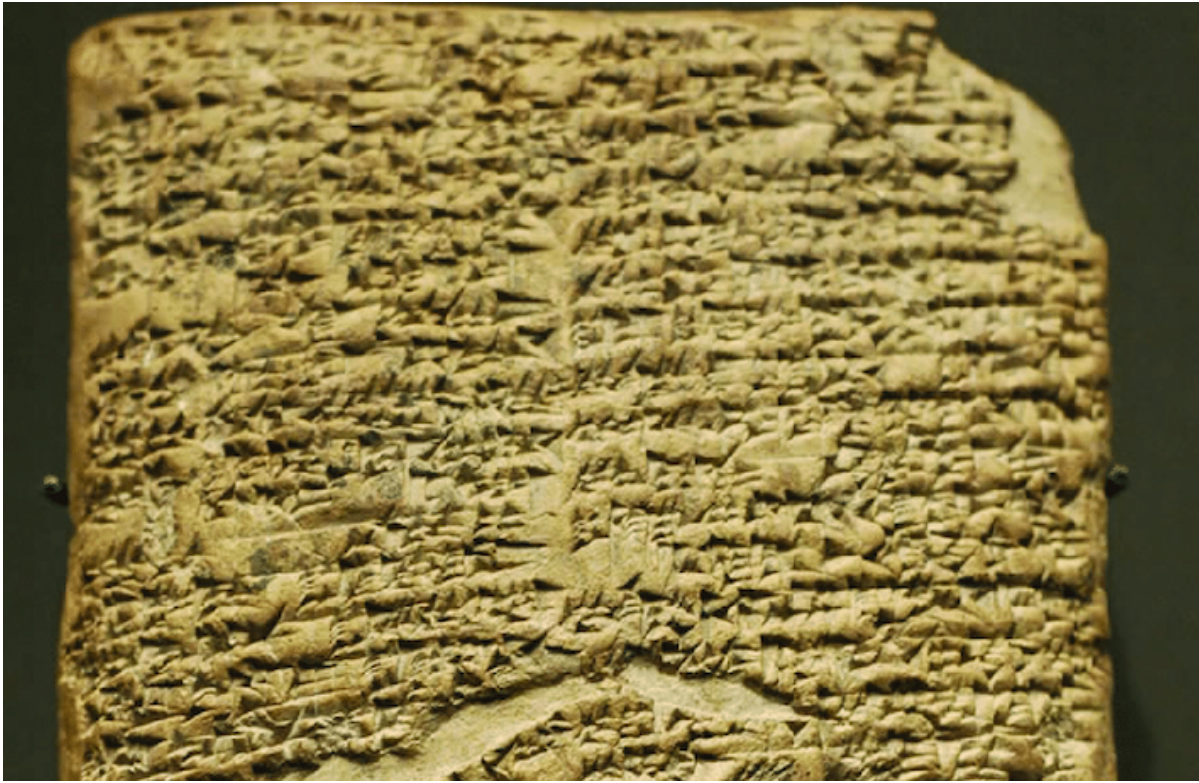


Bill in Congress Would Bar Americans From Reciting Our Own Laws

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(<https://io.wp.com/www.republicreport.org/wp-content/uploads/2022/04/Code-of-Hammurabi.png?ssl=1>)

Last week, 14 organizations wrote

(<https://law.resource.org/pub/us/cfr/regulations.gov/foia/house.gov.20220221.pdf>) to leaders of the House Judiciary Committee to oppose dangerous legislation titled the “PRO Codes Act (<https://www.congress.gov/bill/117th-congress/house-bill/6769/text>).” The new bill provides that any “original work of authorship” that is “adopted or incorporated by reference, in full or in part, into any Federal, State, or municipal law or regulation” would have copyright protection as long as the “owner of the copyright” provides these provisions of law “at no monetary cost for viewing by the public in electronic form on a publicly accessible website.”

Meaning: an individual or group that drafted or published text that was later incorporated into a law could use copyright law to block people from reciting or distributing the text of that law, so long as they offered that text on a website somewhere. As Carl Malamud, president of the non-profit Public.Resource.Org, explained (<https://twitter.com/carlmalamud/status/1517245115902832640>) on Twitter, “This bill would allow private parties to literally OWN parts of the law and set the terms on which you may read and speak it.”

