

SDOs, Copyright, and the Threat of Surreptitious Compulsory Licensing

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I. Introduction

The Promoting Responsible and Open Codes Act (PRO Codes Act), introduced in June by U.S. Reps. Darrell Issa (R-Calif.) and Deborah Ross (D-N.C.),¹ has exposed a long-simmering tension within the world of standards development. On its face, the bill offers a straightforward promise: if a private standard is incorporated by reference into law, that standard must be made freely available to the public. Beneath that promise, however, is a complex set of questions about the economics of standards setting, the role of copyright in sustaining that system, the risks of sweeping statutory reforms that fail to account for the breadth of business models under consideration, and the further attendant risks when Congress wades into a complicated area of litigation.

In contrast to the bold claims made both by the bill's sponsors² and supporters³ and its critics,⁴ the real promise and danger raised by the PRO Codes Act is not that it entrenches copyright, but that it hollows it out—transforming a property right into a conditional license revocable at the government's whim. Worse, it risks normalizing broad “public-spirited” exceptions to copyright that are untethered from the careful doctrines courts have developed over decades. Properly understood, the PRO Codes Act is not a reinforcement of copyright but a distortion that would weaken it for the very organizations that depend on it most.

Standards are indispensable to the modern economy. They form the hidden architecture of markets and regulation, governing everything from boilers and electrical wiring to aircraft design, medical devices, and nuclear facilities. Their creation requires deep technical expertise and countless hours of volunteer effort, and their adoption by governments has long been praised as a means to harness expert knowledge without the expense and politicization of agency-drafted codes. Copyright revenues can be essential to sustaining this enterprise, ensuring that standards organizations can recover the costs of developing works that—once produced—can be copied at almost no cost.

The current debate over the PRO Codes Act, however, highlights that not all standards-development organizations (SDO) operate in the same way. Two distinct business models have emerged. On one side are voluntary-adoption SDOs, which rely on volunteer engineers and technical experts to produce consensus standards and sustain their work through private, generally commercial sales. On the other side are lobbying-oriented SDOs, which supplement technical work with lobbying

¹ Pro Codes Act, H.R. 4009, 119th Cong. (2025), <https://www.congress.gov/bill/119th-congress/house-bill/4009>.

² Press Release, *Issa, Ross Introduce Legislation to Protect Public Access to Federal Rules, Regulations*, OFF. REP. DARRELL ISSA (Jun. 23, 2025), available at <https://issa.house.gov/media/press-releases/issa-ross-introduce-legislation-protect-public-access-federal-rules>.

³ See *Copyright Alliance Issues Statement Supporting HJC Markup of Pro Codes Act*, COPYRIGHT ALL. (Apr. 17, 2024), <https://copyrightalliance.org/press-releases/pro-codes-act>.

⁴ See *Pro Codes Act*, UPCODES <https://up.codes/pro-codes-act> (last visited Oct. 2025); *The Real Truth About the “Pro Codes” Act*, ASS'N RES. LIBS. (Mar. 22, 2024), available at <https://www.arl.org/wp-content/uploads/2024/03/The-Real-Truth-about-the-Pro-Codes-Act.pdf>.

campaigns to secure wholesale statutory adoption; they then typically invoke copyright to meter access to the law text.

Both models depend on copyright, and both are legally entitled to enforce it. But the lobbying model raises sharper questions because of the way it couples lobbying with property rights, creating the appearance—if not the reality—of something like “unclean hands.”⁵ It is this dynamic, not copyright itself, that has drawn legislative attention, and that fuels the push for legislation like the PRO Codes Act.

The danger is that, by targeting copyright across the board, rather than tailoring its response to one business model, Congress could destabilize the entire ecosystem of standards development. The PRO Codes Act risks collapsing the distinction between the voluntary-adoption and lobbying approaches, and introducing a *de facto* compulsory-licensing regime that would undercut the very property rights on which standards creation depends.

