

The Real Truth about the “Pro Codes” Act

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The Copyright Alliance has distributed a document entitled *The Truth about the Pro Codes Act* (H.R. 1631/S. 835). This is a response to the false assertions made in that document.

Copyright Alliance Assertion: “The time to pass the Pro Codes Act is now. Waiting and doing nothing invites further litigation and hinders the development of new and up-to-date standards.”

The Copyright Alliance says Congress needs to act now to encourage the development of standards. But Congress does not need to do anything to incentivize the creation of standards. Industry players benefit economically from governments adopting industry-developed standards as legal codes. Moreover, even without copyright protection for standards incorporated by reference, standards development organizations (SDOs) benefit financially from licensing the latest versions of the standards they develop, and selling training materials and programs on these standards. In terms of litigation, it is the SDOs that are bringing the cases against nonprofit organizations that are seeking to make the standards more accessible. If they stopped filing the cases, there would be no litigation.

Copyright Alliance Assertion: “The Pro Codes Act is consistent with the Supreme Court’s recent decision in *Georgia v. Public.Resource.Org*.”

The Copyright Alliance’s analysis of *Georgia v. Public.Resource.Org* fails to see the forest for trees. Although the case focused on the authorship of the official annotations of the Georgia Code, Chief Justice Roberts writing for the Court asserted that the “animating principle” behind the rule that judges do not own copyright in judicial opinions is that “no one can own the law.” Furthermore, the Chief Justice stated that “it needs no argument” that every citizen “should have free access” to the contents of the law.

The Pro Codes Act is completely inconsistent with the basic premise that no one can own the law. To be sure, when a standards development organization first drafts a standard, it has a copyright in the expression contained in the standard. But once the standard becomes the “law,” the SDO can no longer enforce that copyright. If the SDO lobbied the legislature or government agency to incorporate the standard by reference,

as is typically the case, then the SDO has in effect granted the government and the public a license in the expression in the standard. If the government incorporates the standard by reference without the SDO's permission, that might be a taking for which the SDO might be eligible for compensation from the government. Alternatively, once a standard is incorporated by reference, the ideas and facts contained within the standard merge with its expression.

Even if one focuses on authorship, the Pro Codes Act is inconsistent with *Public.Resource.Org*. Government officials often work closely with SDOs in the drafting of standards, particularly where there is an expectation that they will be incorporated by reference. And when a government agency adopts a provision that incorporates a standard by reference, it is the author of that provision, including the incorporated material, just as it would be if it had pasted the standard into the regulation word-for-word. Under the Copyright Alliance's understanding of *Public.Resource.Org*, a lobbyist who drafts a provision that is included in the US Code should retain an enforceable copyright in that provision. And without that copyright, she wouldn't have the incentive to draft it.

Regardless of the precise legal theory, once a standard is the law, the SDO cannot enforce its copyright.

Copyright Alliance Assertion: "The Pro Codes Act is Constitutional."

Chief Justice Roberts in *Georgia v. Public.Resource.Org* did not specify the precise legal basis for the principle that "no one can own the law." But his quoting precedent stating that "every citizen is presumed to know the law" and that "it needs no argument to show...that all should have free access" to its contents suggests that the principle is rooted in the constitutional right to due process. Because the Pro Codes Act undermines this principle mandated by due process, it is unconstitutional. This constitutional infirmity is not cured by limited public access required under the Pro Codes Act, as discussed below in more detail.

Further, allowing a private entity to own the law would run contrary to the First Amendment, which the Supreme Court in *Globe Newspaper Co. v. Superior Court for Norfolk Cty* stated was intended "to protect the free discussion of governmental affairs." Private ownership of the law obviously would infringe on the free discussion of governmental affairs. The Copyright Alliance contends that fair use adequately preserves the public's First Amendment right to debate issues relating to standards incorporated by reference. However, a person seeking to comment on or criticize the law must have the unambiguous ability to quote the pertinent provision in its entirety, regardless of its length, without the looming threat of copyright infringement liability with its onerous statutory damages. Otherwise, the person's First Amendment right to discuss governmental affairs is illusory.

