

What Standard Developing Organizations (SDOs) Need to Know About Incorporation By Reference (IBR)



Outline

- *The Basics and IBR Concerns*
- *Current Trends in IBR and Where They Will Lead*
- *Timing*
- *Strategic Insights*
- *Current Efforts to Address IBR Concerns*
- *Taking Action*

Definitions

COPYRIGHT

A type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.

IBR

A practice by federal, state, local, and Tribal authorities agencies of referencing standards in regulations.

FAIR USE

A legal doctrine that allows the use of copyrighted material without permission for certain purposes. These purposes include criticism, comment, news reporting, teaching, scholarship, or research.

What Are the Competing Interests?

The need for incentives to create and update standards in a manner that is likely to foster broad participation from a variety of interests



The public's right to access legally binding text

What is Copyright?

- Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression.
- Copyright owners have the exclusive right to reproduce their works and create derivative works, subject to limited exceptions, such as “fair use.”

**Standards are
copyright-
protected
works of
authorship.**

What Is IBR?

- IBR is a practice by federal, state, local, and Tribal authorities of referencing standards into regulations.
- The materials IBR'd into federal regulation are available to the public at a federal library, but no internet access to IBR'd standards is provided by the Office of the Federal Register (OFR) or other government agencies.

EXAMPLE OF INCORPORATION BY REFERENCE

Title 33: Navigation and Navigable Waters

PART 1 01—MARITIME SECURITY: GENERAL

Subpart C—Communication (Port—Facility—Vessel)

§ 101.310 Additional communication devices.

(a) Alert Systems. Alert systems, such as the ship security alert system required in [Safety of Life at Sea \(“SOLAS”\) Chapter XI-2, Regulation 6](#) may be used to augment communication and may be one of the communication methods listed in a vessel or facility security plan under part 104, 105, or 106 of this subchapter. [SOLAS Chapter XI-2, Regulation 6 \(2006\) is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552\(a\) and 1 CFR part 5 1.](#) To enforce any edition other than that specified in this section, the Coast Guard must publish a document in the *Federal Register* and the material must be available to the public. This incorporation by reference (IBR) material is available for inspection at the Coast Guard and at the National Archives and Records Administration (NARA). Contact Coast Guard at: Commandant (CG-NAV), U.S. Coast Guard Stop 7418, Attn: Office of Navigation Systems, 2703 Martin Luther King Jr. Ave. SE., Washington, DC 20593-7418; telephone 202-372-1565. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or email fr.inspection@nara.gov. The material may be obtained from the International Maritime Organization (IMO) Publications Section, 4 Albert Embankment, London SE 1 7SR, United Kingdom; +44 (0)20 7735 7611; www.imo.org.

(b) Automated Identification Systems (AIS). AIS may be used to augment communication, and may be one of the communication methods listed in a vessel security plan under part 104 of this subchapter.

Why Is Incorporation by Reference Used?

- Incorporation by reference allows Federal agencies to comply with the requirement to publish rules in the *Federal Register* and the Code of Federal Regulations (CFR) by referring to material already published elsewhere.
- The legal effect of incorporation by reference is that the material is treated as if it were published in the *Federal Register* and CFR.

This is true at the state and local levels as well.

What Is the Current Federal Policy on IBR?

The Office of Management and Budget (“OMB”) Circular A-119

Directs all federal agencies to incorporate “in whole, in part, or by reference” privately developed standards for regulatory and other activities “whenever practicable and appropriate.”

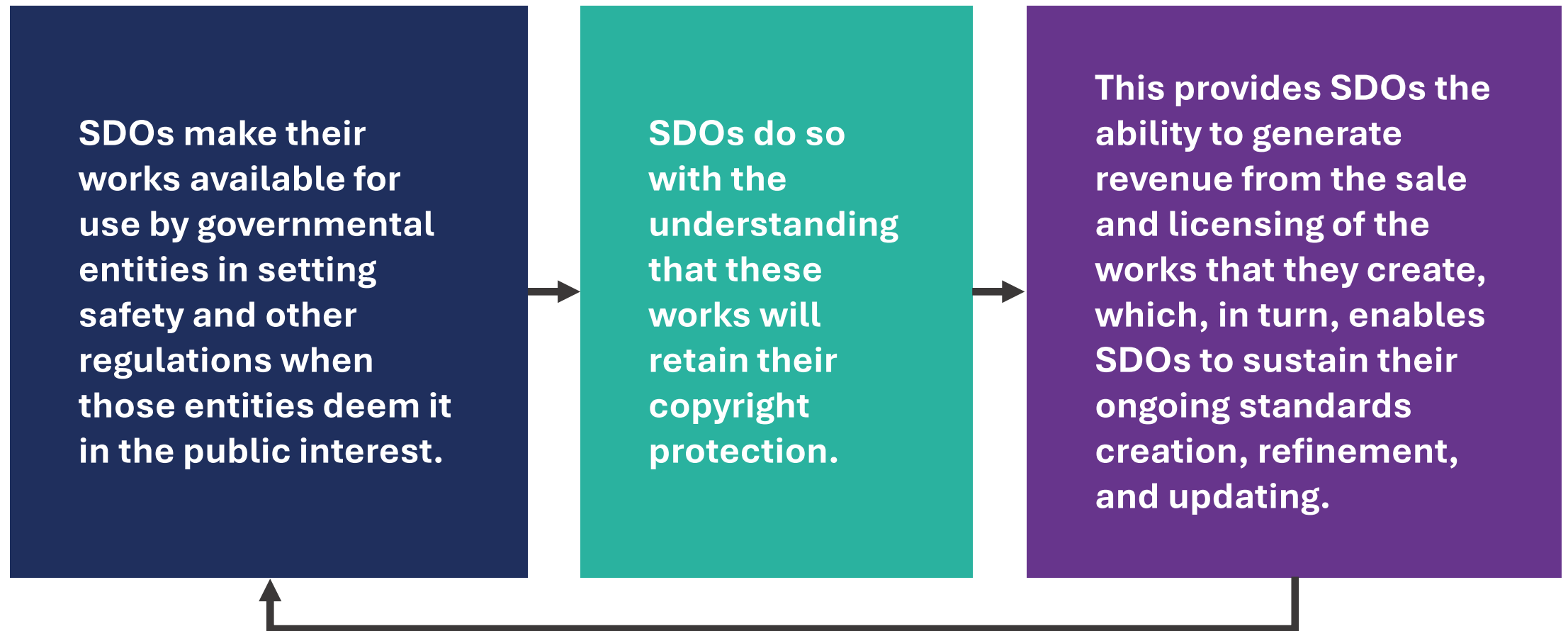
For this policy to succeed, private authors must have an incentive to create works useful to the government.

