

Standards Developers, Public Access, and Copyrights in the 21st Century

by Dominic Sims

“Weights and measures may be ranked among the necessities of life to every individual of human society. They enter into the economical arrangements and daily concerns of every family. They are necessary to every occupation of human industry. ... The knowledge of them, as in established use, is among the first elements of education, and is often learned by those who learn nothing else, not even to read and write.” (John Quincy Adams, *Report on Weights and Measures by the Secretary of State*, to the Senate, February 22, 1821)

“Are standards important?...[W]hile the details have changed over time, standards are more essential today than at any time in our nation’s history. Voluntary consensus standards are at the foundation of the economy. The standards system promotes the public good, enhances the competitiveness of industry, and contributes to a liberalized global trading system. This “essential infrastructure” is therefore important to everyone, and it is important that everyone understand that and work towards maintaining and improving the system.” (Introduction, *United States Standards Strategy*, 2015).¹

Introduction: Standards Development Organizations

Standards are all around us. Though most of us have the luxury of not giving them much thought, they are ever-present, offering safety and security across all aspects of our lives—from the food we eat, to the cars we drive, to the buildings in which we live and work. In the United States alone, there are more than 100,000 standards at work in all industry sectors—worldwide, perhaps ten times that number.²

Standards are developed and published by hundreds of Standards Development Organizations (SDOs) in the US and around the world. SDOs exist in various forms. In the US, some of the most prominent SDOs are nonprofit membership associations, whose staff, members, and stakeholders regularly come together to create consensus-based



health and safety standards for private and government use.

The International Code Council (ICC), a nonprofit association with 58,000 members, is one such organization; it publishes a comprehensive, coordinated family of codes (the I-Codes) that are used in all fifty states and referenced by many Federal agencies. The codes help to reduce costs while at the same time improving safety—both of which are good for the economy. More importantly, however, those codes and standards have helped produce the best building safety and code compliance system—and the safest buildings—in the world today.

The hallmark of the system is that its regulatory backbone—the code content itself—is not initially produced in a governmental setting, but by members of ICC and other private sector SDOs, working in collaboration with industry, government, and other experts in the building sciences. Like many other SDOs, ICC develops its codes through a public-private collaboration that encourages active participation and gives a voice to all affected stakeholders.

Governmental entities in the US, at all levels, have long depended on ICC and other SDOs to provide the codes and standards that underlie the building regulatory system—and they continue to do so today. Most government agencies do not have the consistent access to resources or wide-ranging technical expertise to develop all the materials the system demands, so they have chosen to rely on SDOs such as ICC that offer an array of effective codes and standards at essentially no cost to the taxpayer. ICC’s codes derive their quality and credibility from a code development process that reflects principles of openness, transparency, balance, due process,

and consensus. As a result, deep pockets and special interests do not rule the day. Safety, technology, and other policy considerations ultimately determine what goes into the codes. (For a more detailed description of the ICC process and the US code system generally, see the article *Standards in the States* by David Karmol in the November/December 2015 issue of *Standards Engineering*).

Development of Codes and Standards is not Free

The development and updating of the ICC codes, of course, is not free. ICC, like other SDOs, funds its code development activities and associated organizational costs largely through the sale of its codes and other published material, both printed and electronic. For SDOs that utilize a similar model, copyright protection of their codes and standards is essential to their ability to generate the revenue necessary to support their code development activities. Moreover, in the case of ICC, this funding model enables ICC to make the codes available for adoption and use by governmental jurisdictions at no cost to taxpayers.

Over the past few years there has been considerable discussion and commentary about public access to adopted codes and standards, and about the tension—in the Internet age—between an SDO’s copyright interest and the growing public expectation that everything should be available for free online.

For its part, ICC fully recognizes the public’s right to know what the law is. That’s why it offers free online access to the codes in read-only format. Offering unlimited free access to all codes and standards would undermine ICC’s ability to exist, to support its members’ work, and to produce codes—an outcome that ultimately would not be in the public interest. ICC’s approach strikes a balance that allows easy and meaningful public access, while preserving ICC’s ability to carry out its code development mission that many governments across the US rely on.

