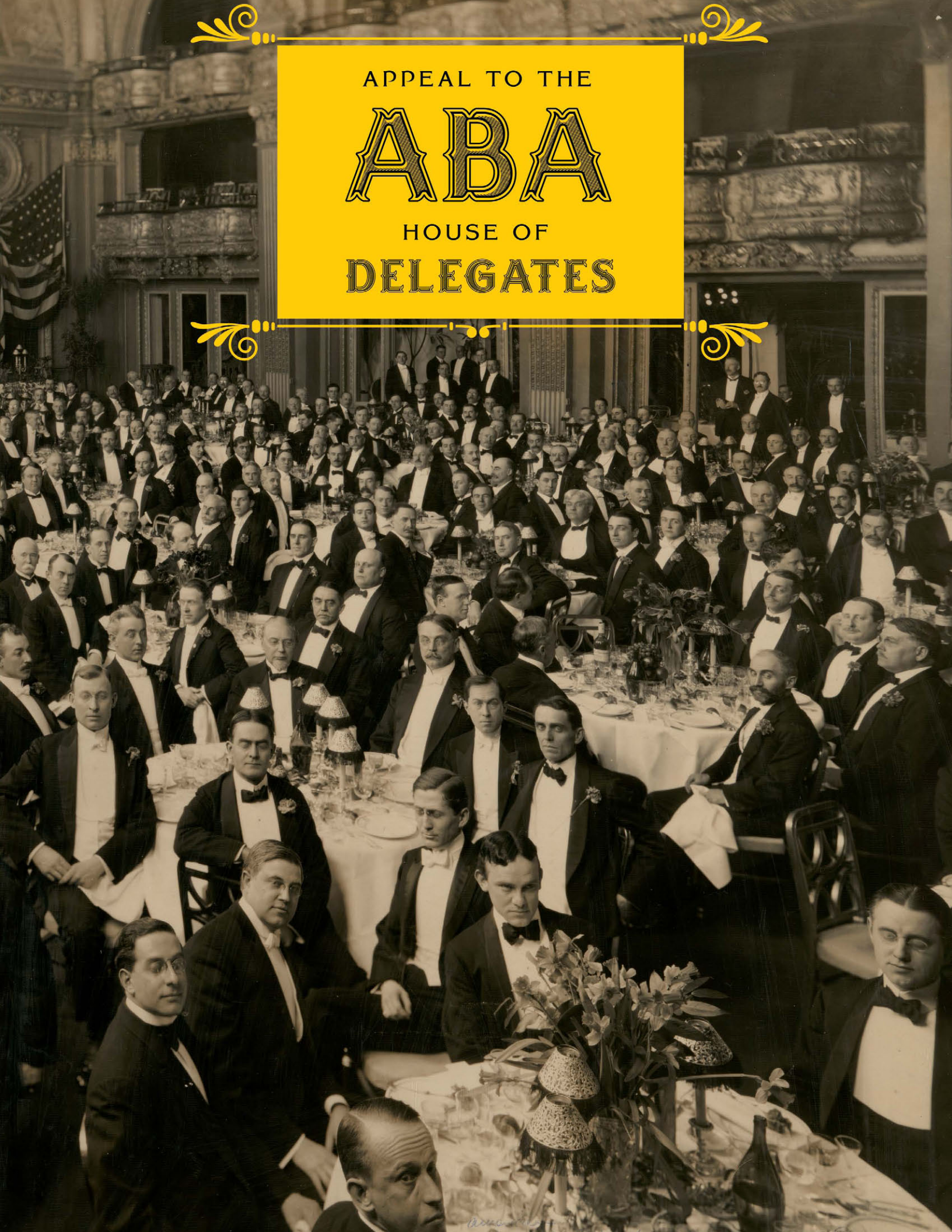
APPEAL TO THE
ABA
HOUSE OF
DELEGATES

APPEAL TO THE
AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES

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2016 ANNUAL MEETING

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SAN FRANCISCO, CALIFORNIA

MEMORANDUM

To: President Paulette Brown, American Bar Association
President-Elect Linda A. Klein, American Bar Association
Members of the ABA House of Delegates
Fellow Members of the American Bar Association

From: Carl Malamud, President, Public.Resource.Org ("Public Resource")

Date: July 1, 2016

Subj: The Code of Federal Regulations, Public Safety, and the Rule of Law

At the 2016 American Bar Association Annual Meeting in San Francisco, our House of Delegates will be asked to consider a resolution on a vital issue: how the texts of federal regulations concerning public safety are disseminated to citizens, businesses, government workers, and the bar. A copy of the proposed Resolution 112 is appended as Attachment A.

This resolution concerns public safety, such as the federal regulations for testing for lead in water. In Flint, Michigan, an estimated 10,000 children have been exposed to drinking water with high levels of lead, which has been known for centuries to cause serious health problems. Flint is just the tip of the iceberg. Hundreds of communities face a similar problem. Testing for lead in water is of great public interest, and it is crucial that this public safety standard be widely disseminated and observed so that communities like Flint can detect and correct these hazards.

The water in Flint is only one of many examples of public safety laws that we ignore at our peril. Federal regulations for blowout prevention in oil wells were ignored by BP, leading to a catastrophic oil spill in the Gulf of Mexico. Journalists, regulators, environmental groups, fishermen, and residents of states bordering the Gulf are all affected parties with a demonstrated need to know how we can prevent future spills.

In Texas City, Texas, federal safety regulations for oil refineries were ignored, leading to a hydrocarbon explosion that killed 15 workers, injured 170 others, and shattered windows three-quarters of a mile away. In San Bruno, California, failure to follow federal public safety regulations led to a gas line explosion that created a wall of fire 1,000 feet high. Emergency medical personnel, firefighters, local government officials, and residents are all affected parties with a demonstrated need to know the public safety requirements that are designed and enacted to protect our cities.

Public safety regulations are not limited to industrial settings. When a rash of child deaths resulted from poorly engineered garage door openers, the U.S. Congress mandated specific safety standards that have greatly reduced those accidents. The U.S. Consumer Product Safety Commission has numerous regulations governing the safety of toys, car seats, playgrounds, and

other items which—when improperly made, installed, or used—have killed and injured our children. Parents, consumer groups, state and local regulators, and many others not only want to read these safety requirements, they are fully capable of understanding what they say. They are clearly affected parties and have a demonstrated need to know the law.

Public safety laws are not obscure documents of interest only to a few corporate manufacturers, they are the tools we use to keep our world safe. In our increasingly technical modern world, public safety regulations are some of our most important laws. Yet, the ABA is being asked to endorse the proposition that access to those laws should be deliberately restricted. This would be a grave mistake, and would fly in the face of our long-standing advocacy for the rule of law.

This is not the first time a resolution of this nature has been presented to the House of Delegates. At the 2016 Midyear Meeting in San Diego, Resolution 106A was introduced by the Section on Administrative Law and Regulatory Practice on the topic of technical standards incorporated by reference into the Code of Federal Regulations. (Attachment B) Apparently, because no other sections were consulted and minority views had not been presented, the resolution was abruptly withdrawn and the section formed an Incorporation by Reference Task Force. The resolution which will be presented in San Francisco is the result of that task force.

The task force was asked to consider a specific issue: the dissemination of public safety standards that have been incorporated by reference into, and thus made part and parcel of, the Code of Federal Regulations. These public safety standards are developed by a variety of organizations, including several 501(c)(3) nonprofit Standards Development Organizations (SDOs), with the active participation of volunteers from all over the country and the support of government at all levels. Not all technical standards are incorporated by reference into law, and a very deliberate procedure must be used by regulatory agencies before they incorporate such text.

I am writing to you today to urge caution in considering this resolution for both procedural and substantive reasons. Procedurally, the task force report that there are no minority views, but this is because the task force did not allow those with "minority" views to participate. Additionally, the disclosure form accompanying the resolution states that none of the parties have a financial interest in the outcome. This is simply not true, because the entities who were permitted to participate are the very entities that benefit financially from restricting access to the law.

Substantively, incorporation by reference is part of a broader concern, the promulgation of primary legal materials. An informed citizenry is the bedrock of our system of government. Laws, court opinions, and regulations are the raw materials of our democracy. We cannot be, as John Adams said, an "empire of laws, not a nation of men" if we do not make our edicts of

government broadly available. There can be no rule of law without making the laws under which we choose as a people to govern ourselves freely available for all to read, and to speak.

The task force that was formed is dominated by organizations that profit from the sale of documents that have been incorporated into law and wish to exercise full control over how "their" portions of the law are used and presented. The SDO representatives on the task force include the general counsel of the American National Standards Institute (ANSI), ANSI's former chairman, and several others connected to private interests that have a financial stake in this issue.

What is more, this issue is the subject of ongoing litigation. Indeed, that litigation was the subject of a cover article in the ABA Journal in June 2014. (Attachment H) There are two U.S. District Court cases that have been underway for three years involving seven parties, including my organization, and eight law firms. Those two cases have piled up over 900 documents on the public part of the court docket and many more under seal. After three years of discovery and briefing, an oral argument before the court on the motions for summary judgment is scheduled for September 12. In other words, the task force is urging you to rush through a hastily assembled resolution on the exact same issues being considered by the judge, and to do so one month before the oral argument in those cases. Would it not be more prudent for the ABA to allow the courts to do their work before rushing in?

The transmittal letter from the task force chair to the sections states "the task force decided from the outset that it should not seek to influence the course of that litigation, and its recommendations would in no way result in the ABA taking sides in that dispute." (Attachment D) That statement does not ring true, and the resolution as written clearly stakes out a position—one that favors the SDOs who are plaintiffs in the litigation, which is no surprise since SDOs were amply and exclusively represented on the task force.

This resolution was developed in great haste in a process rife with procedural irregularities. The ANSI delegation has a clear stake in this litigation and has been pushing very hard to get the ABA to endorse its point of view. Initial consideration for the San Diego Midyear Meeting was a rushed and hurried affair, and the task force that was subsequently formed also had a sense of urgency to get this resolution "out the door"—with some participants perhaps keeping an eye on the progress of the ongoing litigation and the opportunity to try to influence it.

The composition of the task force represented that sense of urgency. In addition to the ANSI delegation, there were two other groups. First, there are administrative law experts, including Professors Levin and Mendelson, both of whom are widely respected scholars in the field. Let

me state clearly, that I have nothing but admiration and respect for the report that Professor Mendelson initially submitted that kicked off this activity. Her scholarship on incorporation by reference is insightful, accurate, and thoughtful. Even after the tinkering and editing from the task force, the background report is still quite useful and is a good introduction to a complex issue. It is the black-letter text of the resolution that was created by the task force that is troublesome.

To form the task force, the administrative law experts were joined by distinguished members from other sections. However, most of those other participants were new to the issue of incorporation by reference, and all of them were forced to rely on the ANSI delegation for insight into technical issues. The task force comprised 15 members from seven entities. (Attachment C)

What was notable about the task force was the lack of participation by any ABA members who work on the dissemination of legal material as part of their professional responsibilities. There were no government documents librarians, no government workers who make regulations, no law librarians, no legal publishers, and certainly no members with expertise in providing access to primary legal materials via the Internet. The legal scholars had to depend on the ANSI delegation, which came to the table with a definite agenda.

The lack of technical expertise about the Internet, legal publishing, and the use of technical standards in regulation was not because such experience is lacking in the ABA. The Technical Standardization Committee of the Section on Science and Technology Law has a large number of participants who have worked in this area for decades. I asked three different sections for permission to participate in the task force proceedings and was turned down on each occasion. Many other members asked to participate and were similarly rebuffed. Indeed, the long-time co-chairs and founders of the Technical Standardization Committee asked to participate in this process, and they were refused. They resigned their positions in protest. (Attachment E at 26)

Not only was participation in the task force limited to a chosen few, but the task force also failed to allow any additional views to be presented. The discussion was conducted in a vacuum. An overriding goal of the task force appears to have been the preservation of the revenue streams that flow to a few private organizations. As Professor Levin, the task force chairman, put it in his closing message to the group on May 9:

> *We all were aware that we were faced with a difficult policy issue that involved competing values – each reasonable on its own terms -- regarding public access and proprietary interests. Many people who had looked at the problem in the past had found no way to*

> *reconcile them. The task force, however, has devised a plan that, whatever its imperfections, holds significant promise of accommodating interests on both sides of the equation. (Attachment E at 44)*

Think for a moment about the interests that are being "reconciled." On the one side are the proprietary interests of a few nonprofit organizations, organizations that eagerly seek to have some of their standards incorporated into law, and also profit greatly from the sale of numerous products, such as the sale of non-mandatory standards, training, and certification. Nonprofit organizations such as ANSI have done quite well under the current system, paying million-dollar salaries to their executives and receiving numerous government subsidies, plus the all-important market positioning they get from being an official provider of an important segment of federal law. This is an enviable market position for a nonprofit, and they have profited handsomely from that position.

What is being balanced against those "proprietary interests" are the rights of the American people to read and speak the law. Joe S. Bhatia, the president of ANSI, put it well when he stated clearly that "a standard that has been incorporated by reference does have the force of law, and it should be available." These standards are integral to the regulations, no different than any other edict of government. Public safety laws are too important to be carved out as a special category of edict of government, a category subject to arbitrary limitations on use.

The way that "balance" was struck is what disturbs those of us who wished to participate. The task force is asking the ABA House of Delegates to endorse severe restrictions on how citizens can access regulations, in the form of "read-only" documents on the Internet. The term "read-only" is a term that doesn't make any sense to those of us who work on the Internet. What are being proposed are a series of licensing restrictions created by a click-through terms of use agreement, coupled with technical restrictions enforced by "Digital Rights Management" (DRM) technical measures. But the law is not a Hollywood movie and it is not a Tom Clancy novel. The law is special in our democracy, or in any society that observes the rule of law. The law belongs to the people and edicts of government are not subject to copyright under long-standing doctrines of common law and the clear and unambiguous policy of the U.S. Copyright Office.

Under the resolution that the ABA is being asked to approve, citizens would be required to preregister and then agree to onerous terms of use with a private organization before being allowed to access the law. Once on the web site, they would be presented with what is possibly the worst way to present this information. Users on the current ANSI "read-only" "reading room" are not allowed to print, copy, save, search, or even send a bookmark to a specific section of the law to a fellow citizen. In some of these "read-only" "reading rooms" that SDOs have

prepared, the standards must be viewed in a small box that requires scrolling back and forth to read a single sentence, and the text can be grainy and superimposed on other text warning against dissemination. Most of these "reading rooms" also discriminate against people with visual impairments because they do not properly support screen-reading software, and in quite a few cases explicitly disable that functionality.

For those of us in the American Bar Association, the concept of "read only" flies directly against the work practices of members of the bar who must use the law to do their jobs. Lawyers do not simply read the law, they cite the law and copy it, they publish extracts in documents such as briefs, treatises, and newsletters. If we entertain the notion that a category of our law requires a license in order to repeat those laws—and that is precisely the position today of ANSI and its fellow SDOs—the bar will be faced with a situation where permission to use the law may be granted only after the extraction of unreasonable rents and a request for permission, which may be arbitrarily granted or refused. This is not a theoretical situation; it is the current stance of the organizations that drafted this resolution and they are proposing that Congress codify those restrictions.

Most disturbing in the resolution that the ABA is being asked to endorse is the idea that the right to speak the law—to post it on the Internet in a transformative fashion that allows others to use it more effectively—belongs to a single private party, and that private party may require a license before others are permitted to work with the material. Just imagine if John B. West had needed a license before including court opinions in his National Reporter System, an innovation that became central to the practice of law in the United States. Allowing only a single party, or those to whom they arbitrarily grant a license, to control access to primary legal materials deliberately retards innovation in order to maximize revenue through a monopoly over crucial components of federal public safety law. Putting the brakes on innovation for presentation of the law not only hurts democracy, it hurts the legal profession, depriving lawyers of better tools and services.

It is fitting that the American Bar Association has turned its attention to this important issue, but we should not let ourselves be run over by a few private groups wishing to use our platform to rush through a resolution in order to take a position in litigation or to urge Congress to enhance their revenue streams. This resolution began as a call for legislation to increase access to the law, but what is before you today is an appropriations bill.

We should carefully study and discuss the issue of promulgation as one integral to the advancement of the rule of law. I believe the current resolution should be withdrawn and a more inclusive task force should be formed, one that holds hearings and deliberately addresses the issue with full consideration of the constitutional implications of limiting the promulgation of

federal law. Even if the House of Delegates does vote on this resolution at the Annual Meeting, could not five minutes be allocated on the agenda in order to hear a differing point of view before taking such a radical step?

Access to public safety regulations is part of access to the rulebook of our democracy. Controlling access to the text of the law cuts to the very heart of the rule of law. When the barons insisted that Magna Carta state "to no one will we sell, to no one deny or delay right or justice" they were talking about the practice of selling access to justice for a fee. (Attachment I) Last year the American Bar Association celebrated the 800th anniversary of Magna Carta, and we reaffirmed our long-standing commitment and support for the rule of law. Just one year later, we are being asked to negate the foundational principle that the law shall be promulgated.

When the United States passed the 24th Amendment to abolish the poll tax, it was "a verification of the people's rights," an acknowledgement that access to our democracy should not be contingent on access to money. (Attachment J) The same issue is at stake today when we consider imposing Digital Rights Management on the Code of Federal Regulations. What is before you in this resolution is a poll tax on access to justice.

Justice Stephen G. Breyer famously stated "if a law isn't public, it isn't a law." The resolution before you would endorse the proposition that the law should be subject to limitations on use for all people, with especially stringent limitations for people without means. Let us think much harder before we make that drastic leap and subject our law to crippling limitations, depriving citizens of their constitutional rights to read and speak the law without paying a fee and obtaining a license. The American legal system deserves better, and we in the American Bar Association should think carefully before we put forth a proposition so antithetical to our core values.

Respectfully submitted,

Digitally signed by Carl Malamud
DN: cn=Carl Malamud, o=Public.Resource.Org, ou, email=carl@media.org, c=US
Date: 2016.07.01 11:54:13 -07'00'

Table of Attachments

Attachment A

Proposed Resolution 112 and Report to the House of Delegates from the Incorporation by Reference Task Force, prepared for the Annual Meeting (May 10, 2016).

AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
SECTION OF INTELLECTUAL PROPERTY LAW
SECTION OF PUBLIC UTILITIES, COMMUNICATIONS, AND TRANSPORTATION LAW
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
SECTION OF SCIENCE & TECHNOLOGY LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

(a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public. To the extent that the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.

(b) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.

(c) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

(a) identify all privately drafted standards and other content previously incorporated by reference into that agency's regulations;

(b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and

(c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.

REPORT

The present resolution is a successor to Resolution 106A, which the Section of Administrative Law and Regulatory Practice submitted to the House of Delegates for action at the 2016 Midyear Meeting. That earlier version would have urged Congress to amend the Administrative Procedure Act to require "meaningful free public availability" of all text incorporated by reference into proposed and final substantive rules of general applicability.

However, that resolution elicited objections from several Sections. They asked Administrative Law to withdraw Resolution 106A from the Midyear Meeting agenda and to form an inter-Section task force charged with devising a substitute resolution that could attract broad support within the House. Administrative Law acceded to this request. As a result, a Task Force on Incorporation by Reference, composed of fifteen members from six Sections and one Division, was convened.[1] After extensive discussions, the task force recommended the present resolution.

The resolution is intended to advance the general principle that citizens in a democratic society must be able to consult the laws that govern them. A corollary of that principle is that all citizens should have access in full to binding federal regulations. Regulations themselves are published in the Federal Register and are freely available online and at all federal depository libraries. Under present law as implemented, however, affordability problems often undermine the principle of public access with respect to material that has been included in such rules through incorporation by reference (IBR). The legislation proposed in the resolution would provide for a common baseline of availability by requiring agencies to provide an online source at which IBR material in such rules may be consulted without charge. The legislation would also provide for access without charge to material incorporated by reference into *proposed* rules while those rules are under consideration, so that citizens may comment on those proposals.

At the same time, federal law recognizes the valuable contributions that voluntary consensus standards make to the nation's regulatory system. Moreover, the purposes and public interest served by copyright laws also deserve recognition and support. Recognizing these concerns, the resolution's proposed legislation is aimed at ensuring meaningful citizen access without unduly impairing the ability and incentive of organizations to produce standards that can be incorporated by reference into federal regulations.

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[1] Entities represented on the task force included the Sections of Administrative Law and Regulatory Practice (James W. Conrad, Jr., Ronald Levin (chair), Nina Mendelson), Civil Rights and Social Justice (Estelle Rogers), Intellectual Property Law (Janet Fries, Susan Montgomery, Mary Rasenberger), Public Utilities, Communications, and Transportation Law (William Boswell, Patricia Griffin), Real Property, Trust and Estate Law (James Durham), and Science & Technology Law (Ellen Flannery, Roderick Kennedy, Oliver Smoot), and the Government and Public Sector Lawyers Division (Gregory Brooker, Regina Nassen).

I. BACKGROUND

For over two centuries, the principle that all citizens should be able to read the law has been bedrock. Since the 1800s, Congress has provided public access to federal statutes without charge and, since the 1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System.[2] Congress has further extended the public access framework, first by requiring the Government Printing Office to provide universal online access to statutes and regulations,[3] and then by requiring online public access to other government documents and materials in the Electronic Freedom of Information of Act Amendments of 1996 and the e-Government Act of 2002.[4]

The Freedom of Information Act generally requires Federal Register publication of all agency "substantive rules of general applicability" and "statements of general policy or interpretations of general applicability."[5] However, it allows, in the so-called "incorporation by reference" (IBR) provision of 5 U.S.C. § 552(a)(1), that "matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."[6] Although the Office of the Federal Register (OFR) must approve all agency incorporations by reference, its regulations do not specify what level of access makes a particular standard "reasonably available" and thus eligible for incorporation by reference.[7]

Both the National Technology Transfer Act of 1995 and Office of Management and Budget Circular A-119 encourage federal agencies to rely on private voluntary consensus standards.[8] Accordingly, agencies have, on a great many occasions, worked with private

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[2] *See* H.R. Journal, 3d Cong., 2d Sess. 328-39 (1795) (describing Act of Mar. 3, 1795), Act of Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381.

[3] 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as "incremental costs of dissemination" and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.

[4] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (1996); E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)-(d), 207(f), 116 Stat. 2899, 2915-16, 2918-19 (codified as amended at 44 U.S.C. § 3501 note (2006)).

[5] 5 U.S.C. § 552(a)(1).

[6] *Id.*

[7] *See* 1 C.F.R. 51.7(a).

[8] *See* National Technology Transfer and Advancement Act of 1995 § 12(d), 15 U.S.C. § 272 note (2012) ("voluntary consensus standards"); Office of Management and Budget Circular A-119, http://www.whitehouse.gov/omb/inforeg_infopoltech (revised Jan. 27, 2016). Circular A-119 also contemplates agency use of other private standards that may not qualify as "consensus." Id. at 5.

standards development organizations (SDOs) and incorporated privately drafted standards by reference into thousands of federal regulations. These privately drafted standards unquestionably have significant public value. SDOs often support and sometimes even seek to have their privately drafted standards adopted as the law of the land. And agencies indisputably find it useful to draw upon this stock of standards.

The Code of Federal Regulations (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These "IBR rules" have the same legal force as any other government rule.[9] Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by SDOs.[10] SDOs range from the ASTM International (formerly the Association for Testing and Materials) to the Society of Automotive Engineers and the American Petroleum Institute.

Federal agencies use privately-drafted IBR rules for a host of subjects, ranging from toy safety,[11] crib and stroller safety, safety standards for vehicle windshields (so they withstand fracture),[12] placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf,[13] and food additive standards, [14] to operating storage requirements for propane tanks, aimed at limiting the tanks' potential to leak or explode.[15] Agencies are encouraged to participate actively in SDO technical committees that draft standards under their jurisdiction.[16]

However, obtaining public access to IBR standards can be difficult. In many cases, IBR rules cannot be accessed without charge either online or in the nearly 1,800 government

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[9] http://www.archives.gov/federal-register/cfr/ibr-locations.html#why (as explained by OFR, "This material, like any other properly issued rule, has the force and effect of law. . . mak[ing] privately developed technical standards Federally enforceable.")

[10] Emily J. Bremer, *Incorporation by Reference in an Open-Government Age,* 36 Harv. J. L. & Pub. Pol'y 131 (2013); Nina Mendelson, *Private Control over Access to the Law*: *The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737 (2014); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

[11] E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children's use, incorporating by reference National Fire Protection Association and ANSI standards)

[12] 49 C.F.R. § 571.2015.

[13] 30 C.F.R. 250.108 (incorporating by reference American Petroleum Institute Recommended Practice 2D).

[14] *See* 21 C.F.R. § 172.831 (sucralose regulation, incorporating by reference the Food Chemical Codex, 4th edition).

[15] 26 C.F.R. 1910.110(b)(3)(i) (incorporating by reference American Society for Mechanical Engineers' Boiler and Pressure Vessel Code (1968 edition)).

[16] *See* Circular A-119, *supra* note 8.

depository libraries. Under OFR's current approach, the public can access these rules without charge in OFR's Washington, D.C. reading room, but only by written request for an appointment.[17] Apart from this, OFR refers the public to the SDO. IBR standards accordingly are distributed across many individually-maintained private websites and available for purchase from the SDO and from third-party resellers.

SDOs typically sell or license publications of their standards for a fee, which may be in excess of the copying cost or other simple cost of making a standard available. SDOs maintain that publication income supports the work of preparing the standards. When SDOs elect to charge for an individual standard, the price can range from $40 to upwards of $1,000.[18] The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at $74;[19] the incorporated safety standard for hand-held infant carriers is $43,[20] and the current edition of the Food Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at $499.[21] The cost of reading the two newly-incorporated-by-reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is $213.[22] As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is $150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly $10,000 as of September 2014.[23]

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[17] *See* Office of the Federal Register, "Where to Find Materials Incorporated by Reference at NARA Facilities," available at http://www.archives.gov/federal-register/cfr/ibr-locations.html#why. Rulemaking agencies also sometimes make the text of IBR rules available for inspection in their own reading rooms, again, typically located in Washington, D.C.

[18] Membership in an SDO usually affords discounted access to its standards, but such memberships can be costly; for example, the American National Standards Institute charges $750 per year.