OMB thus requires agencies to “observe and protect the rights of the copyright holder and any other similar obligations.”

Freedom of Information Act (“FOIA”)

Balances competing interests by authorizing reference by the CFR to materials incorporated by reference, with the approval of the Office of the Federal Register, that are “reasonably available to the class of persons affected thereby.”

Why Is Copyright Protection Essential to Private Standards Development?



What Are the Current Trends in IBR?

- Notwithstanding federal policy, case law is trending towards limiting copyright protection in IBR'd standards.
- What's Changed?... Federal cases:
 - Recognizing a “fair use” defense to copyright infringement of IBR'd standards in some situations
 - Finding no copyright infringement where copyrighted model codes have been IBR'd
 - Rejecting motions for injunctions against commercial actors seeking to exploit IBR'd standards

A Fifth Circuit case recently determined that because a model code developer's codes serve no other purpose than to become the law they can be copied and resold by commercial actors upon being incorporated into law.

Where Will These Trends Lead?

- Trends could continue with fair use and the model codes exception dominating IBR analysis in the courts.

A fair use defense might be extended to include **commercial** exploitation of IBR'd standards.

Secondary references may also be swept up in the IBR analysis, causing standards nested in IBR'd standards to lose copyright.

The exception for model codes might be extended to invalidate copyright in standards not intended for incorporation into law

- If SDOs cannot fund standards development as a result of loss of copyright in IBR'd standards, standards may not be updated as frequently, or for some industries, at all.

Timing (How Fast Is This Moving)

- The IBR issues are moving quickly in the courts with a mix of legal arguments being presented for consideration.

FAIR USE	MODEL CODES
SECONDARY REFERENCES	GOVERNMENT EDICTS DOCTRINE

- It is unclear how the courts will deal with these issues and several cases are moving through the federal system at once.

The U.S. Supreme Court recently declined to clarify the law so uncertainty in this area is expected to continue.

Global Trends in IBR

- Finding exceptions to copyright protection on IBR'd standards is also gaining acceptance globally.
- In response to a decision by the European Court of Justice, the European Commission made a large number of referenced standards, including ISO and IEC standards, available without charge.
- This action has given rise to a lawsuit filed by ISO and IEC in December 2024 against the European Commission seeking to annul the EC's efforts to make ISO/IEC IBR'd standards freely available.

In a decision released in March 2024, the EU Court of Justice found that certain European Harmonised Technical Standards must be freely available without charge because of the overriding public interest in the law justifying disclosure of those standards.

Strategic Insights

- The cases trending towards invalidating copyright in IBR'd standards signals that:

Federal, state, and local agencies may not be able to continue to rely on private sector standards for IBR purposes and these agencies will need to develop alternative ways to regulate.

SDOs whose standards are incorporated by reference by federal, state, and/or local agencies may not be able to rely on revenues derived from standards sales and will need to find alternative business models to sustain standards development activities.

- SDOs need to make their positions known so as to enlighten courts and legislatures about the consequences of eliminating copyright in IBR'd standards.

Strategic Insights, cont'd

- For example, SDOs may urge that:

Governments consider alternative means to incorporate their standards to continue to benefit from efficiencies that result from incorporation by reference.

Courts recognize the significant property interest in copyrighted standards.

Federal and state regulatory authorities purchase or license IBR'd standards.

- At bottom, the standards community will need to get out the word on its perspective on these issues to ensure that a proper balance of interest is ultimately achieved.

Current Efforts to Address the IBR Concerns

- Two ANSI Board Task Groups (TGs) have been looking into the IBR Issue:

Education/Communications TG

Focuses on:

- Strategies for communicating the viewpoints of SDOs on IBR to stakeholders, federal/state agencies, legislators, and the public.
- Legislative responses to judicial decisions, for example through the proposed [Pro Codes Act](#):
 - which seeks to protect SDO copyright in IBR'd standards and codes;
 - while, at the same time, requiring SDOs to make IBR'd standards publicly accessible online in a readable format at no monetary cost to the reader (a stricter requirement than “reasonably available”).

IBR Mechanics TG

Examines:

Technical solutions relating to how standards are used by federal agencies and IBR'd into the CFR.

Researches:

examples of alternatives to IBR currently in use at the federal level

SDOs Should Ask Themselves...

1

How do these trends align with the SDOs' mission, vision, and long-term goals?

2

How do these trends affect the stakeholders supported by SDOs?

3

What risks do these trends pose, and how can we address them?

4

How resilient are we to this disruption, and do we have contingency plans?

5

Are there opportunities to consider alternative business models such as developing new derivative products (e.g., training, certification, appendices)?

Contact Information

Patricia A. Griffin

SVP and General Counsel

pgriffin@ansi.org

Mary Saunders

SVP, Government Relations and Public Policy

msaunders@ansi.org

