Congress Should Reject Bill To Let Private Groups Control Access To U.S. Laws

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Last summer, Rep. Jim Jordan (R-Ohio), chair of the House Judiciary Committee, and Rep. Jerry Nadler (NY), the committee's ranking Democrat, offered at a committee meeting legislation called the PRO Codes Act, as part of a package of three bills they declared to be common sense bipartisan measures. But after the committee adopted the other two bills without much debate, and proponents of the PRO Codes Act then explained what the legislation would do, committee members from both parties — including Democrats Zoe Lofgren (CA) and Pramila Jayapal (WA) and Republicans Dan Bishop (NC), and Matt Gaetz (FL) — expressed strong and specific concerns. After an hour of discussion, the meeting adjourned, and the bill was subsequently pulled.

Watch Video At: https://youtu.be/pjZnyNGqGN0

Now, proponents apparently plan to try to mark up the bill again, perhaps as soon as this week. The House committee has never held an actual hearing on the bill.

Although special interest lobbyists have been pressing anxiously for a year to pass the PRO Codes Act, the bill remains a terrible idea, and it should be rejected.

The Pro Codes Act, which aims to put control of the texts of many American laws in the hands of private parties, is bad for public safety, bad for democracy, bad for the economy, bad for access to justice. It's also very bad for people with disabilities. The bill, in addition, is inconsistent with centuries of legal precedents holding that the people of the United States are the owners of our laws and are free to speak the law to others, without being threatened with copyright lawsuits.

Who is pushing the PRO Codes Act?

So, who, then, wants this legislation? Private groups called standards development organizations (SDOs) are lobbying for the PRO Codes Act. These SDOs perform valuable work by convening the process for and publishing public safety codes and other standards – building codes, auto safety, product safety, food safety, communications protocols, educational testing rules, and much more. The standards are actually drafted by volunteer experts from sectors including industry, academia, and government. But the SDOs then sell these standards for prices that can reach thousands of dollars, meanwhile paying top executives annual compensation as high as $2.8 million.

The SDOs then lobby to make the standards they publish part of federal and state statutes and regulations. But following a protocol originally aimed, in the pre-Internet world, at saving space in the sprawling print version of the Code of Federal Regulations (CFR) and other books of laws, technical standards for decades have normally been made part of law "by reference," meaning the statutes or regulations formally declare the standards to be law, without printing the texts of the standards in the law books.

This situation has meant that businesses, contractors, homeowners, non-profits, journalists, policy analysts, and even government officials seeking to know, comply with, analyze, or improve our laws have often discovered that they cannot access the law unless they pay cash for it.

Who is promoting public access to the law?

More than a decade ago, the non-profit group Public.Resource.Org sought to remedy this serious flaw in our system. Public Resource started buying standards that were incorporated by reference into law and then posting the standards online, in order to share the law with the public without charge.

Public.Resource.Org (sometimes abbreviated to PRO, seemingly reflected in the name "PRO Codes Act") is headed by Carl Malamud; I have advised and helped represent the organization in court since 2012.

The SDOs sued Public Resource for copyright infringement in 2013. But last year, after a long legal battle, the SDOs lost. Or, as Malamud succinctly tweeted, "I bought the law, and the law won."

Now, having been denied what they demanded from the courts, the SDOs have come to Congress with an effort apparently aimed at deterring others from freely communicating the texts of our laws.

Senator Ron Wyden (D-OR) earlier this year blocked an effort to rush the PRO Codes Act through the Senate without a hearing or even a markup, via a unanimous consent procedure. In blocking the bill, Wyden issued a statement warning that the proposed measure "would hinder, rather than enhance, the public's access to technical or voluntary consensus standards that have been incorporated into law by reference." Wyden said the bill "raises concerns of privacy and fairness" and "risks creating barriers to access for many Americans, including researchers and reporters, those without reliable internet service, and individuals with visual impairments."

Twenty organizations — including the American Library Association, Association of Research Libraries, Electronic Frontier Foundation, Public Citizen, and Wikimedia Foundation — sent a letter to senators in February urging them to reject the Pro Codes Act. The letter argued that

the bill “will only serve to unnecessarily ration public access to US law.” The same groups have just sent the letter to House Judiciary leaders.

Among others who have filed briefs with the federal courts supporting Public Resource’s right to post the law online are the NAACP, the libertarian Cato Institute, Reporters Committee for Freedom of the Press, California’s Sonoma County, the state and local government employees union AFSCME, law professors who are experts in copyright, and former senior government officials like ex-White House chief of staff John Podesta, former EPA administrator Carol Browner, and former OSHA head David Michaels.

What have the courts said?

The PRO Codes Act goes against numerous judicial decisions dating back to 1834, a line of precedent that has been powerfully reaffirmed in the past few years.

A unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit, with judges appointed by George H.W. Bush, Barack Obama, and Donald Trump, ruled in September 2023, after ten years of litigation, that Public Resource’s posting on its website standards that have been incorporated by reference into federal regulations is protected by fair use. Fair use is a doctrine rooted in common law and the 1st amendment, as well as enshrined in the Copyright Act. The standards organizations did not petition the Supreme Court for review, presumably because they thought they would lose.

(The European Union Court of Justice this month reached a similar result, holding, in another case involving Public Resource, that the rule of law requires free public access to technical standards incorporated into EU law.)

