

Comment on Professor Peter Strauss's petition for rulemaking by Office of Federal Register

Professor Strauss raises an interesting issue regarding the relationship between standards incorporated by reference federal regulations and other legal texts containing federal law. He highlights the fact that citizens who wish to read the text of voluntary consensus standards incorporated by reference (SIBR) may be required to purchase a copy of the standard from its publisher, while access to other texts containing federal law is normally provided free of charge in electronic form. He argues that the publishers of voluntary consensus SIBR should be required to provide the text of the standards free of charge in electronic form to insure consistency of access among all types of legal texts containing federal law.

Professor Strauss's petition describes a solution in search of a problem. He highlights some costs of the current system without acknowledging the enormous benefits it confers. In particular, he fails to recognize the costs that his proposal would impose on the U.S. Standardization System,¹ which would put at least some of those benefits at risk. When the benefits of the current system are properly taken into account, I believe it is clear that the costs of his proposal would outweigh the benefits. If the Administrative Committee of the Federal Register takes any action on his proposal, it should be to have the Office of the Federal Register investigate what, if any, significant barriers the current system of "reasonable access" creates, and identify proportional, appropriate strategies to alleviate them.

The U.S. Standardization System Is both Democratic and Effective

The U.S. has a strong and unique tradition among developed economies of private sector control over standard setting activities. Other nations at equivalent levels of economic development normally have a much higher level of direct government involvement in standard setting activities. Such direct government involvement is an expense born by the taxpayers of those countries. The U.S. has a more dynamic, market-oriented approach to standard-setting which is an important factor contributing to the global competitiveness of U.S. businesses. For this reason, U.S. industry typically supports market-driven, private sector managed development of voluntary consensus standards.

Accountability of voluntary consensus standard setting activities is maintained in several ways.² Standard setting organizations (SSOs), typically organized as not-for-profit organizations, have the option to become American National Standards Institute (ANSI) accredited SSOs by complying with the due process requirements contained in ANSI Essential Requirements.³ Other guarantees of procedural fairness in private standard setting activities come from antitrust and trade practices law.

¹ American National Standards Institute, Overview of the U.S. Standardization System (2nd ed. 2007), available at <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Brochures/U.S.%20Standardization%20System-07.pdf>.

² See generally, Robert G. Dixon, Jr., Standards Development in the Private Sector: Thoughts on Interest Representation and Procedural Fairness (1978).

³ ANSI Essential Requirements: Due Process requirements for American National Standards, January 2012, available at http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%200Guides,%20and%20Forms/2012%20ANSI%20Essential%20Requirements%20and%20other%20Updated%20Procedures/2012_ANSI_Essential_Requirements.pdf

Sales of Standards Compensate the Private Sector for the Production of Public Goods

Private sector leadership in voluntary consensus standard setting produces public goods (i.e., standards) that help to provide all American citizens with less expensive, higher quality goods and services. Most of the cost of developing standards is borne directly the private sector and is not reflected in the price of published standards. This private sector subsidy takes the form of uncompensated labor (and travel expenses) contributed by volunteer private sector subject-matter experts. SSOs normally have some kind of secretariat that provides administrative support for standard setting activities and coordinates the contributions of the volunteer subject-matter experts. The cost of running these administrative units is normally paid for by the sales of published standards.

In recent decades, a new form of informal SSO has arisen in the US which relies heavily on the Internet both to set standards and to distribute them. The Internet Engineering Task Force (IETF), which develops many of the standards that permit the Internet to function, is a good example of such an alternative SSO. The IETF is **NOT** ANSI accredited, but attempts to maintain transparency and accountability by freely distributing its work product over the Internet. However, the majority of product and process standards developed in the US are developed by traditional SSOs, not by alternative SSOs such as the IETF.

