

Congress of the United States
Washington, DC 20515

July 22, 2024

Oppose the PRO Codes Act (HR 1631) to Protect Public Access to the Law

Dear Colleague:

The PRO Codes Act threatens public access to the law and undermines due process. The bill would keep important legal standards hidden behind restrictive barriers. Instead of open access, it would provide only limited public access. Individuals would have to forfeit personal information just to view these standards. Moreover, the standards would not be available in useful formats, preventing users from searching, copy-pasting, printing, or downloading. To get full access to the law, people would have to pay, creating a two-tiered system: a free but limited "economy-class" access and a full-access version for those who can afford to pay. This is neither fair nor just.

Despite [bipartisan concerns](#), no hearings, multiple failed Judiciary Committee markups, and a scarcely attended final markup, some are working to rush the PRO Codes Act through the House under suspension. Opposing the PRO Codes Act is crucial to uphold the fundamental principles of due process and ensure that all individuals have fair and equitable access to the laws that govern them.

Background: The PRO Codes Act [unjustly restricts](#) access to standards that become law, providing only superficial access to the public through restrictive formats. This bill limits the public's fundamental right to know, discuss, and debate vital regulations. The PRO Codes Act disproportionately affects underprivileged communities, particularly poor and disabled tenants who need access to building codes. Organizations like the [NAACP have highlighted](#) how inaccessible standards leave Black and low-income communities vulnerable in disputes, stating that access to these standards is "access to justice."

In *ASTM v. Public.Resource.Org*¹, a group of standard-development organizations (SDOs) [sued the non-profit Public.Resource.Org](#) (PRO) for posting online standards incorporated by reference, claiming their reading rooms provided sufficient public access. In this case, the SDOs argued that free and full access to the codes would financially harm them. Yet, despite PRO posting incorporated standards for 15 years, the court observed that the SDOs produced no quantifiable evidence of past or future market harm, which it found "telling." Moreover, the court concluded that "free and easy access to the law" provided a substantial public benefit. Courts have repeatedly sided with PRO² and reinforced that no one should control who can read and distribute the law.

¹ 82 F.4th 1262 (D.C. Cir. 2023)

² The Supreme court held that officials who "speak with the force of law" cannot claim copyright in the works they create in the course of their official duties. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). Similarly, the Fifth Circuit in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002), found that model building codes adopted by reference could be copied under fair use. The First Circuit in *Building Officials & Code Administration v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980), suggested that once a model building code is adopted into law, it enters the public domain.

Despite repeatedly losing in court, some SDOs have now turned to Congress. Proponents of the bill are using the same failed arguments about financial harm to justify the PRO Codes Act. Interestingly, [a group of major standard-setting organizations](#) are also opposing the bill.

Oppose the PRO Codes Act to protect public access to the law and uphold the principles of due process, ensuring that everyone has the right to access, discuss, and understand the laws that govern them.

Sincerely,



Zoe Lofgren (D-CA-18)

Member of Congress



Thomas Massie (R-KY-04)

Member of Congress

Congress of the United States

House of Representatives

Washington, DC 20515

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Dissenting View on H.R. 1631, the PRO Codes Act:

It is questionable whether Congress can actually overturn, through this legislation, the longstanding court doctrine that mandates free and full access to the law. This is primarily because those decisions are firmly rooted in the Constitutional doctrine of due process as outlined in the Fifth and Fourteenth Amendments. Additionally, the concept of fair use, although not explicitly mentioned in the Constitution, has been interpreted through judicial precedent to align with the freedoms protected by the First Amendment. Nevertheless, I think it important to outline the defects in this legislation.

The PRO Codes Act violates the fundamental right of our citizens to freely access, read, debate, and share the law. This legislation creates unjustifiable barriers to accessing standards incorporated by reference, effectively placing them behind a paywall controlled by Standards Development Organizations (SDOs). Such a move not only violates the fundamental principles of due process and equal access enshrined in the constitution but also flagrantly disregards established judicial precedents like *ASTM v. Public Resource*, which unequivocally affirm the fair use of standards integrated into the law. In fact, Register Perlmutter responded to a question posed by a member of the House Judiciary Committee during a hearing on Wednesday, September 27, 2023, regarding the Pro Codes Act. Register Perlmutter emphasized “The public should have access to standards when they are incorporated into the law, because the public does have the right of access to the law. While the standards themselves may be protected by copyright, the use of them generally falls under fair use as it is for purposes of understanding, using, and applying the law. So, at present we think the courts are handling this in an appropriate way.” Unfortunately, the PRO Codes Act would overturn this long-held precedent, threatening the very foundation of public access to the law.

