIST SIBR database has 96 entries for standards created by the Compressed Gas Association (CGA) covering topics such as the Standards for Safety Release Devices, for Visual Inspection of Cylinders, and the Safe Handling of Compressed Gases. CGA has an explicit policy of not making any historical standards available for purchase, either on their site or through their 2 designated retail outlets, Thomson Reuters Techstreet and the IHS Standards Store. It is impossible to buy the CGA standards required by law and very few, if any, public libraries have the documents in question.
2. Some nonprofit organizations appear to have an explicit policy of gouging taxpayers because of their privileged position as the supplier of documents required by law. For example, the American Herbal Products Association (AHPA) has issued a number of press releases boasting that their publication Herbs of Commerce ''has become the law of the land'' in 21 CFR 101.4(h). The version of Herbs of Commerce incorporated into law is the 1st Edition, published in 1992. AHPA sells only a PDF version of this document for $250 and has secured the PDF document so that purchases may not print, transfer, or sell the document. On the other hand, the more up-to-date 2nd Edition sells for $99.99 as either print or a PDF file and has no such restrictions.
3. Some of the documents incorporated by reference seem to not exist. For example, the DOT/PHMSA hazmat standards in 49 CFR 179.300–9(a) et. seq. require the use of the Association of American Railroads (AAR) Specification M–1002, Standards and Recommended Practices for Tank Cars, year 2000 Edition. After searching on all available retail outlets for the year 2000 edition, we wrote to the AAR and after extensive discussions, Publications Specialist Kathy Trujillo researched the matter and wrote back that ''of the 23 sections of the Manual of Standards and Recommended Practices, none of the sections has a 2000 date. I do not know what manual the federal regulations is referring to but it is not one of my manuals.''
4. Some of the incorporations incorporate things that don't appear to be actual documents but are instead concepts. For example, 45 CFR 162 has a series of incorporations by HHS/AR for documents produced by the Washington Publishing Company. In 45 CFR 162.1802(a)(2), the 2000 version of the document ''ASC X12N 837: Health Care Claim: Dental'' is incorporated. The company sells a variety of XML Schemas and Implementation Guides, but it is unclear from the CFR exactly what is being incorporated.
5. The OFR regulations require that a specific version of standards be incorporated. Specification of a standard requires a specific title and document number and the date that the standard was published. However, the NIST SIBR database lists 536 entries in the Code of Federal Regulation that have No Date Given (NDG). In some cases, this is because NIST has incorrectly read the CFR. For example, NIST lists NFPA Standards 496 and 70 as having No Date Given in 46 CFR 111.105–7(b) despite the fact that 46 CFR 110.10–1 lists the dates for those standards. It seems that technical coordination between NIST and OFR might increase the accuracy of the results in the NIST database, which is heavily used by standards professionals.

- Many of the technical standards incorporated by reference are so old as to be unsafe. The United States Coast Guard still requires the use of a 1941 standard for Packaging of First-Aid Unit Dressings in 46 CFR 160.041–2(b) and our federal hazmat standards administered by DOT/PHMSA still specify the 1943 Code for Unfired Pressure Vessels in 49 CFR 173.32(c)(4). Not only are such old standards unsafe, they are impossible to procure.

All of these strong policy and economic rationales bolster the argument that these standards belong in the public domain and not behind a copyright / pay wall.

A recent half-hearted urging by the Administrative Conference of the United States that agencies take "steps to promote availability of incorporated materials, such as encouraging copyright owners to make incorporated materials available in libraries," Administrative Conference of the United States, Administrative Conference Recommendation 2011–5, Incorporation by Reference, Dec. 8, 2011, 77 FR 2257 (January 17, 2012),[4] is too weak a step given the mandates of FOIA, the opportunities presented by technology, and, above all, the Supreme Court's edict that the law cannot be copyrighted. Indeed, the final ACUS recommendation represented a capitulation to some SDOs and their lawyers, to small-minded bureaucratic thinking, to a business-as-usual mentality that cramps the development of a robust democracy that would best utilize new technologies to enhance justice, the free flow of information, and economic efficiency.

c. Public safety, economic efficiency, and adherence to law will be enhanced in a society where standards incorporated by references into federal regulations are as readily available as the regulations that incorporate them.

In support of our claim that society will benefit from free access to standards incorporated by reference, we offer a couple of hypothetical examples, followed by some real-life cases.

