

Rep. Lofgren Dissenting View:

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.

Overturning 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.