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Public Works for a Better Government

November 20, 2013

Ms. Amy Bunk
Director of Legal Affairs and Policy
Office of the Federal Register
800 North Capitol Street, N.W., Suite 700
Washington, D.C. 20001

Re: Comments on NPRM, Incorporation By Reference
Docket Number: OFR-13-0001

Dear Ms. Bunk:

The Office of the Federal Register's October 2, 2013, Partial Grant Of Petition, Notice Of Proposed Rulemaking (NPRM) asserts that the OFR lacks the authority and the resources to do what the February 13, 2012 petition requests, or what many others, including Public.Resource.Org, believe is required by 1 CFR part 51 and the U.S. Constitution: *Materials incorporated by reference into federal law—having been made part of the law that governs all of us—should be available for all people to read and communicate without restriction.*

In contrast, the NPRM seems to accept, without qualification, the position of many standards development organizations (SDOs) in this debate:

> If we require that all the materials IBR'ed into the CFR be available for free, that requirement would compromise the ability of regulators to rely on voluntary consensus standards, possibly requiring them to create their own standards…

NPRM at 5.

The NPRM proposes merely that 1 CFR part 51 be amended to require that an agency seeking OFR approval to incorporate materials by reference discuss "the ways in which it worked to make the materials it incorporates by reference reasonably available to interested parties and how interested parties can obtain the materials."

Public.Resource.Org believes that the law, and OFR's whole reason for existing, require OFR to do much more than that. In this comment, we will address two questions relevant to these duties incumbent upon the publishers of our Official Journals.

1. What would happen if OFR required that only standards made available without restriction be eligible for incorporation by reference?

Let us begin with this point—OFR's suggestion that, if the government required that all materials incorporated by reference be available for free, then codes or standards published by SDOs might well be unavailable for incorporation by reference. This assertion seems to rest on a two assumptions: (1) that if the government imposed such a requirement, SDOs would react not by making their standards truly available to the

public online but rather by ending or curtailing their work to create standards and/or by resisting government efforts to incorporate their standards into law; and (2) that the SDOs have the legal authority to prevent the government and private individuals from posting online and sharing with the public standards that have been incorporated into law.

All of those underlying assumptions of fact and law have been refuted, not simply by comments filed in this proceeding, but by important decisions of the United States Supreme Court and other federal courts.

As discussed in greater detail in our comment in OMB Request for Information 2012-7602,[1] the Supreme Court in Wheaton v. Peters, 33 U.S. 591 (1834), and Banks v. Manchester, 128 U.S. 244 (1888), held that the law "is in the public domain and thus not amenable to copyright." Veeck v. Southern Bldg. Code Congress International, Inc., 293 F.3d 791, 796 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003). Wheaton, Banks, and Veeck all concerned comparable fact patterns: One private party was trying to stop another private party from publishing material that was part of the law. In none of those three cases was anyone trying to prevent the first party from selling copies of such material, and Public.Resource.Org does not question the right of SDOs to sell standards incorporated by reference into law. Rather, we believe, as the courts concluded in those cases, that once material has become law, then other parties have the right to read it and to speak it, without limitation – and that that proposition clearly applies to standards incorporated by reference into federal law, notwithstanding assertions of copyright by SDOs.[2]

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[1] https://law.resource.org/pub/us/cfr/notice.omb.20120411_to.pdf

[2] The principle that the law must be public and available to citizens to read and speak has its roots in the concept of the rule of law itself, as well as central provisions of our Constitution. See generally Thomas Henry Bingham, The Rule of Law, 37-38 (Penguin Press 2011) ("The law must be accessible . . . the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations."); Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory 34 (Cambridge Univ. Press, 2004) ("Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance."). That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see. See, e.g., Robert C. Byrd, The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism 33, 128, 135 (U.S. Government Printing Office, 1995).

As this history suggests, open access to the law is essential to a free society. Citizens are expected to obey the law, but they cannot do so effectively if they do not know it. Further, the First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law to each other. Cf. Nieman v. VersusLaw, Inc., 2013 WL 1150277, at *2 (7th Cir. Mar. 19, 2013) ("The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed."). By the same token, 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 non-compliance), but others cannot. Cf. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (a state violates the Equal Protection Clause "whenever it makes the affluence of the voter or payment of any fee an electoral standard"); see also Magna Carta cl. 29 (1297) ("We will sell to no man, we will not deny or defer to any man either Justice or Right.").

