Incorporation by Reference

Comments on the Announcement of a Petition for Rulemaking and Request for Comments published at 77 Fed. Reg. 11414 (February 27, 2012).

Submitted to the Office of the Federal Register, National Archives and Records Administration [NARA 12-0002] online at http://www.regulations.gov.

Submitted by the
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June 1, 2012

Office of the Federal Register (NF)
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740

Dear Sir or Madam:

Please accept these comments in response to the Incorporation by Reference; Announcement of a petition for rulemaking and request for comments, which was published for public comment at 77 Fed. Reg. 11414 (February 27, 2012).

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Who is ASA?

Founded in 1993, ASA represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace.

ASA and ASA's members are committed to safety and seek to give input to the United States Government regarding government policies so that the aviation industry and the government can work collaboratively to create the best possible guidance for the industry and the flying public.

ASA supports efforts to increase safety. ASA has a number of programs to support aviation safety, and ASA works with the FAA and other non-US regulatory authorities to develop and

maintain programs designed to support safety as it relates to distribution, maintenance and installation of aircraft parts.

ASA's members are typically small businesses. Most of them employ between 2 and 20 employees.

How Are ASA Members Affected by Incorporation By Reference

ASA's members work closely with manufacturers, repairs stations and air carriers in order to make sure that the industry's quality assurance systems support the regulatory obligations related to aviation safety. Typically, ASA's members, and their business partners, will all face compliance obligations related to FAA regulations that incorporate by reference a third party document.

For example, ASA members hold inventory that could be devalued by an FAA airworthiness directive. When an FAA airworthiness directive references a service bulletin (a very common occurrence), under industry norms, the service bulleting publishers typically will not share such service bulletins with independent distributors. They protect them from disclosure under a claim of "proprietary rights."

Materials Created by a Private Party

It is very common to see The second of these types is privately-created documents that are incorporated by reference. Such incorporation by reference can be explicit or it can be general. There are a number of different example of such references.

Specific Reference

One example of material that is specifically incorporated by reference is found in Airworthiness Directives. Airworthiness directives are a special form of regulation that is issued by the FAA. Airworthiness directives are issued when the FAA finds that an unsafe condition exists in a product, and the condition is likely to exist or develop in other products of the same type design. 14 C.F.R. § 39.5 Airworthiness directives typically identify the problem and also identify a solution. Manufacturers are required to create solutions in response to airworthiness directives (14 C.F.R. § 21.99); but the normal process for issuing airworthiness directives is that the FAA identifies the problem to the manufacturer and the FAA wait for the manufacturer to create a manufacturer's service bulletin before issuing the airworthiness directive. The airworthiness directive will then reference the manufacturer's service bulletin as the source of information for

correcting the unsafe condition. In such cases, the manufacturer's service bulletin is incorporated by reference into the airworthiness directive.

General Reference

An example of material that is more generally incorporated by reference is instructions for continued airworthiness (ICAs) for aircraft and engines. Under 14 C.F.R. § 43.13(b), a mechanic or other party performing maintenance must use instructions for completing the work that are acceptable. The regulations explains that the mechanic can use the manufacturer's maintenance manuals (also known as the ICAs) or any other instructions that are acceptable to the FAA Administrator. Case law, though, has limited this by explaining that only the manufacturer's manuals are acceptable except in the rare cases where the FAA has approved an alternate method of performing the work. E.g. Busey v. Swanson, SE-9181 (NTSB July 7, 1989) (Failure to follow the manufacturer's manual is a violation because "it is that manual that sets forth the methods techniques and practices for the repair of the wing that are acceptable to the Administrator within the meaning of 43.13(a)").

Design approval applicants are required under the FAA regulations to create ICAs. E.g. 14 C.F.R. § 25.1529. They are told what information must be in the ICAs. E.g. 14 C.F.R. Part 25 Appendix H. They are also required to "make those instructions available to any other person required by [the regulations] to comply with any of the terms of those instructions" which requires those documents be made available to the aviation industry. E.g. 14 C.F.R. § 21.50(b).

Despite these requirements, it is common that such documents remain unavailable to parties that are required to comply with them - both during the comment period and after promulgation of the regulation that incorporates the document by reference.

This issue has an unusually pervasive affect on aircraft parts distributors that deal in rotable parts. Rotable parts are parts that must be periodically overhauled. When a repair station overhauls a component for an air carrier, the air carrier may have access to maintenance manuals that are generally incorporated by Part 43 and also to service bulletins that are incorporated in airworthiness directives. But when a repair station overhauls a component that is owned by a distributor, the distributor typically does not have access to the maintenance manuals nor to the service bulletins that are incorporated in airworthiness directives. Thus, if the repair station has been unable to obtain hose documents, the distributor is not able to provide them either, and the part cannot be overhauled according to the requirements of the regulations.