[19] *See* 29 C.F.R. 1926.602(a)(2)(i) (incorporating Society of Automotive Engineers Standard J386-1969); standards.sae.org/j386_196903/.

[20] *See* 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); *www.astm.org*. For unexplained reasons, the standard is absent from the online reading room ASTM maintains for government-incorporated standards.

[21] *See* 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); https://store.usp.org/OA_HTML/ibeCCtpItmDspRte.jsp?item=344067.

[22] *See* Nuclear Regulatory Commission, Revisions to Transportation Safety Requirements and Harmonization with International Atomic Energy Agency Transportation Requirements, 80 Fed. Reg. 33,988, 34,010-11 (June 12, 2015) (reciting charges for incorporated by reference standards).

[23] Emily Bremer, *On the Cost of Private Standards in Public Law*, 63 U. Kansas L. Rev. 279 (2015). SDOs occasionally charge more for an older version that an agency has incorporated by reference into binding law—a reflection of its governmentally-created value--than for the SDO's current version of those same standards. *See* Strauss, *supra* note 10, at 509-10.

As publicly-filed comments and other public sources indicate, these fees constrain some citizens and entities from seeing the law's text. Regulated entities are often small businesses for whom the mass of necessary standards may be a significant cost.[24] For example, as the Modification and Replacement Parts Association stated in its public comment to OFR: "The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . ."[25] Frequently, members of the public affected by regulatory frameworks relying upon IBR rules also cannot afford to read these standards. For example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.[26]

Some SDOs have created online reading rooms in which the public can view standards that agencies have incorporated by reference into federal regulations without payment of a fee. But these reading rooms do not consistently make all relevant standards available, and the

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[24] Public comments filed with OFR made this problem clear. The National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR's notice of proposed rule that the costs of acquiring access "can be significant for small businesses in a highly regulated environment, such as the propane industry." *See* Comments of Robert Helminiak, National Propane Gas Ass'n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 ("Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers . . . [T]he ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg on safety standards."); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (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 ... "); Comments of American Foundry Society, NARA-2012-0002-0147 ("$75 is not much for a standard, but a typical small manufacturer, including a foundry, may be subject to as many as 1,000 standards. The ASTM foundry safety standard alone cross-references 35 other consensus standards and that is just the tip of the iceberg. . . .").

[25] *See* Comment of the Modification & Replacement Parts Ass'n (Regulations.Gov, filed June 1, 2012) at 14, *available at* http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf.

[26] *E.g.,* Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes "many Vermont seniors" from accessing materials). *See also* Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that "free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . .and strengthen citizen participation in our democracy"); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers).

organizations uniformly reserve the right to revoke the access at will.[27] Some IBR content in rules, particularly older ones, is now simply unavailable from the SDOs at any price.[28]

To date, despite recent reviews by OFR and the Office of Management and Budget on related IBR practices, the executive branch has not acceded to proposals to provide for public access to IBR material in regulations without charge. In November 2013, OFR began a rulemaking in response to a 2012 rulemaking petition filed by Columbia Law School Professor Peter L. Strauss and joined by nearly two dozen signatories, mainly law professors. Arguing that the "reasonably available" language in 5 U.S.C. § 552(a) of the Freedom of Information Act had to be understood to require such access, the petition had asked OFR to approve IBR rules only if read-only access to the text without charge was provided to the public.[29] Ultimately, however, OFR declined to significantly revise its approach.[30] OFR has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.[31]

II. THE RESOLUTION

A. Premises of the Resolution

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[27] *E.g.*, ANSI, IBR Standards Portal, ibr.ansi.org (May 2, 2016) ("I agree that ANSI may terminate my access to the Licensed Materials at any time and for any reason. . ."); NFPA, "Accept Terms for Access," www.nfpa.org (May 2, 2016) ("NFPA may suspend or discontinue providing the Online Document to you with or without cause and without notice."); American Petroleum Institute Acceptance of Terms, http://publications.api.org/GocCited_Disclaimer.aspx ("API may suspend or discontinue providing the Online Document to you with or without cause and without notice.")

[28] For example, the following editions of privately-drafted standards, both incorporated by reference into agency rules, seem completely unavailable to read or buy on the SDOs' websites: American Conference of Governmental Industrial Hygienists, "Industrial Ventilation: A Manual of Recommended Practice" (22d ed. 1995), incorporated by reference in 29 C.F.R. 1910.124 (ventilation requirements for dip tanks); and ANSI 10.4-1963, "Safety Requirements for Personnel Hoists and Employee Elevators," incorporated by reference in 29 CFR 1926.552(c) (hoist safety).

[29] *See* Office of the Federal Register, Incorporation by Reference (Partial Grant of Petition, Notice of Proposed Rulemaking), 78 Fed. Reg. 60,784 (Oct. 2, 2013).

[30] *See* Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov. 7, 2014) (final rule). Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain "the ways that the materials it incorporates by reference are reasonably available to interested parties" and "summarize" the incorporated material. *See* 1 C.F.R. § 51.5(b)(2), (3). Further, although an agency is required to "summarize" in the preamble to a final rule "the material it incorporates by reference," that summary does not have to include the full text. 1 C.F.R. § 51.5(a)(2); 1 C.F.R. § 51.5(b)(3) (2015). In any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations.

[31] The Nuclear Regulatory Commission is currently proposing to incorporate by reference a variety of standards for nuclear plants; as the agency reports, the purchase prices for individual documents range from $225 to $720, and the cost to purchase all documents is approximately $9,000. Nuclear Regulatory Commission, Proposed Rules: Incorporation by Reference of American Society of Mechanical Engineers Codes and Code Cases, 80 Fed. Reg. 56,820, 56,848 (Sept. 18, 2015).

This resolution would put the ABA on record in support of legislation that would go far to promote public access to law, as well as public participation in federal regulation. The ABA should appeal to Congress now for two reasons: First, as noted, OFR has already engaged in a recent reexamination of its approach to implementing its responsibilities under the Freedom of Information Act. Adoption of the resolution would not signify any ABA view regarding OFR's interpretation of its authority under current law; it would, however, advocate a different approach under which a greater level of access would be required. Second, agency use of privately-drafted material incorporated into rules is likely to remain extensive, given continuing agency resource constraints, as well as executive and congressional policy favoring agency reliance on voluntary consensus standards. At this time, congressional action seems the most promising option to provide a higher, consistent level of public access.

As discussed above, facilitation of the public's ability to know the contents of binding law is a longstanding tradition in this country, tangibly reflected in the provisions of the Freedom of Information Act.[32] Indeed, this objective harmonizes with central principles of our constitutional tradition. After all, an essential element of due process of law is that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[33] Similarly, broader access to the contents of regulations would advance principles underlying the First Amendment, because "'a major purpose of that Amendment was to protect the free discussion of governmental affairs,' [and thereby] ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[34]

It should be noted that the public needs access to IBR material in *proposed* regulations no less than in *adopted* regulations. As well-established principles governing the rulemaking process require, an agency's notice of a proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment.[35] These procedural requirements, which serve to maintain the legitimacy of agency rulemaking, require that "interested persons" be able to participate in rulemaking by submitting "data, views, or arguments" – public comments – to the agency.[36] Yet an "interested person" cannot meaningfully exercise his or her right to comment without access to the substance of the standard

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[32] 5 U.S.C. § 552(a)(1)(D) (2012).

[33] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012).

[34] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 604 (1982) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[35] 5 U.S.C. § 553(b)(3); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) ("The object [of § 553(b)], in short, is one of fair notice.").

[36] 5 U.S.C. § 553(c).

on which comment is to be filed.[37] Requiring an "interested person" to pay a fee to learn the content of a proposed rule is a genuine obstacle impeding that person's right to comment under the Administrative Procedure Act.

On the other hand, many SDOs reportedly rely heavily upon the revenue derived from the sale of their copyrighted standards in order to conduct their operations. They maintain that unconstrained public access to such material would leave them unable to continue to develop and produce the standards themselves unless an alternative revenue stream were made available. At the same time, many agencies would be unable, unwilling, or without sufficient resources to replicate what the SDOs currently do. Indeed, as discussed above, agencies often find that they greatly benefit from their ability to make use of these standards. Consequently, any legislation in this area should avoid creating a situation in which access to IBR material in regulations would be provided without charge, but the standards themselves would cease to be developed by the SDOs due to inadequate funding.

As discussed in greater detail below, the resolution incorporates a number of limitations on the recommended public access requirements, so as to ameliorate any reduction in the economic value of copyrighted standards. In some instances, however, these limitations may not obviate the need for additional funding from the government to compensate SDOs for the use of their standards. The extent to which the access requirements contemplated by the resolution would give rise to a need for compensation in a host of different contexts cannot be predicted with certainty. The resolution leaves these determinations to be made between agencies and SDOs during the process through which authorization for use of copyrighted material is secured. The ultimate point, however, is that society benefits from the public's ability to obtain access to requirements incorporated by reference into federal regulations; thus, in situations in which agencies elect to continue to rely on IBR rules and conclude, in consultation with SDOs, that compensation is appropriate, the expenditure of public resources to support such access should be considered legitimate and worthwhile, and Congress should be willing to fund such expenditures.

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[37] *Cf.* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) (requiring agencies to disclose data to effectuate meaningful right to public comment).

B. Authorization Provisions

In light of the objectives discussed above, the resolution urges Congress to enact carefully limited statutory requirements that would come into play when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization. The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public. To the extent that the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material. The agency might determine, as a threshold matter, that the particular material that the agency intends to incorporate by reference is not copyrightable or that the intended use is within the scope of fair use. But if the material is indeed subject to copyright protection, authorization from the copyright holder would be required. The Copyright Office should consider providing guidance to agencies as to how to handle copyright questions that would frequently arise in this connection, and agencies themselves should consider promulgating their own rules or internal guidance to regularize their responses to recurring situations that fall within their respective fields of authority.

The resolution also urges Congress to give agencies permanent authority to enter into agreements with copyright holders to implement the access requirements of the proposed legislation, such as license or assignment agreements, that would grant the agencies the right to implement the access requirements of the proposed legislation and to pay the copyright holders any negotiated fees. Long-term authorization would contribute greatly to the stability of the proposed regime by providing a basis for agency-SDO negotiations to ensure the newly required level of access.

C. Access Provisions

Under the legislation proposed in the resolution, the public access provided by the agency should include, at a minimum, true read-only access to the incorporated portions of the standard, available without charge on a website. The legislation should also provide that such access must be available on computer facilities at government depository libraries; this requirement would address "digital divide" concerns by ensuring meaningful access for persons who do not have computers of their own. The recommended legislation would not, however, require access to a hard-copy version of the incorporated material. This limitation is one way in which the resolution seeks to respect the proprietary interests of SDOs. Read-only access should generally be sufficient to enable citizens to ascertain the contents of proposed or final rules that may affect their rights or obligations. On a voluntary basis, however, SDOs might choose (as some already do) to allow the agency to make downloadable text freely available, or to permit access to hard copies at depository libraries.

Furthermore, as noted, the public access required by the legislation would apply only to the portions of a standard that have been incorporated by reference into a regulation. This limitation is another accommodation to the interests of SDOs. To the extent that those organizations have customers that are willing to purchase an entire copy of a given standard, or other products or services derived from it, the organizations would continue to be able to rely on profits from sales to such customers to recoup costs of creating the standards.

Another practical issue is that the "incorporated portion" of a standard may contain cross-references to a separate part of the standard, which in turn contains cross-references to a different part, and so forth. Agencies will need to be given discretion to make reasonable judgments about how much cross-referenced text they will need to make available through public access. In view of the competing policy considerations underlying the resolution, the legislation should make clear that the goal of this discretion should be to make available enough of the standard to enable members of the public to have access to and understand the portions of the standard that have been made part of federal law, but need not provide more than that limited amount.

Agencies providing public access should ensure that the incorporated material will be presented in a manner that enables reading such material in the context of the relevant section(s) of the associated regulation. For example, the software might provide for a hyperlink between the text of the regulation and the IBR text. However, data formats may vary according to the characteristics of the software platform and may evolve over time. Accordingly, the resolution leaves the details to Congress and the agencies to work out as present and future circumstances may warrant. Agencies providing public access will also need to be attentive generally to other accessibility concerns, including ensuring that the relevant text is available over time and that the public is readily able to locate and use the website on which the text appears.

D. Transition and Ancillary Provisions

Under the resolution, the foregoing requirements and expectations would apply to regulations issued after the effective date of the proposed legislation. In principle, access to IBR text in existing regulations is also highly desirable. However, the administrative burdens of bringing all existing IBR regulations into compliance with the access requirements of the proposed legislation would be considerable. Accordingly, the resolution urges Congress to require each agency to establish a reasonable plan and timeline to provide public access to IBR text in regulations as described herein, including obtaining relevant authorizations and amending or repealing regulations to eliminate incorporations by reference for which authorization is not obtained. The availability of funding to compensate SDOs for use of copyrighted material may be one factor that such plans would need to take into account.

Finally, the proposed legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other currently applicable law.

For example, whatever rights a copyright holder may possess under current law to bring suit against a third party for infringement of their copyright interests in IBR material in regulations would continue to exist under the regime that the resolution advocates.

E. The Scope of the Resolution

By adopting the resolution, the ABA would not, itself, endorse any view regarding the copyright status of any privately developed standards currently incorporated by federal agencies into regulations. Thus, the resolution would not imply a position regarding any pending litigation related to that issue. Nor would the resolution imply any ABA view regarding the desirability of additional legislation that would require public access on any broader basis than the statute that the resolution itself advocates.

However, *voluntary* agreements between agencies and SDOs to provide broader public access to IBR text than would be required by the legislation recommended herein would be entirely compatible with the spirit of the resolution. In considering the possibility of entering into those agreements, agencies and organizations should take account of the guidelines stated in Recommendation 2011-5 of the Administrative Conference of the United States[38] and Circular A-119 of the Office of Management and Budget.[39] Other recommendations to agencies in these pronouncements also deserve sympathetic consideration, such as their admonition that agencies should update incorporations by reference on a timely basis.

III. CONCLUSION

This resolution seeks to protect and promote two essential public interests: the ability of the public to ascertain the requirements imposed by binding regulations governing private conduct, and the intellectual property interests of private entities whose standards may be incorporated by reference into those regulations. It is submitted that the resolution proposes a reasonable balance between these interests and deserves favorable consideration by the House of Delegates, and then by Congress.

Respectfully submitted,

Jeffrey A. Rosen
Chair, Section of Administrative Law and Regulatory Practice
August 2016

GENERAL INFORMATION FORM

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[38] ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (2012).

[39] Revised OMB Circular No. A-119, *supra* note 8.

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeffrey A. Rosen, Section Chair

1. Summary of Resolution(s).

   The resolution proposes legislation that would require federal agencies to provide an online source at which material that has been incorporated by reference into proposed or final regulations can be consulted without charge. At least read-only access would have to be afforded. This requirement would serve to enhance citizens' ability to see the law, to ascertain their legal obligations, and to comment on pending rulemaking proposals. The proposed legislation would contain limitations that are designed to accommodate the intellectual property interests of organizations that create incorporated standards.

2. Approval by Submitting Entity.

   The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on May 2, 2016.

3. Has this or a similar resolution been submitted to the House or Board previously?

   Resolution 106A, dealing with similar subject matter, was submitted to the House for consideration at the 2016 Midyear Meeting. Opposition to that resolution led to its withdrawal and to formation of an inter-entity task force. That task force, after deliberations, drafted and recommended the present resolution.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   None is directly relevant.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   N/A

6. Status of Legislation. (If applicable)

   N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   Policy could be implemented by legislative action.

8. Cost to the Association. (Both direct and indirect costs)

   None.

9. Disclosure of Interest. (If applicable)

   N/A

10. Referrals.

    The five Sections that are cosponsoring the resolution were represented (along with Administrative Law, the principal sponsor) on the task force that drafted and recommended the resolution. The Government and Public Sectors Lawyers Division was also represented on the task force.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Professor Nina A. Mendelson
    University of Michigan Law School
    625 S. State St.
    Ann Arbor, MI 48109
    (734) 936-5071 (o)
    nmendel@umich.edu

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

    Professor Ronald M. Levin
    Washington University School of Law
    Campus Box 1120
    St. Louis, MO 63130
    (314) 935-6490 (office)
    (314) 882-3039 (cell)

rlevin@wustl.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution proposes legislation that would expand public access to material that has been incorporated by reference into proposed or final federal regulations.

2. Summary of the Issue that the Resolution Addresses

Thousands of binding federal regulations "incorporate by reference" material that is contained in standards drafted by private organizations. In many instances, members of the public can obtain access to such material only by visiting a reading room in Washington, D.C., or by purchasing a copy of the standard from the organization that created it. This limited access can create a cost barrier for small businesses that wish to ascertain their obligations under these regulations, as well as for citizens who wish to comment on pending regulations. The policy challenge is to ensure public access to incorporated material in a manner that acknowledges the intellectual property interests of standards development organizations and that does not unduly impair their ability and incentive to continue to produce such standards.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The resolution urges Congress to require that when a federal agency intends to incorporate material from an industry code into a proposed or final regulation, it must obtain authorization from the copyright holder for any portion of the incorporated material that is subject to copyright protection. The authorization must at least provide for members of the public to have access without charge to a read-only online copy of the incorporated material. Access to the online content must be available on computer facilities in depository libraries. The proposed legislation would also permanently authorize agencies to enter into agreements with copyright holders to accomplish the access requirements. Under the legislation, agencies would be expected to apply the access requirements directly to newly adopted regulations and to establish reasonable plans and timelines to bring existing regulations into conformity with the same regime.

4. Summary of Minority Views

None identified.

Attachment B

Proposed Resolution 106A and Report to the House of Delegates from the Section of Administrative Law and Regulatory Practice, prepared for the Mid-Year Meeting (Withdrawn) (December 4, 2015).

AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to amend 5 U.S.C. §552(a)(1) of the Freedom of Information Act (FOIA) to require that when a standard drafted by a private organization is exempted from Federal Register publication because it has been "incorporated by reference" (IBR) into a substantive rule of general applicability, the rulemaking agency must ensure meaningful free public availability of the incorporated text, such as through online access in a centralized online location or access in all government depository libraries.

FURTHER RESOLVED, That the American Bar Association urges Congress to amend 5 U.S.C. §553, the Administrative Procedure Act's rulemaking provisions, to require meaningful free public availability of a proposed IBR standard's text during the public comment period.

FURTHER RESOLVED, That the American Bar Association urges Congress to ensure that private organizations**,** where appropriate, have access to compensation for financial losses attributable to making their standards publicly available.

106A

REPORT

I. INTRODUCTION AND BACKGROUND

For over two centuries, the United States has maintained a constitutive tradition of meaningful free access to our binding laws: that all citizens should be able to see the law is bedrock. Since the 1800s, Congress has provided free public access to federal statutes and, since the1930s, to federal regulations as well, through a network of state and territorial libraries, followed by the creation of the Federal Depository Library System.[1] Congress further deepened the tradition by requiring the Government Printing Office to make available universal online access to statutes and regulations[2] and then requiring online public access to other government documents and materials in the Electronic Freedom of Information of Act Amendments in 1996 and the e-Government Act of 2002.[3]

For numerous federal rules, however, public access is far from assured; these rules can be difficult to find and costly to read. The Freedom of Information Act generally requires Federal Register publication for all agency "substantive rules of general applicability" and "statements of general policy or interpretations of general applicability."[4] However, it allows, in the so-called "incorporation by reference" provision of 5 U.S.C. § 552(a)(1), that "matter reasonably available to the class of persons affected thereby [may be] deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."[5]

To save resources and build on private expertise, federal agencies have, on numerous occasions, worked with private organizations, incorporating privately drafted standards by reference into thousands of federal regulations. The Office of the Federal Register (OFR) must approve all agency incorporations by reference, but the Freedom of Information Act provides no further specifics on what level of access might be

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1 *See* H.R. Journal, 3d Cong., 2d Sess. 328-39 (1795) (describing Act of Mar. 3, 1795), Act of Dec. 23, 1817, res. 2, 3 Stat. 473; Act of Feb. 5, 1859, ch. 22, § 10, 11 Stat. 379, 381.

2 44 U.S.C. § 4102(b)(2006) (capping recoverable costs as "incremental costs of dissemination" and requiring no-charge online access in government depository libraries). The GPO charges no fee whatsoever for online access.

3 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 4(7), 110 Stat. 3048, 3049 (1996); E-Government Act of 2002, Pub. L. No. 107-347, §§ 206(a)-(d), 207(f), 116 Stat. 2899, 2915-16, 2918-19 (codified as amended at 44 U.S.C. § 3501 note (2006)).

4 5 U.S.C. § 552(a)(1).

5 *Id.*

understood to make a particular standard "reasonably available" and thus eligible for incorporation by reference. Meanwhile, OFR has declined to define "reasonably available" in its regulations, despite its statutory responsibility to approve agency incorporations.[6] *See* 1 C.F.R. 51.7(a). Research also has revealed no public consideration by OFR of access charges to incorporated standards.[7]

The Code of the Federal Register (C.F.R.) presently contains nearly 9,500 agency incorporations by reference of standards. These "IBR rules" have the same legal force as any other government rule. Some IBR rules incorporate material from other federal agencies or state entities, but thousands of these rules are privately drafted standards prepared by so-called "standards development organizations," or "SDOs."[8] Standards development organizations range from the Society of Automotive Engineers to the American Petroleum Institute. As the Office of the Federal Register has explained, "[t]he legal effect of incorporation by references is that the material is treated as if it were published in the *Federal Register* and CFR. This material, like any other properly issued rule, has the force and effect of law. . . mak[ing] privately developed technical standards Federally enforceable."[9]

Federal agencies seek to use privately-drafted IBR standards on subjects ranging from toy safety,[10] crib, toddler bed, and stroller safety, safety standards for vehicle

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6 *See* Incorporation by Reference, 79 Fed. Reg. 66,267, 66,270 (Nov., 7, 2014) (final rule). Beyond that, the OFR Director is to assess whether incorporation would "substantially reduce the volume of material published in the Federal Register," and whether the material is "usable," considering "the completeness and ease of handling of the publication; and . . . [w]hether it is bound, numbered, and organized." 1 C.F.R. 51.7(a). In the digital age, these requirements now would seem to serve little purpose.

7 *E.g.* Consumer Product Safety Commission, *Children's Gasoline Burn Prevention Act* Regulation, 80 Fed. Reg. 16,961, 16,962-63 (Mar. 31, 2015) (OFR approval of incorporation by reference of ASTM F2517-15 despite lack of free access); www.astm.org (charging $43 for standard; unavailable in reading room). As of November, 2014, an agency requesting approval of incorporation by reference must itself discuss how the materials are "reasonably available to interested parties." 1 C.F.R. 51.5(a)(1), but it is unclear whether the OFR will make any independent determination on that question or simply defer to the agency.

8 Emily J. Bremer, *Incorporation by Reference in an Open-Government Age,* 36 Harv. J. L. & Pub. Pol'y 131 (2013); Nina Mendelson, *Private Control over Access to the Law*: *The Perplexing Federal Regulatory Use of Private Standards*, 112 Mich. L. Rev. 737 (2014); Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

9 http://www.archives.gov/federal-register/cfr/ibr-locations.html#why. In some instances, as discussed below, a regulated entity might be able to argue that the lack of public access undermines notice sufficiently to prevent federal enforcement.

10 E.g., 16 C.F.R. §§ 1505.5, 1505.6 (CPSC requirements for electrically operated toys, including toys with heating elements, intended for children's use, incorporating by reference National Fire Protection Association and ANSI standards)

windshields (so they withstand fracture),[11] placement requirements for cranes on oil drilling platforms on the Outer Continental Shelf,[12] and food additive standards, [13] to operating storage requirements for propane tanks, aimed at limiting the tank's potential to leak or explode.[14] Executive policy, embodied in Circular A-119, now encourages agencies to contribute funds to private standards drafting as well as informal agency staff participation in the SDO process.

Meanwhile, public access to such standards can be extremely difficult, as it is typically impeded by privately set access charges. Unlike the U.S. Code and the rest of the C.F.R., there is no assured free access to IBR rules either online or in the nearly 1800 government depository libraries. Under OFR's approach, these standards can be freely read by the public in the Washington, D.C. reading room of the Office of the Federal Register, but only by written request for an appointment.[15] Apart from this, OFR refers the public to the SDO. These IBR standards accordingly are strewn across many individually-maintained private websites. SDOs also can set a fee for access, typically one that far exceeds the transactions costs, such as copying costs, of making a standard available.

Membership in an SDO usually affords discounted access to its standards, but such memberships are costly; for example, the American National Standards Institute charges $ 750 per year. Otherwise, access to an individual standard can range from $40 to upwards of $1000. The incorporated safety standard for seat belts on earthmoving equipment such as bulldozers is currently priced at $72;[16] the incorporated safety standard for hand-held infant carriers is $43,[17] and the current edition of the Food

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11 49 C.F.R. § 571.2015.

12 30 C.F.R. 250.108 (incorporating by reference American Petroleum Institute Recommended Practice 2D).

13 *See* 21 C.F.R. § 172.831 (sucralose regulation, incorporating by reference the Food Chemical Codex, 4th edition).

14 26 C.F.R. 1910.110(b)(3)(i) (incorporating by reference American Society for Mechanical Engineers' Boiler and Pressure Vessel Code (1968 edition)).

15 *See* Office of the Federal Register, "Where to Find Materials Incorporated by Reference at NARA Facilities," available at http://www.archives.gov/federal-register/cfr/ibr-locations.html#why. Rulemaking agencies also sometimes make the text of IBR rules available for inspection in their own reading rooms, again, typically located in Washington, D.C.

16 *See* 29 CFR 1926.602(a)(2)(i) (incorporating Society of Automotive Engineers Standard J386-1969); standards.sae.org/j386_196903/. The price of $72 is for the current revision of Standard J386. It is unclear whether the 1969 version can be accessed at all on SAE's website.

17 *See* 16 C.F.R. 1225.2 (incorporating by reference ASTM F 2050-13a); *www.astm.org*. The standard is inexplicably absent from the online reading room ASTM maintains for government-incorporated standards.