This issue brief examines these models, demonstrating how each interacts with copyright. It also considers the law & economics implications of the PRO Codes Act’s attempt to redraw the line between public access and private incentives.

II. The PRO Codes Act Doesn’t Mean What You Think It Means

Reps. Issa and Ross have cast their bill as a measure that will “protect public access to federal rules,” while also recognizing the role of private standards in the regulatory process.⁶ The sponsors’ stated goal is to assure citizens enjoy free online access to incorporated standards, while preserving the copyright protection that funds those standards’ development. The ensuing debate, however, has split the interested parties into two sharply opposed camps, each of which has framed the proposal in ways that obscure its real long-term effects.

Opponents of the bill have described it as a giveaway to standards bodies. UpCodes, a startup that has litigated against SDOs to force publication of model building codes online, argues that the bill “locks up the law” and empowers private organizations to monetize access to rules that bind the public.⁷ Others have warned that the bill would “attempt to copyright the law” and may itself be unconstitutional,⁸ arguing that it constitutes a privatization of law that undermines public access.⁹

⁵ The equitable doctrine of “unclean hands” prevents a party from obtaining judicial relief when its own conduct has been unethical or in bad faith in relation to the matter at issue. See, e.g., *Restatement (Second) of Torts* § 940 (1979). This is not to suggest that enforcing copyrights constitutes an improper manipulation of legal process, but rather that invoking property rights as part of a strategy that leverages public authority to create a captive market raises analogous concerns.

⁶ Issa, *supra* note 2.

⁷ UpCodes, *supra* note 4.

⁸ Canyon Brimhall, *The Pro Codes Act Attempts to Copyright the Law – But Is It Constitutional?*, R STREET INST. (Mar. 2024), <https://www.rstreet.org/commentary/the-pro-codes-act-attempts-to-copyright-the-law-but-is-it-constitutional>.

⁹ ARL, *supra* note 4.

Supporters of the bill, by contrast, characterize the PRO Codes Act as essential copyright protection, arguing that it would preserve the incentive structure for standards development while ensuring transparency.¹⁰ Not surprisingly, the measure has been championed by the International Code Council (ICC) and the National Fire Protection Association (NFPA), the two SDOs whose lobbying activity, as discussed below, may have been an important factor in forcing Congress to consider this “fix.”

That this cross-cutting lineup of interested parties argues the positions they do is not without irony. Among the bill’s opponents are copyright skeptics, who see the measure as a copyright giveaway, but they are joined in opposition by voluntary-adoption SDOs, who fear the bill will undermine their business model. Meanwhile, while the bill’s supporters are typically pro-copyright institutions, the measure they are defending could transform copyright into a contingent right that would evaporate if incorporated into law unless certain access conditions are met. Put differently, while popular rhetoric treats the PRO Codes Act as strengthening copyright, a careful examination of the economic incentives of copyright in the SDO context suggests that it may fact weaken copyright by subjecting the development and promulgation of codes to a form of compulsory licensing.

The real issue in this debate is not whether citizens should have access to the law—no one disputes that principle—but how to achieve that goal without destabilizing the intellectual-property foundation on which standards development rests. The next sections examine two frequently employed business models of standards development—the voluntary-adoption model and the lobbying model—before returning to the PRO Codes Act to assess how it would affect each and why it risks undermining, rather than reinforcing, copyright.

III. Two Business Models of Standards-Setting Organization

The PRO Codes Act debate, though focused on a relatively narrow segment of the standards ecosystem, brings to the surface broader issues of incentive design, the structure of the standards marketplace, and the stability of copyright policy. To understand the potential downstream effects of any legislative intervention, it is useful to examine two popular models for the commercialization of standards development implicated by the proposed legislation.