Problems With Incorporation By Reference of Private Party Instructions

Typically, the FAA does not make it easy to review private party materials that incorporated by reference. Manuals and service bulletins are typically not placed in the rulemaking docket, so affected parties may have no notice of the affect of a rule before it becomes final. A notice of proposed regulation may claim that the documents are available at a remote FAA office, but a call to that office may reveal that the caller is not among those "authorized" to review the material, or the caller may be told that he or she must travel to the FAA directorate office (Renton, Washington in the case of large aircraft) in order to review the material that is incorporated by reference, and may only do so in that office.

The availability of manuals and service bulletins is typically limited for commercial reasons. Some manufacturers have "authorized repair stations" that pay a royalty in exchange for access to data, while independent repair stations may find it difficult or even impossible to obtain these documents. Other manufacturers own their own repair stations and inhibit the manuals and service bulletins from falling into the hands of competing repair stations. When the documents are cross referenced in a regulation, inability to obtain the manuals or service bulletins can make it practically impossible to comply with the regulation. The FAA has recognized that these practices inhibit safety and recently published a policy document explaining that certain practices inhibiting the distribution of ICAs are unacceptable, but there is currently no reliable enforcement mechanism available to companies that have been denied access to these cross-referenced documents.

Examples of what can happen in such a case arose when the FAA issued a series of fuel-tank-related airworthiness directives. The FAA incorporated by reference the type certificate holders service bulletins. Those service bulletins were not available to competitors who manufactured competing (aftermarket) parts for fuel tank systems, and therefore those competitors did not realize that the language that had been incorporated by reference effectively invalidated their existing FAA approvals. Distributors who held inventories of these parts found their parts become worthless overnight and because they had no access to the service bulletins and manuals, they had no way of knowing what the regulation would do to their inventories.

Incorporation by Reference of Standards Permits Predatory Pricing of Those Standards

In addition, ASA members are also affected by standards and instructions established by Standards Developing Organizations (SDOs). This includes materials like the ICAO Technical Instructions for the Safe Transportation of Dangerous Goods by Air, which is incorporated by reference in Part 171 of Title 49 of the Code of Federal Regulations. Because of this incorporation, use of these international standards has become the norm for shipping by air (including domestic shipment by air).

The Department of Transportation regulations incorporate by reference the ICAO Technical Instructions for the Safe Transportation of Dangerous Goods. ICAO licenses to IATA (a private trade association based in Canada) the ability to republish those standards. IATA republishes the Technical Instructions and distributes them to the public as the IATA Dangerous Goods Regulations (IATA DGR). Because they are licensed republication of the document that is incorporated by reference, they are permitted to be used as a source of compliance guidance.

In 2004, a standard-bound English copy of this IATA DGR standard cost $120. In 2012, a standard-bound English copy of this same standard costs $261. It has more than doubled in price in just eight years. This suggests that the incorporation by reference has provided to the standard publisher a *de facto* monopoly that has allowed it to raise prices on the standard in a predatory fashion.

If agencies are able to license standards *ab initio*, before they gain additional value through the incorporation by reference, then they will be able to license them for their intrinsic value, rather than yielding to the standard publisher an additional recurring windfall derived from predatory pricing practices. The predatory pricing windfall comes from taxpayers - the federal government can limit this predatory practice by licensing and publishing the standards when they are incorporated by reference.

Comments

The Office of the Federal Register asked for comments on a number of issues. We offer for your consideration our comments on the issues below.

What Should "Reasonably Available" Mean?

In the age of the internet, "reasonably available" should mean that mandatory regulations, and by extension any material incorporated by reference therein, should be accessible for free via the internet, just as the United States Code or the Code of Federal Regulations are available.

Because the public often accesses regulations in public (federal depository) libraries, and such public libraries typically have internet access today, it is not unreasonable to believe that making documents that are incorporated by reference available on the internet should be sufficient. However, to avoid bias against those individuals who do not have, or choose not to obtain, access to the internet, a copy of any material incorporated by reference may be made available for inspection in hard copy on an agency's public docket.

As the petition observes, eligibility for the incorporation by reference of certain material requires that material "[i]s reasonably available to and usable by the class of persons affected by the publication." 1 CFR § 51.7(a)(4). However, the regulation does not define "reasonably available."

We agree with the petitioners that in the past, when the incorporated materials may have been voluminous, and available only in hard copy format, it may have been reasonable to pass some of the production cost onto the parties that sought that information. The provider of the information incorporated by reference should not have been forced to fully bear the burden of production of those materials. However, as petitioners state, developments in technology now eliminates the production costs of providing volumes of material in physical format.