The PRO Codes Act is particularly troubling because just recently, the U.S. Supreme Court reaffirmed, in *Georgia v. Public Resource* (2020) that copyright claims cannot block the right of the people to communicate their own laws or other edicts of government. In that case, the Court rejected an effort by the state of Georgia to stop Public Resource from posting online the Official Code of Georgia — the state’s book of its laws and annotations explaining those laws. Writing for the Court, Chief Justice John Roberts declared, “no one can own the law.”

These cases suggest that denying the public the right to speak the laws – which the PRO Codes Act would purport to do – is beyond the copyright power of Congress.

The SDO “reading rooms” deny necessary public access to the law

In the PRO Codes Act, the SDOs offer as a supposed solution to public access their own online “reading rooms” that offer versions of the standards incorporated into law. The bill would purport to preserve an SDO copyright over a standard-made-law so long as the standard was posted in one of these SDO reading rooms.

But, as the D.C. Circuit recognized in its recent opinion, these reading rooms are no substitute for meaningful public access to the law. They are, instead, a grudging response to the efforts by Public Resource and others to make the law available – and a desperate attempt by a special interest group to retain a monopoly over laws.

The SDO "read-only" reading rooms are difficult to use. They require users to register and provide personal information, sometimes require scrolling back and forth in tiny boxes to read text, prevent copying and pasting, and prevent searching for terms. They also lack basic functionality to allow access for the disabled.

Even the PRO Codes Act's lead sponsor, Rep. Darrell Issa (R-CA), in 2017 joined Rep. Lofgren in filing an amicus brief supporting Public Resource. That brief detailed the inadequacies of the SDO reading rooms as a substitute for real public access, concluding that the SDO sites "are of little or no use to blind and low vision citizens who use screen readers" and "are incompatible with Internet accessibility tools." Rep. Issa was certainly entitled to change his opinion on these issues, but he cannot change the facts he previously recounted.

The SDO reading rooms also, fundamentally, are subject to the control of private parties that could shut down or limit access at any time. The facts show that SDOs can't be trusted to make the law reasonably available to the public. For example:

- Giant SDO ASTM once denied a graduate student's request for permission to use excerpts from a standard in a research paper.
- In 2017, the Indiana Supreme Court was unable to obtain a safety code at the heart of a dispute before it because of publisher-imposed limitations on access to the code. The court ultimately found the standard on the Internet Archive—because Public Resource posted it there.
- In the wake of the 2010 Deepwater Horizon spill in the Gulf of Mexico, with the oil industry under heavy scrutiny, the American Petroleum Institute eventually posted on its website many of its safety standards, including all of the standards that had been incorporated by reference into federal law. Until that decision by the API, as the Deepwater Horizon poured oil into the Gulf for five months, and in the weeks after, it had been difficult for citizens, and even Members of Congress, to evaluate the adequacy of federal regulations, because key components of those regulations were hidden behind paywalls.

In the regime posited by the PRO Codes Act, if citizens, or advocates, or journalists, or business operators, or lawmakers, or even judges wanted to read, quote, or comment on the law, they would have to register and provide their personal information to a private SDO, hand-copy the words of a standard from a read-only website, and if they quoted too much, they would risk being sued by an SDO for copyright infringement. That's not the right way to provide public access to our laws.

The “reading room” rationing of law is unnecessary

Not only is the reading room approach grossly inadequate, it’s also completely unnecessary. The PRO Codes Act, justified by its advocates as a way to preserve revenues for SDOs, is, in fact, aimed at a non-existent problem. The standards organizations had more than a decade in the federal court litigation to demonstrate that they have suffered financially from Public Resource posting the standards. They never did.

Many entities also have continued to buy standards from SDOs, even if Public Resource has posted them online. That’s not surprising. Some people want the physical book, or a version packaged by the original publisher. Many texts that are found for free online still have a big market for private sellers of print books – start with the Bible, or the works of Shakespeare.

One specific reason why SDOs can still make big money selling standards, as the D.C.Circuit noted, is that the standards that become law have often, by the time they are incorporated into law, been superseded by the newest SDO-published versions of the standards, and those are the ones that dominate sales at any given time.

The SDOs also bring in revenue from selling manuals and other explanatory materials and holding training sessions.

There is a better way forward

The House Judiciary Committee made the right decision last summer to table the PRO Codes Act. Allowing the public to read and communicate our laws, without interference from an SDO monopoly, encourages compliance with the law, improvement of the law, and economic growth and innovation.

If the SDOs want an alternative, we have repeatedly offered one: Instead of making entire books of standards the law, as happens now, agencies or legislatures could incorporate by reference or directly paste into regulations or statutes only those parts of standards that they really need to make law. Then SDOs would still have exclusive content to sell in their standards books, and the public would have full access to the law.

But, through the PRO Codes Act, the SDOs demand that the only solution is to make them the gatekeepers of thousands of pages of federal and state law. House Judiciary members should reject this undemocratic, unlawful approach.

UPDATE 03-19-24: The Judiciary Committee has set the PRO Codes Act for a markup on Thursday, March 21. Rep. Issa has now offered an amended bill that adds the requirement, in order to preserve copyright, that SDO reading rooms have “a searchable table of contents and index, or equivalent aids to facilitate the location of specific content.” That specific additional requirement falls far short of ensuring public access to and use of the law.