

From: [Brodoff, Maureen](#)
To: [Emily Bremer](#)
Cc: [Scott Cooper](#)
Subject: RE: IBR and the Market for Standards
Date: Wednesday, November 23, 2011 4:16:08 PM

Dear Ms. Bremer:

I'm glad this was helpful.

Quite apart from the cost to the agency of supplying a standard free to the entire market for the standard, Professor Strauss' contention that agencies should always pay for the use of standards rather than the citizen users of the standards had a peculiar tone to it, that I had difficulty putting a finger on. I couldn't tell whether it was pro "big government" or anti- in spirit. It did seem to hold government almost in opposition to its citizens and implied that if government regulation imposes costs of compliance on citizens, government should always be required to subsidize those costs. I doubt if his position is quite that extreme, and the fact that the issue involved is one of intellectual property has a big effect on one's view of how that property should be treated when required for use by a governmental regulation. Nevertheless, his argument seems oddly to miss any acknowledgment of the fact that the government and citizens are not separate and independent entities. In other words, having government agencies pay the cost of standards they expect citizens to comply with doesn't mean that citizens don't pay that cost. It's more a question of which citizens: all taxpayers whose tax dollars fund the agency operations; or only those citizens whose activities or business are governed by the standard. Governments frequently chose to shift costs away from all tax payers to subsets of directly affected citizens through user fees, permitting or licensing fees, and such. Who should pay for the costs relating to government regulation, including the cost of standards, is of course a serious policy question but one that governments ought to have flexibility to address on a case-by-case basis depending on the circumstances. Without presuming to put words in your mouth, I read your report as identifying value in such a flexible approach as it concerns standards. One aspect of the policy question over how the costs of standards should be covered is, as the current discussion has raised, that the cost to a government agency of providing a standard for free on a government website may be far greater than the aggregate cost of purchasing access by only those citizens who need to comply with the regulation that incorporates the standard.

If you need a concrete example of how the market for a particular standard may be far greater than the market for its use as part of a federal regulation, it occurred to me that NFPA 101, *Life Safety Code*, may be useful. NFPA 101 is a standard that addresses the safety, particularly from fire, of humans in the built environment and includes design requirements and other features that permit people to remain safe in buildings and to safely escape in the event of an emergency. I believe that the Centers for Medicare and Medicaid Services (CMS), by federal regulation, requires healthcare facilities that receive federal funding or reimbursement to comply with NFPA 101. See 68 Fed. R. 1374 (January 10, 2003). Healthcare occupancies however are just a few of the many occupancies that are addressed in NFPA 101. Even if you assumed that all purchasers of NFPA 101 who were interested in healthcare occupancies were purchasing their copies only because of the federal regulatory mandate, there would remain a large market of purchasers who are interested in using it to protect life safety in any one or more of the many other occupancies that are specifically addressed by NFPA 101 but not covered by any federal regulatory mandate (e.g, hotels, business, industrial, mercantile, residential occupancies, etc.). NFPA 101, by the way, while adopted in many states for some purposes, is not anywhere near as widely adopted as a model building code, but is widely considered and used as a guide for best practices in life safety quite apart from its role in government regulation.

I hope I haven't taxed your patience with my musings. Please do let me know if I can provide you with any further information. Also, at the ACUS plenary session, will there be any opportunities for members of the public to address the body if there is a motion made along the lines proposed by Professor Strauss, or is debate open only to Conference members. I am considering attending just to observe the proceedings, but, if allowed, I might seek to speak in the event that it seemed really necessary.

Have a happy and restful Thanksgiving. Regards, Maureen

Maureen Brodoff
Vice President & General Counsel
National Fire Protection Association
One Batterymarch Park
Quincy, MA 02169-7471
(617) 984-7256
Fax (617) 984-7222
mbrodoff@nfpa.org
www.nfpa.org

Register today for the most powerful five days of the year for fire and life safety professionals who want to enhance their code-related knowledge and develop new skills.



Check out NFPA on social media...

www.nfpa.org/socialmedia

www.nfpa.org/blogs

Notice: The information contained in this electronic message and any attachments to this message are intended for the exclusive use of the addressee(s) and may contain confidential and/or privileged information. If you are not the intended recipient, please notify Maureen Brodoff immediately by replying to the message or by contacting her at (617) 984-7256. Please delete this message and any attachments from your system. Thank you.

From: Emily Bremer [mailto:ebremer@acus.gov]
Sent: Wednesday, November 23, 2011 11:45 AM
To: Brodoff, Maureen
Cc: Scott Cooper
Subject: RE: IBR and the Market for Standards

Ms. Brodoff,

The information you've provided here is precisely what we were looking for—thank you! As you've seen, Professor Strauss has proposed that agencies should pay for the standards they incorporate by reference and then make them freely available electronically. Posted in that fashion, the standards would be available to anyone, whether or not they needed the standard exclusively for the purposes of complying with the relevant federal regulation. The cost to the agency would therefore include the costs of providing the standard not just to regulated parties, but to the broader market for the relevant standard. The point, which is just one among several we've made in response to Professor Strauss' proposal, is that the cost to the federal government of providing free access to incorporated standards could be far greater than what

one might expect. To calculate the cost, you'd have to consider the full market for the standard, which may be much greater than the market for the standard qua regulatory requirement.

