

## Standards – Incorporation by Reference

### EXECUTIVE SUMMARY

The aerospace industry depends on technical standards from more than one hundred different standards-developing organizations. The industry and its supply chain have long accepted and supported the business models of these organizations, which include paying for standards. The cost of the standards is just one of the many costs of doing business. If a recent government trend requiring that standards incorporated by reference into rulemakings be made available free on the internet is not reversed, the viability of these critical standards developers will be threatened and both the industry and its regulators and government customers will lose their invaluable services. Neither industry nor the government can afford to absorb the costs to develop these standards, nor can they develop them without the broad support that the standards developers enjoy. The safety of our aerospace products and the people who use them depends on keeping the technical standards and the systems that support these standards in place.

The Strategic Standardization Forum for Aerospace (SSFA) has developed this paper in response to this recent government trend. SSFA is a forum where the aviation, space and defense industry, in partnership with government, standards development organizations and other stakeholders, addresses and responds to standardization issues and policies that impact the industry. SSFA has held workshops and discussions on Standards as Digital Data, how companies manage changes when they occur in standards, and has responded to proposed rulemakings in the Federal Regulations on standards-related issues.

### AN INDUSTRY CALL TO ACTION

The sustainability of the U.S. standards development process that supports the aerospace industry is threatened by government trends domestically to require free internet access to standards. If this is implemented, it will cause disruption of the existing system and business models used to support standards development. This would have a severe negative impact on the aerospace industry and associated government agencies. If the federal government ignores intellectual property and copyrights and denies standards organizations the right to recoup their costs for standards development, these organizations may no longer be able to provide the important standards and services needed by both industry and government. Jobs, the economy, national competitiveness and the public good will suffer without the critical standards that are used to enhance quality and safety while also driving trade, innovation and economic growth.

This paper is intended to serve as a call to action to industry leaders to engage their support in reaching out to policy makers and legislators to reverse this trend and head off the changes that threaten the viability of the current standards system. This paper articulates the value of the present system supported by current business models; the negative impacts to industry, trade and public safety if the standards system is disrupted; and the added costs, time and infrastructure involved in creating needed alternatives to the current system.

The goal is to encourage industry leaders to take action on the following:

- Submit comments to the proposed revision to OMB Circular A-119 which reinforces protection of copyright and the standards organizations' right to charge a reasonable fee for standards.
- Seek champions in the House and Senate to propose bills reinforcing language that supports the intellectual property and copyrights of standards developing organizations and the concept that "reasonably accessible" does not mean "accessible for free", in order to minimize the chance that future legislature will be proposed that violates developer copyrights.
- Engage the state Attorneys General to enlist their support for the above proposed bill.

## **THE UNITED STATES CONTINUES TO BENEFIT FROM A LONG AND SUCCESSFUL PRACTICE OF RELYING ON VOLUNTARY CONSENSUS STANDARDS IN REGULATIONS**

U.S. government agencies such as the FAA have a long history of incorporating standards by reference into law. This practice, in addition to being supported for decades by both federal statutory and regulatory policies, enables agencies to draw on the expertise and resources of private sector-led standards developers to serve the public interest.

Government agencies rely on the technical expertise embodied in published standards. While the government has strong reasons to want high quality technical standards to help ensure the safety and reliability of products used by and for the public, the agencies lack the breadth and depth of technical expertise and resources needed to produce the standards they use. Therefore, being able to depend on the private sector-led voluntary consensus standards development process to create the standards that industry and regulatory agencies use to support rulemaking brings value to government agencies and protects the interests of the public.

The aerospace industry also benefits greatly when regulatory agencies incorporate standards by reference. Since industry participates in the development of these standards – often working directly with government and regulatory agencies – the resulting standards both support the goals of the regulatory bodies and incorporate the requirements that industry has helped develop.

The current business models of standards developing organizations (SDOs) allow for equal participation by all interested parties including small and medium enterprises, academia and consumer interest groups. Such participation is crucial to ensuring that all stakeholders' interests are considered in the process and results in technical requirements which are far better developed and more robust than those the regulatory agency could develop alone. The ability to charge for standards allows the developers to keep participation costs low, permitting the broadest participation possible.

It needs to be emphasized that the development of any standard requires considerable resources. While using and relying upon SDOs to provide the standards which support regulations is the most cost effective rulemaking process for the taxpayer, significant costs are still involved in the staff, infrastructure and tools necessary to develop, vet, refine, produce and distribute voluntary consensus standards. Standards organizations which fund this process through the sale of standards provide the best value for industry and government alike – but only if their right to continue to charge a reasonable fee to support their services is upheld. Additionally, since standards are used far beyond regulations, sharing the costs across all users around the world minimizes costs for any one user and avoids significant costs to governments. By recovering costs through the sale of standards, SDOs can minimize the barriers to participation and maximize independence from entities seeking to influence the outcome for commercial or political reasons.

