

31 May 2012

**TO: National Archives and Records Administration**

**FROM: Susan K. Tatiner, IEEE-SA Director, Government Relations & Standards Education**

**SUBJECT: IEEE Standards Association Response to Request for Comments on Incorporation by Reference[FR Doc No: 2012-4399], 27 February, 2012**

Thank you for the opportunity to comment on the petition submitted by Professor Peter Strauss *et al.* to the Office of the Federal Register (OFR), regarding the availability of material incorporated by reference (IBR) in the Code of Federal Regulations (CFR).

The IEEE Standards Association (IEEE-SA) respectfully submits the following comments, addressing these issues:

- U.S. Federal agencies and today's private sector
- Copyright
- Access to standards and IBR
- International stance
- Moving toward a solution
- Conclusion

#### **ABOUT IEEE**

*IEEE is the world's largest technical professional society, with a 125-year history of technological innovation. The organization comprises more than 400,000 members who conduct and participate in its activities across the world in more than 160 countries.*

*IEEE is a leading developer of industry standards, with an active portfolio of nearly 1,300 standards and projects under development. These standards affect a wide range of industries including: power and energy, Information Technology (IT), telecommunications, transportation, nanotechnology, information assurance.*

*These standards are developed through one of two distinct processes involving experts from around the world. The first consists of individual experts, and the second of entities – large and small – in standards development activities. In both instances, the five key values of consensus, due process, openness, right of appeals and balance underpin the activities. All participants are equally recognized and have an equal basis in the standards development processes.*

*The development of IEEE standards provides the means for technological development to reach the global marketplace. The standards produced by IEEE are known for achieving high levels of technical excellence and broad applicability. The IEEE standards process is fully consistent with WTO criteria for international standards developing organizations.*

## U.S. FEDERAL AGENCIES AND TODAY'S PRIVATE SECTOR

The standards system that has developed under the NTAAA and OMB Circular A-119 is cost-effective and efficient for U.S. Federal agencies. It opens the door for those agencies to work with global standards organizations in the private sector that have the ability to coordinate with all interested and materially affected parties. IEEE-SA coordinates with industry, governments, associations, and numerous other organizations in the development of standards. This is accomplished through established liaisons with other organizations, cross-pollination of membership, joint standards development and adoption agreements, and a strategic preference for technical global collaboration.

Standards promote economic growth around the world, support efficient innovation, and facilitate international trade. Today's global standards organizations, like IEEE-SA, operate across boundaries. The global nature of IEEE-SA facilitates growth, innovation, and trade through the timely delivery of market-relevant standards that are welcome and accepted everywhere. The large participation in IEEE-SA standards development work and the average low cost for standards enable wide adoption of IEEE standards by users. Other measures that support the wide acceptance of IEEE standards around the world include IEEE-SA's adherence to and support of the principles and requirements of the WTO/TBT agreement, which is reflected in its robust standards development process, and an advanced, RAND-based Patent Policy balanced between the rights of the licensor and the licensee that encourages the owner of IP to give an assurance to license on RAND terms.

## COPYRIGHT

When the NTAAA and OMB Circular A-119 were put in place, they essentially codified an existing best practice to prefer private sector standards, and set the stage for an expansion of this practice. A cornerstone of the envisioned system was the maintenance of the IP rights of copyright holders. Without this, the U.S. Federal agencies would not be able to benefit from the efficiencies of the voluntary consensus standards development process. This principle to "observe and protect" copyright is explicitly stated in A-119.

IEEE-SA supports the December 2011 ACUS Recommendations in their continued recognition of the rights of copyright owners.

#### ACCESS TO STANDARDS AND IBR

U.S. Federal agencies, U.S. citizens, and other parties have an interest in access to standards that are incorporated by reference. Today's stakeholders find that older forms of access (paper copies available in select locations, e.g.) that were once deemed sufficient no longer seem so. This evolution has the potential to strain the relationship between standards developers and the stakeholders who benefit from them. It is to everyone's advantage to seek new ideas on the matter of access that allow us to better transition in the digital age without losing the benefits of the system in place.