Chemical Codex, which the FDA has incorporated by reference into food additive standards, is priced at $ 499.[18] As Professor Emily Bremer has reported, the average price for just one incorporated pipeline safety standard is $150, while a complete set of IBR standards implementing the Pipeline and Hazardous Materials Safety Act cost nearly $10,000 as of September 2014.[19] The cost of reading the two newly-incorporated-by-reference standards for the packaging and transportation of radioactive material, to avoid radiation leakage in transit, is $ 213.[20]

The SDOs have no obligation to make standards available at any price, and some standards, particularly older ones, are now simply unavailable from the SDOs. On the other hand, SDOs occasionally charge more for an older version that an agency has incorporated by reference into binding law—a reflection of the newly conferred monopoly value--than for the SDO's current version of those same standards.[21]

As publicly-filed comments and other public sources indicate, the fees charged for IBR rules significantly obstruct citizens and entities from seeing the text of this law. Regulated entities needing access to incorporated standards are often small businesses for

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18 *See* 21 C.F.R. 172.185(a) (test methods standard for TBHQ in the food additive); https://store.usp.org/OA_HTML/ibeCCtpItmDspRte.jsp?item=344067.

19 Emily Bremer, On the Cost of Private Standards in Public Law, 63 U. Kansas L. Rev. 279 (2015).

20 *See* Nuclear Regulatory Commission, Revisions to Transportation Safety Requirements and Harmonization with International Atomic Energy Agency Transportation Requirements, 80 Fed. Reg. 33,988, 34,010-11 (June 12, 2015) (reciting charges for incorporated by reference standards).

21 For example, the American Herbal Products Association charges $250 for a digital-rights-protected copy of the first edition of its Herbs of Commerce, use of which is a legal obligation under FDA regulations; the more recent second edition, a "must-have" for anyone in the business but not yet made legally obligatory, can be bought as a book for $99. Peter Strauss, *Private Standards Organizations and Public Law*, 22 Wm. & Mary Bill Rts. J. 497 (2013).

whom the mass of necessary standards may be a significant cost.[22] For example, as the Modification and Replacement Parts Association commented in response to the petition for rulemaking, "The burden of paying high costs simply to know the requirements of regulations may have the effect of driving small businesses and competitors out of the market, or worse endanger the safety of the flying public by making adherence to regulations more difficult due to fees . . . ."[23]

And given the access fees charged, members of the public affected by regulatory frameworks relying upon IBR rules likely cannot afford to read these standards. For example, a staff attorney at Vermont Legal Aid filed a public comment indicating that the costs of accessing IBR rules interfered with the ability of Medicare recipients to know their rights.[24]

In a positive development, some of the many SDOs have begun to create online reading rooms in which IBR rules can be viewed without payment of a fee. But standards are still very hard to locate, not consistently available, and readers must identify

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22 Public comments filed with the Office of Federal Register made this problem clear. The National Propane Gas Association, an organization whose members are overwhelmingly (over 90%) small businesses, commented in response to OFR's notice of proposed rule that the costs of acquiring access "can be significant for small businesses in a highly regulated environment, such as the propane industry." *See* Comments of Robert Helminiak, National Propane Gas Ass'n, OFR 2013-0001-0019 (Dec. 30, 2013), at 1; Comments of Jerry Call, American Foundry Society, NARA-12-0002-0147 (June 1, 2012), at 1-2 ("Obtaining IBR material can add several thousands of dollars of expenses per year to a small business, particularly manufacturers . . . [T]he ASTM foundry safety standard alone cross references 35 other consensus standards and that is just the tip of the iceberg on safety standards."); Comments of National Tank Truck Carriers, NARA-2012-0002-0145 (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 ... "); Comments of American Foundry Society, NARA-2012-0002-0147 ("$ 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 ...").

23 *See* Comment of the Modification & Replacement Parts Ass'n 14 (Regulations.Gov, filed June 1, 2012), *available at* http://www.regulations.gov/contentStreamer?objectId=09000064810266b8&disposition=attachment&contentType=pdf

24 *E.g.,* Comments of Jacob Speidel, Senior Citizens Law Project, Vermont Legal Aid, OFR-2013-0001-0037 (Jan. 31, 2014), at 1 (price precludes "many Vermont seniors" from accessing materials). *See also* Comments of Robert Weissman, Public Citizen, OFR 2013-0001-0031 (Jan. 31, 2014), at 1 (reporting on behalf of multiple nonprofit, public interest organizations that "free access . . . will strengthen the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges . . .and strengthen citizen participation in our democracy"); Comments of George Slover and Rachel Weintraub, Consumers Union and Consumers Federation of America, OFR 2013-0001-0034 (Jan. 31, 2014) (noting importance of transparent standards to identify products that are not in compliance with applicable standards so as to notify the agency and alert consumers).

themselves, waive a variety of rights, and even agree to objectionable conditions, including broad indemnification and forum selection clauses, in order to see the text of the rules. And SDOs uniformly reserve the right to revoke the access at will. This insufficiently assures meaningful public access.

Agency use of IBR rules raises two particularly pressing issues. The first is the lack of consistent and meaningful public access to the text of these binding federal rules. While IBR rules are not formally secret, the financial obstacles that must be overcome to read the text undermine any notion of meaningful public availability. Second, the lack of access to proposed IBR rules, as well as supporting data, undermines the public's right to comment on proposed agency rules under the Administrative Procedure Act.

The present resolution would put the ABA on record in support of the principle of meaningful public access to law, as well as public participation in federal regulation. The ABA should speak now for two reasons: First, as described below, the Office of the Federal Register has recently declined an opportunity to use its Freedom of Information Act implementation powers to effectuate these principles. Second, agency use of privately-drafted rules is likely to increase, given continuing agency resource constraints, as well as executive and congressional policy favoring agency use of privately drafted rules in preference to "government-unique" rules.[25] Unfortunately, neither policy has directly engaged the resulting public access problems.[26] Only Congressional action will remedy this unsatisfactory situation. A clear and strong statement by the ABA on the topic should help prompt such action.

II. DISCUSSION

A. The Bedrock Principle of Public Access to the Law Should Be Reaffirmed in the IBR Rules Setting

IBR rules are not formally "secret"—access is not prohibited outright. Self-evidently, however, the cost of reading it, together with the difficulty of finding it, render these standards inaccessible to the public. At root, there must be meaningful free access to all incorporated rules, if the evils of "secret law" that the Freedom of Information Act was established to resist are to be avoided. In the words of Columbia Law Professor Peter Strauss, joined by numerous other professors: "[I]n the age of information, secret

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[25] *See* National Technology Transfer and Advancement Act of 1995, sec. 12(d), 15 U.S.C. § 272 note (2012); Office of Mgmt & Budget, Circular A-119 Revised; Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), available at http://whitehouse.gov/omb/circulars_a119.

[26] Concerns about the pitfalls of incorporation by reference were also highlighted in a recent recommendation of the Administrative Conference. *See* ACUS Recommendation 2011-5, *Incorporation by Reference*, 77 Fed. Reg. 2257 (2012).

law, that the public must pay for to know, is unacceptable."[27] The ABA accordingly should resolve that the Freedom of Information Act be clarified to ensure meaningful levels of free public access to all binding law.

1. As the authors and owners of the law, the public has a right to know it

First, free public access to the law is essential in a democratic society. As the 5th Circuit explained in *Veeck v. Southern Bldg. Code Cong. Int'l*, free public access to the law serves "the very important and practical policy that citizens must have free access to the laws which govern them" if they are to be able to conform their conduct to them.[28] *Veeck* relied principally on the Supreme Court's holding in *Banks v. Manchester* that "[i]t is against sound public policy to prevent [free access to judicial opinions], or to suppress and keep from the earliest knowledge of the public the statutes."[29] As explained in *Veeck*, these justifications are not simply "due process" arguments. Rather, they rest on the idea that "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."[30]

This "right to know" accrues to *all* citizens, not just those who must conform their conduct to the law. Broad public access to IBR material, is as important as access by directly regulated entities. "Th[e] 'metaphorical concept of citizen authorship'" requires free public access to the law as a foundation to a legitimate democratic society. "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."[31] Thus, even those who need not conform their conduct to regulatory requirements have a right to know. As public comments filed

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27 Incorporation by Reference, 77 Fed. Reg. 11,414, 11,415 (Feb. 27, 2012) (posting of law professors' petition to revise IBR rules; seeking comment on same).

28 293 F.3d 791, 795-800 (5th Cir. 2002) (en banc).

29 *See* 128 U.S. 244, 253 (1888) (quoting *Nash v. Lathrop*, 142 Mass. 29, 6 N.E. 559 (1886)).

30 293 F.3d at 799.

31 *Veeck,* 293 F.3d at 799 (quoting *Building Officials & Code Adm. v. Code Technology*, 628 F.2d 730, 734 (1st Cir. 1980)).

to the Office of the Federal Register and the Office of Management and Budget make clear, the public has an interest in reading IBR material.[32]

Ready access to standards that have been incorporated by reference is necessary for citizens to know what their government is doing and to hold the government accountable for serving – or not serving – the public interest. As President Obama stated in his Memorandum on Transparency and Open Government, on January 21, 2009: "Transparency promotes accountability and provides information for citizens about what their Government is doing." This transparency, including public access to the content of regulations, is a critical safeguard against agency capture and other governance problems. Transparency regarding the content of IBR standards is particularly important when that material has been prepared, in the first instance, by private organizations rather than governmental agencies – as when, for example, natural gas pipeline safety rules and offshore oil drilling rules incorporate standards drafted by the American Petroleum Institute, and even when motor vehicle safety standards incorporate standards drafted by the Society of Automotive Engineers. We note that regulatory standards created by industry associations such as the API, compared with professionally focused organizations such as ASME, the American Society of Mechanical Engineers, may raise particular concerns warranting public awareness. Still, this is not to criticize any particular standard or organization, but to emphasize that transparency and ready access are critical to ensuring that the government makes proper use of ***all*** incorporated material and that adopted standards do, in fact, protect the public interest as required by statute. And as the 5th Circuit pointed out in *Veeck*, citizens need access to the law not only to guide their actions and to hold the government accountable, but "to influence future legislation" and to educate others.[33]

2. Limits on public access raise constitutional difficulties

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[32] See supra note 24 (Vermont Legal Services comment); NARA-12-0002-0140 (Consumers Union, emphasizing the need for free access to standards to notify the CPSC and warn consumers regarding unsafe products);OMB-2012-0003-0074 (public interest organizations, including environmental, watchdog, and library organizations, emphasizing need for free access to engage government and public on range of public policy issues); NARA-12-0002 ("A concerned Citizen," noting that knowledge of airbag standards allows citizen to be "a more educated consumer"). Public comments on access issues were filed in an Office of the Federal Register rulemaking on whether to revise its criteria for revising IBR rules; comments also were filed in a 2012 Office of Management Budget proceeding on whether to revise Circular A-119. As of October 2015, Circular A-119 remains unrevised.

[33] 293 F.3d at 799.

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The current system may raise constitutional difficulties by allowing agencies to reference incorporated material, when the public must pay to see that material. (Travel to a Washington, D.C., reading room will not, for most, be a viable alternative.) First, impediments to a regulated entity's ability to access government standards raises due process concerns. As noted, small businesses have complained that the access fees charged to read the text of the law can be a significant obstacle to their ability to learn their legal obligations. In the context of whether to sustain a changed agency interpretation of a rule, the Supreme Court has endorsed "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires,'" and that due process thus bars the imposition of sanctions upon someone who could not have received notice of his or her obligations.[34]

The current use by agencies of incorporated private material without meaningful public access is constitutionally suspect for a second reason as well. The public cannot discuss or criticize the government's decisions if the substance of those decisions is not available. As the Supreme Court noted in refusing to uphold a statute that would close criminal trials, "'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' [This] serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.'"[35] The potential significant charges to read IBR standards raises heightened constitutional concerns, because the thousands of IBR standards are wide-ranging in subject, affecting numerous industries, and quasi-legislative in character, with broad and prospective effect. An assurance of free access only in a Washington, D.C. reading room is insufficient. The obstacles to access that must be overcome -- the charges and travel impediments -- effectively deny the public's right to know and discuss government actions. Legislative history accompanying the Freedom of Information Act draws the same link: "'The right to speak and the right to print, without the right to know, are pretty empty.'" *See* H. Rept. No. 1497, 89th Cong., 2d Session 2 (1966) (quoting Dr. Harold Cross). Significant access charges for regulatory standards are a real obstacle to knowing their content, and indeed,

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34 *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012) (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)(Scalia, J).

35 *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (US 1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see also *Press Enterprise v. Superior Court*, 478 U.S. 1 (1986) (refusing to approve closure of preliminary hearing). *Cf. In re Gitto Global Corp.*, 422 F.3d 1 (1st Cir. 2005) ("Only the most compelling reasons can justify non-disclosure of judicial records."); *Leigh v. Salazar,* 677 F.3d 892, 900 (9th Cir. 2012) ("[A] court cannot rubber-stamp an access restriction simply because the government says it is necessary. By reporting about the government, the media are 'surrogates for the public.'") (requiring consideration of public right of access to view Bureau of Land Management horse roundups).

the Supreme Court has invalidated much smaller charges as inconsistent with similar core principles of democratic government, such as the right to vote.[36]

3. IBR rules must be broadly available; assuring meaningful free access only to regulated entities is insufficient

The need for public notice of the contents of federal regulations goes well beyond the regulated entities tasked with complying with them. Congress enacts regulatory statutes specifically to guard wide swaths of the public, and the public accordingly has a specific interest in the content of rules. Consumers of food and toys, parents who wish to purchase infant carriers, strollers, walkers, or infant bath seats, those who rely on ocean fishing for their livelihood, or neighbors of a pipeline or propane tank – all of these individuals are obviously affected by these standards, and should be entitled to notice of them. For one last example, the Department of Transportation Pipeline and Hazardous Materials Safety Administration requires natural gas pipeline operators to institute "public awareness programs" to provide public information and public communications regarding spills according to an IBR standard of the American Petroleum Institute. 49 C.F.R. § 192.616 (incorporating API Standard 1162). Community members who reside near natural gas pipelines at risk from a spill are obviously affected by the scope of public communication requirements. Standards such as these must be meaningfully available both to pipeline operators and to the community. The content of these standards can affect individual choices of which toys or infant carriers to buy, where to live, and whether to file public comments with the regulating agency or write one's member of Congress. In short, regulatory beneficiaries have a cognizable stake in these standards, and the content of the standards can affect their conduct. They therefore need notice of the text as well; meaningful public access without cost has to be understood as essential.

4. The public must be able to locate the law.

Public access principles require not only the provision of meaningful free access to the text of the law, but that the law be reasonably easy to locate. IBR rules are referenced in the Code of Federal Regulations, but the text of the rules is often very hard to find. IBR rules are distributed across a wide variety of differently-organized websites, and neither the online CFR nor Federal Register typically contains any sort of specific

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[36] *Cf. Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 666-68 (1966) (invalidating state $1.50 poll tax as effective denial of right to vote). OFR's approval of IBR rules under this system of private fees may also raise equal protection concerns, given the central importance, in a democracy, of public access to the law's text. In other settings, the courts have relied on equal protection grounds to invalidate comparable fees imposed upon participation in government. *Harper v. Virginia Bd. Of Elections*, *supra; Lubin v. Panish,* 415 U.S. 710, 717–18 (1974) (striking down $701 filing fee requirement for California election, given "our tradition . . . of hospitality toward all candidates without regard to their economic status."). For many rules, moreover, budget constraints may be connected with substantive interests; access constraints will distinctively, systematically disadvantage those interests. For example, consumers will likely have smaller budgets than manufacturers; neighbors to a pipeline will likely have smaller budgets than the pipeline operator.

link to the IBR rule's text. The current distribution of IBR rules in numerous locations makes each obscure, raising the same sorts of concerns that prompted the passage of the Federal Register Act.[37] Further, although agencies are required to "summarize" in the preamble to a final rule "the material it incorporates by reference,"[38] that summary does not include the full text, and in any event, preambles are published neither in the Code of Federal Regulations nor on agency websites containing regulations. The ABA accordingly should resolve not only that meaningful levels of free access be provided to IBR rules, but that such access enable the public to readily find the text of those rules.

5. Current law as implemented has failed to ensure sufficient public access to the law

One might think that these interests would already be protected under the Freedom of Information Act's Section 552, which requires, as a condition of Office of Federal Register approval of incorporation by reference, that incorporated material be "reasonably available" to the "class of persons affected thereby." 5 U.S.C. § 552(a)(1). Indeed, the legislative history accompanying 5 U.S.C. § 552's incorporation by reference provisions made clear its concern with widespread public access, not simply that the IBR material would not be formally secret: "*Any member of the public* must be able to familiarize himself with the enumerated items . . . by the use of the Federal Register, or the statutory standards mentioned above will not have been met." S. Rep. No. 1219, 88th Cong., 2d Sess. 5 (1964) (emphasis added).

Arguments could be made that the Freedom of Information Act's "reasonably available" language, particularly in this age of information, already requires meaningful levels of free access to all incorporated standards not only to regulated entities, but to regulatory beneficiaries and the public at large. Implementation, however, has fallen far short of this understanding. In November 2013, the Office of the Federal Register began a rulemaking on its "incorporation by reference" approval procedures in response to a 2012 rulemaking petition led by Columbia Law School Professor Peter L. Strauss and joined by numerous law professors. The petition had asked OFR to approve IBR rules only if free read-only access to the text were provided to the public.[39] Despite embarking

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37 Erwin Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 Harv. L. Rev. 198, 204, 205, 294 (1934) (distribution of federal rules among "pamphlets" or upon a "single sheet of paper" amounted to "chaos" and an "intolerable" situation). *See* Federal Register Act of 1935, 74 Pub. L. 220, 49 Stat. 500-503 (H.R. 6323) July 26, 1935.

38 1 CFR 51.5(a)(2); 1 CFR 51.5(b)(3) (2015).

39 *See* Office of the Federal Register, Incorporation by Reference (Partial Grant of Petition, Notice of Proposed Rulemaking), 78 Fed. Reg. 60,784 (Oct. 2, 2013).

on a rulemaking, OFR ultimately declined to significantly revise its approach.[40] The Office of Federal Register has continued to approve the incorporation by reference of standards that remain difficult to locate and expensive to read.

Accordingly, Congressional action to clarify the requirements of the Freedom of Information Act and the Administrative Procedure Act is now critical.

6. Other concerns do not justify sacrificing the bedrock principle of ensuring meaningful public access to the law

SDOs typically favor and sometimes even seek having their privately drafted standards adopted as the law of the land, and agencies undoubtedly find it useful to draw upon this stock of standards. But SDOs also have raised concerns that agreeing to meaningful free public access will result in undercompensation for the cost of preparing these standards even if SDOs can still sell books of standards to the public.

These standards surely can be valuable, and SDOs consistently claim a copyright in them. The ABA need not resolve that the considerations that mandate meaningful public availability of incorporated standards necessarily require invalidation of the SDOs' copyrights in those standards. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and accordingly is beyond the scope of the Resolution.[41] Very often, so little of a full SDO standard is incorporated by reference as to constitute fair use, and to defeat any claim that publication of the incorporated material would diminish the value of the whole. Agencies can be encouraged to minimize the extent of their incorporations to this end. Moreover, legislation to implement this resolution could also address the issue, such as by clarifying the continuing validity of copyrights in IBR materials made publicly available as recommended here or by addressing compensation

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[40] Rather than requiring any greater public access to the text of incorporated standards, OFR essentially reaffirmed the status quo, adding only a requirement that the rulemaking agency seeking approval of an incorporation by reference explain "the ways that the materials it incorporates by reference are reasonably available to interested parties" and "summarize" the incorporated material. *See* 1 C.F.R. 51.5(b)(2), (3).

[41] *See Veeck v. Southern Building Code Cong. Int'l, Inc*., 293 F.3d 791 (5th Cir. en banc 2002), c*ert. denied,* 537 U.S. 1043 (2002); *Practice Management Info. Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), *cert. denied,* 522 U.S. 933 (1997); *CCC Information Svc v. MacLean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995).

an agency could offer an SDO for the use of its privately drafted standards.[42] Some SDOs affirmatively seek incorporation by reference of their standards; others receive financial contributions from agencies specifically to finish a particular standard that the agency can then incorporate; some may benefit because there is a larger market for either their current or superseded standards.

Providing some level of meaningful free public access to these standards, such as through online access or in government depository libraries, does seem unlikely to impair the future development of these standards or the ability of agencies to incorporate them. As noted, some SDOs have recently set up free online reading rooms for their standards that have been incorporated by reference. These actions blunt any concern that the supply of voluntary consensus standards on which agencies can draw will be significantly impacted if some level of free public access to the text is required. SDOs will still be able to earn revenue by selling books of standards, and demand may increase as a result of government incorporation of such standards. In addition, there may be other solutions to this concern, whether through agency negotiation with SDOs or payments to them. Agencies already can and do contribute funds to the SDO standards development process, and executive policy encourages agency staff participation in the SDO process.[43]

Agencies should seek the SDO's agreement to meaningful public access prior to utilizing a privately drafted standard. Under some circumstances, it may be appropriate

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42 Though the law in this area is far from clear, an agency that republishes the text of a copyright-protected standard, over the drafting organization's objection and with harm to the standard's commercial value, could, under some circumstances, lose a "fair use" claim and instead face copyright infringement liability or even liability for taking property without just compensation. 28 U.S.C. § 1498(b) (2006); *see generally* Office of Legal Counsel, U.S. Department of Justice, *Whether and Under What Circumstances Government Reproduction of Copyrighted Materials is a Noninfringing "Fair Use" Under Section 107 of the Copyright Act of 1976*, 1999 WL 3390240 (1999), at * 3-4 ("The case law provides very little guidance, [but] there is no basis for concluding that the photocopying . . . by the federal government automatically . . . constitutes a fair use."); *id.* at *11 (concluding that although government photocopying can be "nonfringing," there is no 'per se' rule protecting government reproduction of copyrighted material). Perhaps because of the potential legal risks, we are unaware of cases in which agencies have published the text of standards over the objection of the SDO. *Cf.* Office of Management and Budget Circular A-119, 63 Fed. Reg. 8555 (Feb. 19, 1998) (calling on an agency publishing a voluntary standard to "observe and protect the rights of the copyright holder and any other similar obligations").

43 Office of Mgmt. & Budget, Circular No. A-119 Revised: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities para. 1 (1998), available at http://www.whitehouse.gov/omb/circulars_a119.

Both the NTTAA and OMB Circular A-119 affirmatively encourage agency staff participation in the SDO processes that develop standards, *see* Pub. L. 104-113, sec. 12(d)(2) (Mar. 7, 1996), and Circular A-119 also contemplates financial contributions ot the SDO process. While this may be sensible, in the absence of public access to SDO materials, it can have two problematic consequences. First, it leaves understanding of supporting science and rationales in private hands, thus evading the APA's public notice-and-comment rulemaking process not only by concealing what is being proposed, but also by hiding the support for it. Second, it creates the appearance, and potentially the reality, of agency staff promoting a regulatory agenda in an effectively ex parte context.

for an agency to offer an SDO compensation for use of a standard as part of reaching an agreement.[44] Accordingly, the Resolution urges Congress to provide for such compensation.

On the other hand, it is abundantly clear that requiring individuals to pay a significant fee, or to travel to Washington, D.C., to see the text of the binding law, substantially burdens public access. The potential need in some cases for agencies to offer compensation to the drafters of private standards to ensure public access to the text should not defeat the obligation of government agencies to make legally binding regulations available to the public.

The Resolution does not suggest any specific resolution of these concerns. Instead, the ABA should simply resolve that Congress enact legislation that at its core bars the outcome that requires a reader to pay significant fees in order to read the binding law of the land.

B. To effectuate the statutory right to participate in rulemaking, the Administrative Procedure Act should be clarified to ensure that the public receives meaningful access to the substance of a proposed IBR rule.

As well-established elements of the rulemaking process require, an agency's notice of proposed rule must be published in the Federal Register with the detail needed to facilitate a meaningful opportunity to comment.[45] These procedural requirements, which are fundamental to ensuring the continued validity and legitimacy of agency rulemaking, require that "interested persons" must be able to participate in rulemaking by submitting "data, views, or arguments" -- public comments--to the agency.[46] An "interested person" cannot meaningfully exercise his or her right to comment without access to the substance of the standard on which comment is to be filed.[47] Requiring an "interested person" to pay a fee to learn the content of a proposed rule is a significant obstacle impeding that person's right to comment under Section 553(c).

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[44] Such opportunity for compensation, if Congress were to make it available, should not be understood to foreclose an SDO's ability to seek compensation by other means if necessary. *See supra* note 41.

[45] 5 U.S.C. § 553(b)(3); *Long Island Care at Home v. Coke* 551 U.S. 158, 174 (2007) ("The object [of 553(b)], in short, is one of fair notice.").

[46] 5 U.S.C. § 553(c).

[47] Cf. Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977) (requiring agencies to disclose data to effectuate meaningful right to public comment).

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III. CONCLUSION

In short, the ABA should resolve—simply—three propositions. First, the ABA should resolve that the Freedom of Information Act be clarified to require meaningful levels of free public access to the text of all binding law. That meaningful free public access could be provided online, for example, or in depository libraries. To ensure that the public can readily locate IBR standards, the access ought to be in a centralized location. If not the government depository library system or live online links in the Code of Federal Regulations, IBR standards at least should be available through a single federally-maintained website. To the extent any disruption would be triggered by this Resolution—perhaps an agency might have to negotiate some level of public access as a condition of incorporating a particular standard by reference or provide compensation to an SDO for financial losses occasioned by the use of its standard—the impact is worth bearing in order to bring FOIA's standard of "reasonabl[e] availabil[ity]" into the Information Age and to effectuate the bedrock principle that the law, in a democracy, must be meaningfully available to the public.

And second, no standard should become part of binding federal regulatory law without the public being assured of the full opportunity to participate normally afforded by section 553 of the Administrative Procedure Act. Therefore, the ABA should resolve that section 553 be clarified to require meaningful free public availability, during the public comment period, of a proposed IBR standard's text.[48]

Finally, the ABA should resolve that, in order to effectuate these critical principles, Congress should ensure that agencies are able, where appropriate and necessary, to compensate private organizations for financial losses attributable to making their standards publicly available.