A. The Voluntary-Adoption Standards Model

Voluntary-adoption SDOs emerged largely in the late 19th and early 20th centuries, often in response to public-safety crises or industrial inconsistencies. The American Society of Mechanical Engineers (ASME) turned to standardization in the 1880s following a series of deadly boiler explosions and soon published its boiler code to prevent further accidents.¹¹ Underwriters Laboratories (UL) was founded in 1894 by insurance companies to address rampant fire hazards

¹⁰ *Copyright Alliance Applauds Introduction of the Pro Codes Act*, COPYRIGHT ALL. (Mar. 2022), <https://copyrightalliance.org/press-releases/pro-codes-act>.

¹¹ FAA, *Voluntary Industry Standards and their Relationship to Government*, FED. AV. ADMIN. (1996), at 27, available at http://www.faa.gov/about/office_org/headquarters_offices/ast/media/vol_std.pdf.

from unsafe consumer products.¹² The American Society for Testing and Materials (now known as ASTM International), founded in 1898, arose from concerns about the inconsistent quality of steel rails used in the railroad industry.¹³

A common characteristic of these organizations is their reliance on volunteer technical committees composed of engineers, academics, government officials, and industry participants. Decisions are reached through consensus ballots and public review, which—under ANSI’s accreditation regime—must reflect a balance of interests to prevent domination by any single stakeholder.¹⁴

Voluntary-adoption SDOs—such as ASME, ASTM International, or the Institute of Electrical and Electronics Engineers (IEEE)—do not typically engage in extensive lobbying campaigns to secure wholesale statutory enactment of their codes. This is not to say these organizations never participate in the political process, but their business models do not generally depend on the lobbying process to secure statutory enactment the way the ICC and NFPA models do (as discussed below). ASME, for example, emphasizes that its codes are developed by volunteer committees and are “frequently referenced in regulations worldwide,” attributing such adoption to their technical credibility, rather than political advocacy.¹⁵ Similarly, ASTM International attributes the widespread citation of its standards in law to “technical excellence and global consensus,” rather than lobbying.¹⁶

This reliance on expertise makes voluntary standards something of a “default” status for standards adoption, which is further supported by federal policy. Under the National Technology Transfer and Advancement Act¹⁷ and OMB Circular A-119, federal agencies are directed to use voluntary-consensus standards wherever possible. At the margins, this reduces SDOs’ need to rely on lobbying campaigns to develop a sustainable business model.¹⁸

Examples of this model abound. ASME’s volunteer committees, for example, maintain the Boiler and Pressure Vessel Code, a core set of safety standards that federal regulators—including the Occupational Safety and Health Administration (OSHA) and the Nuclear Regulatory Commission (NRC)—incorporate by reference routinely.¹⁹ ASTM International now maintains roughly 12,000 voluntary-consensus standards, widely used in construction, petroleum, environmental regulation,

¹² *Id.*

¹³ *Id.* at 28.

¹⁴ See, e.g., *Frequently Asked Questions*, ASTM INT’L, <https://www.astm.org/faq> (last visited Oct. 2025).

¹⁵ *Codes & Standards Development*, AMER. SOC. MECH. ENGRS., <https://www.asme.org/codes-standards> (last visited Oct. 2025).

¹⁶ *About ASTM International*, ASTM INT’L, <https://www.astm.org/about> (last visited Oct. 2025).

¹⁷ National Technology Transfer and Advancement Act of 1995, Public Law 104-113 (1995), <https://www.nist.gov/standardsgov/national-technology-transfer-and-advancement-act-1995>.

¹⁸ OMB Circular A-119, OFF. MGMT. BDGT. (2016), available at <https://share.ansi.org/Shared%20Documents/About%20ANSI/Why-Voluntary-Consensus-Standards-Incorporated-by-Reference-into-Federal%20Government%20Regulations-Are-Copyright-Protected.pdf>

¹⁹ *Voluntary Industry Standards and Their Relationship to Government*, FED. AV. ADMIN. OFF. COM. SPACE TRANSP. (FAA/AST) (1996) at 27, 42, available at http://www.faa.gov/about/office_org/headquarters_offices/ast/media/vol_std.pdf.

