

Scott Rafferty

From: Carl Malamud [carl@media.org]
Sent: Monday, September 12, 2011 12:22 PM
To: Emily Bremer
Cc: Scott Rafferty
Subject: Comments on Report

Hi Emily -

Once again, congratulations on a very good report.

I'm assuming my comments should be confined to the summary of recommendations? I'd be happy to comment on the report itself, but I didn't see any big factual errors there, though I do have some quibbles with some of the logic (especially on my comment 2 below). But, I'm assuming that's not my place to comment on the analysis, but should instead focus on the recommendations.

My comments are mostly in the first 3 recommendations.

1. My biggest quibble is with the separation between regulated parties and the general public in recommendation 1 and throughout the report. I sort of buy a two-part separation (though my experience has taught me that the public is always smarter and more interested than we think they are), but I don't think the first part is just regulated parties. In particular, consider the case of Ralph Nader, who while not being a regulated party would have a compelling interest in being able to easily obtain a read the "ASME Standard for the Acceptable Flammability of Pinto Gas Tanks." Public interest groups such as USPIRG and Consumer Reports, journalists, government lawyers, and many others have an interest in read documents just as compelling as the directly regulated parties. I would recommend either eliminating the distinction between the public and regulated parties or change "regulated parties" to "regulated and other interested parties."

2. Your recommendation 2 about making electronic copies is clear that this is for non-copyright material. But, on page 13, you posit the very interesting suggestion that OFR keep electronic copies for the public of all materials. But, you then dismiss the idea as impractical because of cost. I suspect the Page 13 pseudo-recommendation might be a distraction as making those copies, if you believe the documents is copyrighted, is probably illegal. In the recommendation itself, you are potentially opening up a can of worms by asking agencies to make copies of other documents for the same reasons OFR doesn't like to make copies of things like the US Code. You might want to run this recommendation by some IT folks or have OFR chew on it a bit.

3. On recommendation 3 (work with the copyright holder), I think I have a bigger quibble with the specific recommendations. I'm not convinced that we should be giving up on licenses as a mechanism to achieve the goal of public access. I didn't see compelling evidence that this procedure has been a failure, only that it hasn't been a big strategy used up until now and you're worried about potential use of government funds. But, I don't think we can say no on licenses based on experience to date, and there is certainly no "best current practice" that says don't do this.

4. On 3b, I definitely disagree that it is the job of the federal government to balance the public interest with the revenue needs of standards bodies. I also think we need to be *very* careful before we grant a long-term monopoly on one standards body. Competition is good. There are multiple plumbing codes, multiple telecom standards to choose from. I'm fine with recognizing these bodies need to make money, but our job in the federal government is to look out for the public and the interests of the government. Just as I'm not convinced we should

be taking explicit account of an SDO's revenue needs, I'm not sure we should be endorsing crippleware technical solutions, such as the "read but don't print or save" solutions that you mention in the body of the text.

5. On 3 generally, you might consider a recommendation to the effect that if there are two acceptable standards that do the job and one of them is generally available and the other is under copyright, the agency should give serious weight to the generally available standard.

6. On recommendation 4e, as in the above comment, we should be very careful about using the notice provisions of the Federal Register as a way of making sure private citizens pay money to private bodies. That is a commendable goal, but it seems beyond the scope of the IBR mechanism that we are studying. If Congress or an agency wants regulated parties to be part of an SDO, they should make that a regulation or a law and not use the IBR mechanism as a submarine.

I hope these comments are useful. Please feel free to share with others as appropriate. Again, a really nice job.

Best regards,

Carl