Example 1: Christina imports foreign cars and sells them in the United States. In order to be road-worthy, her cars must comply with the regulations set out in the Federal Motor Vehicle Safety Standards, 49 CFR § 571, 572.[5] Those regulations, in turn, incorporate by reference a series of standards created by SAE International, the nonprofit association of aerospace and automotive engineers that develops industry standards. The SAE standards that the federal government has made part of our law by incorporation into the Federal Motor Vehicle Safety Standards include the following standards that were copied and distributed by Public.Resource.Org, standards that are important to public safety:

J1733: Sign Convention for Vehicle Crash Testing
J1703: Specification for Motor Vehicle Brake Fluid
J1398: Stop Lamps for Use on Motor Vehicles
J1395: Turn Signal Lamps
J1383: Required Performance of Motor Vehicle Headlamps
J1100: Motor Vehicle Dimensions
J826: Motor Vehicle Seating
J759: Lighting Identification Code
J592: Clearance, Side Marker, and Identification Lamps
J588: Turn Signal Lamps

[4] https://www.federalregister.gov/articles/2012/01/17/2012-621/adoption-of-recommendations

[5] http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title49/49tab_02.tpl

J587: License Plate Lamps
J584: Motorcycle Headlamps
J578: Color Specifications
J576: Use of Plastic Materials in Optical Parts
J573D: Specification on Safe Lamp Bulbs and other Sealed Units
J211: Required Instrumentation for Impact Test

One simply cannot read the Federal Motor Vehicle Safety Standards and know the governing law and one's obligations under that law; one has to also read these incorporated standards.

Our car importer Christina, or anyone who wants to modify a motor home, or create a custom vehicle for use in farming, or in a factory plant, or turn an ordinary vehicle into a hot-rod must has to comply with these standards if they are going to bring the vehicles on the road. The small businessperson modifying the vehicle is not the only one who has an interest in these standards. Any buyer might want to understand why, for example, a $1,500 modification is needed to add in the right air bags to the vehicle they are about to purchase. Just as important as the vehicle modifier and potential purchaser are those that worry about vehicle safety: public interest groups, journalists who write about vehicles, and a raft of government public safety officials at the local, state, and federal levels. For example, the Department of Defense has adopted quite a few of these standards as mandatory, which means that all DOD procurement officials and any operations staff need to be familiar with these proprietary documents.

Public.Resource.org paid $65 per copy to read each of these standards. To learn how to comply with federal law, businesses and individuals must purchase these standards from a private entity. In addition to making their vehicles conform to these (and many other) required FMCSA standards, a business operator like Christina must comply with numerous privately-adopted standards incorporated by reference by the Environmental Protection Agency, the Occupational Safety and Health Administration, and other federal agencies. There also are numerous building, electrical, fire, plumbing, and other codes that must be obeyed for these small businesses to conform to the law.

It would be challenging enough to review and comply with all of these standards if there were a one-stop destination on the Internet providing free access to all of them. But there is no such place, because the various standards are behind various pay walls, to be purchased from various vendors at considerable cost.

Example 2: Consider Bob, who installs furnaces and other HVAC equipment in both residential and commercial structures. Bob has to work with building owners to put equipment in, which in commercial buildings usually means hiring a crane company to put the equipment on the roof. Bob is not alone in using cranes. The local Internet Service Provider uses cranes to put up antenna towers, and most construction companies have similar needs. The crane company itself, of course, needs the standards. Crane safety is vitally important: the equipment being lifted is very expensive, the safety of workers and bystanders are at stake, the building might be structurally damaged if a crane is used improperly. Crane safety standards are specified by OSHA, which incorporates by reference a series of standards from other private standards developing organizations (SDOs) (with their purchase prices noted):

ASME B30.2: Overhead and Gantry Cranes ($60)
ASME B30.5: Mobile and Locomotive Cranes ($60)
ASME B30.7: Base-Mounted Drum Hoists ($60)
ASME B30.14: Side Boom Tractors ($64)

BS 13000: Cranes: Safety: Mobile Cranes ($328)
BS 14439: Cranes: Safety: Tower Cranes ($271)

ISO 11660–1: Cranes: Access, Guards, and Restraints, Part 1, General Standards ($195)
ISO 11660–2: Cranes: Access, Guards, and Restraints, Part 1, Mobile Cranes ($150)
ISO 11660–3: Cranes: Access, Guards, and Restraints, Part 1, Tower Cranes ($195)

If a prudent building owner or contractor hiring a crane wants to do due diligence and look at crane safety laws, or if non-profit and community groups want to see if local crane operators are complying with the law, or if local building inspectors want to evaluate compliance with federal standards, they must buy the law, from a series of private entities, and for a considerable sum of money. These standards are so expensive libraries don't stock them. For example, there are less than 20 libraries in the entire United States that have copies of ASME B30.5, entitled "Mobile and Locomotive Cranes," from the engineering organization ASME.