The availability of server space means that it is reasonable to expect an agency to make available electronic copies of any information that is incorporated by reference into a regulation. The ease with which information may be connected to via hyperlink to an external website also provides a simple mechanism by which content may be made available. These factors mean that anyone with an internet connection can access regulations and material incorporated by reference with the click of a button.

It should be the goal of each agency to make regulations as easily accessible to the public as possible. This is especially true when a standard incorporated by reference is deemed mandatory, rather than simply advisory. It strikes us as definitively unreasonable to require an individual to pay to simply have access to the entirety of a regulation. Such an arrangement sets a dangerous precedent for creating what the petitioners dub "secret law." Moreover, a requirement that individuals must pay to know the law has the potential to disproportionately affect lower income persons and small businesses. They may have difficulties in allocating the funds to pay to know the law in a way that large corporations and wealthy individuals do not.

It may be noted that in some instances the law requires that materials incorporated by reference to be made available free of charge. For instance, Public Law 112-90, § 24 provides for a "Limitation on Incorporation of Documents By Reference" and states that guidance and regulation related to pipeline safety may not incorporate documents or portions of documents "unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site."

It is also noteworthy that classified material has been deemed not reasonably available and therefore may not be incorporated by reference. Although not perfectly analogous, material incorporated by reference that is inaccessible due to price also has the effect of limiting those who can reasonably view it. Therefore material incorporated by reference for which one must pay to view should not be deemed "reasonably available."

Although it is true that nearly all Americans now have access to the internet, it should not be the case that the law becomes inaccessible to those who are unable to obtain, or choose not to obtain, access to the internet. The request for comment asked whether making material available to anyone online possibly "[c]reated a digital divide by excluding people without Internet access." Therefore we propose that any agency promulgating rules and regulations which incorporate by reference external standards keep and make available for inspection a hard copy of the incorporated material. Such a copy should be made available via a public docket in hard copy format.

Generating a copy to be made available for public inspection is a time-honored method of making available the regulations governing the public. It is also a cost-effective way of making the material available. An agency would be able to negotiate with the copyright holder for the right to produce a physical copy of the standard, to be made available via the agency's docket. Agencies would then be able to make material incorporated by reference available via their standard practices for access to hard-copy docket materials.

We agree with the petitioners that "reasonably available" should mean the material incorporated by reference that forms a mandatory part of the regulation should be made available for free to the public either on the agency's website or via a hyperlink to the promulgating organization's website. We also suggest that a hard copy of any material incorporated by reference be made available via an agency's public docket, to ensure that all Americans, even those without internet access, may freely know the regulations by which they are governed.

Agencies Should Bear the Cost of Making the Material Available for Free Online

The request for comment asked whether agencies should bear the cost of making material incorporated by reference available for free online. It seems reasonable to expect that the agencies electing to incorporate materials by reference in their promulgation of rules and regulations should bear the cost of making those materials available to the public for free online, particularly in cases in which the incorporated material is a mandatory aspect of the regulation. However, we recognize that the development of standards and other materials that are incorporated by reference is not free. We also recognize that there is a difference between material incorporated by reference that forms a mandatory aspect of a regulation, and incorporated material that is merely advisory in nature.

One purpose of incorporation by reference is to reduce an agency's expenditure of resources to develop a body of guidance that has been previously developed by another party. Agencies are prevented from wasting resources in 'reinventing the wheel,' and they also preserve their precious resources that might have otherwise been utilized in developing the referenced guidance. Thus,

the benefit of incorporation by reference is the cost-savings to agencies that are recognized by allowing private organizations to develop standards and instructions that are subsequently incorporated into regulations.

When an Agency Must License Material to Incorporate it, this Allows a More Robust Cost-Benefit Analysis

Private standard-setting organizations may hold copyrights on the material to be incorporated by reference. Similarly, information may be incorporated by reference from individual companies where (in some cases) the individual company may have intellectual property rights. We suggest that when such material constitutes a mandatory part of the regulation, it should be available, free of charge, to the public in order to permit the public to engage in compliant behavior. This raises a potential question of compensation to the party that developed the material.

Each agency generally has an obligation to promulgate regulations to achieve the statutory goals of the agency. Thus, when an agency incorporates third party material by reference, the agency is using that material for the public good to achieve the agency's statutory goals. This is a compensable taking under the Fifth Amendment to the Constitution.

There is plenty of precedent and procedure for when the U.S. government accomplishes a taking in real property law. See, e.g., 33 U.S.C. § 591 et seq. (relating to the condemnation of real property and the assessment of value of such property).

