

From: Michael Herz (Public Member)

To: Assembly of the Administrative Conference

Re: Comments on Proposed Incorporation by Reference Recommendation

Date: December 1, 2011

I would like to raise three questions on the IBR issue, not because I think these questions will help people but because if they prompt responses the responses will help me.

My leanings are strongly in the Straussian direction. It is hard to get round the power of the basic proposition that people should not have to pay to learn what is contained in laws with which they must comply. Law which is unknowable – like Caligula’s much-invoked decrees in small print posted too high to read, or ex post facto laws – is not really “law.”

But there are (at least) three possible complications at that same level of abstraction.

Standards that are incorporated by reference are not literally unknowable, and law has never been truly free. The government charges for the CFR and the U.S. Code and the U.S. Reports. While those are available in libraries, getting to a library is not “free,” even though there is not a direct monetary payment. This is a setting in which the Internet may truly “change everything,” but the proposition that law must be available for free may be too simple.

Is it clear that we should separate the costs of *learning* what the law is from the costs of *complying* with it? A widget manufacturer has to spend \$x (for engineers, staff, lawyers, and equipment) to bring the factory into compliance with regulations. With IBR, the manufacturer has to spend \$1.01x to also get hold of copyrighted, incorporated standards. That is a modest, and unproblematic, difference in degree. Is it really also a difference in kind, or is the cost of discovering the law (which often involves the cost of hiring a lawyer) just *part of* the costs of compliance?

Agencies charge user fees and permit fees. These cover not the cost not of compliance but rather the government’s costs of regulating. If an agency were to pay to provide the incorporated material, could it (with statutory authorization) charge a user fee to cover those costs? Probably so. But if it did that, what has been accomplished? The private entity is still paying for the incorporated material, just indirectly. (To get even more abstract: agencies provide nothing for free, since their costs are covered by tax dollars.) And if it can charge indirectly, why not cut out the middleman?

I am not sure any of these considerations overcomes Peter’s basic point, and they are irrelevant to his legal arguments under FOIA, but they give me pause.

Michael Herz

Chair, ABA Section of Administrative Law and Regulatory Practice

Visiting Research Scholar, Program in Law and Public Affairs, Princeton University

Arthur Kaplan Professor of Law, Cardozo School of Law

(609) 258-7311 (o)

(917) 309-4497 (c)

herz@yu.edu