Overturing these precedents through the PRO Codes Act would not only restrict public access to vital legal resources but also perpetuate disparities in access, particularly among marginalized and low-income communities. The Act's reliance on restricted "free reading rooms" further exacerbates this issue, imposing barriers that disproportionately affect vulnerable populations and hinder their ability to navigate legal disputes effectively.

Moreover, the PRO Codes Act fails to address the financial interests and accountability of SDOs, which generate substantial revenue from the sale of standards while paying top executives exorbitant salaries. This raises questions about the necessity of granting SDOs additional revenue streams through the Act, especially at the expense of public access to the law. Opposing the PRO Codes Act is not only a matter of upholding legal principles but also safeguarding the rights and interests of all individuals in accessing, understanding, using, and applying the law for their well-being and equitable participation in society. For these reasons I strongly oppose the PRO Codes Act.

The Honorable Mike Johnson
Speaker of the House
United States House of Representatives
H-232, The Capitol
Washington, DC 20515

The Honorable Hakeem Jeffries
Democratic Leader
United States House of Representatives
H-204, The Capitol
Washington, DC 20515

July 19, 2024

Re: Opposition to the Pro Codes Act

Dear Leader Johnson and Leader Jeffries:

The undersigned organizations write to express our strong opposition to the Pro Codes Act. This bill would extend copyright protection to standards that are incorporated by reference into law. In previous letters, we expressed concern that Congress has not held a hearing on the Pro Codes Act. In addition to our procedural concerns, the undersigned organizations share the substantive concerns that this bill would undermine a fundamental purpose of copyright law: to provide public access to knowledge.

Pro Codes would limit access to publicly beneficial standards

Under the Pro Codes Act, standards development organizations would retain their copyright in a standard that is incorporated by reference into law, so long as the standard is made “publicly accessible” online. However, this bill would likely entrench some of the most obstructive current practices of standards development organizations, providing read-only access to the codes and limiting their use through restrictive licenses that prohibit copying, printing, and linking. When standards are made available in this way, the public is restricted in how they can use and share the standards. Often, SDOs require users to provide their personal information to access the standards, which raises privacy concerns. The bill explicitly permits SDOs to require this, and the protections against abuse of this information are not sufficient.

No one owns the law

Although a standard might be developed by an industry group to promote its interests, once it is incorporated into law by reference, it belongs to everyone. Under the “government edicts doctrine,” works created by government employees have the force of law and belong to the public domain. Libraries and other repositories rely on the government edicts doctrine to preserve and provide access to the cultural record, including all elements of the law.

Courts have recognized that no one can own the law. Last year, the D.C. Circuit stated that legal text “falls plainly outside the realm of copyright protection.”¹ In 2020, the Supreme Court of the United States reaffirmed that “if every citizen is presumed to know the law, it needs no argument to show . . . that all should have free access to its contents.”² Extending copyright protection to the law is unconstitutional under the First, Fifth, and Fourteenth Amendments, which guarantee the public’s right to read, share, and discuss the law.

¹ *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1268 (D.C. Cir. 2023).

² *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498, 1507 (2020).

Providing access to the law is fair use

Even if standards incorporated into the law by reference *could* retain copyright protection, their reproduction would be a fair use. In September 2023, the D.C. Circuit ruled that making standards incorporated by reference publicly available is a lawful fair use that serves a nonprofit, educational purpose of providing the public with a free and comprehensive repository of the law.³ The court correctly applied copyright law in determining that the substantial public benefits of free and easy access to the law, including government-mandated codes and standards, must be considered against any potential monetary losses to the copyright holders.

We urge Congress to engage with our organizations and the public to meet its ostensible goal of making mandatory regulations available online for free so people can know, share, and comment on them, while preserving appropriate incentives for developing standards useful for incorporation by reference. Extending copyright protection to elements of the law will only serve to unnecessarily impede public access to US law.

Sincerely,

American Economic Liberties Project

American Federation of State, County and Municipal Employees (AFSCME)

American Library Association (ALA)

Association of Research Libraries (ARL)

Authors Alliance

Center for Democracy & Technology

Copia Institute

eBook Study Group

Electronic Frontier Foundation (EFF)

Fight for the Future

Foundation for American Innovation

iFixit

Library Futures, NYU Engelberg Center

Program on Information Justice and Intellectual Property Project on the Right to Research

Public Citizen

Public Knowledge

³ *American Society for Testing & Materials v. Public.Resource.org, Inc.*, 82 F.4th 1262 (D.C. Cir. 2023).