In other words, the concern you cite is the one we're trying to bring to bear on Professor Strauss' proposal: if the government is going to pay to make an incorporated standard freely available, it will have to compensate the SDO enough to account for the significant effect on the full market for the standard. Does that make sense?

I do recall meeting you—it was a pleasure. Thank you for your kind words and for lending me your time and expertise. Your (and the other SDOs') contributions to this project have been invaluable.

Have a great holiday!

Best,
Emily

From: Brodoff, Maureen [mailto:mbrodoff@NFPA.org]
Sent: Tuesday, November 22, 2011 8:19 PM
To: Emily Bremer
Cc: Scott Cooper
Subject: RE: IBR and the Market for Standards

Dear Ms. Bremer,

Scott forwarded me your email below.

I am not sure exactly what information you are seeking. The market for standards is without question much larger than the community of those who must comply with a standard because it is incorporated in a federal or other regulation. How you quantify that may be difficult because in the case of many NFPA standards, as an example, they may be adopted in many states, or at the federal level for some purposes, but users buy them either partly or largely, depending on the standard, because they constitute the standard of care in a given trade or business, and provide what are considered best practices and guidance, irrespective of their status in regulations. For example, NFPA sells many copies of NFPA 13, *Standard for the Installation of Sprinkler Systems*, to training programs that teach or certify sprinkler installers who require their trainees to study and learn the methods and requirements of NFPA 13. While the use of NFPA 13 in training programs is no doubt to some extent influenced by the fact that NFPA 13 is adopted by reference (largely as a secondary reference in a model building code) in many places, it is largely used for training sprinkler installers because it is the industry accepted standard and there is general agreement that all good sprinkler installers should know it. One measure of the private reliance on standards is that they are cited in litigation of various kinds as evidence of what is the reasonable standard of care in a given industry or profession. (I can find you ALR or other articles on this subject if it has any relevance for you). We also know that many corporations who operate internationally, require the use of private sector standards in their operations, as best practices, even though not required by regulation in host countries. How the market for standards is affected by a standard's adoption by reference into a regulation, or in particular, a federal regulation, is hard to gauge, but there is no doubt that most private sector standards are developed and used for both private self-regulation as well as government use and that they are not purchased exclusively by people who need to comply with a regulation or for the sole purpose of complying with a regulation.

I am not sure how the market for standards as private self-regulation figures into the analysis of Professor Strauss's position. Our great concern, however, is that if cost-free access on a federal government website were mandated whenever a standard was adopted by reference into a federal regulation (no matter how constrained or narrow the federal requirement to use the standard was), the standard would effectively become available, cost free, not just to people complying with federal regulation, but to everyone who wanted a copy, thus impairing the market for our works across the board.

I would be most happy to discuss this with you further and if I had a better understanding of what you are looking for might be better able to provide you with useful information. I am in my office on Wed. (tomorrow) and then, like you, out until next week. Let me know if you would like to discuss further or feel free to call me at 617-984-7256.

You may not recall, but I had the pleasure of meeting you at the ACUS Committee on Administration and Management meeting on October 28. As I mentioned then, I found your report to be uncommonly thoughtful and informative. Regards, MB

Maureen Brodoff
Vice President & General Counsel
National Fire Protection Association
One Batterymarch Park
Quincy, MA 02169-7471
(617) 984-7256
Fax (617) 984-7222
mbrodoff@nfpa.org
www.nfpa.org

Register today for the most powerful five days of the year for fire and life safety professionals who want to enhance their code-related knowledge and develop new skills.

 **FIRE & LIFE SAFETY CONFERENCE** DEC 12-14, 2011
ORLANDO, FL
www.nfpa.org/FLSConf

Check out NFPA on social media...
www.nfpa.org/socialmedia
www.nfpa.org/blogs

Notice: The information contained in this electronic message and any attachments to this message are intended for the exclusive use of the addressee(s) and may contain confidential and/or privileged information. If you are not the intended recipient, please notify Maureen Brodoff immediately by replying to the message or by contacting her at (617) 984-7256. Please delete this message and any attachments from your system. Thank you.

From: Emily Bremer [mailto:ebremer@acus.gov]
Sent: Tuesday, November 22, 2011 11:43 AM
To: Scott Cooper
Subject: IBR and the Market for Standards

Scott,

As we move towards our Plenary session, at which the proposed incorporation by reference recommendation will be debated, we are having some internal discussions about the market for and use of standards. These discussions were spurred by comments and proposed amendments received from one of our senior fellows, Professor Peter Strauss of Columbia Law School. These comments and proposed amendments are available here:

http://www.acus.gov/wp-content/uploads/downloads/2011/11/Peter_Strauss_Combined_Comment_and_ProposedLanguage.pdf

One key point in our discussions is that the market for a standard may be bigger than just the community of those who are required by federal regulations to comply with it. Can you think of an example of standard that is incorporated by reference in a federal regulation, but is often sold to and used by folks who are not subject to the regulation? Any help would be appreciated!

If you have any questions or want to chat about this, please give me a call. I'll be in all week, except for Thursday, and will be in the office all next week, too.

Thank you!

Emily Schleicher Bremer | Attorney Advisor



ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
1120 20th St., NW Suite 706 South . Washington, DC 20036
(202) 480-2086 . ebremer@acus.gov . www.acus.gov