The idea of a taking that affects a copyright, as contemplated by the petition at issue, has also been contemplated under the federal law. 28 U.S.C. § 1498(b) provides that an uncompensated taking by the U.S. government of a copyrighted material may be litigated (exclusively) in the Court of Claims.

This does not mean that 'taking' of copyrighted works is wrong. Indeed, there may be many cases where it is beneficial. The cost savings to an agency in terms of resources that would have been expended to achieve the same level of guidance found in the incorporated document has an identifiable value. When the cost of developing the incorporated guidance would be greater than the licensing fee to license material that is incorporated by reference, it is more economically efficient to license that material than for an agency to develop the material itself.

By requiring agencies to pay fair value for copyrighted material that they incorporate by reference, we also force agencies to consider the real value of their actions, and to assess whether it would be cheaper in the long run for the agency to develop the incorporated material itself. This encourages a more honest accounting of the costs of regulation.

The Agency's Cost to License Some Standards May Be Negligible; For Example ASA Already Makes its Incorporated-By-Reference-Standards Available for Free

Different standards will have different costs. For example, some trade associations like the Aviation Suppliers Association already make their standards available free of charge to the public. When trade associations develop standards, they often do it with funds that come from the association's members, so such development is fully paid from dues. They may not require an agency to pay in order to license their standards, because their [IRC 501(c)] non-profit purpose is furthered by the adoption and incorporation by reference of the standards.

The Aviation Suppliers Association publishes the ASA-100 quality standard. This standard is incorporated by reference in FAA AC 00-56 in the United States and has been proposed for incorporation by reference in a European regulation that is currently open for comment [GM 145.A.42(a)]. ASA makes this standard available for free on its website - it is available as a free download.

Some incorporated guidance materials are already required to be produced as a condition of licensing or as a condition of other federal benefits. Persons who hold FAA design approval (like type certificates) are required to provide safety information to the FAA as a condition of the continued validity of the certificate. E.g. 14 C.F.R. § 21.99 (requiring design approval holders to provide the FAA with corrective actions to safety issues, which are often published as service bulletins). Because this information is required to be produced, the normal arguments in favor of copyright protection yield to a fair use exception that favors distribution of the materials for their intended safety/regulatory purpose.

Design approval holders are also required to produce ICAs (e.g. 14 C.F.R. § 25.1529) and make them available to any person required to comply with them. E.g. 14 C.F.R. § 21.50(b)). Thus, there should be no cost to the federal government to act as an agent for distributing material that is already required by regulation to be made available.

Where Incorporation By Reference Provides a Benefit to the Publisher, the Real Cost to License the Incorporated Standard May Be Negligible

There is already precedent under the law for the idea that where the owner of 'taken' property experiences a benefit to his or her untaken property, this benefit represents an offset to the value that must be compensated. In the real property arena, 33 U.S.C. § 595 provides that when a taking has the effect of improving the value of untaken property, this must be calculated as an offset to the calculated value of the taken property.

Thus, for example, where the FAA has identified an unsafe condition in an aircraft, the aircraft design approval holder has an obligation to provide a solution. 14 C.F.R. § 21.99. The aircraft design approval holder really has a choice, though, between providing no solution, and surrendering the type certificate, or providing the corrective service bulletin and retaining the valuable type certificate. In such cases, the surrender of the copyright in the service bulletin has an offsetting value (the value of the otherwise invalid type certificate) that completely negates any takings value that the federal government might owe to the aircraft design approval holder.

How Should Licensing Fees Be Financed?

To the extent agencies find it necessary to pay licensing fees to the holders of copyright, those costs should not be passed on to the public seeking to access the material incorporated in a regulation, because this would have a chilling effect on the ability of persons to know and understand the legal standards to which they are expected to comply. Agencies should seek to avoid externalizing the cost benefits they recognize when incorporating material by reference onto the regulated public.

The incorporation by reference of standards is a way for the government agencies to save government funds that might otherwise have been spent on developing comparable guidance. When an agency is required to license standards that it wishes to incorporate by reference, each agency has an opportunity to assess the value of the standard, and to determine whether it would be more economical to develop the regulatory standards internally rather than paying the licensing fees associate with incorporating the standard by reference.

The petitioners point out that the NTTA and OMB Circular A-119 limit the policy favoring incorporation by reference to standards that that indicate one means by which a regulatory requirement may be satisfied. In cases such as these, it may be reasonable to require a consumer to pay a fee to a private standard-setting organization that holds a copyright, in those cases in which obtaining the standard is not the only method of accomplishing compliance. Material incorporated by reference that is merely advisory in nature is a benefit and point of convenience to regulated parties, but because regulated parties are not required to know and understand those

standards, it is perhaps not necessary that such standards should be made available for free (and thus there would be no need for an agency to license such standards for distribution to the public).

