

C O M M E N T

A Multidimensional Problem

by Emily S. Bremer

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Federal agencies often give legal effect to privately developed standards by incorporating them by reference in regulations. The practice, though obscure, is longstanding. The provision of the Freedom of Information Act (FOIA) that permits the incorporation by reference of “matter reasonably available to the class of persons affected thereby” was enacted in 1966.¹ And agencies’ incorporation by reference of voluntary consensus standards gives effect to a federal standards policy that emerged in the late 1970s,² was first embraced by the Executive in 1982,³ and was partially codified by Congress in the National Technology Transfer and Advancement Act of 1995.⁴

The difficulty is that the standards are not as freely available and easy to find as the regulations into which they are incorporated. The private, nonprofit organizations that develop standards typically assert copyright to them and rely on the revenue generated by their sale to fund the standards development process.⁵ In 2011, the Administrative Conference of the United States recommended that agencies should work with standards developers and other copyright holders and use electronic tools such as read-only access to expand the free online availability of incorporated materials.⁶ The Office of the Federal Register (OFR) and the Office of Management

and Budget (OMB) have recently taken steps to encourage and support agency implementation of this collaborative approach.⁷

In *Taking Public Access to the Law Seriously: The Problem of Private Control Over the Availability of Federal Standards*, Professor Nina Mendelson has done a great service, offering a strong and comprehensive argument for “why law needs to be public.”⁸ This comment and the Administrative Conference’s recommendation also agree that the policy goal should be to make incorporated materials freely available online.⁹ Where we part ways is with respect to the solution. Focusing exclusively on the public access dimension of the incorporation by reference conundrum, Professor Mendelson concludes that any solution relying on collaboration with private standards developers “should be out of bounds.”¹⁰ But the problem has several other dimensions—interests, both public and private, that must be considered if one is to design a policy that is workable and avoids unintended, negative consequences.¹¹ Viewed from this perspective, public-private collaboration emerges as the policy prescription with the greatest promise. And there is substantial evidence that it is already working.

I. The Significant Private Role in Standardization

To begin, the problem of public access to incorporated standards must be understood within the context of the

1. 5 U.S.C. §552(a)(1); see Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250. Although this comment focuses on standards, agencies also incorporate many other kinds of materials by reference in regulations. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131, 145-47 (2013) [hereinafter Bremer, *Incorporation by Reference*].
2. See Admin. Conference of the U.S., Recommendation 78-4, Federal Agency Interaction With Private Standard-Setting Organizations in Health and Safety Regulation, 44 Fed. Reg. 1357 (Jan. 5, 1979); Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1379-86 (1978).
3. See Federal Participation in the Development and Use of Voluntary Standards, 47 Fed. Reg. 49496 (Nov. 1, 1982).
4. See Pub. L. No. 104-113, §12(d), 110 Stat. 775 (1996), available at <http://www.nist.gov/standardsgov/ntaa-act.cfm>.
5. See Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 279 (2015) [hereinafter Bremer, *On the Cost*].
6. See Recommendation 2011-5, Incorporation by Reference, 77 Fed. Reg. 2257, 2257 (Jan. 17, 2012), available at <https://www.acus.gov/recommendation/incorporation-reference>. I served as the Conference’s in-house researcher on this recommendation. See Bremer, *Incorporation by Reference*, *supra* note 1, at 131 n.*.

7. See Request for Comments on a Proposed Revision of OMB Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,” 79 Fed. Reg. 8207 (Feb. 11, 2014). The proposed revisions were not printed in the *Federal Register*, but are available on OMB’s website at THE WHITE HOUSE, <http://www.whitehouse.gov/sites/default/files/omb/inforeg/revisions-to-a-119-for-public-comments.pdf> (last visited Dec. 20, 2014); see also 159 CONG. REC. H4499 (daily ed. July 16, 2013) (statement of Rep. Eddie Bernice Johnson) (identifying collaboration as a preferable approach).
8. Nina A. Mendelson, *Taking Public Access to the Law Seriously: The Problem of Private Control Over the Availability of Federal Standards*, 45 ELR 10776, 10777 (Aug. 2015), originally published as Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 122 MICH. L. REV. 737, 748 (2014).
9. See Recommendation 2011-5, 77 Fed. Reg. at 2258-59.
10. Mendelson, *Private Control*, *supra* note 8, at 802.
11. See Bremer, *On the Cost*, *supra* note 5, at 283-96.