All Americans Currently Benefit from Incorporation by Reference of Standards into Federal Law

One of the strategic initiatives of then Vice President Al Gore's "Reinventing Government" project in the 1990s was to increase public sector reliance on market-driven voluntary consensus standards. Incorporation by reference of private voluntary consensus standards reduces the cost to American industry of compliance with health and safety regulations, environmental protections, and product safety regulations. If a voluntary consensus standard is chosen for incorporation by reference, this normally means that it has widespread support among stakeholders as a strategy to make compliance less costly. Many stakeholders who will be subject to SIBR will have participated in the development of the standard, and thus will have an intimate knowledge of its provisions, making its implementation less costly. The price of obtaining a copy of the published standards is nominal for almost any other stakeholders subject to the SIBR but who did not participate in the standard setting activity.

Professor Strauss's proposal fails to recognize the contributions to the global competitiveness of American industry made by traditional SSOs. Most traditional SSOs operate on very modest budgets, and try only to recoup their direct costs of providing administrative support by charging for their publications. Most of the cost of providing this very important form of economic self-regulation is borne directly by the stakeholders who contribute their expertise to the process. Requiring traditional SSOs to distribute their publications free of charge and in electronic form would remove this very modest subsidy that covers the overheads of traditional SSOs. It would have the perverse effect of punishing the most successful SSOs by depriving them of the very modest revenues they depend upon to function.

Free Internet Distribution of Voluntary Consensus Standards as Taking Requiring Compensation

I believe Professor Strauss's apparent lack of familiarity with the U.S. Standardization System has led him to misconstrue the holding in *Veeck v. Southern Building Codes Congress International*, 293 F.3d 791 (5th Cir. 2002). The Fifth Circuit's decision balances the public's right to access SIBR with the need of SSOs to cover their modest overhead costs by selling copies of their publications. Finding the right balance between those competing interests is a much more complex and nuanced undertaking than Professor Strauss seems to realize. His proposal unfairly denigrates the sale of SIBR by SSO publishers as some sort of nefarious attempt to profit at the expense of the right of American citizens to know the law. Nothing could be further from the truth.

Professor Strauss's desire to impose a "one-size-fits-all" solution on the U.S. Standardization System may reflect his lack of understanding of the enormous tangible economic benefits all U.S. citizens derive from voluntary consensus standards that are incorporated by reference into federal regulations. He fails to identify any significant segment of American society that is disadvantaged by the current system. I am confident that if he took the time to conduct empirical research on this issue, he would discover that, in fact, there simply is no significant segment of American society disadvantaged by it.

Professor Strauss's proposal is a procrustean bed that would force voluntary consensus standard setting into the mold of other forms of federal law making. Such a desire for consistency threatens to undermine a dynamic, vital form of public-private partnership in federal law. If there are really any stakeholders who understand how the current system of "reasonable access" actually works and also believe that it creates significant barriers to citizen access, then a careful investigation into the operation of current system should be undertaken. Any issues that emerge from a careful study of current practice could be addressed with more narrowly targeted, proportional reforms.

Organic Diversity in Lawmaking Serves the Public better than Artificial Consistency

Professor Strauss also seems to assume that the U.S. would not be required to compensate SSOs for taking their copyrights, but this may not be so. If his proposal were held to constitute a taking of private property, federal agencies would be required to compensate SSOs for transferring their intellectual property into the public domain. This would then create barriers to public-private collaboration designed to reduce private sector compliance costs without compromising the public interest.

The term "legal centralism" is used to describe a state-centered perspective on legal phenomenon, while the term "legal pluralism" is used to describe the coexistence of multiple forms of law within a single jurisdiction. Professor Strauss's proposal reflects his legal centralist orientation, but it suffers from an inability to see other effective and viable ways to promulgate a legal order. Voluntary consensus standard setting is an important form of legal pluralism that is alive and well in American today, and is making important contributions to the competitiveness of American industry.

In sum, I believe that Professor Strauss's proposal is fundamentally misguided because he presumes without proof that universal free electronic access to SIBR would somehow benefit American democracy, while ignoring the democratic character and significant economic benefits of the U.S. Standardization System as currently organized.

Respectfully submitted,



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