The practice of incorporation of standards by reference has successfully enabled both industry and government to benefit from reduced costs to their own standards programs and has given them the ability to rely on broader technical expertise from all stakeholders for technical solutions that drive the economy and support public safety and health.

## **REASONABLE ACCESS IS NOT FREE ACCESS**

The U.S. government has long recognized that standards are the copyrighted intellectual property of standards developing organizations and that, when necessary, SDOs must be able to charge a reasonable fee for standards to recoup their expenses associated with supporting the development, publication and distribution of standards. The government and Congress deliberately acknowledge this through policies such as OMB's Circular A-119. The OMB Circular A-119 established existing federal policy regarding "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities." Consistent with the National Technology Transfer and Advancement Act of 1995, the Circular directs federal agencies to use voluntary consensus standards in lieu of government-unique standards when possible. OMB Circular A-119 recognizes that copyright protection and commercial distribution of standards supports the mission and purpose of SDOs and states that federal agencies "must observe and protect the rights of the copyright holder."

The Office of the Federal Register (OFR) regulations governing incorporation of standards by reference, as found in 1 CFR part 51, requires that standards be "reasonably available," which does not – nor was it intended – to mean "available for free." "Reasonable" means "fair, proper, or moderate under the circumstances,"<sup>1</sup> and "reasonably available" has been consistently interpreted, in rule and in practice, to include reasonable costs for copies of standards.

## **THE IMPACTS OF FORCING SDOs TO GIVE STANDARDS AWAY FOR FREE**

One potential impact of forcing SDOs to give their intellectual property away free would be that the aerospace industry would have to cover the lost revenue and increase payments to SDOs in order to continue the standards development process for our needed standards. This would cause companies to drop out of voluntary standards developing activities until the few remaining couldn't afford to continue. The aerospace industry would be left without the vital standards and services SDOs provide.

If industry doesn't absorb the costs, then government agencies would have to cover the expenses of the standards development process which would not be possible under current levels of government funding, including concerns over sequestration and debt. It also would pull funds away from government procurement, research and development projects and the regulatory process, negatively impacting industry and government agencies alike. Finally, it would make the government a monopoly player in standards development, undermining the current open, balanced and voluntary consensus-based system.

If standards developing organizations could no longer recoup their costs through the sale of standards, and neither industry nor government were willing or able to cover the costs of standards development, then these organizations would no longer be able to provide the standards and services that industry and government require. Without the critical standards SDOs provide, industry would be severely impacted. Certification of products would be vastly more difficult and costly, critical technical data could not be easily revised, accessed or maintained, and ultimately jobs, the economy and public safety would be put at risk.

Additionally, many SDOs use industry engagement and funding of standards development activities to support and sustain technical outreach and activities in the areas of science, technology, engineering and math education, which are vital to maintain a strong economy and enable the workforce of the future. Deny SDOs the ability to charge reasonable fees for standards and the loss to industry is far greater than the loss of the critical standards themselves.

## **WHY INDUSTRY SHOULD CARE ABOUT PROPOSED THREATS TO STANDARDS ORGANIZATIONS AND WHAT INDUSTRY NEEDS TO DO**

If the aerospace industry doesn't want to lose the valuable services of its standards developing organizations (e.g., AIA, ASTM, ASME, IEEE, SAE, ARINC, RTCA, and others), then its senior leaders must tell their

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<sup>1</sup> Black's Law Dictionary, (abridged 8th ed. 2005), p. 1099.

Congressmen and decision makers in government of the value of the current business models which support the standards that industry and government rely on for the public good.

Legislators need to hear from industry that if the SDOs can't stay viable and therefore cease to function, the technical data that both industry and government depend on will degrade or be lost, threatening the economy, jobs, competitiveness and public safety. Industry needs to point out that the current business models for funding standards development have long demonstrated their flexibility to react rapidly to changing technology and support innovation more effectively than any existing government standards processes.

Companies need to warn legislators of the severe negative impacts to costs for both government agencies and industry if either has to make up for standards funding currently shared by the broad range of standards users.

Aerospace companies also need to be mindful of the threat to their own intellectual property and copyrights if those of standards developing organizations can be dismissed so easily. Therefore, industry must remind legislators of existing law and decades of practice that acknowledge SDOs' rights to recoup their costs by charging reasonable fees for standards. Companies need to express concern that if the government ignores the intellectual property and copyrights of standards developing organizations, it sets a dangerous precedent raising grave concerns in industry that company-unique data, drawings, formulas, instructions or other materials which may also come into play in the course of complying with regulations might now be in jeopardy.

And finally, the aerospace industry needs to identify the risks to U.S. competitiveness if developing nations have free access to technical data we paid to create and develop.