Copyright Alliance Assertion: “The Pro Codes Act preserves existing copyright protection for codes and standards that are incorporated into law by reference—it does not expand copyright to allow an organization to own the law.”

This assertion is refuted by the plain language of the bill. It provides that “a standard to which copyright protection subsists under section 102(a) at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference....” The SDO thus would be permitted under the bill to own copyright in provisions of the law, contrary to *Public.Resource.org*. The Pro Codes Act doesn’t just “preserve existing copyright protection” for standards that are incorporated by reference. If it did, there would be no need for the legislation.

Copyright Alliance Assertion: “Codes and standards are highly innovative and important works that are at the core of what copyright is intended to encourage.”

Although standards might be “highly innovative and important works,” they do not necessarily contain much expression that is at the core of what copyright is intended to encourage. Moreover, as discussed above, the government edits doctrine bars copyright protection for standards that are incorporated by reference. Under the merger doctrine, when standards are adopted into law, any expression they contain are transformed into uncopyrightable facts.

Copyright Alliance Assertion: “Not enacting the Pro Codes Act threatens to make legal and regulatory compliance more difficult and expensive, and thus would make our country and communities less safe.”

This assertion is based on the premise that “eviscerating copyright protection risks SDOs’ ability to create codes and standards in the first place.” This premise has no basis in fact. In *ASTM v. PublicResource.Org*, the DC Circuit 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....” 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 adoption as law, to keep current. The SDOs can also derive significant revenue from selling training materials and programs. Finally, SDOs do not need a copyright incentive; the development of standards advances the economic interests of their members.

Copyright Alliance Assertion: “The Pro Codes Act ensures free online access to the public of all standards that are incorporated by reference into the law.”

The Pro Codes Act is not necessary to ensure free online access to the public of all standards that are incorporated by reference into law. In fact, the Pro Codes Act would simply encourage SDOs to do badly what public interest organizations already do well for free. Under existing law, standards developed by private organizations and incorporated into public law can be freely disseminated without any liability for copyright infringement.

Copyright Alliance Assertion: “The Pro Codes Act encourages public discourse concerning the laws intended to protect the public.”

This is simply a reformulation of the previous and following assertions; please refer to our responses.

Copyright Alliance Assertion: “The Pro Codes Act ensures the public will have continued access to the law.”

Allowing SDOs to retain copyright in standards so long as they make them “publicly accessible” online would entrench the existing practices of SDOs providing “free reading rooms” to view standards. Unfortunately, these reading rooms have technical and legal limitations that create barriers to users. Some SDOs use terms of use or technological measures to prohibit users from copying, printing, or downloading text. SDOs often collect personal information before granting access to the reading rooms, raising concerns about users’ privacy rights. Under the bill’s definition of “publicly accessible,” both of these practices would continue.

The Copyright Alliance does not address accessibility issues in its assertions, but libraries, civil society organizations, and disability rights groups have described challenges for people with disabilities in [letters to Congress](#) and in [litigation](#). Before a user can utilize a reading room, they must access an online portal, which is often incompatible with screen readers or other assistive technologies. Users must then create an account through registration forms that are also often inaccessible. And, the standards themselves are rife with accessibility barriers. This is precisely the kind of differentiation between “economy-class” and “first-class” access to the law that the Court condemned in *Public.Resource.Org*.

Finally, the SDOs likely will do the minimum necessary to meet the statutory definition of “publicly accessible online,” rather than present the law in the most useful manner for builders, consumers, and even government officials.

Copyright Alliance Assertion: “The Pro Codes Act does not alter copyright law’s fair use defense.”

On its face, the Pro Codes Act does not limit a defendant’s ability to assert that its posting of a standard incorporated by reference is a permitted fair use. But have no doubt that SDOs will point to the laudatory Congressional findings in the Act to argue against a fair use ruling. Moreover, SDOs contend that by setting a standard for “publicly accessible online,” Congress was expressing its view that this level of public accessibility was sufficient to meet the public interest objective undergirding the fair use analysis. Thus, the Pro Codes Act could have a negative impact on the exercise of the fair use right.

In any event, under the principle that no one can own the law, one shouldn’t have to rely on fair use in order to provide access to the law.