Respectfully submitted,

Jeff Rosen, Chair
Section of Administrative Law and Regulatory Practice

February 2016

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[48] Although 5 U.S.C. § 553(b)(3) formally authorizes an agency merely to give notice of a "description of subjects and issues involved," as a practical matter agency notices of proposed rule generally contain text the agency is proposing to promulgate. (Advance notices of proposed rulemaking are more frequently phrased in general terms.) The ABA accordingly should resolve that the text of proposed IBR rules also be made publicly available to make meaningful the right to comment.

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Jeff Rosen, Section Chair

1. Summary of Resolution(s).

   To effectuate the bedrock principle of public access to the law, the resolution urges Congress to strengthen the Freedom of Information Act and Administrative Procedure Act to ensure meaningful free public access to the text of all binding federal rules. The resolution responds to the current use in federal rules, by agencies, of thousands of privately drafted standards that the public must pay to view. The resolution also urges Congress to ensure meaningful free public availability of a proposed standard's text during the public comment period.

2. Approval by Submitting Entity.

   The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution on November 10, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   None are directly relevant.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   N/A

6. Status of Legislation. (If applicable)

   N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Policy could be implemented by legislative action.

8. Cost to the Association. (Both direct and indirect costs)
   None.

9. Disclosure of Interest. (If applicable)
   N/A

10. Referrals.

    Business Law Section
    Civil Rights and Social Justice Section
    Government and Public Sectors Lawyers Division
    Intellectual Property Law Section
    Science & Technology Law Section

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Professor Nina A. Mendelson
    University of Michigan Law School
    625 S. State St.
    Ann Arbor, MI 48109
    (734) 936-5071 (o)
    nmendel@umich.edu

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

    H. Russell Frisby, Jr.
    Stinson Leonard Street
    1775 Pennsylvania Ave., NW
    Suite 800
    Washington, D.C. 20006
    (202) 572-9937
    (202) 255-4320
    russell.frisby@stinson.com

    Professor Ronald M. Levin
    Washington University School of Law

Campus Box 1120
St. Louis, MO 63130
(314) 936-6490
(314) 882-3039 (cell)
levin@wulaw.wustl.edu

106A

EXECUTIVE SUMMARY

1. Summary of the Resolution

To effectuate the bedrock principle of meaningful public access to the law, the resolution urges Congress to strengthen public availability to the text of all federal regulations. Meaningful free access should be afforded both when agencies propose adoption of these standards and after promulgation as final rules.

2. Summary of the Issue that the Resolution Addresses

Federal agencies currently "incorporate by reference" thousands of outside standards into binding federal regulations. Free public access to the text is reliably provided only in the Office of the Federal Register's reading room in Washington, D.C. Otherwise a reader may be required to pay substantial access fees set by drafting organizations, significantly obstructing public access, particularly by individuals and small businesses. The right to comment on an agency's proposed "incorporation by reference" of such standards into federal regulations is also impeded by the lack of public access to the text.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution urges Congress to amend the Freedom of Information Act to ensure meaningful levels of free public availability to all federal regulations, including text that is "incorporated by reference." Such public access could be afforded through centralized online access, for example, or in government depository libraries. The resolution also urges Congress to amend the Administrative Procedure Act's rulemaking provisions to require meaningful free public availability of such text during the public comment period.

As a safeguard against the (probably remote) possibility that the prospect of free public access might induce a drafting organization to decline to make its standard available for incorporation, the report also recommends that Congress should ensure that agencies have access to the ability to compensate such organizations where appropriate.

4. Summary of Minority Views

None identified.

Attachment C

Incorporation by Reference Task Force Roster (Prepared by Carl Malamud, March 28, 2016).

Membership of the ABA Task Force on Incorporation by Reference

1. Ron Levin, Chair of Task Force
   Professor of Law, Washington University Law
   Admin Law Section
   http://law.wustl.edu/faculty/pages.aspx?id=279

2. Jamie Conrad, Conrad Law & Policy Counsel
   Former Counsel at Chemical Manufacturers Association
   Admin Law Section
   http://www.conradcounsel.com/

3. Nina Mendelson, Admin Law Section
   U. Michigan Law School
   https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=nmendel

4. Estelle Rogers, Section on Civil Rights and Social Justice
   Retired
   http://www.americanbar.org/groups/women/gender_equity_task_force/estelle_rogers.html

5. Greg Brooker, Civil Chief at the U.S. Attorney's Office in the District of Minnesota
   Government and Public Sector Lawyers Division

6. Regina Nassen, Deputy County Attorney, Pima County
   Section of State and Local Government Law
   Government and Public Sector Lawyers Division
   https://www.linkedin.com/in/regina-nassen-91574013

7. Janet Fries, Of Counsel, Drinker Biddle
   IP Section
   http://www.drinkerbiddle.com/people/attorneys/fries-janet

8. Susan Montgomery, Foley Hoag LLP
   Executive Professor, Northeastern University School of Law
   IP Section
   http://www.foleyhoag.com/people/montgomery-susan

9. Mary Rasenberger, Author's Guild
   IP Section
   https://www.authorsguild.org/who-we-are/staff-directory/mary-rasenberger/

10. Bill Boswell, Section on Public Utility, Communications and Transportation Law
    former General Counsel of North American Energy Standards Board
    https://www.linkedin.com/in/bill-boswell-44234125

11. Jim Durham, Univ. of Dayton School of Law
    Section of Legal Education and Admissions To the Bar
    Section of Real Property, Trust and Estate Law
    https://www.udayton.edu/directory/law/durham_james.php

12. Ellen Flannery, Covington and Burlington
    Science/Tech Section
    https://www.cov.com/en/professionals/f/ellen-flannery

13. Judge Kennedy, New Mexico Court of Appeals
    Science/Tech Section
    https://coa.nmcourts.gov/bios/kennedy.htm

14. Ollie Smoot
    Science/Tech Section
    Former Chairman of ANSI
    Former President of ISO
    https://en.wikipedia.org/wiki/Oliver_R._Smoot

15. Patricia Griffin
    General Counsel of ANSI
    https://www.ansi.org/other_services/speakers_bureau/griffin.aspx

CC'd:

Jeffrey A. Rosen (jeff.rosen@kirkland.com)" <jeff.rosen@kirkland.com>
    Chair of the Admin Law section
    Was general counsel of the Dept. of Transportation, then General Counsel of OMB
    http://www.kirkland.com/sitecontent.cfm?contentID=220&itemID=9699

"Frisby, Jr., H. Russell" <russell.frisby@stinson.com>
    Admin Law section delegate
    ACUS committee on IBR
    Specializes in energy litigation
    https://www.stinson.com/RussellFrisby/

"Kiefer, Anne (Anne.Kiefer@americanbar.org)" <Anne.Kiefer@americanbar.org>
    Staff director, Admin Law section
    https://www.linkedin.com/in/anne-kiefer-a9692711
    Before that, worked at the Steel Tank Institute, which sells standards
    http://www.steeltank.com/Publications/STISPFAStore/tabid/487/Default.aspx

Attachment D

Letter of Transmittal to the Sections from the Incorporation by Reference Task Force (April 13, 2016).

American Bar Association
Section of Administrative Law and Regulatory
Practice1050 Connecticut Avenue NW, Suite 400
Washington, DC 20036
(202) 662-1690
Fax: (202) 662-1529
www.americanbar.org/adminlaw

April 13, 2016

To: Interested Sections/Divisions
From: Ronald M. Levin, Chair, Task Force on Incorporation by Reference
Re: Proposed Resolution

The Task Force on Incorporation by Reference – composed of representatives from six Sections and one Division of the ABA – has reached consensus on the text of a draft resolution regarding public access to provisions in industry standards that have been incorporated by reference into federal regulations. The resolution is to be submitted to the ABA House of Delegates for action at the Annual Meeting in August. We now seek co-sponsorship of the resolution from the entities that were represented on the task force.

The proposed resolution is a successor to Resolution 106A, which the Section of Administrative Law and Regulatory Practice submitted to the House for action at the 2016 Midyear Meeting. That earlier version would have urged Congress to amend the Administrative Procedure Act to require "meaningful free public availability" of all text incorporated by reference into proposed and final substantive rules of general applicability. It also urged Congress to ensure that private organizations would, where appropriate, have access to compensation for financial losses attributable to this requirement.

However, the resolution elicited objections from several Sections. They regarded the resolution as unbalanced for a variety of reasons, such as a belief that it gave insufficient weight to the copyright interests of standards development organizations that create the incorporated standards. They asked Administrative Law to withdraw Resolution 106A from the Midyear Meeting agenda and to form an inter-Section task force charged with devising a substitute resolution that could attract broad support within the House. Administrative Law acceded to this request, and the present task force was formed as a result.

The task force is composed of fifteen members from seven entities, including the Sections of Administrative Law and Regulatory Practice (James W. Conrad, Jr., Ronald Levin (chair), Nina Mendelson), Civil Rights and Social Justice (Estelle Rogers), Intellectual Property Law (Janet Fries, Susan Montgomery, Mary Rasenberger), Public Utilities, Communications, and Transportation (William

Boswell, Patricia Griffin), Real Property, Trust and Estate Law (James Durham), and Science & Technology Law (Ellen Flannery, Roderick Kennedy, Oliver Smoot), and the Government and Public Sector Lawyers Division (Gregory Brooker, Regina Nassen).

After three conference calls in March and April, together with numerous email messages and exchanges of drafts, the task force has reached consensus on the attached proposed resolution, which would replace the original resolution. In essence, the proposal urges Congress to require that when a federal agency intends to incorporate material from an industry code into a proposed or final regulation, it must obtain authorization from the copyright holder for any portion of the incorporated material that is subject to copyright protection. The authorization must at least provide for members of the public to have access without charge to a read-only online copy of the incorporated material. Access to the online content must be available on computer facilities in depository libraries. The proposed legislation would also permanently authorize agencies to enter into agreements with copyright holders to accomplish the access requirements. Under the legislation, agencies would be expected to apply the access requirements directly to newly adopted regulations and to establish reasonable plans and timelines to bring existing regulations into conformity with the same regime.

These access requirements would serve to ensure that citizens' ability to ascertain their legal obligations, and to learn about and comment on rulemaking proposals while they are pending, will not be foreclosed by cost barriers. At the same time, the resolution acknowledges the legitimate interests of copyright holders insofar as it requires federal agencies to seek authorization and provides that the required access can be limited to a read-only format and to those portions of a code that have been or would be incorporated into the regulation.

The task force was cognizant during its deliberations of related litigation now pending in the U.S. District Court for the District of Columbia, which concerns the status under copyright and trademark laws of certain privately drafted codes that have been partially incorporated by reference into federal regulations. The task force decided from the outset that it should not seek to influence the course of that litigation, and its recommendations would in no way result in the ABA taking sides in that dispute.

The task force is at work on a report that will accompany the resolution to the House. The report will explain the background of the controversy over public access to incorporated standards and the competing policy considerations implicated in it. It will also spell out some of the assumptions that are implicit in the resolution (e.g., that the resolution implies no ABA view as to the desirability of legislation that would provide for broader public access than the legislation recommended in the resolution would). In addition, the report will suggest considerations that Congress

might bear in mind in framing the proposed legislation, but it will also emphasize the flexibility left open by the broad terms of the recommendation.

We now invite the Sections or Divisions that have been represented on the task force to consider co-sponsorship of this resolution that will be submitted for House of Delegates approval at the Annual Meeting. For those Sections and Divisions that approve cosponsorship, we also ask that each participating entity authorize its Delegates or other representative on the task force to approve the supporting report on the entity's behalf, together with any minor changes that might prove necessary as the resolution is put in final form. We would like all entities to notify us regarding their willingness to cosponsor at their earliest convenience, preferably by Tuesday, May 3. The last date on which cosponsors could possibly be joined is May 9, because of the House's May 10 deadline for submission of resolutions for action in August. Please forward your reactions to me at rlevin@wustl.edu or to Anne Kiefer at Anne.Kiefer@americanbar.org.

Thank you for your participation in supporting the task force and for your consideration of this request.

HOUSE OF DELEGATES RESOLUTION PROPOSED BY

THE TASK FORCE ON INCORPORATION BY REFERENCE

April 13, 2016

1. RESOLVED, That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

(a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public. To the extent that the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.

(b) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.

(c) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

2. FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

3. FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

(a) identify all privately drafted standards and other content previously incorporated by reference into that agency's regulations;

(b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and

(c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.

Attachment E

Electronic Mail of Deliberations of the Incorporation by Reference Task Force and Technical Standardization Committee of the Section of Science and Technology Law (January 9, 2016 to May 27, 2016).

From: Roderick Kennedy <[redacted]
Sent: Jan 9, 2016 4:03 PM
To: "Scott O. Bradner" <[redacted] David Duperrault <[redacted] Jorge Contreras <[redacted] Lucy Thomson <[redacted] "Ellen J. Flannery" <[redacted] "Michael A. Aisenberg" <[redacted] Michele Herman <[redacted] Bonnie Fought <[redacted]
Cc: "Hawk, Caryn" <[redacted]
Subject: Resolution 106: Group Roster

Howdy, folks, and welcome. I think this is the point at which we have a working group. From the comments that came in with the requests to participate over the last few days, it looks like there is a breadth of representation and ideas on the subject.

Many of you are more familiar with this area than I am; the breadth of application of the Resolution was something by which I was mildly shocked, but not entirely surprised.

We need to complete a conference call and have an idea of a working document or summary of one by the 15th of January, the way I understand it, so a report can go to the Jan. 20 conference call.

I'd like to suggest next Wednesday or Thursday. My schedule is fairly open, so where and when do you fall available?That will allow me some time to figure out how to set up a conference call through our most helpful ABA coordinators.

Hope you're all having a fine weekend.

RTK

Roderick Kennedy
"They sicken of the calm who knew the storm."
--Dorothy Parker
[redacted]

From: Roderick Kennedy <[redacted]
Date: Sat, 9 Jan 2016 17:05:45 -0700
Subject: UPDATED group list ad link to Resolution text.
Cc: "Hawk, Caryn" <[redacted]
To: "Scott O. Bradner" <[redacted] Carl Malamud <carl@media.org>,
David Duperrault <[redacted] Jorge Contreras <[redacted]
Lucy Thomson <[redacted]
Michele Herman <[redacted] [redacted]
"Michael A. Aisenberg" <[redacted]
"Ellen J. Flannery" <[redacted]
Bonnie Fought <[redacted] VVC <[redacted]

And, there was a request for the text of the resolution. Here=E2=80=99s
the link. 106A
<http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_106A.docx>

106A =
<http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_106A.docx> SECTION
OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
Requiring agencies to provide free public availability of the text of standards that are drafted by private organizations and then incorporated by reference into federal regulations.

Roderick Kennedy
"They sicken of the calm who knew the storm."=20
--Dorothy Parker
[redacted]
[redacted]

Subject: Re: UPDATED group list ad link to Resolution text.
Date: Sun, 10 Jan 2016 18:05:20 -0500
From: Tony Rutkowski <[redacted]
Organization: Netmagic Associates LLC
To: VVC <[redacted] Patty Griffin <[redacted] Clark R. Silcox <[redacted]
Neil Bogatz <[redacted] Amy Marasco (LCA) <[redacted]

Hi Dan,

Always great to hear the argument for the untenable. We're not talking about an organization that actually produces anything. It's simply taking someone's IPR and making it available on a site to further an industry development. That's the objective, not publishing - which has almost zero marginal value today.

In all my decades of participation in different bodies, I've never heard anyone argue that charging for standards is a good thing. Today this is a *really bad* practice that with few exceptions severely harms the industry involved.

That might be otherwise we tolerable by society. However, where government is used as a shill to further the publication business model by making the organization's publications part of a regulatory requirement, the practice is unacceptable. Then the purpose of the regulation is impeded by keeping the information out of the handed of intended
users attempting to meet the regulation. The public in the end is harmed - potentially severely.

Fortunately, the practice has almost disappeared because there is a highly competitive market now for standards publishing. The last holdouts are those standards publishers skewing the marketplace using the government. The ABA here is decidedly doing the right thing.

After seeing The Big Short yesterday, there are definitely some similarities as to bad practices tolerated if not furthered by government in the standards marketplace.

--tony

On 2016-01-10 1:00 PM, VVC wrote:
> The government, cases, and agencies, and ANSI have done a lot to meet the 'needs' and satisfy "readily available" without impacting some ASDs needed revenue streams to survive by going to "freely available." "Readily" is now Federal policy and ANSI supports it and launched an IBR portal also.
>
> Some are still clamoring for free beer and free sex too.
>
> I want free Smartphones!
>
> Go read ANSI Contribution to GSC on the subject of IBR and see ANSI IBR portal.http://ibr.ansi.org/
>
> Do you think ABA dues and services should be free too? Maybe you can draft that Resolution?
>
> Dan

From: Jorge Contreras <[redacted]
Date: Mon, Jan 11, 2016 at 8:53 AM
Subject: Re: Resolution 106: Group Roster
To: Roderick Kennedy <[redacted]
Cc: Lucy Thomson <[redacted] "Scott O. Bradner" <[redacted] David Duperrault <[redacted] "Ellen J. Flannery" <[redacted] "Michael A. Aisenberg" <[redacted] Michele Herman <[redacted] "Hawk,Caryn" <[redacted] Barbara Mitchell <[redacted] Bonnie Fought <[redacted] Patricia Griffin <[redacted] Tony Rutkowski <[redacted]

Rod and others,

I will be teaching a class at the proposed time, but there is no convenient time that will work for everyone. Since I can't join in person, I'll register my input here.

I have a few concerns, mostly with the process that led to this Resolution. First, the IBR debate has been around for years, as many in this group know. I find it surprising that the Administrative Law Section did not reach out to other sections (particularly SciTech, which has a standing Technical Standardization Committee) to cooperate on this Resolution. While the people in AdLaw have expertise in some of the areas discussed in the Resolution, they seem to lack real world standardization experience, which we possess in a large degree. I think that a more nuanced and accurate report would have resulted from a more inclusive process.

Second, I wonder why AdLaw has chosen this particular moment to advance this Resolution. I am concerned about the timing, because IBR is currently the subject of active litigation. In fact, several people in this working group are involved in that litigation. As we all know, ABA should not be used as a tool to advance particular litigation goals by the parties. As the ABA , we must be extremely careful to advocate only for the good of the broad legal community and the nation as a whole, and not in support of particular interests, financial or otherwise.

Based on these initial concerns, I would probably be most comfortable if ABA did not speak on this topic at the present time. However, if the group decides that a Resolution of some kind is desirable, I would urge this working group to cooperate to make adjustments that will best achieve balance among legitimate competing concerns, rather than support of a particular litigation outcome.

Best regards and good luck!

From: Carl Malamud <carl@media.org>
Date: Mon, 11 Jan 2016 12:42:11 -0800
Cc: Ollie Smoot <[redacted] Jorge Contreras <[redacted] "Aisenberg, Michael A." <[redacted] Lucy Thomson <[redacted] Scott Bradner <[redacted] David Duperrault <[redacted] "Ellen J. Flannery" <[redacted] Michele Herman <[redacted] "Hawk,Caryn" <[redacted] Barbara Mitchell <[redacted] Bonnie Fought <[redacted] Patricia Griffin <[redacted] Tony Rutkowski <[redacted] Nina Mendelson <[redacted] Dan Bart <[redacted]
To: Roderick Kennedy <[redacted]

Dear Judge Kennedy and members of the working group -

First, my apologies for not being able to make the Weds. phone call. I have to take my mother to an important doctors appointment. The only thing harder to schedule than a pack of lawyers is a single neurologist.

I have two concerns with the conversation on this mailing list as it is currently framed:

1. I'd like to echo Jorge's caution about the ABA taking a stance when litigation is pending in the courts. In fact, after the Admin Law section considered the resolution before us today, they immediately went to the hill and co-sponsored an event with ANSI and ASTM on voluntary standards with the ABA's name on it. This seemed to me a bit premature and I worry that the timing may indeed be political.

https://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=920dcf8b-8eda-45ab-9eae-ec0bec2edf27

2. The resolution as currently framed does not, as an explicit design choice, deal with the copyright issues. Professor Mendelson put a huge amount of work over a long period of time writing an excellent background paper. However, copyright is not an issue that has been carefully considered by her or Admin Law and it would be a disservice to throw in conclusions without thinking through the issues much more carefully. That would, at a minimum, require the same kind of careful research and deliberation that Professor Mendelson gave us on the IBR issue. As you can see from the resolution text, it is deliberately mute on that issue, and if we were to consider it I would hope we would do so in a careful manner instead of simply throwing solutions into a resolution at the last minute.

As to the substance of the resolution, there is one clause that bothers me, and I think the clause is squarely in the purview of this committee. The clause reads:

> "the rulemaking agency must ensure meaningful free public availability of the incorporated text, such as through online access in a centralized online location OR access in all government depository libraries." (emphasis added)
>
There are two issues:

1. Centralized online location could easily mean some private organization with onerous terms of use (like the present reading rooms). It is important that this be a service under the auspices of the federal government. This is, after all, the U.S. Code of Federal Regulations and the point of the resolution is the government should take steps to ensure more meaningful access.

2. When we say "OR access in all government depository libraries" that leaves open the possibility of simply putting one paper copy in the libraries and considering that to be enough. In an Internet era, it isn't. I'm a huge supporter of our Federal Depository Library System, but I think most of the librarians in that system would agree with me in saying this step would be necessary but not sufficient.

My solution is a simple edit. Remove the word "or" and replace it with "provided by the Government Printing Office and"

So, the clause would read:

> "the rulemaking agency must ensure meaningful free public availability of the incorporated text, such as through online access in a centralized online location provided by the Government Printing Office and access in all government depository libraries."

The reason I say GPO is they are the current provider of online access to our Official Journals (including the Federal Register and the CFR) and they are also the online repository for access to district and appellate court opinions. The alternative is simply remove the specifics so the clause reads "the rulemaking agency must ensure meaningful free public availability of the incorporated text." However, as the clause currently reads, the ABA is making architectural decisions as to how, technically, the law should be distributed. I don't think the Admin Law section carefully considered the technical implications of, for example, advocating a single centralized solution, nor did they think through the cost and technical implications of making documents available in libraries.

I would be more than happy to discuss the issue by phone or email if anybody would like more details.

Best regards,

Carl Malamud

P.S. In the spirit of full disclosure, I would like people on this list to know that this is an issue that I have devoted considerable time to in the last 9 years and I have a definite point of view. My testimony before Congress on the issue of Edicts of Government and in particular Incorporation by Reference may be found here:

https://public.resource.org/edicts/

From: "Ollie Smoot" <[redacted]
To: "'Jorge Contreras'" <[redacted]
"'Aisenberg, Michael A.'" <[redacted]
Cc: <[redacted] "'Roderick Kennedy'" <[redacted]
"'Lucy Thomson'" <[redacted]
"'Scott O. Bradner'" <[redacted]
"'David Duperrault'" <[redacted]
"'Ellen J. Flannery'" <[redacted]
"'Michele Herman'" <[redacted]
"'Hawk,Caryn'" <[redacted]
"'Barbara Mitchell'" <[redacted]
<[redacted] "'Bonnie Fought'" <[redacted]
"'Patricia Griffin'" <[redacted]
"'Tony Rutkowski'" <[redacted]
"'Carl Malamud'" <carl@media.org>,
"'Dan Bart'" <[redacted]
Subject: RE: Resolution 106: Group Roster
Date: Mon, 11 Jan 2016 11:56:52 -0800

The Resolution seems to omit mention of recent developments in the IBR area, but I admit to following the issue only until it appeared resolved last year. The Resolution reads to me as seeking to eliminate the recent positive (at least to me) steps and to put the ABA into the hard core of “The Law Must Be Free” groups.

I urge Tony, who I am glad to see has lost none of his fire, to provide another proposal that doesn’t high handedly rule out the business models of most of the traditional engineering sectors. We didn’t allow them to tell the IT and Telecom sectors how to do their standards, and they might expect the same forbearance from us.

I see suggestions like Michael’s as innovative thinking, but mindful of the brevity of Section 107, and the enormous length of subsequent sections that embed business models of particular sectors in the statute, what would the language look like?

Looking forward to the conference call.