and manufacturing. Federal agencies such as the Environmental Protection Agency (EPA) and the Consumer Product Safety Commission (CPSC) incorporate ASTM International standards by reference into regulations governing emissions testing and product safety.²⁰ IEEE produces hundreds of standards for electrical and computer engineering, including the well-known IEEE 802 Wi-Fi protocols.²¹ Founded 1905, the Society of Automotive Engineers (now known as SAE International) continues to supply aviation and automotive standards referenced by the Federal Aviation Administration (FAA) and U.S. Transportation Department (DOT).²² The American Concrete Institute (ACI) produces the ACI 318 structural code, which is widely referenced in building regulations.²³

I. The economics of the voluntary-adoption model

Voluntary-adoption SDOs typically do not rely heavily on dues or public appropriations. Instead, their primary source of revenue is the sale of standards documents. ASTM International, for example, derives roughly 85% of its funding from publication sales, with only about 15% from membership fees.²⁴

Thus, such SDOs have generally argued that their ability to continue producing technical standards depends on revenue from the sale of copyrighted materials. Because developing consensus standards requires expert committees, extensive consultation, and periodic revision, SDOs maintain that the ability to earn copyright revenues is essential to their work.²⁵ Courts have acknowledged this claim, even as other courts have questioned whether industry and regulatory incentives might suffice without copyright protection.²⁶

But what must be acknowledged is the uneven economics of standards setting: only some standards are incorporated widely into law or command significant market demand, while many others serve

²⁰ S. Michael Gentine & Kelsie Sicinski, D.C. Circuit: “Fair Use” Means Sharing Safety Standards Incorporated by CPSC Is Fair Game, ARNOLD & PORTER KAYE SCHOLER LLP (Oct. 30, 2023), <https://www.arnoldporter.com/en/perspectives/blogs/consumer-products-and-retail-navigator/2023/10/dc-circuit-fair-use-means-sharing-safety-standards>.

²¹ IEEE 802 LAN/MAN Standards Committee (LMSC), INST. ELEC. ELECTRONICS ENG'RS., <https://www.ieee802.org> (last visited Oct. 9, 2025); *The Evolution of Wi-Fi Technology and Standards*, IEEE STANDARDS ASS'N., <https://standards.ieee.org/beyond-standards/the-evolution-of-wi-fi-technology-and-standards> (last visited Oct. 9, 2025).

²² Order 8110.116, FED. AV. ADMIN. (Sep. 23, 2011), available at <https://www.faa.gov/documentLibrary/media/Order/8110.116.pdf>.

²³ 2022 ACI 318-19 *Building Code Requirements for Structural Concrete and Commentary on Building Code Requirements for Structural Concrete* (ACI 318R-19), INT'L CODE COUNCIL, <https://codes.iccsafe.org/content/ACI31819R2022P2> (last visited Oct. 9, 2025); Jack Moehle, *Introducing ACI 318-19: Building Code Requirements for Structural Concrete*, B. SAFETY J. (Aug. 26, 2019), <https://www.iccsafe.org/building-safety-journal/bsj-technical/introducing-aci-318-19-building-code-requirements-for-structural-concrete>.

²⁴ FAA/AST, *supra* note 19, at 42.

²⁵ *Copyright in Standards Incorporated by Reference into Law and the Pro Codes Act*, CRS Product No. R47656, CONG. RES. SVCS. (Aug. 8, 2025); *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437 (D.C. Cir. 2018).