Standards developers have dramatically increased access to standards since 1998. Online read-only access, access in libraries, no-cost access to tables of content, "free" access to standards IBR through programs subsidized by industry (such as the IEEE GET 802™ program)... all are examples of modalities that standards developers have used to improve access to standards. Recognizing that U.S. Federal agencies and citizens have different needs during rulemaking, procurement, and other activities, standards developing organizations have made special arrangements at different times to accommodate their needs.

Standards developers want to do more. We actively seek ways to get our standards out to the public in low- and no-cost ways. We actively seek ways to diversify our business operations and move away from dependence on the sale of standards. And we worry about how to address the "digital divide" as we move forward.

## INTERNATIONAL STANCE

The standards system that has developed under the NTAAA and OMB Circular A-119 is independent of government control. A-119 offers a level of assurance to the world that standards adopted by U.S. Federal agencies are not crafted to establish or encourage trade barriers. NIST, the US Trade Representative, and others have worked hard to prove the good faith of those U.S. citizens and national and multinational companies who participate in global standards organizations. The role of the U.S. Federal agencies in standards development is in balance. When changes are considered to the system to address the need for access to standards, it is important to reflect on the possible impact any changes might have on balance and the perception of balance. A change, for example, that involved increased U.S. government financial support would likely have a negative impact on the perception of independence. IEEE-SA operates in active agreement with the WTO principle that standards should not create unnecessary obstacles to trade, and whenever appropriate, should specify requirements in terms of performance rather than design or descriptive characteristics. IEEE-SA adheres to the six principles of the TBT Committee's Decision on International Standards. IEEE-SA is truly a global organization, engaged with members and participants around the world. Standards developing participants engage face-to-face in standards development, and, when long-distance travel is prohibitive, they are able to engage electronically in the development of IEEE standards by, for example, submitting comments during a formal consensus ballot. Anyone in the world can participate in developing IEEE standards, and IEEE-SA makes an effort to reach out to both individuals and entities in all countries.

## MOVING TOWARD A SOLUTION

IEEE-SA strongly defends its copyright to its standards. We also recognize that there is an argument to be made about the rights of citizens to access to the law and the need to evolve what access means in the 21<sup>st</sup> century. When there are countervailing rights, the question is not solely who is "right." The question is, how can we craft a solution that moves beyond slogans?

The issues and problems identified in the IBR debate are not going away; yet few in the debate have proposed solutions. It's time for everyone to work together to move the debate to the solution-finding stage.

One possibility would be to replace IBR with performance-based regulations that describe what is required and name standards for compliance as proof of meeting the performance level. A precedent for such a path is the so-called New Approach of the EU. Although some have not been pleased with the way the New Approach has worked in practice, there is no reason to believe it could not be improved upon.

What makes such an approach interesting in this debate is that the standard named remains voluntary. Thus, the approach seems to have found a way to give the public the mandatory information it needs while protecting the rights of SDOs. Another advantage appears to be that it simplifies the problems surrounding the updating of standards that are incorporated by reference. In a new approach, the regulation would update the levels of performance expected and not concern itself with the maintenance schedule of the standard.

Once stakeholders commit to finding a path forward in the IBR debate, other solutions will undoubtedly emerge. IEEE-SA supports a solutions-based path forward, with review, comment, and careful consideration of the consequences of change.

## CONCLUSION

The public is an important beneficiary of the standards system that has developed under the NTAAA and OMB Circular A-119. Private resources are brought to bear to create standards at low overall cost to the public; those resources include the considerable expertise that resides in industry.

If standards development were free, there would be no problem, but it is not free. It isn't even inexpensive, and someone must pay to develop the standards the world needs for safety, for growth, for innovation.

IEEE-SA suggests that any change to IBR practices be considered as part of the OMB review of Circular A-119.