Although it seems acceptable that a copyright holder whose material is not mandatory in the regulation should be able to charge a licensing fee for material incorporated by reference that is merely advisory in nature, if an agency elects to incorporate such material those fees should still be limited to a reasonable amount. In many cases, the incorporation by reference provides added value to the publisher of the standard in terms of "free advertising" through the incorporation; thus the publisher of the material is gaining a benefit from the incorporation that should reasonably be regulated by the publishing agency. The copyright holder should be able to profit from their original work, but the copyright holder should not be able to make a profit from the public that is largely attributable to the fact that those who are regulated are seeking to better understand a method of compliance with particular regulations (as opposed to those persons seeking the copyrighted work for its independent value). The copyright holder receives benefit from the incorporation of its standard via traffic directed to its standard and in cases of hyperlinking, to its website.

In cases where material incorporated by reference forms a mandatory aspect of the regulation it seems apparent that it should be made available to those who are affected by it free of charge. Just as the United States Code and the Code of Federal Regulations, among sources of law, are available for free via www.gpo.gov/fdsys, so too should mandatory material incorporated by reference be easily and freely accessible to the public so they may know it in order to understand their compliance obligations.

The Burden of Paying to Know the Law Disproportionally Affects Small Businesses and Individuals

Paying to know mandatory requirements of regulations that are incorporated by reference disproportionally affects small businesses and individuals. Paying to simply know the law that regulates ones actions should not be an additional cost of doing business. Such requirements could have the effect of pricing small businesses out of certain sectors; particularly in highly regulated industries.

Requiring regulated individuals to pay to discover the detail of the regulations controlling their conduct may have the effect of driving small competitors out of the market. For large corporations, paying licensing fees may be easily absorbed. However, for small businesses, especially depending on the severity of the licensing fee, the burden may prove to be substantial. This is all the more true in heavily regulated industries, such as aerospace, in which

manufacturers are frequently required to refer to materials incorporated by reference remain current with the most recent safety requirements.

The PMA industry is comprised primarily of smaller manufacturers, of the very type that may struggle to regularly pay to access materials incorporated by reference. Moreover, although the cost of a licensing fee in isolation may be insignificant in isolation, the cumulative burden of paying multiple licensing fees—either because there are multiple laws one needs to review, or because material incorporated by reference itself incorporates material by reference, for which one must pay a licensing fee—may put a comprehensive understanding of the law out of financial reach.

Costs are inevitably pushed down to those least able to bear them, for instance a law student conducting research for a journal note. Persons in academia, or an individual curious about a law that may have a personal effect or that may affect a loved one, should not be required to pay to learn the law. For these individuals, learning the law is not simply a cost of doing business, or a dent in the bottom line. Rather for these individuals, paying a licensing fee acts as a substantive impediment to learning what the law truly is.

Conclusion

Given the ongoing importance of air safety, we believe it is important that the public have free access to the laws and regulations governing their conduct. "Secret" laws not only subject the public to civil and possible criminal penalties, but also endanger the safety of the flying public by not making reasonably available the full scope of the compliance obligations under the regulations.

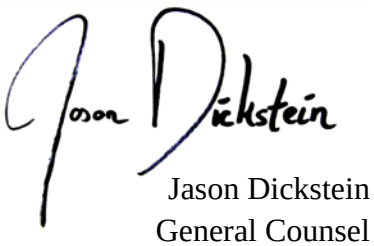
It is important that agencies seeking to incorporate information by reference distinguish between consensus standards that are developed by organizations which allow for input from interested parties, and which govern conduct and processes, and instructional material or service documents that are produced by individual companies and which may allow those companies to gain an advantage over their competitors. Agencies may also distinguish between permissive, advisory standards, such as ICAO Technical Instructions, and mandatory standards, such as Airworthiness Directives. To pay to access the former may be permissible, but the latter should be available to all, for free.

Although we recognize that the cost of developing standards is not free, the cost of regulating the public is supposed to covered by our tax burden. Where standards are incorporated by reference as requirements in regulations, the cost of making the regulatory standards available to the public should not be externalized to the public - the public deserves the ability to economically and

simply understand the full compliance obligations of the laws and regulations that govern their conduct. Mandatory standards and instructions that are incorporated by reference should be made available, free of charge, on the internet, with a hard copy available for inspection on the promulgating agency's docket.

Your consideration of these comments is greatly appreciated.

Respectfully Submitted,



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