The importance of public access to standards incorporated by reference becomes more stark when considering real-life, high-stakes matters.

In the wake of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, with the oil production industry under heavy scrutiny by government, the media, and the public, the American Petroleum Institute posted on its website many of its safety standards, including all of the standards that had been incorporated by reference into federal law. API press release[6]; Committee on Administration and Management, Administrative Conference of the United States, "Incorporation by Reference in Federal Regulations," Oct. 19, 2011, at 28.[7] Until that decision by the API, as the Deepwater Horizon poured oil into the Gulf for five months, and in the weeks after, it had been difficult for citizens to evaluate the adequacy of federal regulations, because key components of those regulations were hidden behind pay walls.

Similarly, when a natural gas pipeline in San Bruno, California, exploded that same year, "the House of Representatives considered whether relevant pipeline safety standards should have been more freely accessible to first responders." ACUS, "Incorporation by Reference in Federal Regulations," at 26. Should those standards, in a life-threatening emergency situation and beyond, have been readily available to first responders? Of course.

When matters got serious, our society has had to get serious, and post the law for the public to review. But that decision should not be in the hands of a private body, one that had previously posted copyright notices warning the government and other purchasers of its standards not to share its property.

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[6] http://new.api.org/Newsroom/api-expanded-stds.cfm

[7] http://www.acus.gov/wp-content/uploads/downloads/2011/11/Incorporation-by-Reference-Report.pdf

The lack of access to technical standards has become an issue not only for the regulated, but even for members of Congress. During the Gulf oil spill, a House of Representatives committee wishing to examine a pipeline safety standard published by the American Petroleum Institute was told by API that it could only read the document if it forked over $1,195 to read one document, one of over 100 public safety standards regulating pipeline safety and hazardous materials. After the committee staff met with federal agencies to raise concerns, API offered the standard for free. But the incident educated the staff about the fact the many vital safety standards were not available to the public or even to the elected representatives who write our statutes. Prompted by that House committee, Congress enacted a provision into The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, signed into law on January 3, 2012 (P.L. 112–90), that prohibits the Secretary of Transportation from issuing a pipeline safety "guidance or a regulation… that incorporates by reference any documents or portions thereof unless those documents or portions thereof are made available to the public, free of charge, on an Internet Web site."

Faced with the reality of how keeping incorporated by reference standards behind a pay wall undermines efficiency and common sense, Congress acted. But the new legislation is a single small piercing of this giant wall that keeps so much of federal law shielded from citizens. And it has reportedly prompted some SDO lobbyists to try to seal up the wall again completely.

3. **Granting broader public access to these standards in the face of copyright claims will not deter the promulgation of standards by private organizations.**

Defenders of upholding copyright protections and charging fees in this context claim that granting citizens more reasonable access to the law will destroy the economic incentives that today motivate private organizations to craft important standards. We contend that such economic incentives cannot trump the fundamental legal imperative at stake: Citizens should not be required to pay money to have ready access to the laws that govern them. We also have argued that allowing broader access to these provisions of law will improve the functioning of our economy and society. Beyond that, we do recognize the importance of giving private SDOs adequate incentives to create standards. However, these organizations will have strong incentives and benefits under the more open regime that the law requires.

First of all, the U.S. Court of Appeals decided the *Veeck* case, denying copyright protection for a model law incorporated by reference, ten years ago, the Justice Department subsequently urged the Supreme Court to deny review, and the Supreme Court did decline to upset that ruling. Despite the fact that, for at least since then, if not since the 1980 Court of Appeals decision in *BOCA*, the validity of copyrights on standards incorporated by reference have been in doubt, the SDOs have thrived. In fact, Public.Resource.Org has been posting online the building codes of the 50 states – codes based on copyrighted industry standards—since 2007. This action by Public.Resource.Org has garnered significant public attention, with reports in the New York Times,[8] San Francisco Chronicle,[9] and many social media forums, yet Public.Resource.Org has not received a single letter of protest, and the SDOs have continued to prosper.

