

C O M M E N T

Comments on Taking Public Access to the Law Seriously

by Lois Schiffer

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Professor Mendelson's article is extremely important. Although I have worked on federal regulations and environmental law for over 40 years, until I read Professor Mendelson's article I had not focused on this critical issue. The idea that the government has a body of law that the public cannot access for free is quite startling from the perspective of the enforceability of federal rules, government transparency, and public access to material that may bind the public. It also raises serious questions about basic due process and fairness.

I am in complete agreement with Professor Mendelson. If the government is going to use privately-developed standards as part of its rules, it is important that the public can review the standards and participate in those rules. I may go further than Professor Mendelson in adding that in order for there to be meaningful public comment, the government should make it a component of its use of private standards that the standards-developing entity maintain an adequate record and that the public has an opportunity to review the standard.

For example, while I certainly can understand that the tensile strength of a pipe might not be riveting to many, someone somewhere is making an assumption about how protective the standard is going to be, the nature of that strength, and what kind of testing is required. If people who will be bound by the proposed regulation want to understand the standard and comment on the draft regulation but they do not have free access to the standard and what underlies it, I do not know how their comments can be meaningful. In addition, the idea that most interested parties will have the resources to buy private standards is problematic. It is the rare public rule that does not have a wide range of interested parties. In fact, I am surprised

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there have not been more legal challenges to the use of private standards in federal regulations, especially if the standards are not publicly available for free.

I would like to suggest a glimmer of hope for remedying the problem of public access to private standards—an approach that arises in a different context. Specifically, in February 2013, the Office of Science and Technology Policy (OSTP) in the White House issued a policy that builds on the U.S. Open Data Policy.¹ The OSTP policy seeks to increase public access to federally-funded research results. The idea is that if federal money pays for research, then the public should have access to the research—preferably for free.

Federal agencies are expected to develop their own policies for making this research publicly available. The core principle in the NOAA policy is that publications and environmental data funded through taxpayer dollars will be made publicly accessible in a timely fashion.² In the case of articles published by limited access journals—journals that are similarly situated to standards issued by private organizations because their work is funded by people who purchase their products—efforts are underway to figure out how that information can be made available for free. For example, this could include embargoing the research results so that the journal could sell its product for the first 12 months, after which the research results would be publicly available—or it could be through other methods yet to be developed.

I raise public access to research results as an analogue, because the policy makes very clear that when government activity uses material to which the public really needs to have access, the government is beginning to think

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1. Memorandum from John P. Holdren, Dir., Office of Sci. & Tech. Policy, Exec. Office of the President (Feb. 22, 2013), available at https://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf.
 2. NAT'L OCEANIC & ATMOSPHERIC ADMIN., NOAA PLAN FOR INCREASING PUBLIC ACCESS TO RESEARCH RESULTS (Feb. 2015), available at http://docs.lib.noaa.gov/noaa_documents/NOAA_Research_Council/NOAA_PARR_Plan_v5.04.pdf.

about and figure out ways to make that happen. Professor Mendelson's article highlights the importance of similar arrangements for publicly-adopted private standards. In such cases, it is not because taxpayer dollars are at stake, but because even more crucial principles—fundamental fairness and constitutional due process—come to bear that we must figure out ways to make sure the public has free, quick and available access. Whether that means the gov-

ernment pays the licensing fee to the private entity or other means are used to make sure the material is publicly available should be worked out, because the idea that the public is required to comply with the law but cannot see what the law is goes against every concept of due process.

Accordingly, I am very glad Professor Mendelson wrote this article and highlighted a fundamental problem that needs to be addressed.