²⁶ *Vecek v. Southern Building Code Congress Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002).

narrower or specialized purposes. While there has been, to date, no broadly available quantification of sales distribution across standards, it is reasonable to infer—drawing on patterns in other creative markets—that revenues are likely concentrated in just a handful of broadly adopted or “blockbuster” standards, which in turn help to sustain the development of more specialized standards with more limited commercial appeal.²⁷

Given this reality, the voluntary-adoption model is uniquely vulnerable to shifts in copyright doctrine. Incorporation by reference (IBR) allows regulators to require compliance with an external standard by citing it directly in law, rather than reproducing the text. Moreover, IBR allows updates to the standards to be reflected in the law without the need to promulgate new regulations or pass new legislation. Regulators have generally held that incorporation does not place the standard into the public domain.²⁸ OSHA, for instance, has repeatedly confirmed that “copyright laws protect national consensus standards,” even when incorporated into OSHA rules.²⁹

From an economic perspective, the voluntary-adoption model represents a unique solution to the public-goods problem. Standards have high fixed development costs but, once created, can be reproduced (or incorporated by reference) at negligible marginal cost. Absent some exclusion mechanism, there would be chronic underinvestment. Copyright creates a limited exclusion that allows SDOs to recoup costs, while volunteer labor minimizes the need for large financial outlays.

The voluntary-adoption model’s efficiency stems from its ability to pool technical expertise that governments could not feasibly replicate at scale. Agencies would face significant opportunity costs, both financial and political, if forced to draft thousands of engineering standards internally. Volunteer-consensus processes also produce broader stakeholder buy-in, which enhances compliance and legitimacy.³⁰ At the same time, the backdrop of copyright ensures that SDOs will be able to fund ongoing work, even for standards that do not generate large market demand.

B. The Lobbying Model of Standards Development

In contrast to the voluntary-adoption model of standards development is what we can call the “lobbying model.” While it is true that this SDO business model similarly relies on engineering expertise and consensus-building activities, it is distinct in that it seeks to leverage copyright to encourage promulgation of standards-reliant codes. For example, the ICC advertises that an important part of its government-relations team’s mission is to “advocate for the adoption,

²⁷ See generally John Burroughs, *Incorporated Standards and Fair Use: Remaining Uncertainties Set the Stage for Further Litigation*, UNIV. CHI. BUS. L. REV. ONLINE EDITION (2024), <https://businesslawreview.uchicago.edu/online-archive/incorporated-standards-and-fair-use-remaining-uncertainties-set-stage-further>.

²⁸ *Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected*, AMER. NAT’L. STANDARDS INST. (n.d.) at 13, available at <https://share.ansi.org/Shared%20Documents/About%20ANSI/Why-Voluntary-Consensus-Standards-Incorporated-by-Reference-into-Federal%20Government%20Regulations-Are-Copyright-Protected.pdf>.

²⁹ *Updating OSHA Standards Based on National Consensus Standards; Personal Protective Equipment*, 74 FED. REG. 46,350 (Sep. 9, 2009), <https://www.osha.gov/laws-regs/federalregister/2009-09-09>.

³⁰ See discussion *supra* notes 28-Error! Bookmark not defined. and accompanying text.

implementation and enforcement of current building safety codes, standards and policies.”³¹ The NFPA notes that its staff “engage[] with policymakers at all levels of government to support adoption and use of NFPA codes and standards.”³² And at least one account of the relationship between these two organizations detailed the intense lobbying battle between ICC and NFPA in the early 2000s, when each group deployed “lobbyists, political ads, and grassroots campaigns” to persuade states and cities to adopt their specific codes.³³

The evidence suggests it is likely this business model that has generated many of the conflicts that have inspired legislation like the PRO Codes Act.

I. Mechanics of the lobbying model of standards development

In contrast to the voluntary-adoption approach, the commercialization portion of the lobbying model centers on two sequential moves. First, a private body like the ICC or the NFPA drafts a comprehensive code and lobbies legislatures and agencies to adopt this code wholesale (often with minimal amendments). Second, once legal force is attached, the organization asserts copyright in the text of the law and sells access to the code via print, PDFs, and subscriptions, while offering only constrained read-only portals as a free option.