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[8] http://www.nytimes.com/2008/09/29/business/media/29link.html

[9] http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/26/BAAH134FI4.DTL

We understand that SDOs need money to fund their standards-developing efforts, but perhaps these organizations have begun treating this revenue stream as an opportunity for a financial windfall at the expense of U.S. citizens. One measure of their health might be this table indicating salaries that SDOs are able to pay their chief executives:

Compensation of Major Nonprofits Involved in Standards Setting

Rank	Name of Nonprofit Organization	Name of Leader	Year	Amount
1	Underwriters' Laboratories	K. Williams	2009	$2,075,984
2	National Sanitation Foundation	Kevin Lawlor	2009	$1,140,012
3	British Standards Institution	Howard Kerr	2010	$1,029,161
4	National Fire Protection Association	James M. Shannon	2009	$926,174
5	American National Standards Institute	Saranjit Bhatia	2010	$916,107
6	ASTM International	James A. Thomas	2009	$782,047
7	IEEE	James Prendergast	2009	$422,412
8	Society of Automotive Engineers	David L. Schutt	2009	$422,128
9	American Society of Mechanical Engineers	Thomas G. Loughlin	2009	$420,960
10	The United States of America	Barack Obama	2011	$400,000

Second, trade groups – engineers, designers, and others – have strong incentives to create uniform codes even if they lose copyright protections for those standards that the government incorporates by reference.

> . . . it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.

1 Goldstein on Copyright § 2.5.2, at 2:51, quoted in *Veeck*, 293 F.3d at 806.

Third, even without copyright protection for standards that the government incorporates by reference, SDOs can continue to earn revenue on products related to those standards – commentary, FAQs, and other interpretive information.

Veeck, 293 F.3d at 806.

Fourth, as was the case when *Veeck* was decided, the SDOs today have numerous other means of earning revenue, including selling copyrighted standards that are not incorporated in to law, selling membership dues, charging conference fees, and obtaining government research grants.

The SDOs would actually grow and prosper in an open environment, and they would certainly carry out their mission more effectively. They might need to change their business models, but hasn't the Internet made the rest of us change our business models?

The Federal Register request for comment, 77 FR 11414, asked if federal agencies should bear the cost of making standards incorporated by reference available for free online. Our response is that today the government bears no costs and, more importantly, no responsibility for making these technical standards incorporated by reference available. The SDOs have exploited this situation to extract rent from the American people, reaping windfall profits on the backs of those that must obey the law. We have no opinion on whether

the government should pay money, or if the SDOs should face up to their public interest responsibilities as IRS-certified public charities under section 501(c)(3) nonprofits. What we do know is that government has not faced up to its responsibilities to make sure that the regulations they promulgate are available to an informed citizenry. The answer might be to encourage the SDOs to take a more public-spirited approach to their work, it might involve government paying for rights, it might involve switching to the many SDOs that do make their standards available to citizens at no charge and with no restrictions. (We would note that any fee government would pay to incorporate a standard by reference would be offset in part by the fees paid today by government entities to purchase individual copies of the standards they are required to oversee and enforce.)

4. **Conclusion**

Based on the foregoing, we urge that the best practices for providing access to standards incorporated by reference in regulation during rulemaking and during the effective period of the regulation, and for incorporating standards by reference in regulation, is to recognize that such standards, once they are incorporated by reference, are in the public domain and cannot be hidden behind copyright pay walls.

By making rules like the National Fuel and Gas Code, the standard for safety in wood and metal ladders, or the standards for safety and hygiene in water supplies, readily available to all without restriction, we make society better. People can read the standards and learn, they can improve upon them by making searchable databases or better navigational tools, they can build new kinds of businesses.

Innovation and education are just two of the benefits of opening up this world, but at the root are basic issues of democracy and justice. We cannot tell citizens to obey laws that are only available for the rich to read. The current system acts as a poll tax on access to justice, a deliberate rationing and restriction of information critical to our public safety. That system is wrong legally, it is wrong economically, and it is wrong morally.

We would be pleased to provide additional information at your request.

Sincerely yours,

David Halperin
Of Counsel
Public.Resource.Org

Carl Malamud
President and Founder
Public.Resource.Org