larger, predominantly private standards development system that has prevailed in the United States for over a century.¹² Beginning in the late 1800s and early 1900s, private technical committees emerged to address the extraordinary standardization needs of, first, the Industrial Revolution and, later, the World Wars. Collaboration between the government and these private organizations also emerged early on, and was particularly spurred on by the enormous standardization required to support the war effort. Viewed within this historical context, the current federal standards policy “is best understood as merely the most recent and prominent extension of a larger and more deeply rooted commitment to private standards development” and public-private collaboration.¹³

Today, the private standards system is significantly larger than the sphere of federal regulation. Two points of public-private comparison illustrate. First, although there are well over 100 federal agencies,¹⁴ these are far outnumbered by the more than 600 private standards development organizations.¹⁵ Second, the number of private standards incorporated by reference in federal regulations represents only a very small percentage of the more than 100,000 private standards estimated to be in use throughout the United States.¹⁶ As of May 13, 2015, the Standards Incorporated by Reference (SIBR) Database, which is maintained by the National Institute of Standards, a component agency of the Department of Commerce, identified 12,486 incorporations by reference of standards in the Code of Federal Regulations (CFR).¹⁷ This is likely a significant overestimate of the actual number of private, incorporated standards. After all, the database counts *incorporations by reference* of standards, not *standards* themselves, and it includes incorporations of government-unique standards.¹⁸ Moreover, many agencies incorporate the same standard in different provisions of the CFR, and it is also very common for agencies to incorporate by reference different versions of the same standards in different provisions of the CFR. A case study of standards incorporated by reference in pipeline safety regulations revealed that, although 73% of those standards were created by only three organizations, those standards represented just a small fraction

(one-tenth of 1%, 2%, and 3.7%) of each organization’s overall standards portfolio.¹⁹

A good estimate, then, is that only about 2-4% of all private standards are incorporated by reference into federal regulations. This powerfully illustrates the continued significance of the longstanding private role in standardization. In this light, it is difficult to see how the public access problem can be solved unilaterally by government and without substantial public-private collaboration.

II. A Multidimensional Problem

Finding a way to make incorporated standards freely available online is challenging because the problem is a multidimensional. Public access to the law is just one relevant imperative. From a practical perspective, an agency seeking to facilitate free access to its incorporated standards must find a way to achieve that outcome without: (1) abdicating its statutory responsibilities (e.g., to protect public health and safety); (2) infringing the copyrights of standards development organizations; or (3) violating federal standards policy. In other words, the public access problem implicates a variety of interests that must all be considered and balanced.

An important consideration is the potential implications for public health and safety if an agency is prohibited from using certain standards solely because those standards are not freely available online. In many instances, the technically superior, authoritative standard is a private standard. Preventing an agency from using that standard may undermine its ability to fulfill its regulatory mission. A good example is found in the pipeline safety context, where in early 2012, Congress imposed an uncompromising free access mandate on the Pipeline and Hazardous Materials Safety Administration (PHMSA).²⁰ The agency worked diligently for over a year and a half to negotiate free access agreements with all of its standards developers.²¹ In the end, however, it was unable to secure free online access to some of its most important and expensive standards, including several sections of the American Society of Mechanical Engineers’ (ASME) Boiler and Pressure Vessel Code.²² Recognizing the threat to public safety, Congress swiftly amended the law to give PHMSA the flexibility it needed to carry out its core statutory mission.²³

The copyright dimension of the public access problem plainly implicates the private interests of standards developers, but it also implicates a few less obvious public interests. Standards development is expensive. If the non-profit organizations that develop standards cannot recoup

12. See Bremer, *Incorporation by Reference*, *supra* note 1, at 139-41.

13. Bremer, *On the Cost*, *supra* note 5, at 299.

14. See DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (Admin. Conf. of the U.S. ed., 2d ed. 2013); see also VANDERBILT UNIV., CTR. FOR THE STUDY OF DEMOCRATIC INSTS., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, available at <http://www.vanderbilt.edu/csdi/Sourcebook12.pdf>.

15. See U.S. DEPT. OF COMMERCE, STANDARDS & COMPETITIVENESS: COORDINATING FOR RESULTS 5 (May 2004), available at <http://ita.doc.gov/td/standards/pdf%20files/Standards%20and%20Competitiveness.pdf>.

16. E-mail from Scott P. Cooper, Vice President of Gov’t Relations, Am. Nat’l Standards Inst., to author (June 11, 2013) (on file with author).

