

April 27, 2023

The Honorable Dick Durbin
The Honorable Lindsey Graham
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Graham:

We write to express our strong opposition to S. 835, the “Pro Codes Act” — ill-advised legislation that attempts to allow special interest groups to control how people can read and disseminate thousands of federal, state, and local laws that govern building safety, food safety, toy safety, energy efficiency, and other essential matters governing everyday life. The bill deceptively suggests that it would provide for better online access to law. In fact, it would do the opposite, by purporting to grant copyright in that law, contrary to the principle that every citizen should have free access to our laws.

Specifically, the Act provides that a technical standard that is copyrighted would retain copyright protection if Congress, a federal agency, or a state government expressly incorporated the standard into law, so long as the private organization that published the standard “makes all portions of the standard so incorporated publicly accessible online at no monetary cost.”

If the bill passes, private organizations could seek to use their copyright to impose conditions on Americans’ access to standards incorporated in the law, such as requiring people to submit personal information to read the law and to waive the ability to download, print, copy, or disseminate the law.

Where is this proposal — to confer on private parties a right to control access to the law — coming from? Technical standards are produced under the auspices of private groups called Standards Development Organizations (SDOs), which frequently push to make them part of the law. When government bodies incorporate those standards into law, they often do so by reference, meaning they declare the standards the law without reprinting their entire texts in the body of statutes and regulations. SDOs have charged high fees and imposed other restrictions on access to and dissemination of these laws. Now, under pressure from legislators and advocates to make these laws available, the SDOs seek to trade public limited access for control over these legal texts. Although the bill might deter SDOs from continuing to charge fees for basic access to standards incorporated by reference, it would ratify the SDOs’ practice of imposing on the public and government severe restrictions and terms of use.

We urge you to reject this misguided plan. Our democracy is premised on an informed citizenry and freedom of speech. Citizens should be able to access the law without first accepting terms of use or disclosing personal information to private actors. They should be able to speak the law without restrictions and create new outlets for sharing the law and enhancing its usability, including for furthering accessibility for the disabled. As centuries of legal precedent has affirmed, it is essential that the law be readily accessible for all to read, understand, and disseminate.

We ask that you reject this effort to aid special interests at the expense of the public interest.

Sincerely,

Electronic Frontier Foundation

Public Citizen

Public.Resource.Org (“PRO”)

American Federation of State, County and Municipal Employees

Authors Alliance

Creative Commons

Demand Progress

Fight for the Future

GovTrack.us

Library Futures

Public Knowledge

SPARC

Reporters Committee for Freedom of the Press

The Internet Archive

Appendix: Memorandum regarding H. R. 6769, the “Pro Codes Act”

S. 835, the “Protecting and Enhancing Public Access to Codes Act” or “Pro Codes Act” is ill-advised legislation that attempts to allow private entities to impose restrictions on Americans’ full access to the texts of thousands of federal, state, and local laws that govern building safety, food safety, toy safety, energy efficiency, and other essential matters governing everyday life. Under the bill, private organizations could require Americans to supply personal information and agree to onerous terms of use in order to access laws, and they could place restrictions on Americans’ ability to download, print, copy, or disseminate the law.

The bill runs counter to long-standing Supreme Court precedent recognizing that all citizens should have free access to the content of law. It also would pose serious constitutional concerns — concerns recently noted by the U.S. Court of Appeals for the District of Columbia Circuit— by permitting private ownership of standards that are essential to understanding legal obligations.

Under the Pro Codes Act, a technical standard would retain copyright protection, even if it is incorporated by reference into law, if the private organization that published the standard “makes all portions of the standard so incorporated publicly accessible online at no monetary cost.”¹

The bill is being pushed by standards development organizations (SDOs)—industry groups that convene groups of experts, including government officials, to draft technical standards on subjects ranging from energy regulation to product safety to educational testing, and then publish those standards. In many cases, an SDO is focused on having a standard enacted into law. When government bodies incorporate those standards into law, they often do so “by reference,” meaning that they declare the standards to be the law without reprinting their entire texts in the body of statutes and regulations.

This approach originally was in part aimed at saving trees and library space. In the Internet age, however, it is easy to allow citizens full access to all provisions of the law, all the time – and to share them with others. That unrestricted access and sharing can facilitate, in turn, commentary, research, comparison, and accountability about the law.

