

E. Copyright Handling

7. *Comment.* The Commission proposed to codify its practices regarding the copying of copyrighted material submitted to it. Two commenters suggested that, under the “fair use” doctrine of copyright law, the Commission already is authorized to make copies of submittals as necessary to perform its official responsibilities, and that § 2.790(e) is unnecessary. One commenter was concerned that proposed § 2.790(e) violates the Copyright Act (17 U.S.C. 101 *et seq.*) by allowing the Commission an unrestricted right to make and distribute copies as a condition of providing the Commission with information. Two commenters objected to the “hold harmless” provision, which was intended to limit liability of NRC employees for inadvertent copyright infringement in making copies of documents when the submitter lacked the requisite authority to grant reproduction permission (proposed § 2.790(e)(1)(ii)). These commenters considered this an improper attempt to shield the Commission from responsibility for wrongful acts arising out of potential copyright abuses. Finally, one commenter suggested that it is unfair for the Commission to require, as a condition of acceptance for any submittal, that the submitter grant a license to the Commission to make copies because the submitter may not in fact have the legal authority to do so.

Response. The Commission agrees with the comment that, under the “fair use” doctrine, the Commission is authorized to make such copies of information submitted to it as necessary to perform its official responsibilities. The purpose of § 2.790(e) is simply to codify and give public notice of the Commission’s intent to make copies of documents submitted to it as necessary to perform its mission, and to make explicit its view that such activity *per se* constitutes “fair use.” Section 2.790(e) is intended to eliminate any confusion about how the Commission will make use of information submitted to it.

The Commission recognizes that § 2.790(e) is coextensive with the “fair use” doctrine, and does not grant the Commission an unrestricted right to copy material submitted to it. Rather, the Commission’s right to copy submittals is linked directly to the need to perform its statutory mission of protecting the public health and safety and promoting the common defense and security. The Commission disagrees with the comment that § 2.790(e) would give it a virtually unlimited right to

reproduce copyrighted material. The Commission does not intend to make or distribute copies of submittals in a manner inconsistent with traditional copyright protections. The Commission makes copies available pursuant to its responsibilities under the Federal Records Act and the Administrative Procedure Act. The NRC will continue its practice of placing copyrighted documents into the electronic record-keeping system for inspection. This does not entitle non-NRC parties to copy documents not otherwise authorized by copyright laws, much as with volumes maintained by public libraries.

Commenters expressed further concern that the “hold harmless” provision, proposed § 2.790(e)(1)(ii), was an improper attempt to shield the Commission from liability for copyright infringement. This provision sought to limit liability resulting from unauthorized reproduction or distribution of documents submitted to the NRC. The Commission never intended to shield from liability for copyright infringement NRC employees who go beyond fair use. The intent of the “hold harmless” provision was simply to make clear that NRC personnel must not be held liable for making copies of materials utilized pursuant to the proper performance of their official responsibilities. As proposed, the specific goal of § 2.790(e)(1)(ii) was the prevention of suits by third parties who might claim copyright infringement in the event their copyrighted material was submitted by another to the NRC and copied by the Commission without the copyright holder’s knowledge or consent. However, under the fair use doctrine, no liability should attach to the copying and internal distribution of submittals as necessary to carry out the Commission’s regulatory responsibilities. Thus, upon further reflection, because the fair use doctrine permits the copying necessary to carry out its official duties, the Commission has concluded that the proposed provision is unnecessary. It has been deleted from the final rule.

Because § 2.790(e) is based upon the fair use doctrine, and because the fair use doctrine provides that copies may be made without the consent of the copyright holder, the remaining provisions of §§ 2.790(e)(1) and 2.790(e)(2)⁴ also are unnecessary. These provisions would have required that, as a condition for the Commission’s accepting any submittal, the submitter

explicitly authorize the Commission to make and distribute copies of the submittal, and provided notice of the Commission’s “hold harmless” position. However, in the Commission’s view, any submittal may be copied as necessary to support the agency’s mission, regardless of any stated copyright restrictions accompanying the submittal or any objections from copyright holders. Similarly, these copies may be distributed within the agency for use in carrying out the Commission’s official responsibilities. The fair use doctrine requires no express grant of permission and thus, such a requirement is not needed in the regulation. Moreover, it may create problems for those submitters who are unable to make such a warranty over the objection of third-parties who may hold copyrights in some or all of the information being submitted. Finally, the “hold harmless” provision, likewise, is deemed unnecessary and has been removed.

In sum, in response to these comments, and in order to avoid confusion regarding the Commission’s intent in promulgating § 2.790(e), changes have been made in the final rule. Sections 2.790(e)(1) and 2.790(e)(2) have been deleted. Section 2.790(e) has been retained to give explicit notice of the Commission’s intent to copy and distribute submittals within the agency as necessary to carry out its official responsibilities, consistent with the fair use doctrine.

III. Final Action

The NRC is amending its regulations on availability of official records to provide specific guidance for marking information a submitter seeks to have withheld from public disclosure on the basis of proprietary content or other confidential information, to codify NRC practices concerning circumstances under which submitted documents will not be returned to the submitter, and to explain and clarify NRC’s practices regarding handling of copyrighted material submitted to it.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104–113, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or otherwise impractical. In this final rule the Commission is codifying its practices regarding the treatment of proprietary information and copyrighted material. This action does not constitute the

⁴ One portion of § 2.790(e)(2) addressed affidavit waivers and has been relocated in the regulation to clarify that point, as explained above.