This two-stage maneuver—leveraging the political process to create a legal obligation and then invoking copyright to control the text—structures a business model in which legal adoption helps to create a captive market for the publisher’s editions.³⁴ This can generate significant revenue for the relevant standards bodies:

To understand the battle between NFPA and ICC, it is useful to avoid thinking of the two groups as associations of code geeks. Rather, think of them as two publishing houses engaged in a war for book sales. Codebooks are a big business in the United States and abroad. When a city or a state adopts one model code or the other, it means that thousands of code officials, architects, engineers and others must purchase new copies to keep on their desks. In 2004, NFPA pulled in \$58 million from publication sales, while ICC earned \$25 million.³⁵

The ICC, which emerged through consolidation of various regional model-code bodies, most notably publishes the International Codes (“I-Codes”), which serve as the baseline building regulations for most U.S. jurisdictions.³⁶ The NFPA, founded in 1896, develops hundreds of safety

³¹ *Advocacy – Government Relations*, INT’L CODE COUNCIL, <https://www.iccsafe.org/advocacy> (last visited Oct. 2025).

³² *Public Policy and Advocacy*, NAT’L FIRE PROT. ASS’N., <https://www.nfpa.org/advocacy> (last visited Oct. 2025).

³³ Sarah Harney, *The Code War*, GOVERNING (Aug. 11, 2010), <https://www.governing.com/archive/Code-War.html>.

³⁴ *Id.*; *Protect Safety Codes by Supporting Advancement of the Pro Codes Act*, INT’L CODE COUNCIL (2024), <https://www.iccsafe.org/building-safety-journal/bsj-news/protect-safety-codes-by-supporting-advancement-of-the-pro-codes-act-2>; *Free Access to NFPA Codes and Standards*, INT’L ASS’N FIRE CHIEFS, <https://www.iafc.org/topics-and-tools/resources/resource/free-access-to-nfpa-codes-and-standards> (last visited Oct. 2025).

³⁵ See Harney, *supra* note 34.

³⁶ *Id.*

standards, including NFPA 70 (National Electrical Code) and NFPA 101 (Life Safety Code), which are widely adopted by reference.³⁷ Once enacted, the ICC's I-Codes and the NFPA codes are sold at textbook-level price points and supplemented by paid digital subscriptions that offer broader functionality.³⁸

The lobbying model can create tension because it sits at the fault line between private copyright enforcement and the public's right to know the law. As we discuss in the next section, courts have been forced to confront the economic and legal consequences of allowing private SDOs to both press for their texts to become legally binding and then restrict access to those same texts once enacted.

C. Relevant Case Law

The overlap between voluntary-adoption and lobbying-oriented SDOs becomes most visible in the courts. Whatever differences exist in their business models, both types of SDO ultimately confront the same question: what becomes of copyright once private standards are incorporated into binding law? Judicial treatment of this issue has been uneven across circuits and contexts, but it reflects a common baseline principle—citizens must be able to access the laws that govern them, even when those laws originate as privately authored texts.

Early decisions reflected a strong inclination to preserve copyright protection, notwithstanding incorporation. In *Practice Management v. AMA*, the 9th U.S. Circuit Court of Appeals upheld copyright in the American Medical Association's (AMA) Current Procedural Terminology (CPT) coding system, despite its incorporation into Medicare regulations, as the court reasoned that government reference did not divest the AMA of authorship or originality.³⁹ Similarly, in *CCC Information Services v. Maclean Hunter*, the 2nd U.S. Circuit Court of Appeals confirmed copyright protection for an automobile-valuation guide, even though state law required insurers to use it.⁴⁰ These cases underscored the view that mere legal reliance on a work did not erase the statutory protections conferred by the Copyright Act—a view congenial to SDOs that depend on copyright revenues to sustain costly consensus-driven technical work.

The 5th U.S. Circuit Court of Appeals, however, took a different approach in *Veck v. SBCCI*, where a citizen posted online the building codes of two Texas towns that had adopted a model code

³⁷ James Peterkin & Scott Mason, *Navigating IBC and NFPA Differences*, HEALTH FACILITIES MGMT. (Jul. 14, 2022), <https://www.hfmmagazine.com/articles/4500-navigating-ibc-and-nfpa-differences>.