Public.Resource.Org (PRO)

Repair.org

Society of American Archivists (SAA)

SPARC

Wikimedia Foundation

CC: Members of the House Judiciary Committee

Chairman Jim Jordan
Committee on the Judiciary
United States House of Representatives
2056 Rayburn House Office Building
Washington, DC 20515

Ranking Member Jerry Nadler
Committee on the Judiciary
United States House of Representatives
2132 Rayburn House Office Building
Washington, DC 20515

April 9, 2024

Re: Opposition to H.R. 1631, the “Protecting and Enhancing Public Access to Codes Act” (Pro Codes Act)

Dear Chairman Jordan, Ranking Member Nadler, and members of the Committee:

The undersigned organizations write to express our strong opposition to the “Protecting and Enhancing Public Access to Codes Act” (Pro Codes Act). The trade associations and civil society groups that signed this letter agree with the findings of Congress in the Pro Codes Act that technical standards are critical to the public interest. Our interest is in ensuring that copyright law is not exploited to create a monopoly in which private standards development organizations (SDOs) control access to the codes and regulations that govern public health and safety. Further, courts have found there is no evidence to support the SDOs’ claims that they have lost revenue due to the public dissemination of their standards. In addition to the substantive issues outlined in this letter, the undersigned organizations are concerned that the committee has never held an actual hearing on this bill.

Pro Codes would limit access to publicly beneficial standards

Under this bill, standards development organizations would retain their copyright in a standard that is incorporated by reference into law, so long as the standard is made “publicly accessible” online. However, SDOs often require users to provide their personal information to access the standards, raising privacy concerns. Pro Codes would also entrench some of the most obstructive current practices of standards development organizations, providing read-only access to the codes and limiting their use through restrictive licenses that prohibit copying, printing, and linking. When standards are made available in this way, they are often inaccessible to people with print disabilities; the public is restricted in how they can use and share to the standards; and they must sacrifice their personal privacy for the privilege.

Providing free public access to the law furthers the purposes of copyright: to allow public access to knowledge.¹ Consider Section 508 of the Rehabilitation Act, which requires federal agencies to make websites and other information technology offerings accessible to people with disabilities. Section 508 incorporates by reference the Web Content Accessibility Guidelines (WCAG) standards set by the World Wide Web Consortium (W3C). Because the public can access these standards, they can look up exactly what federal agencies are required to adhere to when making information available. Without access to the WCAG standards, the public would have fewer tools to hold website owners accountable.

¹Brief for the IP law professors as Amicus Curiae, p. 4, *American Society for Testing and Materials v. Public.Resource.org, Inc.*

No one owns the law

Although a standard might be developed by an industry group to promote its interests, once it is incorporated into law by reference—typically at the request of the industry group—it belongs to everyone. Courts have recognized that no one can own the law. Last year, the D.C. Circuit stated that legal text “falls plainly outside the realm of copyright protection.”² In 2020, the Supreme Court of the United States reaffirmed that “if every citizen is presumed to know the law, it needs no argument to show . . . that all should have free access to its contents.”³ By extending copyright protection to the law, Pro Codes is unconstitutional under the First, Fifth, and Fourteenth Amendments, which guarantee the public’s right to read, share, and discuss the law.

Providing access to the law is fair use

Even if standards incorporated into the law by reference *could* retain copyright protection, their reproduction would be a fair use. In September 2023, the D.C. Circuit ruled that making standards incorporated by reference publicly available is a lawful fair use that serves a nonprofit, educational purpose of providing the public with a free and comprehensive repository of the law.⁴ The court correctly applied copyright law in determining that the substantial public benefits of free and easy access to the law, including government-mandated codes and standards, must be considered against any potential monetary losses to the copyright holders.

The court found that although Public.Resource.org has been posting incorporated standards for fifteen years, “the plaintiffs have been unable to produce any economic analysis showing that Public Resources activity has harmed any relevant market for their standards. To the contrary, ASTM’s sales have increased over that time...”⁵ The court explained that because governments did not update their regulations incorporating standards as frequently as SDOs updated their standards, industry players continued to license the standards, even before their adoptions as laws, to keep current.

Pro Codes assumes that the fundamental purpose of copyright law is to create monopolies for rights holders, when in fact it is to promote the dissemination of knowledge for the public good. SDOs do not need a copyright incentive; the development of standards advances the economic interests of their members. Although Pro Codes by its terms would not overturn decisions such as *ASTM v. PublicResources* that found that fair use permitted the third-party posting of an incorporated standard, the intent of the legislation is clearly to put the thumb on the scale against a fair use finding.

We urge Congress to engage with our organizations and the public to meet its ostensible goal of making mandatory regulations available online for free so people can know, share, and comment on them. Pro Codes will only serve to unnecessarily ration public access to US law.

