

From: Carl Malamud  
Sent: Saturday, October 01, 2011 1:50 PM  
To: Jonathan Siegel

I've got a couple of suggestions that perhaps might be of use as you think of the redraft. Feel free to send along to the committee chair if appropriate. I'm also fine with these being published as formal comments if appropriate.

1. For the preamble, would it make sense to acknowledge that the issue of copyright in standards after they've been incorporated into law is unsettled and that ACUS is not taking a position on this subject? There is obviously a strong bias towards protecting and honoring copyright on the one hand, but we also have the Veeck decision and some ambiguity in the law. I think it would be fair to say this is "above our pay grade."
2. Again for the preamble, would it make sense to acknowledge that this study and recommendations are not the final word on the subject, but the beginning of a longer examination of a difficult set of issues that are extremely important for administrative lawmaking in our increasingly-technical society? This signals to the SDOs and government officials that this is a subject that will require continued study and affirms an ACUS commitment to continue to work in this area.
3. On the issue of public access to standards, I understand we're not going to be staking out an aggressive fair use position, but could we go a bit farther than we have? In particular, I think it would be fair in the recommendations to say that agencies should make every effort possible to secure the greatest public access to standards. This is in line with my previous note saying that balancing the revenue needs of the SDOs is no different than balancing the revenue needs of Lockheed Martin in a defense procurement: that's not our job.
4. A practical suggestion that we might consider at least discussing: there is a Federal Depository Library Program which provides public access to government documents. It really is not a stretch to suggest that if a standard is incorporated by reference that 1,280 copies of that standard be provided to FDLP. This does not solve the electronic access problem, but it would go a \*long\* way towards making the law more accessible. (FYI, if you search on Worldcat for technical standards, you'll soon find that there are only a very small handful of libraries that have technical standards that have been incorporated into law.) I suspect it would be a trivial task for an agency to secure permission from an SDO to make 1,280 copies of a standard.
5. Again for the preamble, would it make sense to acknowledge that Incorporation by Reference is a two-way street? Yes, it results in the government saving considerable money and time and results in higher-quality standards. On the other hand, the fact that these standards have been incorporated into law confers immense prestige and status to the SDOs, most of which are 501(c)(3) non-profits with public service as an explicit part of their mission. As such, it is incumbent on both the government regulators and on the SDOs to strive to meeting a broader mission of making the law available.

6. The issue of due process in standards formulation was a pressing issue in the 1960s and 1970s. It resulted in significant reform in the standards-making process. It also resulted in an obligation in A-119 to make sure that any standard incorporated by reference was the result of an open consensus-based process. I think it would be important in our preamble or in one of the recommendations to reaffirm this principle and point to the requirements of A-119. We can't forget that these private bodies are acting as our proxies in making the law and it is important that due process be observed.

I'd be happy to discuss these suggestions or answer any questions.

Best regards,

Carl Malamud  
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