Ollie

From: Patricia Griffin <[redacted]
To: Anthony Rutkowski <[redacted] Roderick Kennedy <[redacted] Lucy Thomson <[redacted] "Scott O. Bradner" <[redacted] David Duperrault <[redacted] "Ellen J. Flannery" <[redacted] Michele Herman <[redacted] "Hawk,Caryn" <[redacted] Barbara Mitchell <[redacted] '[redacted] <[redacted] Bonnie Fought <[redacted] "Patricia Griffin" <[redacted] Tony Rutkowski <[redacted] "Oliver R. Smoot" <[redacted] Carl Malamud <carl@media.org>, "Dan Bart" <[redacted] Michael Aisenberg <[redacted] Jorge Contreras <[redacted]
Subject: ABA Resolution
Date: Tue, 12 Jan 2016 17:13:22 +0000

Hi Everyone:
Many thanks for the opportunity to address the group. I join others in agreeing with Jorge that the ABA should not be used as a tool to advance particular litigation goals. Here, the issue addressed by this proposed Resolution is the subject of a pending lawsuit brought by several SDOs against PublicResource.Org, styled ASTM et al. v PublicResource.Org. That case questions whether the National Archives and Records Administration's (NARA's) recent interpretation of FOIA's "reasonably available" test is adequate to balance the interests of SDO copyright holders and those of the public. NARA recently clarified that, in the final analysis, the SDOs' copyrights should be preserved and that government agencies should "collaborate" with SDOs when necessary to ensure that the public has reasonable access to IBR'd documents. The preservation of the SDOs' copyright interests is central to the plaintiff's case and cross motions for summary judgment are pending both supporting and challenging that idea.
The proposed Resolution attempts to sidestep that central question, saying on page 11 that:
The ABA need not resolve that the considerations that mandate meaningful public availability of incorporated standards necessarily require invalidation of the SDOs' copyrights in those standards. The doctrine governing whether copyright persists in text that is first developed by private-sector entities and subsequently adopted into law is complex and fact-specific, and accordingly is beyond the scope of the Resolution.
But this issue cannot be so easily dismissed in this manner. First, an SDO's ability to assert copyright interests in IBR'd standards and the manner in which it is compensated for those interests does need to be resolved. If it is not, as ANSI and several SDOs stated in an Amicus brief they filed in the case yesterday (copy attached), any invalidation of an SDO's copyrights in IBR'd standards raises very substantial problems under the Takings Clause of the Constitution. Second, PublicResource.Org's goal in the lawsuit and the Administrative Law Section's goal in the Resolution is identical: to make privately-developed standards incorporated by reference in regulations available for free. As the first annex to this email illustrates (see below), the ABA's Report and the PublicResource.Org brief use often identical language to support their views. In the end, it is difficult for me to see how the ABA can take a position here without putting itself squarely on one side of this pending case.
In addition, even if there was no pending litigation on this issue, the proposal urged by the Administrative Law Section and some of the discussion in this working group seems more suited for consideration by the Section on Intellectual Property Law as it could result in changes to copyright law applicable to IBR'd documents. Those kinds of changes in copyright law should be affected through changes to the Copyright Act itself, not – as suggested by the current Resolution - through an amendment to FOIA.
ANSI's position on the IBR/copyright issue is reflected in the attached Amicus brief and in ANSI's recent Contribution to the 2015 Global Standards Collaboration (GSC), excerpted below in the second annex to this email (see also www.ansi.org/ibr). As ANSI has noted in these documents, efforts are being made by many SDOs to achieve the goal of reasonable availability through increasing placement of IBR'd standards in read-only mode at SDO and ANSI websites.
Best,
Patty

Patricia A. Griffin
Vice President & General Counsel
American National Standards Institute
25 West 43rd Street, 4th Floor
New York, N.Y. 10036
Tel: [redacted]

From: Roderick Kennedy <[redacted]
Subject: Reminder: Conference Call
Date: Wed, 13 Jan 2016 09:39:07 -0700
Cc: Barbara Mitchell <[redacted]
<[redacted]
To: Lucy Thomson <[redacted] VVC <[redacted] Ollie Smoot
<[redacted] "Scott O. Bradner" <[redacted] David Duperrault <[redacted] "Michael
A. Aisenberg" <[redacted] Michele Herman <[redacted] "Nied,
Earl" <[redacted] Bonnie Fought <[redacted] Patricia Griffin <[redacted]
[redacted] Jorge Contreras <[redacted] Carl Malamud <[redacted] "Ellen J.
Flannery" <[redacted] Tony Rutkowski <[redacted] Roderick Kennedy
<[redacted] "Colleen E. Prim" <[redacted] "William A. McComas"
<[redacted] Dan Bart <[redacted] '[redacted] <[redacted]

I think this is the full mailing list. If I've missed anyone you know of, please send it along.

Here is the dial-in number for our conference call.

Dial-in #: (866)[redacted]
Conference Code: [redacted]

I'm most impressed by the quality and breadth of participants and viewpoints that we've gathered for our discussion. A couple non-binding, non-exclusive, and non-limiting thoughts from the Chair, to the extent I've got any prerogative:

I thought the earlier question of the "professionals with standards organization" folks and the less-versed being identified among us was a good one. So for my part:

I'm a judge. My experience with standards and SDO's is mainly from the perspective of knowing they exist, and wondering why attorneys in trial courts haven't paid more attention to them when pleading some criterion for someone's conduct. If I know there are standards, why don't we do more with 'em? (This could be a New Mexico thing, too.) I have a general idea of how they come about, and the pervasiveness of standards that exist for all sorts of things I don't understand.

The American Academy of Forensic Sciences just became an SDO for the National Forensic Science Commission, and I've been a bit involved in that; one of the questions we're dealing with is whether to charge for the standards, and if so, how much? So far, we seem to have have a solid bias toward minimal cost to the public, since the push for forensic science standards is rooted in the embarrassment of wrongful convictions based on bad practice in the field. Since the standards must be available to folks like public defenders (for example), cost and cost recovery are salient questions.

For the discussion;

I'm sensing that there are a couple of broad items we might try to resolve:

First, this resolution is coming to us in the Science/Tech Section with a short lead time; is this question of a size that our input should be greater than we can muster in the time we have? Should we get back to the Admin folks for more joint effort? If so, can we suggest a working plan and timeline?

Second, Michael, Jorge and Tony, to name a few, have been thinking about a copyright/fair use model to talk about as opposed to a FOIA amendment that the Resolution suggested. This is certainly a change. Can we firm it up enough to send it out in our report? (see point above)

Last, we represent a diversity of normative values like transparency and broad availability of standards to regulated interests and the public on one hand and the reality of overhead for the development of standards that an SDO would legitimately seek to recover on the other. They're not necessarily exclusive, but also might be

things that operate on different planes. We can assume both to be present in our group, but getting stuck on either could cause our conversation to go very long and deep without addressing the Resolution.

Going back to my earlier thoughts, perhaps an approach that looks at questions like “if we look at it from [this] perspective, this would be an outcome worth considering,”, and “if we were to put together a report, it should include [fill in the blank] as a statement fairly reflecting my perspective” would be helpful. In addition to these, which are part of our brief, where statements like thies might take us in terms of going back to the Admin Section with ideas for a more complete approach to the problem would be a constructive product of this working group.

Our report’s due quickly, and I have a tendency to toss ideas around. I’m really looking forward to our discussion this afternoon.

Rod Kennedy

Subject: Re: Reminder: Conference Call
From: Carl Malamud <carl@media.org>
Date: Wed, 13 Jan 2016 10:01:09 -0800
To: Roderick Kennedy <[redacted]
Cc: Lucy Thomson <[redacted] VVC <[redacted] Ollie Smoot <[redacted] Scott Bradner <[redacted] David Duperrault <[redacted] "Michael A. Aisenberg" <[redacted] Michele Herman <[redacted] "Nied, Earl" <[redacted] Bonnie Fought <[redacted] Patricia Griffin <[redacted] Tony Rutkowski <[redacted] Jorge Contreras <[redacted] "Ellen J. Flannery" <[redacted] Tony Rutkowski <[redacted] "Colleen E. Prim" <prim@Bowie-Jensen.com>, Nina Mendelson <[redacted] "William A. McComas" <mccomas@Bowie-Jensen.com>, Barbara Mitchell <[redacted] '[redacted] <[redacted]

Dear Judge Kennedy -

Again, my apologies, I won't be on the call as that is the one time I was unable to make it.

Given the very short lead time and the expertise of this group, I really think doing a copyright/fair use model instead of an APA amendment would be doing a huge disservice to the ABA. You would basically be writing a new resolution from scratch in a short period of time, and doing so without the benefit of the kind of background research that such a resolution deserves and without reaching out to the other groups that would have a tremendous amount to say on the topic.

It is also important to note that we are not talking about standards in this resolution, this resolution is only about standards that have been deliberately and explicitly incorporated into the text of the Code of Federal Regulations. Again, before we start diving into 200 years of jurisprudence on fundamental issues such as who is allowed to speak the law, I think the topic needs to be fully considered and sections such as Civil Rights and Social Justice would have a lot to say on the subject.

Finally, I think it is important to understand the timing of this resolution. The litigation on this subject has just received a huge number of amicus briefs, not only the one Ms. Griffin forwarded to this list, but also from a large number of SDOs, the insurance industry, advocates for people who are visually impaired, a prestigious group of law scholars, an association of journalists, and DC-based public interest groups. Amicus briefs are due on January 21, the House of Delegates is early in February, briefing in the litigation for Motions for Summary Judgment is completed in the end of March.

Again, major last-minute changes to the resolution, or adding in contentious topics such as copyright, does not seem to be the kind of calm, deliberate consideration we've come to expect from the ABA. The resolution before us walks a fine line, and makes some guarded and careful recommendations that I believe many could agree on if we agree to leave other subjects off the table. If we turn it into a Christmas tree, however, I don't see how we're going to come to a conclusion. My recommendation, for what it is worth, is to consider the text of the resolution as passed by Admin Law and ask if there are any minor tweaks (such as the 5 words I suggested).

Best regards,

Carl

P.S. For those wishing to read the amicus briefs, you can find them on this mirror of DCD docket 1:13-cv-01215 starting at item 139:

http://www.archive.org/download/gov.uscourts.dcd.161410/gov.uscourts.dcd.161410.docket.html

From: "Flannery, Ellen" <[redacted]
To: "'Carl Malamud'" <carl@media.org>,
Roderick Kennedy <[redacted]
CC: Lucy Thomson <[redacted] VVC <[redacted] Ollie Smoot <[redacted] Scott Bradner <[redacted] David Duperrault <[redacted] "Michael A. Aisenberg" <[redacted] '[redacted] <[redacted] Michele Herman <[redacted] "Nied, Earl" <[redacted] Bonnie Fought <[redacted] Patricia Griffin <[redacted] Tony Rutkowski <[redacted] Jorge Contreras <[redacted] Tony Rutkowski <[redacted] "Colleen E. Prim" <prim@Bowie-Jensen.com>, Nina Mendelson <[redacted] "William A. McComas" <mccomas@Bowie-Jensen.com>, Barbara Mitchell <[redacted] '[redacted] <[redacted]
Date: Wed, 13 Jan 2016 16:00:25 -0500
Subject: RE: Reminder: Conference Call

Dear working group members,

One option as a recommendation for your report is that SciTech would ask the Administrative Law Section to withdraw the resolution from the agenda of the House of Delegates meeting in February because the issues and concerns are too numerous or complex to be resolved in the short time available; and if withdrawn, SciTech would work with Ad Law to try to draft a revised resolution.

Another possibility is that SciTech would oppose the resolution if not withdrawn.

Another possibility is that SciTech can see some minor changes to the text of this resolution, but we want to develop our own resolution on other issues that are raised by this resolution.

Thanks for your careful deliberations.

Best regards,
Ellen
(Section Delegate to the House)

Subject: Re: Reminder: Conference Call
From: Roderick Kennedy <[redacted]
Date: Thu, 14 Jan 2016 08:50:04 -0700
Cc: Jorge Contreras <[redacted] Carl Malamud <carl@media.org>, "Aisenberg, Michael A." <[redacted] " <[redacted] Lucy Thomson <[redacted] VVC <[redacted] Ollie Smoot <[redacted] Scott Bradner <[redacted] David Duperrault <[redacted] <[redacted] Michele Herman <[redacted] "Nied, Earl" <[redacted] Patricia Griffin <[redacted] "Ellen J. Flannery" <[redacted] Tony Rutkowski <[redacted] "Colleen E. Prim" <[redacted] "William A. McComas" <[redacted] Barbara Mitchell <[redacted] Caryn Hawk <[redacted]
To: Bonnie Fought <[redacted]

Housekeeping:

First off—thanks to all of the participants for a far-reaching, and (for this naive user of the info) exciting discussion of the Resolution and what to do about it. From the comments that have begun arriving, I think we'll have more than a few more sources of substantial input 'ere day's end.

I hit the button to have the call recorded when I began; I'll try to find out what we can do to make that available.

I took some notes, as did my law clerk, that I can scan and see if anyone can make something out of. The option of a transcript was mentioned by the cyber-operator on the conference call, but the phrase "additional cost" and my judge's sense of transcript costs and Scots heritage had me hit the decline button without further thought.

Answering a couple early questions from Jorge and Carl, while setting up folks to flesh out my imperfect recollection here without notes….

One of the outcomes is a general view that Resolution 106A has some serious limitations in scope and thrust that we need to put words to. For Example-and this is subject to supplementation by all and sundry in our group, since I'm sure i missing something:

Ellen's attention to the first paragraph on p.13 of the commentary as being dissonantly (?) macro as against the somewhat micro-approach of the resolution served as a good stepping off point.

I think three directions are forming up:

First is asking Admin Law to withdraw the resolution because it needs more work, and an inter-section/disciplinary attention, including probably the IP Section's copyright folks. This will require a bullet-list approach of our comments about the resolution's limitations and avenues forward in correcting them. We hope to have a bunch of those by close of business today for a brief report due tomorrow from our group.

Second is a realization that neither the resolution nor a vote on it at the mid-year meeting will be able to result in ABA amicus briefs in pending litigation, or policy statements in a timely fashion with the current litigation in mind—thus, we have some time to do some work. In this line, I'm going to try and have a talk with Prof. Levin over in Admin Section to glean some info about the genesis and thrust of the resolution.

Third is make the suggestion that we form a multi section working group between Admin (current sponsor), IP, and Sci/Tech

As a neophyte in process with assemblies and delegates, I gather that we ask for withdrawal, and work toward assembling a broader working group between sections if that is accomplished. I believe we have a consensus that we should ask our Section delegates to oppose the Resolution as currently drafted for the reasons that have been discussed, and will consist of the bullet-points we will gather by day's end. Some of these are:

The emphasis on Title 5 and FOIA in the Resolution as the locus of a solution to the problem of accessibility does not sufficiently include any approaches with roots in copyright.

Copyrights are worth $omething, and the use of copyrighted material must involve discussion of compensation.

The third section of the Resolution (that somehow SDO's would be compensated for their IP) is exceedingly amorphous, but cost recovery and preserving SDO's ability to work (since the US Government isn't in the standards development business and relies on SDO's) has to be part of the plan, and needs attention, or deletion from the resolution at this time.

More on a mechanical level:

Ollie Smoot graciously offered to give some thought to more specific ideas that could form a bullet list of things that should be included in an approach to this problem, Michael Aisenberg also had some thoughts, and I suspect from Carl's email that some ideas lie with him as well. Jorge obviously has some basis for significant input. Those folks were named—all members of our group who have ideas PLEASE chime in.

The input has already begun, according to my mailbox, for which much gratitude is due.

Thanks again, and all help and input is gratefully received.

RTK

From: Carl Malamud <carl@media.org>
Date: Thu, 14 Jan 2016 08:41:45 -0800
Cc: Bonnie Fought <[redacted] Jorge Contreras <[redacted] "Aisenberg, Michael A." <[redacted] <[redacted] Lucy Thomson <[redacted] VVC <[redacted] Ollie Smoot <[redacted] Scott Bradner <[redacted] David Duperrault <[redacted] <[redacted] Michele Herman <[redacted] "Nied, Earl" <[redacted] Patricia Griffin <[redacted] "Ellen J. Flannery" <[redacted] Tony Rutkowski <[redacted] Nina Mendelson <[redacted] "Colleen E. Prim" <prim@bowie-jensen.com>, "William A. McComas" <[redacted] Barbara Mitchell <[redacted] Caryn Hawk <[redacted]
To: Roderick Kennedy <[redacted]

Judge Kennedy -

Thanks very much for the helpful summary. If you're going to do a cross-section approach, I would highly recommend that you include the Civil Rights and Social Justice section. We really can't ignore the fundamental constitutional issues that are at stake here.

In regards to the issue of amicus briefs and current litigation that you brought up, I don't think the worry was that the ABA would be entering an amicus brief at the district court level in the next few weeks. The concern was that many of these issues, in particularly copyright over the law, are in front of a judge after 2 years of intensive preparation. Do we really want to have the ABA run a parallel determination of what current copyright law is while a U.S. District Court judge is considering the issue in depth? It seems presumptuous. As for bullet points for your list, I would add:

- Any consideration of this issue should bear in mind that fundamental issues—freedom of speech, equal protection, due process, and rule of law—are at stake here.

Finally, in regards to copyrights, I think perhaps we're jumping the gun when we say "Copyrights are worth $omething, and the use of copyrighted material must involve discussion of compensation." Let us not forget that in many cases, the U.S. government is a joint author of the works, the SDOs eagerly sought their incorporation into law, the works were created by a large number of unpaid volunteers who in many cases did not assign their rights, many of the works were created at the behest of the government, and in many cases the government paid for the creation of the works.

Let us also not forget the substantial benefits that accrue to SDOs to leverage their position as a creator of important public safety regulations to sell value-added products such as training, certification, handbooks, and the like. This win-win symbiotic relationship between SDOs and government have made many of these 501(c)(3) nonprofits immensely rich with $1 million/year salaries for most of their CEOs and immensely rich compensation packages for their senior executives. ASTM, for example, spends 9.33% of their money on compensating senior executives and paid their CEO $1,136,652 in 2013. [1]

My point is that you can't make a blanket assertion about copyright and standards. Nor can you do so about money. Many SDOs eagerly press to have selected materials into law and leverage that position to immense advantage. If you try and enact your standard into law, as many of them do, part of that bargain includes the fact that in our system of government, the law belongs to the people, not to the government, and certainly not to a private party.

Again, this is why I think you have to include Civil Rights and Social Justice in this discussion. This is not just about copyright, this is about public safety, the constitution, and the rule of law. We can't forget how important this is.

Carl

[1] Comment on Safety Standards for Infant Bath Tubs, CPSC-2015-0019, October 28, 2015. https://law.resource.org/pub/us/cfr/regulations.gov.docket.14/cpsc.gov.20151028.html#t7

From: Roderick Kennedy <[redacted]
To: Carl Malamud <[redacted]
Cc: Jorge Contreras <[redacted] Flannery, Ellen <[redacted] Bonnie Fought <[redacted] Aisenberg, Michael A. <[redacted] tony <[redacted] Lucy Thomson <[redacted] VVC <[redacted] Ollie Smoot <[redacted] Scott Bradner <[redacted] David Duperrault <[redacted] GilWhittem <[redacted] Michele Herman <[redacted] Nied, Earl <[redacted] Patricia Griffin <[redacted] Tony Rutkowski <[redacted] Nina Mendelson <[redacted] Colleen E. Prim <[redacted] William A. McComas <mccomas@bowie-jensen.com>; Barbara Mitchell <[redacted] Caryn Hawk <[redacted]
Sent: Tue, Feb 2, 2016 9:40 am
Subject: Re: Resolution 106A

Got an email asking what was going on. All I know is what I've heard from Ron Levin:

Following a conference call, Ad Law notified Ellen Flannery and other concerned Delegates today that it will withdraw 106A from the midyear meeting agenda. Instead, as those Delegates requested, an inter-Section task force will be formed to see if it can hammer out a substitute resolution for consideration at the annual meeting in August. So we'll see what develops next.

OMB has issued a document on the subject, that Ollie Smoot was nice enough to forward. It is available here: https://www.whitehouse.gov/omb/inforeg_infopoltech

I look forward to seeing what becomes of this resolution in particular, and the inquiry in general. Pleasure working with you all.

Roderick Kennedy
"They sicken of the calm who knew the storm."
--Dorothy Parker
[redacted]

From: Jorge Contreras <[redacted]
Date: Sun, 7 Feb 2016 09:26:47 -0700
Subject: Re: any news?
To: Carl Malamud <carl@media.org>
Cc: Roderick Kennedy <[redacted]

Rod - thanks for the update. This is the first I've heard about the actual formation of a group too. Hopefully the organizers will invite members of our Committee to participate?

Best regards,
Jorge

On Sun, Feb 7, 2016 at 8:47 AM, Carl Malamud <carl@media.org> wrote:
Are we going to be allowed to participate in the process? The world I work in doesn't form secret groups that determine the answer to issues, they work in public. Jorge knows this from his long-time work with the IETF.

On Feb 7, 2016, at 7:44 AM, Roderick Kennedy <[redacted] wrote:

Hopefully, you already know this, but a task force with Admin Law is forming; the matter is targeted for the August general meeting.

Roderick Kennedy
"They sicken of the calm who knew the storm."
--Dorothy Parker
[redacted]

On Jan 31, 2016, at 10:58 PM, Jorge Contreras <[redacted] wrote:

Rod - I'm wondering the same thing. Any definitive word on next steps?

Sent from my iPhone

On Jan 28, 2016, at 10:10 AM, Carl Malamud <carl@media.org> wrote:

I was wondering what the status was of the admin law resolution? Are they withdrawing for 6 months, or are they still trying to get it passed? (And, if they do, does Sci Tech have any plans to speak on the subject from the floor?)

Best regards,

Carl

From: Carl Malamud <carl@media.org>
Subject: Fwd: Resolution 106A
Date: Thu, 18 Feb 2016 08:02:32 -0800
Cc: "Mark D. Agrast" <[redacted]
To: Estelle Rogers <[redacted]

Dear Estelle -

A task force has been formed to reconsider the withdrawn Resolution 106A on Incorporation by Reference. Delegates have been named from the IP, Admin Law, and Sci Tech sections. For Sci Tech, the former Chairman of the Board of ANSI (a key player in the litigation and one with a financial stake in this outcome of this resolution) is one of the delegates. I like him very much as a person, but it definitely means there is a lack of balance in the task force as currently constituted.

I'm worried that the focus on admin law and IP will overshadow some of the important constitutional and social justice issues that are at stake here. Would the Section on Civil Rights and Social Justice be wiling to nominate me to serve on this task force? I'd be honored to participate and I believe I could make a constructive and important addition to the work of the task force. I've cc'd Mark Agrast on this note, he's worked with me on a number of occasions and he's seen the work I've done on access to legal materials.

Nominations were due on Monday, but I believe they would accept one at this point.

Best regards,

Carl

Begin forwarded message:

All,

This is to follow up on Russell Frisby's message confirming that the Ad Law Section will withdraw Resolution 106A from the midyear meeting agenda. I am writing to initiate the process of forming an inter-Section task force to consider how the resolution might be modified to enable it to achieve broad support and ultimately pass in the House in August. This message is directed to those Delegates who were represented on the January 22 conference call at which we formed a consensus on the desirability of forming such a group. (Apologies if I left someone off by mistake. Please let me know if I did.)

I anticipate that other entities will also wish to participate. I intend to report on this plan at the meeting of Conference and Division Delegates this Sunday and to invite any other Sections to participate if they are interested in being represented on the task force. (I know that Public Utilities, for one, has already expressed interest.)

In order to keep the size of the task force manageable, I am asking that each Section or other participating entity should select only one or two representatives to serve as members of the group. Presumably (although this would be a decision for the task force itself to make), members of the task force would be able to consult with other members of their respective Sections as the deliberations unfold.

In order to get the process moving expeditiously, I contemplate asking all Sections that wish to be part of the process to submit the names of their appointees to me by one week after the HOD meeting, i.e., Monday, February 15. That deadline might have to be extended, especially if we need to accommodate Delegates who find out about the task force plan for the first time in San Diego, but it's a target to aim for.

Thank you again for your interest in working cooperatively with Ad Law to work out acceptable revisions to 106A.

Ron Levin

Ronald M. Levin

From: Carl Malamud <carl@media.org>
Subject: IBR task force
Date: Fri, 19 Feb 2016 13:51:59 -0800
To: [redacted]

Dear Professor Levin -

I was hoping I might an opportunity to participate in the Incorporation by Reference task force. Several people (Nina Mendelson, Mark Agrast, and Judge Kennedy) suggested I drop you a line. I've also asked Estelle Rogers if perhaps I could participate from the point of view of the Civil Rights and Social Justice section. If it helps, I'm also a member of the Sci Tech and Admin Law sections.

For the past 8 years, I've spent a lot of time on the issue of Incorporation by Reference, and I think I could make a constrictive contribution to the deliberation. Nina and I have spent a lot of time talking about this issue since we both have studied it quite a bit. My particular area of expertise is Internet publishing. Among other things, I helped the Obama transition effort, and then the National Archives and the Office of the Federal Register in the revamp of the Federal Register. I was also responsible for placing the SEC EDGAR and US Patent databases on the Internet.

Some testimony I gave on the subject of IBR to the House Judiciary Committee can be found here:

https://public.resource.org/edicts

Thanks very much for considering this request.

Best regards,

Carl Malamud

From: "Levin, Ronald" <[redacted]
To: Carl Malamud <carl@media.org>
Subject: RE: IBR task force
Date: Fri, 19 Feb 2016 23:25:21 +0000

Carl,

The problem with your message is that I have not and will not appoint anyone to the task force. The purpose of the task force is to generate a revision of the former resolution 106A that can pass the House of Delegates with the combined support of interested Sections of the ABA. To that end, the leaders of those Sections have designated people who they believe will represent their respective points of view, and I have simply accepted their designations on that basis.

I am, however, well aware that you participated actively in discussions within the Science and Technology Section during the leadup to the midyear meeting. I would imagine that you might be able to have some indirect impact on the work of the task force by consulting with Sci Tech's representatives as deliberations proceed. To be more specific, Sci Tech has designated Rod Kennedy and Ollie Smoot as its representatives. I realize that Ollie comes from a point of view that is the opposite of your own. But I did have conversations with Rod while 106A was pending, and his references to the views you had expressed were not unsympathetic. (And that's over and above your conversations with Nina, which don't trouble me in the slightest degree.)

I'm sorry I can't accede to your request, but I hope the foregoing sheds some light on the nature of this process.

Ron Levin

Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University School of Law
Campus Box 1120
St. Louis, MO 63130
[redacted]
fax [redacted]
[redacted]

From: Carl Malamud [mailto:carl@media.org]
Sent: Friday, February 19, 2016 5:46 PM
To: Levin, Ronald <[redacted]
Subject: Re: IBR task force

Dear Professor Levin -

I wasn't asking you to appoint me. I was expressing a desire to participate and looking for guidance on how to do so. Your note certainly sheds light on the subject and I'm glad you're not troubled by the people I talk to.

Thanks for your time.

Carl

From: "Levin, Ronald" <[redacted]
Subject: RE: IBR task force
Date: February 19, 2016 at 3:53:57 PM PST
To: Carl Malamud <carl@media.org>

Carl,

Thank you for your clarification, and it sounds as though we are now on the same wavelength. I hope the forthcoming deliberations will meet with your ultimate approval.

Ron Levin

Subject: Re: Resolution 106A
From: Estelle Rogers <[redacted]
Date: Thu, 18 Feb 2016 09:27:18 -0800
To: Carl Malamud <carl@media.org>

I'll send it along. Remind me, are you a member of the Section? And will you write to Nina or should I?

On Feb 18, 2016, at 9:24 AM, Carl Malamud <carl@media.org> wrote:

Of course, I wasn't asking you to make the decision yourself, understand it is a section decision. But, I would very much appreciate it if my request could be sent to the council.

I have significant expertise in this issue, including my 2014 testimony before the House Judiciary Committee on the subject:

https://public.resource.org/edicts/

I'd appreciate the opportunity. Thanks much for sending my request in.