17. NAT’L INST. FOR STANDARDS & TECH., REGULATORY SIBR (P-SIBR) STATISTICS, STANDARDS INCORPORATED BY REFERENCE DATABASE, https://standards.gov/sibr/query/index.cfm?fuseaction=rsibr.total_regulatory_sibr (last visited May 13, 2015) [hereinafter P-SIBR STATISTICS].

18. For example, the U.S. Environmental Protection Agency is identified as the third largest contributor of incorporated standards. See P-SIBR STATISTICS, *supra* note 17.

19. See Bremer, *On the Cost*, *supra* note 5, at 306-07.

20. See Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, §24, 125 Stat. 1904, 1919 (codified at 49 U.S.C. §60101 (2012)).

21. See Bremer, *On the Cost*, *supra* note 5, at 323-26.

22. See *id.* at 327-29.

23. See Availability of Pipeline Safety Regulatory Documents, Pub. L. No. 113-30, 127 Stat. 510 (2013).

the costs through copyright, they must find an alternative revenue model.²⁴ Each alternative has its own downsides. Charging more for membership or participation in the standards development process would make it harder for small businesses, public interest advocates, and academics to participate, undermining decades of effort to make the process more balanced and inclusive.²⁵ Relying more heavily on donations could imperil the standards developers' independence by giving large donors greater leverage to influence the standards development process with threats to withdraw needed financial support. Having government pay for free online access (which would necessarily be available to all users of a standard around the world) would be prohibitively expensive, particularly in these times of budget austerity.²⁶

Finally, any solution to the public access problem should preserve the longstanding and highly valuable public-private partnership in standardization. Federal agency use of private standards in regulation reaps many public benefits. It saves agencies time and money and allows them to capitalize on the substantial technical expertise that exists outside government.²⁷ More crucially, it enables federal regulators to integrate regulatory regimes with the much larger universe of private standards.²⁸

III. Public-Private Collaboration Can Work

Public-private collaboration offers the greatest promise for achieving the ideal of free online access to incorporated standards without sacrificing these diverse values and interests. And there is substantial evidence that it can work. Several of the largest U.S. standards developers, including the National Fire Protection Association and ASTM International, have created online standards libraries designed to provide the public with free access to incorporated standards.²⁹ The American National Standards Institute (ANSI) recently created an online standards portal that allows smaller standards developers to offer free public access without incurring the substantial costs of building the necessary IT infrastructure.³⁰ In the pipeline safety case study, standards developers offered free online access to approximately 66% percent of PHMSA's incorporated standards independently of the agency's efforts to implement the short-lived free access mandate.³¹

Any policy must be evaluated based on its demonstrated effectiveness in achieving a desired outcome. An approach that looks great on paper may prove unworkable in practice. PHMSA's experience suggests that a bald free access mandate is one such simple, uncompromising, and unworkable approach to the free access problem. In contrast, the collaborative approach, although necessarily incremental, provides the flexibility necessary to accommodate the demands of this difficult, multidimensional problem.

24. See Bremer, *Incorporation by Reference*, *supra* note 1, at 176-77.

25. See OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-119 REVISED: FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES, 63 Fed. Reg. 8546 (Feb. 19, 1998), available at https://www.whitehouse.gov/omb/circulars_a119.

26. See Bremer, *Incorporation by Reference*, *supra* note 1, at 177.

27. See *id.* at 139-41.

28. See Bremer, *On the Cost*, *supra* note 5, at 306-09.

29. See, e.g., *Free Access*, NAT'L FIRE PROT. ASS'N, <http://www.nfpa.org/codes-and-standards/free-access>; *Reading Room*, ASTM INT'L, <http://www.astm.org/READINGLIBRARY/>. Accessing the standards typically requires users to register and agree to certain terms and conditions. There are reasonable explanations for why standards developers have taken these steps to protect their copyrights, including a desire to avoid any apparent waiver of rights that are now at issue in long anticipated copyright litigation, see, e.g., *Complaint, Am. Educ. Research Ass'n et al. v. Public.Resource.org, Inc.*, (D.D.C. 2014) (No. 14-857); *Complaint, Am. Soc'y for Testing & Materials, Inc. et al. v. Public.Resource.org, Inc.*, (D.D.C. 2013) (No. 13-1215), as well to account for the possibility that efforts to voluntarily meet the public need for access will threaten the continued financial viability of the standards development process.

30. See *ANSI Launches Online Portal for Standards Incorporated by Reference*, ANSI (Oct. 28, 2013), http://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=e6e2ff18-d2fd-4886-91f4-fcbcf5b9d145.

31. See Bremer, *On the Cost*, *supra* note 5, at 316, 326.