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The alternative would be to drop the responsibility for code development into the laps of governmental entities, which do not have the expertise of the multitude of ICC Members or the resources to carry out this function. Building safety would suffer; regulations would become less consistent between communities; and important ancillary products and services, such as training, education, and certification that ICC members and professionals in the building safety industry rely on, would disappear.

In addition, taxpayers would have to start footing the bill through some new financial mechanism. Perhaps most importantly, the code development process would inevitably become subject to the well-funded special interests that have become increasingly influential in the political process at all levels of government.

The Federal Government and Public Access

The Federal Government recently took a long look at the issue of public access to adopted codes and standards. The backdrop of this inquiry lies in part in the *National Technology Transfer and Advancement Act of 1995*. In that law, Congress recognized the long and beneficial history of governmental reliance on private sector standards, and codified the requirement that Federal agencies use “standards that are developed or adopted by voluntary consensus standards bodies” except where “inconsistent with applicable law or otherwise impractical.”

The requirements of the Act were implemented by the Office of Management and Budget (OMB) in *OMB Circular A-119*. It reiterated that wherever possible, agencies had to use private sector standards “in lieu of government-unique standards.” Significantly, it also provided that agencies “must observe and protect the rights of the copyright holder” with respect to any standards that they used.

Earlier this year OMB released a revised version of A-119,³ the first revision since 1998. The revised Circular reiterates the preference for voluntary consensus standards over government-unique standards. Regarding public access, OMB tells agencies that they should work with SDOs to “promote the availability” of copyrighted material, and lists factors that agencies should consider in assessing whether

standards are “reasonably available,” but in doing so the agency should “respect... the copyright owner’s interest in protecting its intellectual property.” The final version of A-119 is thus entirely consistent with OMB’s earlier comments on the proposed revisions, in which it made clear that ignoring SDOs’ rights in their content is not in the public interest:

“OMB does not believe the public interest would be well-served by requiring standards incorporated by reference to be made available ‘free of charge.’...[T]he costs of standards development are substantial, and requiring that standards be made available ‘free of charge’ will have the effect of either shifting those costs onto others or depriving standards developing bodies of the funding through which many of them now pay for the development of these standards. Such changes could have serious adverse consequences on important governmental objectives, including the ability of regulators to protect the environment and the health, welfare, and safety of workers and consumers.”⁴

OMB’s position is also consistent with comments in a 2011 staff report to the Administrative Conference of the US (ACUS),⁵ which was considering recommendations regarding public access to private-sector standards that are incorporated by reference into Federal regulations:

“The public-private partnership in standards...has reaped extraordinary benefits for both government and the private sector. In addressing the important public policy question of how to ensure the reasonable availability of incorporated, copyrighted materials, these benefits must be kept in mind. Any solution must preserve and improve – and not undermine – the valuable public-private partnership in standards.”⁶

Looking Ahead: Protecting IP through Education

Recently, ICC signed on as a “Founder Member” of the Intellectual Property Alliance, a non-profit that helps SDOs protect their copyrights through workplace education programs. The IP Alliance was formed in 2014 by Intellectual Property Shield, Inc. and SES – The Society for Standards Professionals, as a way to leverage their collective knowledge about copyright infringement and the distribution of standards.

The operating premise behind the IP Alliance is that copyright infringement in the workplace—which is often inadvertent—can be greatly reduced by simply educating users about copyright protection and how to properly handle copyrighted material. The IP Alliance promotes videos and other educational programs to inform the standards user community of the ways in which users could be putting their companies at risk for copyright infringement. An additional goal, as noted by one early member of the Alliance, is to “make sure that our customers understand not only the value of our standards, but how that value is directly linked to proper usage of standards.”

For ICC and many other SDOs, protecting their IP is essential to their ongoing standards development activities. And those activities are at the heart of the system of private sector standards that is one of the underpinnings of our economy and our society. Collaborative efforts such as the IP Alliance (with its nonthreatening focus on education and outreach) will be critical in enabling SDOs to continue to help build and maintain the 21st century version of that “essential infrastructure” that is the system of standards in the United States today.

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