Carl

> On Feb 18, 2016, at 9:21 AM, Estelle Rogers <[redacted] wrote:
>
> Sorry but I think the section council should have that pick. I ll let you know.
>
>
> Estelle Rogers
> Sent from my iPad
>
>> On Feb 18, 2016, at 8:40 AM, Carl Malamud <carl@media.org> wrote:
>>
>> Your section is allowed to have two members. May I join you?
>>
>> I put Mark down as a personal reference in case you wanted somebody to vouch for my sense of decorum and gravitas. :)
>>
>>> On Feb 18, 2016, at 8:38 AM, Estelle Rogers <[redacted] wrote:
>>>
>>> I talked to Nina personally and someone else I forget at the moment. They said I was on the task force. They must have forgotten. Could u please contact them?
>>> Btw, Mark is not on the Council of our Section anymore.
>>>
>>> Sent from my iPhone

From: Carl Malamud <carl@media.org>
Subject: Re: Task Force on Incorporation by Reference
Date: Wed, 9 Mar 2016 07:03:26 -0800
To: Roderick Kennedy <[redacted]

I actually do worry about

In particular, he and several others firmly believe that it is ok to limit access to the law through the mechanism of a read-only site run by the standards bodies. They are not very technical, so for them a web site is a web site. To them, the fact that the web site has limited search, or doesn't work for people who are visually impaired, or doesn't work on certain platforms is not an issue. Hey, you can read the thing on the Internet, what's your problem?

They don't understand that one restricted web site as the only place to read the law also means that groups like mine can be prosecuted for unauthorized speaking of the law to others. And, we are not able to transform the law and new and innovative ways, the way John West transformed case law to create the national reporter system.

The core issue is does the standard retain copyright when it is incorporated to law. Ron and quite a few folks in admin law don't see a problem with that. And, the 3 folks from the IP section as well as the representatives who have worked for standards organizations are going to push very hard for a solution that either explicitly or implicitly says that a private organization is allowed to have a monopoly on the law and to make licensing decisions as to who else is allowed to speak that particular law and in what ways.

Nina, of course, totally gets this. But, remember, it was the admin law section council that came in at the last minute and added the problematic language to the resolution and did so over her objections. With the task force,

Do you see why I'm worried? (And, totally puzzled why I'm not allowed to participate. It does not seem fair.)

On Mar 9, 2016, at 6:50 AM, Roderick Kennedy <[redacted] wrote:

I think Levin and the Admin perspective are pretty much in line with your thinking. you might want to get in touch with him. Some of your experience will likely be quite germane to putting a finer edge on how to accomplish what he's put forward.

Roderick Kennedy
"They sicken of the calm who knew the storm."
--Dorothy Parker
[redacted]

From: "Levin, Ronald" <[redacted]
Subject: Followup to Wednesday meeting of Task Force on Incorporation by Reference
Date: March 16, 2016 at 9:26:46 PM MDT
To: Ollie Smoot <[redacted] "'Jamie Conrad'" <[redacted] "'Nina Mendelson'" <[redacted]
Cc: "'Kiefer, Anne'" <[redacted]

Dear members of the Task Force on Incorporation by Reference:

The task force made good progress during today's conference call. At the risk of drastic oversimplification, there appeared to be broad support for a proposal under which future IBR rulemaking should be accompanied by a limited form of guaranteed public access to IBR material, such as read-only access to an online version and some corresponding form of access at depository libraries. The implementing legislation would preserve any copyright rights the SDO would otherwise possess as against third parties. We did not reach any level of consensus about promoting access to existing IBR regulations, nor about what arrangements – including compensation arrangements – should be expected when an agency intends to afford access to copyrighted IBR codes on more liberal terms than the above.

I hope that the foregoing account is not read as being anything more than a crude summary of a very wide-ranging discussion. Nothing of substance has been finally decided, and much work remains to be done.

We agreed on the following procedural steps. Members of the task force are encouraged to submit to me, by next Monday, March 21, draft language that the task force should consider for inclusion in a revised resolution. You don't need to submit a fully fleshed-out proposal; any language that reasonably approximates ideas that appeared to attract support during today's conversation is welcome. (In case it would be helpful to your drafting efforts, I am pasting the language of Resolution 106A at the end of this message.) I will synthesize the various suggestions into a discussion document that I will circulate by the end of next week. We will then discuss the proposals in a conference call sometime in the middle of the following week (during the period from March 29 to 31). The precise date and time for the call will be determined on the basis of an email survey by which we will ascertain members' availability.

The goal of the forthcoming conference call should be to agree on the outlines of a tentative proposal. Hopefully we will be able, within a few days' time, to convert that tentative proposal into a discussion draft that can be circulated within our respective Sections for their reactions.

The due date for submission of a resolution and report to the House for action in August is (we were told) May 10. In order to meet that deadline, we would need for the various participating Sections to vote their approval of the task force's proposal by late April. As a practical matter, the meeting schedules of the Sections vary widely. It appears that all the participating entities have procedures for email or telephone decisions, so that we can, as necessary, obtain the necessary approvals by means other than votes taken at live Council meetings. However, to the extent that task force members foresee potential objections from within their respective Sections, they should consult with interested members of those Sections as our proposal comes together, so that the approval votes taken near the end of April will be essentially pro forma.

Meanwhile, if you have suggestions for the report, please send them on as well. No doubt, some aspects of the 106A report will have to be dropped in light of whatever decisions we reach regarding the resolution, but other aspects can probably be carried forward to the next version no matter what we decide to recommend.

Thank you to all for your participation and efforts, current and future.

Ron

From: Jorge Contreras <[redacted]
Date: Thu, 17 Mar 2016 11:43:40 -0600
Subject: Re: Followup to Wednesday meeting of Task Force on Incorporation by Reference
To: Roderick Kennedy <[redacted]
Cc: Carl Malamud <carl@media.org>

Rod - I hope you realize that you have at your disposal an invaluable resource in the SciTech Technical Standardization Committee. I suspect that there is no other ABA committee that has such a deep knowledge of the standardization world and its processes. I am both surprised and disappointed that SciTech has chosen not to tap this expertise to a greater degree with respect to the IBR discussion. I hope that you, in formulating proposals as requested below, will consider convening interested persons within the committee to assist or make suggestions.

On a personal note, this and other experiences over the past year have persuaded me that, after 13 years, it is time for me to step down as co-chair of the SciTech Technical Standardization Committee. My co-chair, Michele Herman, will likewise be stepping down. I hope that you will find many opportunities to work with the committee under whatever new leadership the Section elects to appoint.

It has been a pleasure getting to know you, and I wish you the best.

Sincerely yours,
Jorge

From: Mary Rasenberger [mailto [redacted]
Sent: Monday, March 21, 2016 3:26 PM
To: Levin, Ronald; Ollie Smoot; 'Jamie Conrad'; 'Nina Mendelson'; [redacted]
Cc: 'Kiefer, Anne'
Subject: RE: Followup to Wednesday meeting of Task Force on Incorporation by Reference

Ron and all,

On behalf of the IPL Section, Susan Montgomery, Janet Fries and I are submitting the following draft language for the task force to consider for a revised resolution:

RESOLVED, That the American Bar Association recognizes and supports in principle both the purpose and public interest served by copyrights and the purpose and public interest served by providing the public with access to laws and regulations generally, including in particular standards or other specific content that has been "incorporated by reference" (IBR) into regulations.

RESOLVED, That the American Bar Association urges Congress to amend [APA, FOIA or other appropriate Acts] to require that, prior to incorporating, including "incorporating by reference," into a proposed regulation any portion of a standard written by a non-government organization or other specific content that is subject to copyright, the rulemaking agency must have the copyright owner's authorization to provide the public with access to that incorporated specific content as part of the regulation, which authorization must include at least read-only, online access to the specific copyright content as part of an electronic version of the complete regulation and access to a printed version of the specific copyright content as part of a complete regulation in a government depository library, but the authorization need not include, and the copyright owner may retain, the right to provide public access to the incorporated specific copyright content apart from the regulation or in an annotation, compilation or other work , the right to provide public access to any unincorporated portion of the standard, and its other copyrights.

RESOLVED, That the American Bar Association further urges Congress to require that the rulemaking agency include in all publicly accessible copyright content incorporated into laws or regulations notice of attribution to the copyright owner, the limits of the public access authorization and contact information for anyone wishing to obtain authorization to otherwise use, copy, display, distribute, sell or create derivative works of the incorporated copyright content.

FURTHER RESOLVED, That the American Bar Association further urges Congress to require rulemaking agencies to identify standards and other copyright content previously incorporated into regulations, determine whether the agency has authorization from the copyright owner and, if not, as expeditiously as possible, obtain the copyright owner's authorization to provide the public with access to that incorporated specific content as part of the regulation, as described in the foregoing paragraph, or take other appropriate actions.

I look forward to our call next week.

Best,
Mary

From: Oliver Smoot [mailto[redacted]
Sent: Saturday, April 02, 2016 12:35 AM
To: Levin, Ronald <[redacted] 'Jamie Conrad' <[redacted] 'Nina Mendelson' <[redacted]
Cc: 'Kiefer, Anne' <[redacted]
Subject: RE: March 25 draft of IBR resolution

Dear Ron,

I read this draft many times since receiving it and appreciate the work that went into it. I then started working on it in Word. Sometime into that the realization came to me that you are trying to get the Congress do only two things:

Set a higher floor under what constitutes “reasonable access” and

Recognize that agencies must have an agreement with the IBR owner to meet this new floor for access.

You and others finally convinced me that “principles” are not useful in an ABA Resolution; therefore I think it better to slim thing down and focus on only those two goals, I propose the attached slimed down version of your draft to meet them. To me, this could be accomplished by the following, but I recognize that others might find this insufficient:

“The American Bar Association urges the Congress to amend applicable law to authorize agencies publishing proposed or final rules that incorporate copyrighted works by reference to enter into agreements with copyright holders to enable full public access to such documents.”

Therefore, I stayed closer to your draft.

While I recognize you have proposed that socialization of our drafts within the sections begin, I don’t think we are there yet.

Ollie

From: William Boswell [mailto[redacted]
Sent: Monday, April 4, 2016 12:17 PM
To: 'Levin, Ronald' <[redacted] 'Oliver Smoot' <[redacted] 'Jamie Conrad' <[redacted] 'Nina Mendelson' <[redacted] Mary Rasenberger <[redacted]
Cc: 'Kiefer, Anne' <[redacted]
Subject: RE: March 25 draft of IBR resolution

All:

I rather like Ollie's draft because it focuses on the end state that many are attempting to achieve without getting us bogged down in details that likely would be revised during the legislative drafting process, assuming Congress ever chooses to take it up. Both he and Ron implicitly acknowledge that the more detailed the resolution that's presented to the HoD the more likely we may be to generate confusion rather than clarity. Also, as any of us who've been involved in legislative drafting can attest, too much clarity is not always the road to success.

My notes on the paragraphs below, plus a closing note, are in red.

Bill Boswell

A]

> **1. Endorses the principle that all citizens should have access to the texts of binding federal regulations, including text that has been included in such rules through incorporation by reference (IBR), and should likewise have access to IBR text in proposed rules while those rules are under consideration.**
>
> **2. Recognizes and supports in principle both the purpose and public interest serve by copyright law and, accordingly, recognizes the public interest in not unduly impairing the ability and incentive of organizations to produce standards that can be incorporated by reference into federal regulations.**

As we have heard, the Rules and Calendar Committee may decide for us that these statements of principle must be deleted. In response to a suggestion on Wednesday, I shortened the paragraphs for the exact purpose of making them possibly more palatable to R&C, but that tactic might not work. Even if that committee would let these paragraphs through, it's certainly arguable that putting these sentiments into the explanatory report would be sufficient to articulate the premises on which the tangible proposal rests.

I'd prefer to see these in the explanatory report. BB

[B]

> **(3) … (b) The required public access … need not include … portions of a standard that have not been incorporated by reference into the regulation.**

The *substance* of this idea is important to a number of members of the task force. However, the language that Ollie retained does say that public access to "the incorporated portion of the copyrighted

work" must be allowed, so the words that he would delete are, logically speaking, redundant. The question then is whether the task force feels any need to include the extra language for the sake of emphasis.

I'm not sure what this adds, since all that the group should want to see is that which is IBR. Seems superfluous. BB

[C]

> **(c) The incorporated material must be presented in a manner than facilitates reading the material in the context of the relevant section(s) of the associated regulation.**

This paragraph was based on language initially submitted by our IP Section members: provide access to "the specific copyright content as part of a complete regulation." That phrasing seemed ambiguous to me, because it could be read to mean that the online display must actually integrate the borrowed material into the text of the regulation – making it *incorporated*, not *incorporated by reference*. My rewording was intended to express the same idea in clearer language, although I may not have accurately grasped their point.

Regardless, Ollie's draft poses the question of whether this idea needs to be in the resolution at all. Now that I think about it, this sounds like the kind of detail that is typically left to an explanatory report. That would be sufficient to bring the idea to the attention of congressional drafters, but perhaps the Delegates don't need to vote on it. However, we should hear from our IP members as to whether they think the idea does need to be in the

As in the prior note, I'm not sure what this adds. BB
resolution.

[D]

> **(d) An agency that is seeking authorization for use of IBR material should be empowered to pay a drafting organization such sums as are appropriate to compensate the organization for its use of the incorporated material, whether or not copyrighted, if Congress has provided funding for that purpose.**

I added language on compensation to the preceding draft at some members' request, but we can consider whether we need it. Ollie's draft does retain the idea that the agency must obtain authorization in order to use copyrighted content. Implicit in this idea is an assumption that the agency might have to make a payment in order to obtain the authorization. But it's for the agency and SDO to work out those terms, and perhaps the resolution doesn't have to go into more detail, as long as public access without charge is assured.

We seem to have agreed last week that this is for the agency and the SDO to work out. No one suggested that we tell them how to do it in each instance. BB

[E]

> **5. Takes no position regarding (a) the copyright status of private content currently incorporated by federal agencies into regulations; or (b) the desirability of new**

legislation that would require public access to IBR text in regulations on any broader basis than is provided in this resolution.

As with the statements of principles in my draft's paragraphs 1 and 2, Rules and Calendar might ordain that this paragraph must be deleted. But even if it doesn't, we could perhaps do without it. The main purpose it serves is to *negate* contrary assumptions that people might infer from the resolution. Perhaps language in the report could serve that function adequately.

If we are taking no position, why do we need to say that we are taking no position. That would seem to be self-evident. BB

[F]

6. Encourages agencies (a) to enter into voluntary agreements with standards development organizations so as to provide broader public access to IBR text in regulations than would be required by the legislation recommended herein, taking account of the guidelines in Recommendation 2011-5 of the Administrative Conference of the United States; and (b) to implement additional measures in Recommendation 2011−5 by updating incorporations by reference, considering IBR text availability as a factor in choosing standards, and improving drafting techniques when IBR text is used.

I proposed this language because it is the kind of exhortation that commonly appears in HOD resolutions, and to my knowledge nobody disagrees with the ACUS recommendations as far as they went (although some thought the Conference should have gone further). On the other hand, we don't need to make such an endorsement in order to fulfill the charge of the task force, so it doesn't have to be included. Moreover, now that the OMB circular has in essence endorsed the ACUS recommendations, perhaps we could assume that agencies will look to that document rather than the ACUS recommendation as such.

It seems to me that this is background material that most HoD members will simply be unaware of (As Churchill once observed of ending phrases with a preposition, "That is something up with which I will not put."). I'd suggest that we place it in the explanatory report. BB

I invite comments from other members of the task force about how we should respond to Ollie's proposed deletions. Again, I thank him for proposing his alternative draft.

As a group, we seem to have coalesced around the notion of read-only access, both pre- and post-adoption, a technology that is relatively new. While I can't speak for all SDOs, I suspect that the comfort level of many SDOs will be increased substantially if that is maintained. BB

From: Mary Rasenberger <[redacted]
Date: Thu, Apr 7, 2016 at 4:22 PM
Subject: RE: March 25 draft of IBR resolution
To: William Boswell <[redacted] "Levin, Ronald" <[redacted] Oliver Smoot
<[redacted] Jamie Conrad <[redacted] Nina Mendelson
<[redacted] <[redacted] '[redacted]
<[redacted] <[redacted] <[redacted]
'[redacted] <[redacted] '[redacted] <[redacted]
'[redacted] <[redacted] [redacted] <[redacted]
'[redacted] <[redacted] [redacted] <[redacted]
'[redacted] <[redacted]
Cc: "Kiefer, Anne" <[redacted]

Hi everyone,

I am attaching a mark-up of Ollie's draft. We (in the IPL section) also like the shorter, more high level approach.

The draft contains a carve-out on the requirement for publicly available online access for rules after they have been adopted. The carve-out would apply only to corporations and not the general public.

As we have continued to educate ourselves about the issues, we have learned that publicly available online access could eliminate any copyright protection in countries like China and India where IP is hard to enforce and the ability to make any money from sales in those countries would be eliminated. This won't matter for many SDOs, but for some important ones, like ASME, it could put them out of business or significantly affect the business in a way that the government might not be able to subsidize. Some standards organizations, such as for manufacturing public safety standards, make a good deal of money from overseas sales of their publications. Eliminating the ability to make money from certain important countries will make the standards more expensive domestically – which under our recommendations, would end up coming out of tax payer pockets in the amount of tens of millions – so this could end up getting far more political than we had intended. Most importantly, when looking at the whole picture, it may not be in the public interest.

As such, we suggest carving out free public online access for certain regulations, once adopted, that only corporations and not the general public have to comply with, and substitute reasonably available access in those cases, which could include a pay wall, for instance, or geographic limitations, though I gather those are hard to enforce), or coming to the agency, as well as access on computer terminals in federal depository and other libraries. Public online access would be required during the rulemaking however, as the public may have an interest in what the rules are adopted, even if the public will not have to comply with the rules.

I realize this is going back on what we had some consensus on already, but this is based on new information we received. Indeed, personally, I had hoped that we would have had the time to conduct some real research on existing practices and needs before launching into the draft. There is a lot of work that has already been done on this issue, and I would like to make sure that we are moving forward with the benefit of all the information that we need to make a recommendation on behalf of the entire ABA. It may be that others have already done that, but I am still getting up to speed.

I look forward to speaking tomorrow.

Best,

Mary

From: Patricia Griffin <[redacted]
Date: Fri, Apr 8, 2016 at 12:53 PM
Subject: RE: March 25 draft of IBR resolution
To: "Oliver R. Smoot" <[redacted] Estelle Rogers <[redacted] wpboswell <[redacted]
Cc: Mary Rasenberger <[redacted] <[redacted] '[redacted] <[redacted] <[redacted] Jamie Conrad <[redacted] Nina Mendelson <[redacted] <[redacted] '[redacted] <[redacted] '[redacted] <[redacted] "Levin, Ronald" <[redacted] <[redacted] '[redacted] <[redacted] "Kiefer, Anne" <[redacted]

Hi All:

The “reasonably available” approach adopted by the ACUS/OFR/OMB is further explained and illustrated in an IBR Handbook just released by the OFR: https://www.archives.gov/federal-register/write/handbook/ibr.pdf

This approach took into account the potential adverse consequences to many SDOs of mandating free availability – even “read only access” on a government website. Given Mary’s comments about the harm that could be caused to SDOs like ASME by the current draft, I would suggest that the working group step back and study this issue further before taking action. ANSI could assist this effort by convening a meeting with our Organizational Member Forum which consists of 250ANSI-accredited standards developers to explore both the market effects of our various proposals, but also the technical aspects of providing “read only access.”

Best,

Patty

Patricia A. Griffin
Vice President & General Counsel
American National Standards Institute
25 West 43rd Street, 4th Floor
New York, N.Y. 10036
Tel: [redacted]
Fax: [redacted]
Email: [redacted]

From: Oliver Smoot [mailto[redacted]
Sent: Friday, April 08, 2016 12:39 PM
To: 'Estelle Rogers'; 'wpboswell'
Cc: 'Mary Rasenberger';[redacted] Patricia Griffin;
[redacted] 'Jamie Conrad'; 'Nina Mendelson';[redacted]
[redacted] 'Levin, Ronald';[redacted]
'Kiefer, Anne'
Subject: RE: March 25 draft of IBR resolution

If there is a sense of compromise in the group, how about “available without charge to any US person directly affected?” and let the agencies and copyright holders argue it out? At some level of “free” the copyright holder loses its copyright in effect if not on paper. The cost to the US government (and thus us) will be different. As others have observed, the actual audience for these documents in the US is typically identifiable, and access could be managed on an IBR by IBR basis.

Ollie

From: Estelle Rogers [mailto[redacted]
Sent: Friday, April 8, 2016 7:49 AM
To: wpboswell
Cc: Mary Rasenberger; [redacted] Jamie Conrad; Nina Mendelson; [redacted] Levin, Ronald; [redacted] Oliver Smoot; [redacted] Kiefer, Anne
Subject: Re: March 25 draft of IBR resolution

I think the principle is “free to the public”—not necessarily free--so “reasonably available” falls short, as far as I’m concerned. I have come to believe that read-only electronic access is adequate and hard copy unnecessary, as long as assistance in accessing the text is available at the libraries. I’m glad that there seems to be consensus on providing the same availability during the rulemaking period as well as when enacted.

Unfortunately, I am unable to be on the call, but I thank everyone for their hard work and expect to refer the language to the CRSJ Council when we meet later this month.

Estelle

On Apr 8, 2016, at 5:39 AM, wpboswell <[redacted] wrote:

As an addendum to my comment from earlier this morning, Mary's observation is useful in reminding us that one size doesn't necessarily fit all, and that there are risks, including significant economic risks to both the SDOs and the public, in 1) making everything available at no cost to everyone, and 2) doing so in the same fashion irrespective of what it is. These risks, as she properly notes, extend well beyond our borders.

I continue to believe that there is value in the term 'reasonably available' and I hope we don't assume it needs to be discarded simply because it isn't synonymous with 'free' or 'freely accessible'. Not one of the IBR standards we've referenced is free, because there was and will always remain a significant cost to create it.

Bill Boswell

Sent from my iPhone

Date: Fri, 22 Apr 2016 12:55:41 -0600
Sender: Technical Standardization Law discussion <ST-TECH@MAIL.AMERICANBAR.ORG>
From: Jorge Contreras <[redacted]
Subject: ABA Tech Standards Committee
To: ST-TECH@MAIL.AMERICANBAR.ORG

Dear SciTech Technical Standards Committee members,

It's hard to believe, but I co-founded this committee with Ollie Smoot back in 2003, shortly after the CAFC's decision in Infineon v. Rambus. Ten years ago, Michele Herman became Vice Chair and then Co-Chair with me. We published the Patent Policy Manual in 2007. We were joined by Vice Chair Pam Deese in the late 2000s and early teens.

After all of these years, Michele and I have decided that it's finally time for us to step down as the leaders of this important committee. So, we wanted you to know that we will no longer be your Committee Co-Chairs as of the ABA Annual Meeting this August.

SciTech leadership will ensure the continuity of leadership of the committee, and we have copied both the current chair, Cyndi Cwik, and next year's Chair, Eileen Ewing, in case you have any questions or suggestions. Michele and I remain ready and willing to consult with Section leadership regarding the transition for this committee.

But we mostly wanted to say Thank You to everyone with whom we've worked over the last decade and more on dozens of projects, seminars, CLEs, policy statements and never-dull discussions. We look forward to keeping in touch and working with you as regular committee members in the coming years.

Warm regards,
Jorge and Michele

From: Nina Mendelson [mailto [redacted]
Sent: Monday, May 09, 2016 9:50 PM
To: oliver smoot <[redacted]
Cc: Ellen Flannery <[redacted] Mary Rasenberger <[redacted] Estelle Rogers <[redacted] William Boswell <[redacted] Montgomery, Susan <[redacted] Jamie Conrad <[redacted] Regina L. Nassen <[redacted] Oliver Smoot <[redacted] Roderick Kennedy <[redacted] Levin, Ronald <[redacted] Anne Kiefer <[redacted]
Subject: Re: Final draft of the IBR report

For the reasons Ron and Judge Kennedy have mentioned, I too am very concerned about adding any sort of instruction to Congress to consider security measures to enforce read-only access. It raises issues that we have not had an opportunity to consider.

I wanted to add a couple of things to these earlier notes. The concerns Mary raises are valid, and SDOs remain free to work security-related details out when the agency seeks authorization to use the standard. If SDOs believe, say, that the read-only access that they are being asked to authorize is, in reality, downloadable access, they can presumably suggest some different software or simply refuse authorization. But it makes sense to leave these details to the interested parties to work out in implementation, just as we are doing with other issues. The resolution certainly does not preclude negotiation that would ensure that read-only access is truly read-only.

Meanwhile, my understanding of what the task force negotiated was to set a "higher floor" of public access. This was exactly the term Ollie used to describe the deal, way back when he offered the dramatically shortened version of the resolution that ultimately became the basis for our agreement. And that floor is read-only online access. (Not downloadable access.) SDOs remain free, as they presently are, to provide greater access. Presumably they could do so in cooperation with agency regulatory efforts, whether there is "encouragement" to do so or not.

But going beyond this to have Congress legislate on required "security" in connection with read-only access, sends the message, contrary to the deal, that read-only access is more like a "ceiling." It might be that we could somehow draft around this problem, but it seems odd anyway to task Congress with figuring out specific software security requirements--the SDOs would seem to have a lot more expertise on this.

Also, I note that many people have not weighed in. It's also awfully late to be trying to work out the nuances of this issue or draft new language that is satisfactory to all.

This group, led by Ron, has done a terrific job working out an approach to a complex problem that has eluded many others. I personally hope we can still hold this deal together. The report/resolution is due to the HOD tomorrow. Accordingly, I will go along with removing the "encourage" voluntary agreements language. But I can't agree to proposed language addressing "security."

Nina

On Mon, May 9, 2016 at 9:02 PM, oliver smoot <[redacted] wrote:

> I agree with Mary and Ellen.
> Ollie

From: Flannery, Ellen <[redacted]
To: Mary Rasenberger <[redacted] <[redacted] <[redacted] William Boswell <[redacted] <[redacted] 'Jamie Conrad' <[redacted] 'Nina Mendelson' <[redacted] <[redacted] 'Oliver Smoot' <[redacted] <[redacted] Levin, Ronald <[redacted]
Cc: 'Kiefer, Anne' <[redacted]
Subject: RE: Final draft of the IBR report
Sent: Mon, May 9, 2016 11:51:40 PM

I agree with Mary on both points -- defining “read only” access, and deleting the last paragraph of the Report about “encouraging” certain things. The Report should not be “encouraging” things beyond what was agreed for the text of the Resolution. So I also request deletion of that paragraph. Thank you.