The en banc 5th Circuit in Veeck specifically addressed the policy and empirical issues regarding what might happen if courts, as that court did, expressly upheld the right of a citizen to communicate the law, in that case the right of a citizen to post the building code of his town, derived from a model code, on the Internet. Rather than assume, as the OFR's NPRM seems to, that the entire system of private standard-setting might collapse, the 5th Circuit examined the arguments and determined that allowing citizens to speak their own laws would not end this beneficial system:

> Many of SBCCI's and the dissent's arguments center on the plea that without full copyright protection for model codes, despite their enactment as the law in hundreds or thousands of jurisdictions, SBCCI will lack the revenue to continue its public service of code drafting. Thus SBCCI needs copyright's economic incentives.
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> Several responses exist to this contention. First, SBCCI, like other code-writing organizations, has survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these. Second, the success of voluntary code-writing groups is attributable to the technological complexity of modern life, which impels government entities to standardize their regulations. The entities would have to promulgate standards even if SBCCI did not exist, but the most fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation. The self-interest of the builders, engineers, designers and other relevant tradesmen should also not be overlooked in the calculus promoting uniform codes. As one commentator explained,
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> > …it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.
> >
> > 1 Goldstein § 2.5.2, at 2:51.
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> Third, to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with "value-added" in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves "the Progress of Science and useful Arts." U.S. Const. art. I. § 8, cl. 8.

293 F.3d at 806 (footnotes omitted).

We think these conclusions expressed by the court in Veeck are even more powerful today. Notwithstanding the issuance of the Veeck decision itself, and the U.S. Supreme Court's denial of review after being informed by the Justice Department that "[t]he

court of appeals reached the correct result,"[3] SDOs have continued to create and issue standards for over a decade. SDOs also have continued to press federal and state authorities to incorporate their standards into law. See Public.Resource.Org, Inc.'s Counterclaim For Declaratory Judgment, Answer To Complaint For Injunctive Relief, And Jury Demand, American Society For Testing And Materials v. Public.Resource.Org, Inc.,[4] Case No. 1:13-cv-01215-EGS, Aug. 6, 2013, at 9-15.[5]

Given these factors, we strongly believe that, if OFR required that only standards made available without restriction be eligible for IBR, then (1) SDOs would continue to promulgate standards and urge their incorporation into law; (2) SDOs, government, and various private entities would make standards incorporated by reference available to the public without restriction, and the courts would uphold any challenges to such action, allowing OFR to be confident that standards it was considering for IBR approval would indeed be publicly available.

2. Is the Code of Federal Regulations Strengthened or Weakened By the Current Lack of Official Public Online Availability of Standards Incorporated By Reference?

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

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

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[3] Brief for the United States as Amicus Curiae, S. Bldg. Code Cong. Int'l, Inc. v. Veeck (2003) (No. 02-355), at 1, available at http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0355.pet.ami.inv.pdf.

[4] https://archive.org/download/gov.uscourts.dcd.161410/gov.uscourts.dcd.161410.21.0.pdf

[5] OFR's NPRM does eventually acknowledge that some commentators asserted "that the SDOs derive significant, sometimes intangible, benefits from having their work IBR'ed into a regulation and those benefits more than offset the cost of developing the standards themselves. Some of these benefits include increased name-recognition and trust, increased revenue from additional training opportunities, and an increase in the demand for standards. " Unfortunately, instead of examining these assertions, OFR responds to them, "We don't have the knowledge or expertise to have an opinion on this issue but believe that agencies and SDOs will continue to work together on this issue." NPRM at 18-19. But, as noted, earlier in the NPRM, OFR seems to assume as gospel the unsupported claim of SDO advocates—that standards as we know them would disappear if the public had access to that subset of standards that is incorporated by reference.

Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register May 14, 1936.[6]

Griswold opened his essay by declaring:

> Administrative regulations "equivalent to law" have become important elements in the ordering of our lives today. Many cases have reiterated the rule that executive regulations properly made have "the force and effect of law." The volume of these rulings has so increased that full, accurate, and prompt information of administrative activity is now quite as important to the citizen and to his legal advisor as is knowledge of the product of the Congressional mill. There should consequently be no need to demonstrate the importance and necessity of providing a reasonable means of distributing and preserving the texts of this executive-made law.

48 Harv. L. Rev. at 198.

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

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

Id., at 202.

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

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

Id., at 213.

What has become of Griswold's vision in our time? The work that he inspired and that many others carried out to bring order to the law and make its provisions once again accessible to the people through the Federal Register and CFR has been undone. It has been undone not by the practice of incorporation by reference itself, but by the lack of reasonable public access to many of the standards and materials that the government has incorporated by reference into federal regulations. The CFR has been transformed from a mechanism to inform citizens into a profit opportunity for a few private organizations.

This situation is particularly unfortunate because the power and widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity

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

hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees, a more legitimate argument when printed physical documents were the only means of transmission. Today, the only thing impeding the broader availability to the public of standards incorporated by reference into the law—hyperlinked to the regulations that incorporate them, to the benefit of all users—is the interest of SDOs in charging monopoly prices for the standards.

3. Conclusion

Rather than throwing up its hands and insisting it has the power only to issue half-measures, OFR should be compelled by its statutory and constitutional obligations, and by its mission as devised by Erwin Griswold, to require that only standards made available without restriction be eligible for incorporation by reference. This move would help push this policy process in the only appropriate direction—one that gives people the freedom to read and speak the laws that govern them.

Sincerely yours,

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