However, the SDOs have for many years refused to provide meaningful access, much less dissemination of laws incorporated by reference. Instead, they have demanded that people pay high prices, sometimes thousands of dollars, just to read incorporated standards. Sometimes the SDOs even let standards that still have the force of law go out of print, further restricting access to law.

In recent years, under pressure from legislators and advocates, some SDOs have made some standards that are incorporated into law available online without fees, but these SDOs often require registration and surrender of personal information, impose onerous terms of use, and

¹ A similar bill introduced in the House in the last Congress, H. R. 6769, also called the Pro Codes Act, provided that any “original work of authorship” that is “adopted or incorporated by reference, in full or in part, into any Federal, State, or municipal law or regulation” would have copyright protection as long as the “owner of the copyright” provides these provisions of law “at no monetary cost for viewing by the public in electronic form on a publicly accessible website.”

restrict users' ability to copy or disseminate the standards. And SDOs have been aggressively threatening, and suing for alleged copyright infringement, people who have posted these standards—these laws—online.

The Pro Codes Act would ratify these practices by purporting to allow private parties to determine how and where individuals may access mandates incorporated by reference, including whether other organizations and individuals can post them online.

The bill's approach should be rejected. Standards incorporated by reference into law should be widely available to the public—not only without charge, but in the public domain, not subject to restrictions imposed by purported copyright holders.

It is essential that the law be readily accessible for all to read, understand, and disseminate. Citizens should be able to create new outlets for sharing the law and enhancing its usability, including furthering accessibility for the disabled. And allowing free access to standards incorporated by reference strengthens the capacity of organizations like ours to engage in rulemaking processes, analyze issues, and work for solutions to public policy challenges.

Full access to our laws, including standards incorporated by reference, for businesses, government agencies, advocacy groups, researchers, journalists, and others also helps protect public safety, promote innovation and economic opportunity, increase access to justice, and strengthen citizen participation in our democracy.

The Pro Codes Act would put control of access to provisions of law in the hands of their copyright owners so long as the owners made them available for viewing online (but not necessarily copying or printing). In this way, the Act runs counter to well-considered legal precedent, starting with *Wheaton v. Peters* (1834), in which the U.S. Supreme Court held that no one could claim copyright over the Court's decisions. More recently, in 2018, the D.C. Circuit in *American Society for Testing v. Public.Resource.Org* noted "a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations." Concurring, Judge Katsas stated, "As a matter of common-sense ... access to the law cannot be conditioned on the consent of a private party." And in 2020, the Supreme Court in *Georgia v. Public.Resource.Org* held that government-published material, even material without the force of law, is not copyrightable if promulgated by government bodies in the course of their lawmaking duties. Writing for the Court, Chief Justice Roberts affirmed, "no one can own the law."

Taken together, these court decisions reinforce the principle that standards incorporated into the law, including standards incorporated by reference, belong to the public. Use and distribution of the law should not be restricted.

Fortunately for the standards organizations, they are well positioned to sustain themselves in the absence of the special privileges they seek with this proposed legislation. These SDOs regularly lobby government agencies and legislatures to make some of their standards the law. Instead of seeking to block the public from communicating the law, the SDOs could work with government officials to incorporate by reference, or directly paste into laws and regulations, only those portions of the standards required to create and explain legal obligations. In so doing, they could retain copyright protections for other aspects of those standards.

Even where entire standards are incorporated by reference, many in industry will still opt to purchase the official standards documents from SDOs. SDOs, whose CEOs get paid as much as \$2 million a year, can also continue to earn revenues from selling the many standards that are not incorporated into law and from manuals, training documents, and other materials. The self-serving claim of some SDOs that the standards system would collapse if citizens have real access to the law is undermined by their failure to demonstrate loss of sales since court decisions upheld the rights of citizens to post online standards incorporated by reference.

Barring citizens from reading or disseminating public laws without a license from a private party, as the Pro Codes Act aims to do, runs counter to the very core of what it means to be a nation of laws. Our democracy is founded on an informed citizenry, and on freedom of speech, and never has the U.S. Congress required that citizens accept terms of use or register their private information before they are allowed to see the laws by which we have chosen to govern ourselves—or restricted the ability of citizens to speak their own laws.

We ask that you reject this ill-advised and undemocratic effort to aid special interests and undermine public accessibility to our laws.