From: Mary Rasenberger [mailto[redacted]
Sent: Monday, May 09, 2016 7:15 PM
To:[redacted] William Boswell; [redacted] 'Jamie Conrad'; 'Nina Mendelson';[redacted] 'Oliver Smoot'; Flannery, Ellen;[redacted] Levin, Ronald
Cc: 'Kiefer, Anne'
Subject: RE: Final draft of the IBR report

Ron, first I apologize for not meeting your deadline last week, as I was in nonstop meetings and didn't even have time to open all of my emails. A one day turn around time doesn't always work if people are otherwise scheduled. Then this weekend, when I can usually catch up, my aged parents were visiting and my daughter home from college and the little free time I had was devoted to editing documents that had to go to press today. As it was, I put aside other very urgent matters to review this today.

That said, in all fairness I have consistently been making the same comments since I first saw this draft, which was, by the way, very recently. We have had very little time to work on this report as a group and the IP sections positions should not be harmed by the fact this came at a time when I have been working 24/7 in triage mode.

As I have consistently maintained, I believe that it is overly one-sided to keep in details such as about how agencies should serve the standards and how agencies should conduct copyright review (which I find not only unnecessary and extraneous to a legislative recommendation - and not even quite right, hence I had suggested just deleting it), and then to not flag a huge issue which I described in our calls, which is the fact that security measures need be taken if read only access is to mean read only. There is no need to answer all of your questions to do that. The recommendation will be criticized as techno ignorant if we don't say something to show we recognize that most popular read-only technologies do little to prevent copying and even downloading.

The other big issue is the recommendation to encourage voluntary agreements that go further. We never agreed to that in any call and I have deleted that in every draft of the resolution and report. You may have said you wanted to put it in the report but never asked for approval of that.

Due to the tardiness, the bottom line is that I can live with two small changes.

- Add the notion of "reasonably effective" to read only access. Or add a footnote that says that by read-only access, we mean to specify technologies that effectively deter downloading and copying - something like that - something that shows we know it's an issue. I am on my phone walking to an event, so can't read the actual document.

- regarding the voluntary agreements that go further, can you just delete the one sentence that says "we encourage ... " per my email to Estelle. I realize this is something some of you support, but it is simply not what we all agreed on. Just rephrase it as something that can be considered so that it does not read like a recommendation that we all signed onto.

Apologies for the typing.
Sent from Outlook Mobile

_____

From: Levin, Ronald <[redacted]
Sent: Monday, May 9, 2016 5:57 PM
Subject: RE: Final draft of the IBR report
To: <[redacted] <[redacted] William Boswell <[redacted]
<[redacted] Mary Rasenberger <[redacted] <[redacted] 'Jamie
Conrad' <[redacted] <[redacted] 'Nina Mendelson' <[redacted]
<[redacted] <[redacted] 'Oliver Smoot' <[redacted]
<[redacted] <[redacted] <[redacted]
Cc: 'Kiefer, Anne' <[redacted]

Mary,

First, as to GPSLD, I wasn't told what the Division's Executive Committee's reasoning was, except that the issue is complicated and the Committee has unanswered questions. Greg and Regina are on this email and can respond to your query if they wish.

As to your comments, I am troubled by the timing. When I circulated the second draft on Thursday, I called for all issues regarding the report to be raised by 2:00 Friday. When I got no substantive feedback from anyone (except Bill and Nina on the few small points everyone saw) on the rest of Thursday, Friday, Saturday, and Sunday, I felt justified in declaring that I considered that the task force had approved the report.

I do not say these things in a judgmental spirit. I would like to accommodate all task force members, including you. At this point, however, I have to act on behalf of all members, and I feel that people were entitled to rely on my representation that the report was finished. I do not feel I can take it for granted that everyone is close to their computers, ready to engage in debate on late-breaking issues. Thus, I think members would feel justly aggrieved if something significant were to be added in this last-minute fashion, especially when it could have been raised earlier.

Therefore, I think the only changes that should be considered at this juncture are ones that are so innocuous that we can be confident that no one would disagree. Per this criterion, here are my reactions to your specific points:

II.B. The statute you cited does seem to bear out what you say about the Copyright Office, so I will accept your edit to mention it specifically as the appropriate lead agency for giving government-wide guidance.

However, I do not agree with your criticism of the suggestion that agencies "should consider promulgating their own rules or internal guidance to regularize their responses to recurring situations that fall within their respective fields of authority." This reflects a very standard view in administrative law circles: publication of guidance is highly valued as a tool for promoting consistency, regularity, transparency, and adherence by staff to agency policies. One shouldn't be surprised to see such a good-government suggestion in a report (not resolution, just report) sponsored primarily by the Administrative Law Section. Moreover, the language only says that agencies shouldconsider issuing such guidance. I don't see a good reason why theyshouldn't even consider it. Can you give one?

For the same reasons, I would prefer to say, in the first sentence, that the Copyright Officeshould consider (not "could") preparing government-wide guidance. (That's evidently stronger than you would prefer, but it's weaker than what I would prefer, which is theyshould do it.)

II.C.: Regarding depository libraries, I actually do think we are saying more than that they should have internet connections. Rather, I think we are saying that they should provide access on the same basis that people with computers would have – i.e., it can be limited to read-only, no hard copies, etc. The language was specifically negotiated on this basis, so I'm not eager to tinker.

Regarding security measures, this issue strikes me as potentially having a number of ramifications that the task force did not explore in any depth, and I strongly doubt that we should try to settle on something at the last minute. A variety of questions come to mind. (For example: Would measures that limit screen-shots also limit readability? Must the security measures apply to non-copyright material? If not, how does the agency keep them

separate?) I do not have answers to these questions, but I tend to think the ABA should leave them to others, since the task force did not arrive at a position. Trying to be openminded, I suppose it is conceivable that someone could write language on this point that is so vague that no one could reasonably disagree with it. But I'm pretty sure that a sentence that begins "Congress should direct that . . . ." is not such language.

II.E. When the task force decided during its conference call on April 8 to delete most of the paragraphs in the March 25 draft, I stated my understanding that the task force expected me to put the substance of those paragraphs into the report. I repeated that statement multiple times thereafter, without any doubts being raised. One of those paragraphs read as follows:

[The ABA] Encourages agencies (a) to enter into voluntary agreements with standards development organizations so as to provide broader public access to IBR text in regulations than would be required by the legislation recommended herein, taking account of the guidelines in Recommendation 2011-5 of the Administrative Conference of the United States; and (b) to implement additional measures in Recommendation 2011 5 by updating incorporations by reference, considering IBR text availability as a factor in choosing standards, and improving drafting techniques when IBR text is used.

This seems to me to be basically equivalent to the paragraph you have asked to strike – and it explicitly says that weencouragevoluntary agreements. At this point, I think I have to assume that the paragraph represents the sense of the task force, so I don't think I should delete it.

Ron

From: William Boswell [mailto[redacted]
Sent: Monday, May 09, 2016 2:56 PM
To: 'Mary Rasenberger' <[redacted] Levin, Ronald <[redacted] 'Oliver Smoot' <[redacted] 'Jamie Conrad' <[redacted] 'Nina Mendelson' <[redacted]
Cc: 'Kiefer, Anne' <[redacted]
Subject: RE: Final draft of the IBR report

All:

As to 'read only" I don't think we intended to get into the weeds on how such access is to occur. Nor is it necessary or useful that we do so except to emphasize that it must be secure.

In the pre-adoption phase the proposed IBR standards belong to the SDOs, because the agency hasn't made a final decision on incorporation, so the SDOs likely are going to insist that their own portals and protocols be used for security purposes, as Mary points out. Post-adoption there will have to be equally strong uniform security protocols. I mention this because some SDOs got back to Patty and me during the discussion phase saying that agency security protocols didn't work to prevent copying when they (the SDOs) had, as a courtesy, permitted read only.

Bill
William P. Boswell, LLD, LLC
405 Hare Lane
Sewickley, PA 15143
[redacted]

From: Mary Rasenberger [mailto [redacted]
Sent: Monday, May 9, 2016 3:19 PM
To: Levin, Ronald <[redacted] Oliver Smoot <[redacted] 'William Boswell' <[redacted] 'Jamie Conrad' <[redacted] 'Nina Mendelson' <[redacted]
Cc: Kiefer, Anne <[redacted]
Subject: RE: Final draft of the IBR report

Ron,

Very nice email. Your points are well taken.

Can you tell us more about the concerns of the Government and Public Sector Lawyers, or can they? Some of my issues with the report are that we are being overly prescriptive about how agencies should implement this without knowing what rules they already have. This is not my area of law, however; it just strikes me as someone who has worked in the government that it seems extremely odd and ignores the fact that agencies are full of rules about contracting and legal approvals. I would be interested in knowing whether the GPSL folks shared any of those concerns or had others.

Your new draft of the report is good and is almost there, but I do have some comments in the attached.

The important ones are copies below:

II.B: Here is where I query whether it is really necessary to tell agencies how to do their jobs. Who are we to be telling federal agencies how they should manage their copyright issues? And, it is part of the Copyright Office's statutory mandate to provide advice to other agencies on copyright (17 USC 701(b)(2)), so please correct that.

II.C: We should note somewhere the security concerns with read-only access – that it still is downloadable by most if not heavily encrypted. And of course screen saves are a way to copy read only. So, we need to add something along the lines of: "Congress should direct agencies to employ up-to-date security measures to prevent downloads or screen shots of the read-only materials."

II.E: I still take big issue with this paragraph. This goes beyond our resolution.

Mary

From: Levin, Ronald [mailto[redacted]
Sent: Monday, May 09, 2016 9:13 AM
To: Oliver Smoot; 'William Boswell'; 'Jamie Conrad'; 'Nina Mendelson';[redacted]
MaryRasenberger[redacted]
Cc: Kiefer, Anne
Subject: Final draft of the IBR report

Dear members of the Incorporation by Reference Task Force:

After I circulated the second draft of the IBR report, I received only one set of comments (from Nina Mendelson) and a response to only one of those comments (from Bill Boswell). Subsequently, Nina and Bill resolved their differences on that point on their own, and I will incorporate that language. Having received no other input, I take it that Nina's other proposed tweaks, as well as my other edits to the first draft, have been accepted by acquiescence.

Accordingly, I have incorporated those last few changes into the report and reformatted it into a form that is ready for filing with the House of Delegates by Tuesday (tomorrow). At the back of this version are filled-in copies of a "General Information Form" and "Executive Summary," as required by HOD rules. You can examine these forms and give me any feedback or requests for revision. It is mostly pro forma. The responses to substantive sections consist mainly of language you have seen before; in fact, the summary of what the resolution contains came verbatim from the transmittal letter to Sections that we sent a few weeks ago. If I hear no objections by the end of Monday, I will advise Anne that the document is ready for filing. You will all get copies of the official document when it is submitted.

FYI, I have been advised that the Executive Committee of the Government and Public Sector Lawyers Division discussed the resolution and concluded that it had too many uncertainties about the resolution to take a position at this time. The Council of the Division will decide later whether to support or oppose the resolution. For now, therefore the Division has elected not to be a cosponsor but has no position on the underlying resolution. This means that the resolution will go forward sponsored by a total of six Sections. I consider this a pretty credible showing of support.

The work of the task force now seems to have come to an end. Should any questions about amendments arise later, I will work with the Section Delegates for the cosponsoring Sections. In some instances, these Delegates were also members of the task force. Those who were not could presumably consult with their task force representatives if such an issue were to emerge.

We don't know what will happen in the House of Delegates, and of course the reaction of Congress and others in the outside world is even less predictable. In my opinion, however, the task force can take considerable satisfaction in what it has accomplished. At the outset there were ample grounds for suspecting that this project would get nowhere. We all were aware that we were faced with a difficult policy issue that involved competing values – each reasonable on its own terms -- regarding public access and proprietary interests. Many people who had looked at the problem in the past had found no way to reconcile them. The task force, however, has devised a plan that, whatever its imperfections, holds significant promise of accommodating interests on both sides of the equation.

No doubt many and perhaps most of us would individually prefer a solution that would strike the balance differently. I would not fault anyone for being ambivalent about the resolution. But our proposal is a reasonable compromise reached through mutually respectful discussions among representatives of varying points of view. It is the kind of intermediate solution that one would expect to emerge from a broad-based ABA task force like ours, if it were to accomplish anything. By this standard, I think we have done well.

Thanks to all of you for bringing your broad knowledge, insights, critical analysis, and cooperation to this enterprise. Stay tuned for further developments in August, if not before!

Ron

From: Nina Mendelson [mailto [redacted]
Sent: Tuesday, May 10, 2016 11:33 AM
To: Mary Rasenberger <[redacted]
Cc: oliver smoot <[redacted] Levin, Ronald <[redacted] Ellen Flannery <[redacted] William Boswell <[redacted] Jamie Conrad <[redacted] Regina L. Nassen <[redacted] Anne Kiefer <[redacted] Estelle Rogers <[redacted] Montgomery, Susan <[redacted] Roderick Kennedy <[redacted] Oliver Smoot <[redacted]
Subject: Re: Final draft of the IBR report

So the sentence in question would read . . . "the public access provided by the agency should include, at a minimum, true read-only access to the incorporated portions of the standard . . . ."

Correct?

As you know, I am worried about opening up this issue, but I am willing to accept the first proposal, the addition of the word "true." On the theory that it is meant to emphasize that references to "read-only" means *really* read-only.

I think putting read-only in quotes here might cause confusion with other references to read-only access in the report, but I don't have a particular objection to the quote marks here if others strongly prefer.

Nina

On Tue, May 10, 2016 at 12:21 PM, Mary Rasenberger <[redacted] wrote:

On the security issue here are two possible minimal changes that flag the issue without getting into detail - which I agree could get complex.

1. What about adding "true" before "read-only access" in the first sentence of IIC? If we put "read-only" in quotations it would be clear we are modifying that term.

2. Alternatively, in the first sentence of the last paragraph of IIC, after "in a manner that" we could add "effectively deters downloading and copying and".

From: "Levin, Ronald" <[redacted]
Subject: RE: Final draft of the IBR report
Date: May 10, 2016 at 10:59:08 AM MDT
To: Nina Mendelson <[redacted] Mary Rasenberger <[redacted]
Cc: oliver smoot <[redacted] Ellen Flannery <[redacted] '[redacted]
<[redacted] William Boswell <[redacted] Jamie Conrad <[redacted]
"Regina L. Nassen" <[redacted] [redacted]
<[redacted] '[redacted] <[redacted] "Anne Kiefer"
<[redacted] Estelle Rogers <[redacted] [redacted]
<[redacted] [redacted] <[redacted] "Montgomery, Susan"
<[redacted] Roderick Kennedy <[redacted] Oliver Smoot
<[redacted]

So the indications are that Nina and Mary have come to agreement on a solution, which I would assume others would also find acceptable. (Or virtual agreement, anyway. I personally would vote against using the quote marks, because they seem to strongly invite the reader to ask herself what “true” means, yet the report doesn’t answer that question. Like Nina, however, I would go along with the quote marks if they are important to Mary or others).

Once we get an answer to that small point, I think we are done. Because of the fair-notice problems I noted yesterday (which would be even worse today), I don’t think any brand-new questions should be raised at this point.

I refrained from responding to Estelle before all chickens were hatched. But now they seem to be, so I will say thank you!

Ron

Date: Thu, 26 May 2016 10:16:57 -0400
Sender: Technical Standardization Law discussion <ST-TECH@MAIL.AMERICANBAR.ORG>
From: GTW <[redacted]
Subject: ABA Tech Standards Committee
Comments:To: Jorge Contreras <[redacted]

Hello Jorge and Michele: You have done a great job in leading our activities and you both have my best wishes and likely those of many of us who have benefited from your leadership. This is to give our new committee leaders a possibly controversial matter to take on as their first task.

I write to the ABA Tech Standards Committee about an ABA proposed resolution on standards incorporated by reference in regulation that was brought to my attention by the American National Standards Institute. I have attached the ABA resolution on the matter of standards incorporated by reference set to be voted upon in August. I see also that the new text was prepared by a multisection task force that revised an earlier resolution that had been rejected,

This is as much about my learning about ABA approval processes of various documents as it my feeling I have some competence and knowledge about IBR standards issues and regret that we as the Tech Standards Committee apparently do not (did not) have the means to express a point of view about the resolution.

It is gratifying to me that the Science and Technology Law section was represented on the drafting task force but unsettling at least to me that the wisdom of the various members of this directly relevant committee was not actively sought.

This seems not the correct occasion to contribute views of problematic aspects of the proposal and the applicability of many current policies and procedures generally supporting the status quo ... but I seek some better understanding how the Section of Science and Technology can support any proposal resolution without the benefit of counsel of a directly relevant section committee.

George T. Willingmyre
President GTW Associates

Date: Fri, 27 May 2016 04:32:28 -0700
Subject: Re: ABA Tech Standards Committee
From: Carl Malamud <carl@media.org>
To: GTW <[redacted]
Cc: ST-TECH@mail.americanbar.org

Dear George -

I know quite a few members of this list, certainly including myself and Jorge, had asked to participate in the task force but were firmly rebuffed. There seemed to be a conclusion that they wished to reach, and a desire to keep the task force homogenous so they could quickly reach that outcome.

I asked several times for an opportunity simply to talk to members of the task force about technical publishing and the Internet, but was unable to present my views, let alone participate. It was particularly unsettling for me that some of the members of the task force had already make up their minds about the proper outcome of ongoing litigation on the subject, despite the fact that the judge has not yet ruled on a very extensive set of Motions for Summary Judgment. Others on the task force had never considered IBR or technical standards before and had to try and get up to speed. It seemed a little presumptuous of the ABA to be jumping towards a pre-ordained position with such a cursory investigation of the issues.

On a technical basis, the task force deliberation certainly could have used some expertise as they considered issues like “shall we place a copy of each standard on a single terminal in federal depository libraries to meet out public access obligations.” As most people on this list know, there aren’t many “terminals” left in the FDLP system and most libraries really hate to lock a single electronic copy down onto a physical computer since that isn’t how they work or their clients work. In addition to not availing itself of the technical expertise from this group, I should note that the task force had nobody with any expertise in govdocs and the FDLP system, and very little representation from the folks that actually make the technical regs and use them inside of government.

The first attempt at running this resolution through for a quick rubber stamp had to be yanked from the mid-year meeting because nobody had been consulted, hence this task force. It seemed like this time the process was still controlled very tightly with a hope to get the resolution approved as quickly as possible. In my opinion, the task force did not properly consider the technical issues of publishing in an Internet age and they certainly did not take into account many of the broader constitutional issues that I think members of the ABA might consider important if they knew about them.

We can only hope at this point that the House of Delegates will ask for more information or that perhaps the public will begin to weigh in with their opinions on the subject before the House meets. I would hate for the ABA to come down on the wrong side of such an important issue concerning the rule of law and an informed citizenry in the Internet age.

Carl

Attachment F

Comments of the Section of Intellectual Property Law and the American Society of Mechanical Engineers on the ANSI Delegation Proposed Resolution (March 25, 2016).

Mary Rasenberger
Apr 7, 4:05 PM
Added Text

Mary Rasenberger 4/6/16, 2:04 PM
Do we need to define this?

Mary Rasenberger 4/6/16, 2:04 PM
If we make this broader than standards created by SDOs, we need to go back and think about what we are unintentionally covering.

Mary Rasenberger
Apr 7, 4:05 PM
Added Text

Mary Rasenberger
Apr 7, 4:05 PM
Deleted: , without charge,

Mary Rasenberger
Apr 7, 4:05 PM
Deleted: any third party

Mary Rasenberger
Apr 7, 4:05 PM
Added Text

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Mary Rasenberger
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Mary Rasenberger
Apr 7, 4:05 PM
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Mary Rasenberger
Apr 7, 4:05 PM
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Mary Rasenberger

RESOLVED, that the American Bar Association

1. Urges Congress to enact legislation that applies the following provisions to federal agencies when they propose or issue substantive rules of general applicability that incorporate by reference any portion of a copyrighted document containing standards created by a private standard development organization:

(a) The agency must obtain the copyright holder's authorization to enable members of the public to have access~~, without charge,~~ to ~~any third party~~the copyrighted works incorporated by reference in either proposed or final rules~~.~~, as follows:

(~~b) The~~i) For proposed rules, the required public access, during the public comment period, must at least include read-only access to the incorporated portion of the copyrighted work, available online and at computer terminals in government depository libraries; but it need not include availability of the copyrighted work in hard-copy printed form~~.~~;

(~~c~~(ii) For issued rules, the required public access must at least include read-only access to the incorporated portion of the copyrighted work, available online, if the general public will be required to comply with the rule, and, in all events, at computer terminals in government depository libraries; but it need not include availability of the copyrighted work in hard-copy printed form. If the rule applies only to corporate entities and not to the general public, the agency must secure reasonable access.

(d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

2. Further urges Congress to permanently authorize agencies subject to the above provisions to enter into agreements with copyright holders to accomplish the above access.

Mary Rasenberger
Apr 7, 4:05 PM
Added Text

Mary Rasenberger
Apr 7, 4:05 PM
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Apr 7, 4:05 PM
Added Text

Mary Rasenberger
Apr 7, 4:05 PM
Deleted: .

Mary Rasenberger 4/6/16, 2:17 PM
This is not realistic. The agencies have had rules about this and have not done such a terrible job to date. I don't see how we can ask them to undo regs. The administrative burden is too big.

Mary Rasenberger
Apr 7, 4:05 PM
Added Text

3. Further urges Congress to require each agency, within a specified period:

(a) to identify all copyrighted works previously incorporated by reference into regulations of that agency;

(b) to determine whether the agency requires agreement with the copyright holder in order to provide the public with the form of access described above; and

(c) if so, to create a plan ~~for obtaining~~ to obtain such authorization~~.~~.

Attachment G

Initial Comments of the Working Group of the Section of Science and Technology Law, Prepared by the Honorable Roderick T. Kennedy (January 15, 2016).

Points for Science and technology Position on Resolution 106A

The principle reflected by the Resolution that citizens have a right to fully access the laws by which they are bound is entitled to the Section's robust support. This implicates due process of law, equal protection of the laws, and the freedom of speech by disseminating information integral to rules having the force of law. The Section recognizes and agrees with the need to have the text of documents incorporated by reference (IBR) in Proposed and Final Federal Regulations available to the public.

The Section wishes specifically to recognize the singularly helpful efforts of Professor

The Section recognizes that the Administrative Conference of the US recently reviewed a petition substantially similar to Resolution 106A and after receiving substantial input decided not to adopt the steps proposed but rather to work with Federal agencies to ensure that practical means of access exist for every regulatory process.

Anecdotes show that while progress has been made, the goal of increased not been fully achieved.

The Section recognizes that the Resolution reflects the Administrative Law Section's judgment that to regulate the availability of IBR documents by the Office of the Federal Register is best addressed by amending the Freedom of Information ACT (FOIA) so as to compel a statutory enactment embodying the public's right to access to IBR documents at no cost to the public.

This issue combines constitutional, legal, technical and business issues in ways that are becoming more prevalent as our society evolves to be electronically based.

The Resolution proposes that the ABA support legislation to effectuate what the Administrative Conference already rejected.

Instead, the Section on Science and Technology proposes that the Resolution be withdrawn pending the outcome of the present litigation; meanwhile representatives of all concerned ABA bodies be invited to join in a task group under a Chair selected by the Section on Administrative Law to monitor the litigation and at its conclusion determine whether the goal of making IBR documents available has been achieved. If not, the group will draft a proposal addressing the constitutional, statutory, administrative, business and technical issues raised by IBR and submit a report on what the ABA should do next to the next House of Delegates Meeting.

Specifically the resolution:

- Does not define "meaningful free public access." Instead it offers comments on various statutory, business and technical issues, sometime in apparently conflicting ways, about

the perceived current deficiencies in the development of Federal regulations. The Freedom of Information Act requirement is for reasonable availability. In our electronic society the word "free" has controversial meanings—including that copyright does not apply--that are not addressed in the resolution or report.

- The resolution does not address the copyright holder's rights to control its works other than to urge in its third provision that copyright holders "where appropriate, have access to compensation for financial losses." Copyright licensing is a richly developed field that ordinarily operates to make works very widely available, but such outcomes are summarily dismissed in the report. Accordingly, we believe that the third section of the resolution that implies a private right of action in the Court of Claims for compensation for government release of IBR documents in which persons or entities claim property rights requires more exploration.

- Issues concerning joint ownership of intellectual property in IBR materials between individuals, individuals and groups, and individuals, groups and government entities can confound simple analysis of economic effect, financial loss, and right to compensation.

- In this light, the resolution does not address the technical fact that currently no document made available for viewing through the Web is immune to copying. Thus, one result of ill-thought out solutions could be to render each IBR document essentially in the public domain, vitiating its copyright.

- There are alternatives to amending the Administrative Procedures Act of the FOIA, such as developing an amendment to the Copyright act that would provide a legally limited right to view and make copies.

In light of these deficiencies, the Section of Science and Technology urges the withdrawal of this Resolution.

The Working Group urges the Council to instruct our delegates to seek an outcome substantially embodying the objectives about but empowers them to use their best efforts to achieve what they perceive to be the best outcome in light of the circumstances.

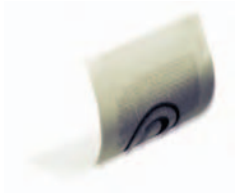
Attachment H

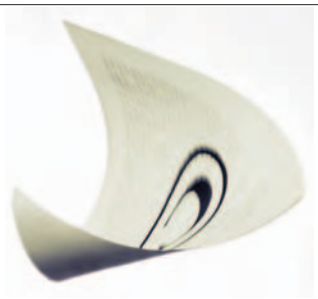
Victor Li, “Who Owns the Law? Technology reignites the war over just how public documents should be,” ABA Journal (Permission Granted for Noncommercial Use) (June 1, 2014). (Use of the article should not be construed to imply endorsement of this appeal by the ABA Journal.)

Paradigm Shift

Three years ago the *ABA Journal* began a series of reports on the paradigm shift in how law is being practiced. Noting the changes brought on by a maturing market, disruptive technology, economic recession and the rise of legal services competing with law firms for parts of the legal dollar, this series has looked at how the legal business is responding and the legal profession often not responding to pressures never before placed on lawyers and law firms.

