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

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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 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 direct 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—MARITTME 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."

What is ANSI's Position on Copyright and IBR?

IBR does not extinguish copyright.

When a legislature or agency incorporates a privately developed standard by reference, the standard does not enter the public domain.

Federal policy requires agencies to respect that copyright.

OMB Circular A-119, implementing the National Technology Transfer and Advancement Act, expressly directs agencies that incorporate voluntary consensus standards to "observe and protect the rights of the copyright holder." Therefore, federal IBR policy is violated, not fulfilled, by free distribution of standards online without SDO consent.

Copyright protection is what makes the system work.

SDOs invest substantial resources in developing and maintaining the standards that governments rely on at no public cost; revenue from the sale and licensing of those standards funds that work. Eliminating copyright protection upon IBR would destabilize the private standards development ecosystem that OMB A-119 was designed to preserve.

Why Is Copyright Protection Essential to Private Standards Development?

SDOs make their works available for use by governmental entities in setting safety and other regulations when those entities deem it in the public interest.

SDOs do so with the understanding that these works will retain their copyright protection.

This provides SDOs the ability to generate revenue from the sale and licensing of the works that they create, which, in turn, enables SDOs to sustain their ongoing standards creation, refinement, and updating.

What Are the Current Trends in IBR?

- Courts in multiple circuits have now held that certain reproduction of IBR'd standards constitutes fair use or is otherwise not actionable – representing a fundamental and present challenge to the copyright model that sustains private standards development.
- What's Changed? Federal cases…

…Holding that reproduction of IBR'd standards for the purpose of disseminating the law constitutes transformative use supporting a fair use defense – now firmly established in both the D.C. and 3rd Circuit	…Finding no copyright infringement where copyrighted model codes have been IBR'd (the "model codes exception")	…Rejecting motions for injunctions against commercial actors seeking to exploit IBR'd standards

Key Recent Decisions

ASTM International v. UpCodes, Inc. **(3d Cir. 2026): Fair use extended to a for-profit commercial platform**

- Reproduction of ASTM standards incorporated into building codes is likely fair use
- For-profit status alone does not defeat the defense
- Standards incorporated *indirectly* through a model code are treated the same as directly incorporated standards
- Non-mandatory text – annexes, explanatory materials – is also covered

ANSI filed an amicus brief in this case.

Canadian Standards Association v. P.S. Knight Co. (5th Cir. 2024): Adverse result on a separate legal theory

- Applying Veeck v. Southern Building Code (5th Cir. 2002), the court held that standards incorporated into law become "the law" and may be freely reproduced
- Extended this reasoning to standards incorporated into Canadian law, potentially broadening Veeck's reach
- No fair use analysis required – the public domain theory was dispositive

ANSI filed an amicus brief in this case.

Where Will These Trends Lead?

- Trends could continue with fair use and the model codes exception dominating IBR analysis in the courts.
- 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.
- **Risks that have materialized** *(ASTM v. UpCodes, 3d Cir. 2026)*:
  - Fair use can now cover commercial exploitation of IBR'd standards – *ASTM v. UpCodes* (3d Cir. 2026)
  - The fair use defense applies equally whether a standard is incorporated directly by statute or regulation, or indirectly through a chain of reference – e.g., a jurisdiction adopting a model code that in turn references the standard – *ASTM v. UpCodes* (3d Cir. 2026)
  - Non-mandatory text including annexes – also covered by fair use – *ASTM v. UpCodes* (3d Cir. 2026)

Risks on the horizon:
- Model codes exception extended to standards not intended for IBR
- AI training on IBR'd standards argued as transformative fair use

Timing (How Fast Is This Moving)

- The trend in the courts is now clearly adverse to SDO copyright claims in IBR contexts – two circuits have aligned on fair use, and the Fifth Circuit independently reaches adverse results under its *Veeck* precedent.
- While the outer boundaries of these doctrines remain to be determined, and significant cases continue to develop, the direction of travel is well established.

LEGAL THEORIES IN PLAY

- FAIR USE
- MODEL CODES
- SECONDARY REFERENCES
- GOVERNMENT EDICTS DOCTRINE

Where Things Stand

Adverse results are now emerging from multiple circuits on multiple legal theories simultaneously. SDOs should treat this not as an emerging risk but as a present one.

Strategic Insights

- The cases trending towards limiting copyright in IBR'd standards signal that:

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

For SDOs: 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 while providing better copyright protection.

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

ANSI's Intellectual Property Rights Policy Advisory Group (IPRPAG) Copyright Group, with its two Task Groups, is actively engaged on the IBR issue:

Education/Communications TG

Focuses on:

- Strategies for communicating the viewpoints of SDOs on IBR to stakeholders, federal and state agencies, legislators, and the public.
- Legislative responses to judicial decisions, for example through the proposed PRO Codes Act (H.R. 4072, 119th Congress):
  - would preserve SDO copyright in IBR standards while requiring free public read-only access — one proposed framework for balancing access and incentives
  - A Senate companion bill was introduced on March 20, 2026.

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, including FDA recognized standards lists, EPA criteria-based approaches, and the OSHA NRTL conformity assessment model

***Note**: Both Task Groups operate under the Copyright Group, a standing committee of ANSI's Intellectual Property Rights Policy Advisory Group (IPRPAG).*

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 including training, certification, and compliance tools?
6. Do we provide free and easily obtained read-only access to IBR'd standards? If not, what steps can we take now – both to mitigate litigation risk and to align with the emerging domestic and global baseline?

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For more information on ANSI's work on IBR, please visit [ansi.org]() or contact the ANSI Legal and Government Relations teams.

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