

Chairman Dick Durbin
Committee on the Judiciary
United States Senate
711 Hart Senate Building
Washington, D.C. 20510

Ranking Member Lindsey Graham
Committee on the Judiciary
United States Senate
211 Russell Senate Office Building
Washington, DC 20510

February 7, 2024

Re: Opposition to S. 835, the “Protecting and Enhancing Public Access to Codes Act” (Pro Codes Act)

Dear Chairman Durbin, Ranking Member Graham, 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.

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 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.

No one owns the law

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

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.

Sincerely,

American Foundation for the Blind

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

³ *Georgia v. PublicResource.org, Inc.*

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

⁵ *Id.*

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

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