This article is the sixth in our series. The liberation of information that has come with computers and the Internet creates new doors of opportunity and opens new areas of dispute in the document-ruled profession of law. What's made available, who provides it how, where and when, and at what cost are now fundamental questions. This article looks at a debate going on in businesses, between different crafts and their regulators, and before judges: How public must public information be, and who absorbs the costs and earns the profits of providing it?





BY VICTOR LI

Who Owns the Law?

Technology reignites the war over just how public documents should be

These days the smallest and most exclusive piece of real estate in Washington, D.C., is the sliver of common ground that exists between congressional Democrats and Republicans. But during a January hearing before the U.S. House of Representatives Judiciary Committee on the scope of copyright protection laws, Democrats and Republicans were in broad agreement on an issue that was seemingly settled long ago: No one can own the law.

But technology and a growing privatization of the law-making process have stirred up the debate once again. Huge amounts of formerly stored-in-print material—including laws, court and administrative rulings, and regulations from governments, standards bodies and myriad other organizations—are now digitized, which means printing costs and access issues should be minimal. Many of these documents are legally

PHOTO ILLUSTRATION BY STEPHEN WEBSTER

CARL MALAMUD
Founder of Public.Resource.org

enforceable; some are standards that are legally binding; and others provide information that would normally be publicly available, though in the past you might have had to go to a clerk's office or library and pay for copies.

But the end of print and ink does not mean the end of all costs. And the debate has divided those who call for free access for all in all cases and the legal research firms (established and startup) who say legal documents can be misleading or meaningless without the context, organization and analysis that someone has to be paid to provide.

These issues have set off battles between legal information giants like West and LexisNexis and upstart competitors seeking access to court records. And they have inspired lawsuits, including a fight between three professional standards organizations and one crusader for free access to public information.

ACCESS CRUSADER Sitting at the witness table at the House committee meeting was that crusader, Carl Malamud. He is an open-source activist and the founder of Public.Resource.org. His group is funded through donations and grants, and it recently turned to crowdfunding through Kickstarter to support the conversion of 28,040 public safety standards into HTML files. Malamud was on hand to detail the latest skirmishes in his 20-year fight for free and open access to the law.

Malamud certainly never envisioned this role for himself. After all, his initial foray into the world of the World Wide Web came in 1993 when he created an Internet radio station that broadcast, among other things, floor debates from both the U.S. House and Senate. That same year he gave a demonstration of the station to a group of Congress members, and then-Rep. Edward Markey of Massachusetts asked him whether the Internet could be used to post the Securities and Exchange Commission's EDGAR database (Electronic Data Gathering, Analysis and Retrieval), which contains filings and disclosures from public companies.

"He asked me why those documents weren't available to the public," recalls Malamud, "and I had no answer."

Malamud went to the SEC and was told there was no demand for it—and even if there were, it would be prohibitively expensive ($30 million). So he got a $600,000 grant from the National Science Foundation and bought filings from the SEC that he put online using a computer from his friend, future Google Chairman Eric Schmidt. Malamud estimates that nearly 50,000 people used his site every day, including investment clubs, students and reporters.

"The SEC fought us on EDGAR," Malamud says. "But two years later, they ended up taking over my system. Now it's one of the most popular sites on the Internet."

Malamud has moved on from clashing with government agencies that cite cost concerns and lack of public demand as reasons for their reluctance to repost their information. Instead, he's turned his attention to legal publishers, whom he accuses of trying to wring money out

PHOTOGRAPH BY TONY AVELAR

of an unsuspecting public by charging them for information that, by all rights, already belongs to them. In the last decade, he has clashed with legal publishing companies such as West and LexisNexis, which have objected to Malamud's habit of posting laws, statutes, regulations and codes online for free.

In 2007 Malamud alerted West that he wished to publish the company's federal case-law reporter on his website. He exchanged letters with the publisher, asking for guidance as to what he could and could not publish online without inviting a copyright infringement lawsuit. Malamud wrote that he would extract the public domain content and republish it on the Web while eliminating or redacting West's additions and annotations.

He also requested clean copies of the *Federal Reporter, Federal Supplement* and *Federal Appendix*, stripped of West's intellectual property, writing that "you have already received rich rewards for the initial publication of these documents, and releasing this data back into the public domain would significantly grow your market and thus be an investment in your future."

West responded by noting that it did not claim copyright in the portions of the judicial opinions issued by the court, but it did claim protection for its additions—including annotations, headnotes, summaries, updates and revisions, as well as the selection and arrangement of the opinions. "As you suggest in your letter, the copyrightability of this material, which is original to West, has never been seriously questioned," wrote Edward Friedland, then-deputy general counsel for West's parent company at the time, the Thomson Corp.

Malamud's approach allowed him to avoid being sued. In fact, he says, his actions have resulted in tons of cease-and-desist letters, but not a lot of lawsuits. "I try to make it a habit not to get sued," he says.

And his position is clear: If it was produced by the government, it belongs in the public domain.

BATTLE LINES When he was finished with EDGAR, Malamud decided to take on another challenge. He saw how difficult it was to use the U.S. Patent and Trademark Office's database, so he simply uploaded patent filings to his website with the goal of making it easier for users—and would-be inventors—to search through claims and applications to identify prior art.

"Before I put the patent database online, it cost $20 to $30 to read a patent, and that's not a good thing," Malamud says. "It puts a brake on innovation."

It's Malamud's call for innovation that puts him at odds with legal publishers and governmental entities, as well as private organizations that create model standards and safety regulations. After all, almost no one denies that the law is free, and that the general public has a right to access the law.

"The ability to know the law, to read the law, is essential to the functioning of our democracy," Malamud says. But he is adamant in his belief that it's not enough to merely have access to the law. It's every bit as important to him that people are able to do what he did and utilize legal information in new and innovative ways.

That's a bridge too far for some. During the January hearing, Malamud spoke about how, during the past year, he has been targeted by opponents that have blurred the distinction between government entity and private organization.

For example, state and local governments often contract private publishers like West or LexisNexis to produce and publish their official codes. In 2013, Georgia, Idaho and Mississippi asserted copyright protection after Malamud posted their laws on his website.

"While it is clear that the law has no copyright, a few states have evidently not received the memo," he says.

Idaho, for instance, claimed in its cease-and-desist letter that it owned a copyright in the "analyses, summaries and reference materials" contained in the annotated code. However, the state went one step further and claimed copyright protection for the native statutory content itself, stating that Malamud needed a license (which could be provided free of charge) if he wanted to use it on his website. Georgia also claimed copyright infringement, writing in its takedown letter that while "the state asserts no copyright in the statutory text itself," Malamud allegedly copied annotated text, which the state claimed was copyrighted. Mississippi made a similar claim, noting that LexisNexis, which published the code, had provided a clean, unannotated copy of the code that was available for free.

To Malamud, that's a false distinction. He says the codes are not independent endeavors by private companies but are, instead, clearly labeled as official state laws.

"The *Official Code of Georgia Annotated* is a publication of the state, and it is the definitive statement by the state of the law," said Malamud in his response to Georgia's cease-and-desist letter. "Any citizen wishing to read the *Official Code of Georgia Annotated* would have trouble distinguishing between the 'statutory text itself' and those materials outside the box. No matter how you slice that cheese, it all looks the same. The *Official Code of Georgia Annotated*, every component of it, is the official law."

STANDARDS SUIT Meanwhile, several standards-development organizations have taken Malamud and his organization to court. These SDOs propose model regulations and codes that cover everything from building inspections and fire safety to heating and refrigeration. And they work to get local, state and federal agencies to adopt them into laws.

Last August, three SDOs—the American Society of Heating, Refrigerating and Air-Conditioning Engineers, the American Society for Testing and Materials, and the National Fire Protection Association—sued Malamud for copyright violations after he refused to pull copies of their regulations from his website. The lawsuit, pending before the U.S. District Court for the District of Columbia, warns that "Public Resource's actions threaten the substantial public benefits, including

safety, efficiency and cost savings that result from [the standards organizations'] ownership and exploitation of their copyrights in the standards they create."

Sitting next to Malamud at the hearing was Patricia Griffin, vice president and general counsel for the American National Standards Institute, which oversees the development and standardization of professional standards. Griffin argued that it should be up to the standards-development organization to determine how it provides the public with access to its model regulations, noting that some had completely free access while others charged a price or restricted a user's ability to download the information.

"When the government references copyrighted works," said Griffin in her testimony, "those works should not lose their copyright. But the responsible government agency should collaborate with the SDOs to ensure that the public does have reasonable access to the referenced documents."

These arguments are all anathema to Malamud. "Equal protection of the laws and due process are jeopardized if some citizens can afford to purchase access to the laws that all of us are bound to obey—with potential criminal penalties for noncompliance—but others cannot," he said in his testimony. "Access to justice should not require a gold card."

Malamud, meanwhile, has retained noted tech law firm Fenwick & West to represent him. Attorneys from the digital rights group the Electronic Frontier Foundation have also signed on to represent Malamud.

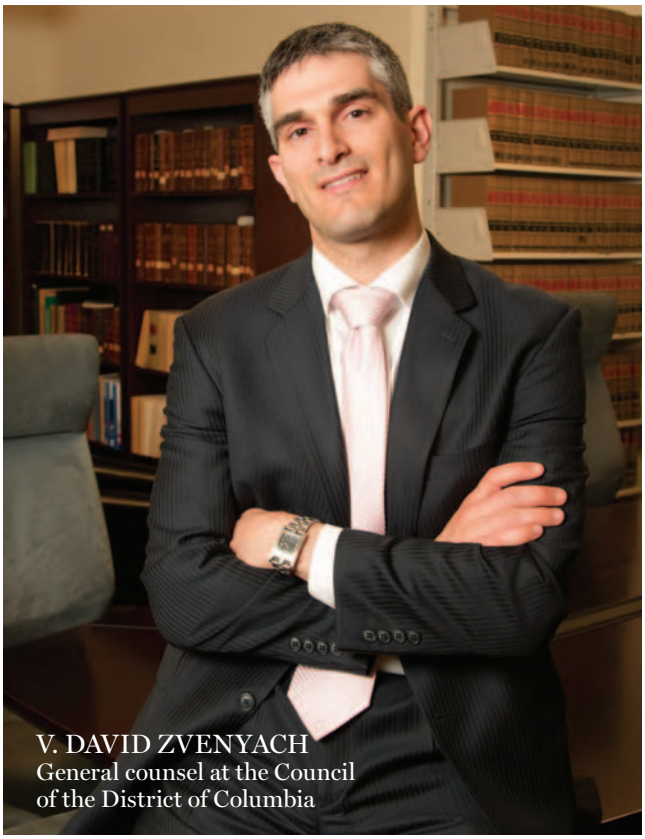
"Public.Resource.org doesn't publish every version of every standard by these organizations—only the ones incorporated into the law," says Corynne McSherry, an EFF attorney in San Francisco who is representing Malamud. "It's not like all of their creative work suddenly goes away—just the stuff that is incorporated into the law."

INNOVATION VS. RELIABILITY

In the old days, if students or lawyers wanted to do legal research, they had to head to the nearest law library and navigate a seemingly never-ending sea of movable, space-saving bookshelves. Before the advent of the Internet, hard-bound volumes (supplemented by any number of paperbound updates) of various federal and state registries published by West or LexisNexis were the sole means of performing legal research. More recently the CD-ROM came along and helped users perform searches more easily, but most researchers still had to go to the library to use the service.

These days, thanks to technology and the proliferation of mobile devices among lawyers, legal research can be done from anywhere in the world. Additionally, there are several companies and websites dedicated to providing free legal research.

"In the 1970s, there wasn't a better way of doing things since the publishers were the only ones who could publish the books," says Malamud. "Today there are much better ways of making this information available."



V. DAVID ZVENYACH
General counsel at the Council of the District of Columbia

He points to several free legal research sites, including Justia, Fastcase and Cornell Law School's Legal Information Institute, as well as local governments in Chicago and Washington, D.C., that have done innovative things with publicly available information.

LexisNexis and West agree on this: The law belongs to the general public. But they also emphasize the value they add to the law and the services they provide for legal professionals—material that they maintain is copyrightable.

"Our customers look to us for a complete collection of the law, including all relevant analytical material," says John Shaughnessy, vice president of corporate communications for Thomson Reuters, current parent company of West. "And Westlaw is the only online service that provides the case-plus expert analysis, the creative work product of our attorney editors who write case summaries and headnotes for each point of law, and organize the law by applying the only taxonomy that is purpose-built for legal professionals."

LexisNexis stresses its reliability and points out that sites offering legal codes, statutes and regulations might not be current or entirely accurate.

"Our product is the most up-to-date and accurate representation of what the law is when it's being used," says Ian McDougall, executive vice president and general counsel at LexisNexis. "Some sites that put up the bare text might not have cross-linked it to pending lawsuits or secondary legislation. It's a much more difficult process to do that."

LexisNexis and West also point out that they have

PHOTOGRAPH BY ARNIE ADLER

complied whenever a state or local government has requested a clean copy of their codes without the add-ons. Last year the District of Columbia made a clean copy of its code available to the general public. Despite being a bare-bones version, there were some formatting and coding issues that had to be resolved before anyone could do anything with it. Once those issues were resolved, legal hackers were able to design various programs and computer language codes to help users better utilize the sprawling text.

For instance, at a one-day legal "hackathon" in April 2013 in D.C., computer-savvy individuals created a browser to allow users to search through the code, and converted it into a different computer language so that others could more easily work with it.

"The bottom line is that, until the last several years, there hasn't been much of a demand for the code to be published in this way," says V. David Zvenyach, general counsel at the Council of the District of Columbia, who spearheaded the move to provide a clean copy of the D.C. code for the general public. "It's a recent issue, and I think it's related to new technology and new systems and structures that make them useful."

ED WALTERS
CEO of Fastcase

PHOTOGRAPH BY ARNIE ADLER

VALUE ADDED However, not all of these innovators agree with Malamud's positions. Ed Walters, chief executive officer of Fastcase, a newer legal research firm, fervently believes individuals must have free and open access to the law if American democracy is to work. But he also believes those who supplement the legal documents they publish have a legitimate interest, too.

Like Malamud, Walters has had run-ins with state legislators who, citing copyright concerns, have demanded he remove state codes from his database. In a video presentation for a 2013 ReInvent Law conference, Walters recounted his experiences with the Georgia state legislature and LexisNexis, saying he became alarmed when he noticed a copyright notice on the state's official code. He said the legislature refused to let Fastcase use the code, claiming that LexisNexis owned it; and LexisNexis agreed, reasoning that because it had added headlines to every single section of the code, it essentially owned the code.

"Nobody thinks state statutes are copyrightable," Walters said. "There are hundreds of years of precedent that spell it out." Ultimately, Walters got around the issue by simply rewriting all the case headlines—nearly 30,000 of them.

Walters, who agrees with Malamud on most issues relating to who owns the law, could have simply ignored LexisNexis and published the code as is, like Malamud did. However, Walters parted ways with Malamud on this issue and refused to do so. Instead, he believes in a publisher's right to maintain copyright protection over its proprietary information.

"Publishers should have the right to protect the stuff they add in," says Walters. "We add in stuff too, and we would like to protect that. The point is that public law should be available to everyone so that anyone can create value on top of it. That way, people can create all kinds of wonderful products that are available to anyone. There will never be any innovation otherwise."

Zvenyach has tried to strike a balance between accommodating the open-source advocates who want all the data and protecting the interests of the code's publishers.

"I don't think anyone is elated," Zvenyach says. "The open-source folks want more information faster, and I concur with that. Meanwhile, publishers would like to be the primary and only source."

Zvenyach also says he disagrees with Malamud's position that annotations and other additions are fair game if they are part of the official code. "There's never been a question that if someone copied the code word for word but stripped out the annotations, case notes and whatnot, then there's no copyright violation," he says. "The annotations are original works, though."

Zvenyach acknowledges that utilizing sources beyond the official code brings up authenticity and reliability issues that lawyers must be cognizant of. "Frankly, the code that's available online does not meet UELMA requirements," he says, referring to the Uniform Electronic Legal Material Act. "Our goal is to be compliant by the end of the fiscal year, and we're working with open-source developers to make that happen."

Laura Orr, a law librarian at the Washington County Law Library in Hillsboro, Ore., cautions that relying on unofficial sources could have a deleterious effect on the practice of law.

"I'm all in favor of putting law in the public domain," she says. "However, the quality of the sites online that allow for legal research varies greatly. There are fabulous free resources online and it's great they're there. But imagine if everyone in court relied on different versions of a statute or case law. Without true authentication protocols, you can't for sure know if what you're looking at is accurate."

STANDARDS ON THE LINE? People on all sides of the issue are carefully watching to see what happens in *American Society for Testing and Materials v. Public.Resource.org.* The suit, which is about to enter the discovery phase, could have profound implications for all involved.

For SDOs in the United States, it could signal the end of their current business model. That model has benefits to the public, says Mel Oncu, general counsel at the International Code Council, because the private organizations fund the drafting and creation of the model codes themselves, rather than dip into taxpayer funds.

Meanwhile, there are more than 1,000 private standards organizations in the U.S., and these organizations develop codes for nearly everything under the sun, including electrical appliances, cement composition and toy safety.

"The impact of not protecting the intellectual property for the private organizations that create these codes and standards is significant," says Sara Yerkes, senior vice president of government relations at the ICC, which is not involved in the litigation against Malamud. "Holding copyright allows standards-developing organizations to fund the development of technical codes and standards. SDOs are providing a valuable service to the government at minimum cost to the taxpayers."

National Fire Protection Association President Jim Shannon calls the standards-development process "the original public-private partnership." According to Shannon, the NFPA, which is part of the Malamud lawsuit, has taken extraordinary steps toward making sure the public has access to its regulations. "Many organizations, especially the NFPA, have put regulations on the Internet so that anyone who wants to read it can access it," Shannon says. "They don't have to pay a nickel."

Shannon says the model allows organizations like the NFPA to act quickly and nimbly when there's an emergency. Referring to a 2010 power plant explosion in Middletown, Conn., Shannon says the NFPA was able to draft and enact a new safety standard in a little over a year, a fraction of the time it would take the government to do the same. Denying copyright protection to SDOs once their standards become law would have a disastrous effect on public safety, he adds.

"Our standards are being used by the government, and that relieves them from the burden of developing their own," notes Shannon. "There's also a benefit to interstate commerce because we promote national standardization." Shannon argues that without the funds to maintain their development process, organizations like his cannot stay on top of the latest developments in their industry and will be unable to maintain up-to-date safety standards.

But Malamud and others contend that if the SDOs intend for their guidelines to be adopted into law, then they cannot be copyrighted. "They're in the lawmaking business," he says. "When their guidelines are approved or adopted, they get the gold seal of approval. Not one of these standards bodies has ever begged for their standards not to become law."

Walters concurs: "It's well-established that when the government enacts a standard or building code into law, then it is in the public domain. Wishing won't make that any different."

Malamud also takes issue with the notion that the standards groups have met their obligations by providing free copies of their codes online. Even if the material is free, Malamud argues, by forcing people to go to their websites to read their codes, the organizations are restricting access to the information.

"I'd like to make these codes available on all mobile devices," Malamud says. "If one body wants to restrict their materials to their reading room, then it stifles innovation. My right as a small nonprofit is to take this information and make it better and more efficient for users."

The standards organizations are unsympathetic, and warn that relying on unofficial sources can be extremely dangerous.

"Anyone who needs the content of a code or standard for technical or professional reasons should access the code through an authorized source to ensure that the version being consulted is both accurate and complete," Oncu says.

WAITING FOR CONGRESS In the meantime, Malamud is hopeful Congress might resolve the issue once and for all. He notes that at least four U.S. representatives from both sides of the aisle, including powerful California Republican Rep. Darrell Issa, stood up and supported him during the January hearing.

"If the states of Georgia, Idaho and Mississippi produce a law, every single person who voted for it is an author," Issa said at the hearing. "It doesn't belong to some entity. In its rawest form, isn't every single person who participates in the creation of a law or the inclusion by association of the standard, in fact, an author?"

Issa went on to say that states like Idaho were "inherently wrong" if they believed any part of the law could be subject to copyright protection.

Words, however, will only go so far. There is no bill pending before the committee and most members of Congress are concentrating on their re-election campaigns. If the current Congress fails to act, then Malamud and other open-source activists will have to go back when the new Congress opens in 2015 and do it all over again.

Unlike with legal codes, Malamud says that's a price he is more than willing to pay. ■

Attachment I

Magna Carta Liberatum, 1733 engraving of the Charter of 1215 by John Pine (Source: Wikipedia) (June 15, 1215).

The Arms of the 25 Barons that were to decide any disputes between the King and his Subjects as they are preserved in the Letters of Arms.

By Permission of

The Right Honourable PETER Lord KING, Baron of OCKHAM, Lord High Chancellor of GREAT-BRITAIN;
The Right Honourable ARTHUR ONSLOW Esq: SPEAKER of the Honourable House of COMMONS;
S.r JOHN HYNDE COTTON B.t Representative of S.r ROB.t COTTON B.t
FRANCIS ANNESLEY, Esq;
SAMUEL BURROUGHS, Esq; one of the Masters of the High Court of Chancery;
WILLIAM HANBURY, Esq;

• TRUSTEES of the COTTONIAN Library.

This Plate being a correct Copy of King JOHN's GREAT CHARTER, taken from an ORIGINAL now remaining in the COTTONIAN Library, is to them most humbly Dedicated,

By their most Dutiful, and most Obedient, humble Servant,

J. Pine.

Ricus Comes de Clara

Com. Aubemarle

Gaufrid. Comes Eboxc. et Glouc.

Salvat. Com. Wintonia

Hent. Com. Hereford.

Rogr. Bigod. Com. Norff. & Suff.

Robtus. Comes Oxon.

Comes Herefordie Junior.

Rob. fit. Walth.

Eustach. de Vescy

Radulf. Bigot.

Willelmus de Mohun

Major de Londonia

Willus de Lanvalay

Robtus de Ros

Constabular. Castr.

Robtus de Percy

Johes. fit. Robti

Willus Malet

Gaufridus de Say

Regerus de Mobray

Willus de Huntingfeld

Rius de Manfichet

Willus de Albiniac

Memorandum, the Chief Justice of his Majesty's Court of Kings Bench for the time being is one of the Trustees of the Cottonian Library, But that Office is now Vacant.

The Names of these Barons are collected from M. Paris and other Historians, and engraved as spelled in Records preserved in the Tower of London.

There are two Originals of King Johns Magna Charta, of the Liberties of England, in the Cottonian Library, both wrote in the same Year, one of them has the Kings Seal to it, the other non has none, the by the date in the Parchment, it appears to have had the Seal, but unfortunately Fire, that happened in the 1731 in the said Library the 23 of October, 1731, and destroyed and damaged a Considerable number of Books, there with all both sides of the former Also and Charter, and melted the Wax of the Seal, so that the impression cannot now be discerned. The Charter, from whence I have the impression of K. Johns Seal, before the Fire happened, And to compare both the Writing thereof, this Copy is engraven in the same Form as Stands, having only Nineteen Lines compleat from 2 other Originals, which are numbers 19 and 20 in the Cotton Library, and is in the last Line Dobrestie. David. Casley, Deputy Keeper of the Cottonian Library.

We have caused it to be compared this Copy of King John's Magna Charta of the Liberties of England with the Original in the Cotton Library, and find it to agree therewith, saving that, in the Fifth Line, Willum, which was evidently by mistake in the Original as supplied from another Original in the same Library. Witness our Hands this 9th day of May. 1733.

N. Mardinge. C. Rem. Com.
M. Lawton Custos Recordor. in Cur. Recept. Scac. & Dep. Cam.
George Holmes Deputy Keeper of the Records in the Tower of London.
David Casley Deputy Keeper of His Majesties and the Cottonian Libraries.

Sold by J. Pine Engraver in Old Bond Street near Piccadilly. And by the Booksellers of London and Westminster.

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Attachment J

Statement of President Lyndon B. Johnson, Presidential Papers, 1963-1964, Volume 1 (January 23, 1964).

podium, and I said, "And I have one other favor to ask of you. There is a young, progressive, attractive, well-educated fellow who is running for Congress," and I couldn't think of his name.

"I want to tell you people that he is one of the finest candidates I have ever observed," and I still couldn't think of his name.

"And I believe if you send him to Congress he will make one of the ablest Congressmen any District ever had," and I still couldn't think of his name.

About that time I heard a fellow whisper "Barr, Joe Barr." And I looked around and it was the candidate himself!

His qualifications impressed me then even more than his name. He has justified all the very fine impressions that we had of him. I know that Mrs. Barr is entitled to more than 50 percent of the credit for the fine work that Joe has done, and we are all going to take a great deal of pleasure in sharing with him the responsibilities of this job.

Now I am going to ask Henry Fowler to get on back on that Hill and see what happened to that excise tax vote this morning, and see if we can't get that tax bill passed at an early date so that Joe will really have some money in the banks to protect.

NOTE: The swearing-in ceremony was held in the Cabinet Room at the White House at 12:30 p.m. In the President's closing remarks he referred to Henry H. Fowler, Under Secretary of the Treasury.

145 Statement by the President Announcing the Adoption of the 24th Amendment to the Constitution. *January* 23, 1964

TODAY, as they have always done throughout the long and rewarding history of this country, the people of the United States made known their views.

The abolishment of the poll tax as a condition to voting in Federal elections is the forward step of a modern society. It is a verification of people's rights which are rooted so deeply in the mainstream of this Nation's history.

The vote today by the South Dakota Legislature, the 38th State to ratify the 24th amendment, meets the congressional requirement of such action by three-fourths of the States.

As Majority Leader of the Senate, I personally urged the banishment of bars to voting. This triumph, now, of liberty over restriction is a grateful and proud moment for me.

The acceptance of this amendment by the States in so short a time after congressional approval of the resolution introduced and managed by Senator Holland of Florida is gratifying. The tide of a strong national desire to bring about the broadest possible public use of the voting process runs too strong to hold back.

In a free land where men move freely and act freely, the right to vote freely must never be obstructed.

I congratulate Senator Holland, the other Members of the Congress, and the thousands of State legislators whose active efforts have eliminated an unattractive growth on our national countenance.

It is my hope that the enactment of this amendment will encourage more people in every State to use, in greater numbers, the greatest gift for any land of liberty: the right to vote.

NOTE: See also Item 171.