² *American Society for Testing and Materials v. PublicResources.org, Inc.*

³ *Georgia v. Public.Resource.org, Inc.*

⁴ *American Society for Testing and Materials v. PublicResource.org, Inc.,*

⁵ *Id.*

Sincerely,

American Council of the Blind

American Federation of State, County and Municipal Employees (AFSCME)

American Foundation for the Blind

American Library Association (ALA)

Association of Research Libraries (ARL)

Authors Alliance

Center for Democracy & Technology

Copia Institute

eBook Study Group

Electronic Frontier Foundation (EFF)

Fight for the Future

Foundation for American Innovation

iFixit

Library Futures, NYU Engelberg Center

Public.Resource.Org (PRO)

Repair.org

Program on Information Justice and Intellectual Property Project on the Right to Research

Public Citizen

Public Knowledge

Public.Resource.Org (PRO)

Society of American Archivists (SAA)

SPARC

Wikimedia Foundation



18 July, 2024

Honorable Mike Johnson
Speaker, U.S. House of Representatives
Washington, D.C. 20515

Honorable Hakim Jefferies
Democratic Leader, US House of
Representatives
Washington, D.C. 20515

Dear Speaker Johnson and Leader Jeffries,

We write to you today in opposition to H.R. 1631 / S. 835, the Pro Codes Act.

As background, SAE International (“SAE”) is a global association of more than 128,000 engineers and related technical experts in the aerospace, automotive and commercial vehicle industries headquartered in Warrendale, Pennsylvania and with a heavy presence in Detroit, Michigan. One of our core competencies is voluntary consensus standards development. Founded in 1905, SAE International is the world’s leading authority in mobility standards development. The design of automotive and aerospace safety, productivity, dependability, efficiency, and certification is better with SAE’s standards, and through the engagement of over 14,000 technical experts, technical information of the highest integrity is available to underpin every part of industry, and support efficient, performance-based regulation.

SAE International publishes 14,000 current standards with an archive of another 20,000 historical standards many of which are still relevant to industry today. The standards that SAE publishes reach more than 1,500 organizations in 65 countries. Users of these standards includes all levels of industry from the original equipment manufacturers to small and medium suppliers as well as start-ups. In addition, SAE content is used by almost 300 university engineering programs globally.

This legislation would force our organization and many other leading Standards Development Organizations (SDOs) to provide their intellectual property in the form of standards on the internet for free if any part of this standard is incorporated by reference into law by a federal, state, or local government. If the SDO does not comply, the penalty is loss of copyright.

Advocates of the Pro Codes Act claim that the bill represents the standards industry and is inclusive of all SDOs. This is simply not the case. Rather, this legislation is designed to provide legal protection to specific groups that lobby to get their standards into law. However, the legislation unfairly targets SDOs like us and others who do not operate in this manner. A simple citation to a standard in a law or regulation from any governmental body without permission of an SDO can mandate that an entire privately developed work be put into the public domain. In essence, the Pro Codes Act is a government taking of intellectual property rights from private organizations that do not work to incorporate their standards into law.

Additionally, H.R.1631 lacks formal notification requirements when our standards are incorporated into law, thereby putting us at unfair risk of losing rights to the standards we create. If a standard is incorporated into law entirely unbeknownst to us, we are left without any opportunity to protect our rights by making the standards freely available to the public on our own platform. Copyright ownership allows SDO's to maintain standards and ensure that others do not change the integrity of the standards in a way that creates incompatibilities or safety or security issues that threaten the public and harm consumers.

Like many other SDOs, SAE is reliant on copyrights in their standards to produce the income necessary to support our standards development activity, maintain the relevance of the standards and ensure openness, balance of representation, and access to all. The financial burden will be shifted to the American taxpayer as the U.S. government will be forced to develop highly complex scientific and engineering standards in the place of SDOs, including an increase in the government workforce to manage this activity.

The standards which uphold safety, advance technology and maintain thriving, cost-efficient supply chains, succeed because SDOs provide a practical, neutral platform for industry and government to form consensus. A blind mandate that all standards incorporated by reference be made available for free will have a devastating effect on SDOs and their ability to carry out their missions, not to mention the over three hundred (300) employees of SAE. Further, the SAE Foundation, SAE's charitable arm, has reached over 110,000 K-12 students and 8,700 Collegiate Students (and 299 Universities) with its STEM education programming in 2023 alone. Education of our young engineering students would be the first to be affected by any financial hardship to our organization.

SAE standards allow us all to fly and drive safely, maintaining competitiveness, supporting the economy, and keeping the nation secure. Consensus across industry and with the government through standards is the bedrock of our industries and together with other uniform standards created by similar SDOs, the standards development system is critical to the strength of our economy and status as a leading competitor on the world stage.

For these reasons, we oppose the Pro Codes Act and urge Congress not to enact legislation that severely harms the standards ecosystem while exercising a federal taking of private intellectual property rights.

Sincerely,

David Alexander



Senior Director, Standards
SAE International