³⁸ *International Building Code*®, INT'L CODE COUNCIL <https://shop.iccsafe.org/2021-international-building-coder.html> (as of October 2025, ICC's 2021 IBC listed at \$203 in softcover, with a \$112 license for digital content); *NFPA LiNK*, NAT'L. FIRE PROT. ASS'N., <https://www.nfpa.org/product/nfpa-70-national-electrical-code-nec/p0070code/nfpa-70-national-electrical-code-nec-2023/7023sb> (as of October 2025, NFPA 70 (2023) was listed at about \$161 in softcover, with an approximately a \$168 annual subscription fee for a license).

³⁹ *Practice Mgt. Info. Corp. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), opinion amended by (9th Cir. 1998) 133 F3d 1140.

⁴⁰ *CCC Info. Servs. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 74 (2nd Cir. 1994).

verbatim.⁴¹ Sitting *en banc*, the court held that, once a model code is enacted as municipal law, it loses copyright protection under both the government-edicts doctrine and the merger doctrine.⁴² The court reasoned that “public ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it,” emphasizing that citizens must have free access to the rules that bind them.⁴³ The circuit court’s decision was rooted in the idea that, once enactment renders a standard a non-substitutable public good, exclusionary rights function as a toll on compliance, rather than as an incentive for creation.

Importantly, the *Veck* court was careful to limit its holding to the wholesale adoption of model codes as law, noting that the case did not involve extrinsic technical standards. This distinguishes that opinion from cases that uphold copyright protection for incorporated technical works.⁴⁴ *Veck* thus struck most directly at lobbying-oriented SDOs, whose revenue model depends on wholesale enactment of their codes. When enactment itself triggers loss of copyright, it undercuts the very mechanism on which they rely to convert technical documents into guaranteed markets. By contrast, voluntary-adoption SDOs generally see their standards incorporated by reference, rather than enacted wholesale, and thus remain better positioned to preserve copyright protection under prevailing doctrine.

This difference is not merely procedural: when a standard is incorporated by reference, it remains a privately authored work that is *used by law* but not *transformed into law*, allowing copyright to persist under, for example, the “reasonable availability” regime established by OMB Circular A-119. Wholesale adoption, however, turns the text into the law itself, triggering the “law is public domain” problem at the heart of *Veck*. As discussed below, the PRO Codes Act threatens to collapse this distinction, treating both models as functionally equivalent and thereby extending statutory protection to the lobbying-oriented model, while destabilizing the voluntary-adoption one.

Subsequent cases have, however, shifted away from the government-edicts doctrine and instead relied on fair use to reconcile public access with copyright. In *American Society for Testing & Materials v. Public.Resource.Org*, the U.S. Circuit Court for the D.C. Circuit upheld nonprofit republication of standards incorporated by reference into law, reasoning that such dissemination was transformative: while SDOs published standards for commercial sale, Public.Resource.Org republished them to educate the public about legal obligations.⁴⁵ The court also found the “reading rooms” that SDOs maintained to be inadequate, noting they often barred printing, downloading, or robust searching.⁴⁶

⁴¹ *Veck v. SBCI*, *supra* note 26.

⁴² *See id.* at 801, 795.

⁴³ *Id.* at 799.

⁴⁴ *Id.* at 804.

⁴⁵ *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1265 (D.C. Cir. 2023).

⁴⁶ *Id.* at 1270.

Doctrinally, this fair-use holding applied across the board—sweeping in both lobbying-oriented and voluntary-adoption SDOs alike.

The ICC's litigation against UpCodes, a startup offering searchable online building codes, pushed these tensions into the commercial realm. The district court echoed *Veeck* in holding that private entities cannot wield copyright to bar access to enacted law, while leaving unresolved questions about non-enacted provisions and advertising claims. The case highlights the remaining gray area: nonprofit republication for educational purposes has been immunized, while commercial republication is still subject to closer scrutiny, with courts weighing the public benefits of wider access against potential market substitution.