Public.Resource.Org (<https://public.resource.org/about/>), for which I have long served as of counsel, signed the new letter opposing the bill, along with the Electronic Frontier Foundation (<https://www.eff.org/deeplinks/2022/03/pro-codes-act-wolf-sheeps-clothing>), Public Citizen, Demand Progress, the Internet Archive, and other groups.

The PRO Codes Act, introduced in February by Representatives Ted Deutch (D-FL) and Darrell Issa (R-CA), is being pushed (<https://www.nfpa.org/News-and-Research/Publications-and-media/Blogs-Landing-Page/NFPA-Today/Blog-Posts/2022/03/03/Pro-Codes-bill-filed-to-preserve-safety-code-copyright>) by some standards development organizations (<https://www.ansi.org/news/standards-news/all-news/2022/02/2-24-22-ansi-supports-proposed-legislation-protecting-copyright-of-standards-incorporated-into-law#:~:text=As%20the%20coordinator%20of%20this,lose%20its%20copyright%20protection%20when>). SDOs are private groups that convene experts from industry, academia, and government to create important technical standards for building, food, and product safety, energy efficiency, educational testing, and much more. SDOs, whose CEOs get paid as much as \$2 million a year, have often pressed for their standards to become law and then charged the public, and even government agencies, high prices to read them. More recently, under pressure to make the standards-turned-laws more accessible, some SDOs have placed these texts in online “reading rooms.” But to access the standards there, visitors often must register and agree to onerous terms of use, including restrictions on copying or distributing.

The misguided PRO Codes Act appears to be an effort to win in Congress on an issue where the SDOs have been losing in court.

In 2013, a group of SDOs sued Public.Resource.Org (let’s call it PRO) in federal court in Washington DC for copyright infringement after PRO posted online hundreds of technical standards that became the law once they were expressly incorporated by legislatures or agencies into statutes or regulations. (PRO has been represented in the case by the Electronic Frontier Foundation, the law firm Fenwick & West, and me.)

Nine years into that litigation, after PRO won a victory in the U.S. Court of Appeals, District Judge Tanya S. Chutkan ruled (<https://www.eff.org/document/astm-v-publicresourceorg-summary-judgment-opinion>) on March 31 that every standard at issue that had been incorporated into law and that PRO had posted was protected from copyright claims under the fair use doctrine (<https://www.eff.org/press/releases/publicresourceorg-can-keep-freeing-law-court-allows-posting-public-laws-and>), which allows communication of otherwise privately-owned materials when in the public interest.

Judge Chutkan’s decision followed a long-standing principle of U.S. law strongly favoring the rights of Americans to speak their own laws, a principle that the U.S. Supreme Court confirmed with its 2020 decision in *Georgia v. Public Resource* (<https://www.supremecourt.gov/opinions/19pdf/18->

1150_7m58.pdf). That case arose when the state of Georgia sued PRO for posting online the Official Code of Georgia, i.e. the state-approved volumes containing the laws of Georgia. PRO won that case, with Chief Justice Roberts affirming, “no one can own the law.”

PRO also prevailed in the U.S. Court of Appeals for the D.C. Circuit in the technical standards case, with that court in 2018 directing

([https://www.cadc.uscourts.gov/internet/opinions.nsf/533D47AF883C8194852582CD0052B8D4/\\$file/17-7035.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/533D47AF883C8194852582CD0052B8D4/$file/17-7035.pdf)) Judge Chutkan to determine if PRO’s publication of the standards was protected fair use and noting “a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations.” It was in the wake of that decision that Judge Chutkan issued her ruling allowing PRO to keep offering the standards to the public.

Despite the powerful precedents declaring the right of citizens to access and communicate their laws, the SDOs have already told the district court (https://www.republicreport.org/wp-content/uploads/2022/04/2022-04-22-241_o-Joint-STATUS-REPORT-Pursuant-to-the-Cts-March-31-2022-Minute-Order-by-AMERICAN-SOCIETY-FOR-TESTING.pdf) they plan to appeal.

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