These cases did not emerge in a vacuum. The most acute disputes, such as *Veeck* and *UpCodes*, arose from the distinctive incentives of lobbying-oriented SDOs, which campaign for wholesale enactment of their codes and then invoke copyright to meter access once those codes have become law. That strategy created the scarcity dynamic that brought these conflicts into the courts. Voluntary-adoption SDOs like ASTM International have been swept into the same doctrinal current—most notably in *Public.Resource.Org*, where fair use applied to their standards incorporated by reference—but their exposure reflects the breadth of the doctrine, rather than the business model they pursued. The underlying political pressure for legislation such as the PRO Codes Act seems to stem far more from the lobbying-oriented posture of ICC and NFPA.

Moreover, this jurisprudence is critical to understanding the stakes of the PRO Codes Act. Courts have already developed tools to balance access and incentives, allowing standards to remain protected as intellectual property, while ensuring that the public is not priced out of compliance. The PRO Codes Act, by contrast, threatens to displace these doctrines with a blunt statutory rule that collapses distinctions among SDOs and risks destabilizing copyright protections across the board. The next section turns to that legislation, analyzing its likely effects on both voluntary-adoption and lobbying-driven models of standards development.

IV. The Law & Economics of the PRO Codes Act

Into this complicated case law, Congress is considering injecting the PRO Codes Act. Framed as a transparency measure, its core provision declares that, once a private standard is incorporated by reference into law, it must be posted online for free.⁴⁷ If the standards body fails to provide that access, it will lose its copyright in the work.⁴⁸

Supporters argue that this rule addresses a basic democratic concern: citizens should not have to pay, or navigate paywalled reading rooms, to learn the rules that govern them.⁴⁹ For proponents, the problem is straightforward—codes that function as law are often accessible only through expensive

⁴⁷ Pro Codes Act, *supra* note 1, at § 123(b).

⁴⁸ *Id.*

⁴⁹ See, e.g., Copyright Alliance, *supra* note 3.

books or restricted digital portals. By forcing free posting, the bill purports to guarantee that binding legal obligations are accessible to all.

At first glance, the policy appeal is strong. Courts in cases like *Veek* and *Public.Resource.Org* have reasoned that, once private standards become law, restricting access through paywalls or high-friction portals imposes deadweight losses by charging tolls for access to a non-substitutable public good.

Yet the PRO Codes Act addresses this problem in a way that risks undermining copyright more broadly. By conditioning copyright protection on whether a standard has been incorporated by reference, the bill effectively converts government adoption into a trigger for compulsory licensing at zero price. This approach does not simply guarantee access; it extinguishes property rights whenever the state adopts a private work. That is to say, a third party gets to exercise veto power over an SDO's property rights.

Critically, entities like ICC and NFPA are just as entitled as any other standards body to enforce their copyrights. This approach to funding their operations is not *per se* objectionable, even as litigation has challenged whether incorporated statutes should or should not qualify for a fair-use exception. What is relevant here is how the lobbying-oriented model appears to foment many of the legal crises to which the PRO Codes Act seeks to respond. To the extent there is a problem the courts have not addressed, the fix is not to create a major exception to copyright. It should be to examine the activity that generates such problems and tailor any appropriate responses to that activity. Here, it is likely the combination of political adoption and subsequent reliance on exclusivity that makes the lobbying-oriented model uniquely open to criticism.

Further, the design of the PRO Codes Act could disproportionately harm voluntary-adoption standards bodies, which do not lobby for their codes to be adopted wholesale, but whose works are frequently referenced in federal and state regulations—access to which is very likely already covered under fair use. Unlike lobbying-oriented SDOs, who seek enactment as part of their business model, voluntary-adoption SDOs have little control over whether their codes are cited by regulatory bodies. Under the PRO Codes Act, such adoption would effectively eliminate the SDOs' copyrights, erasing the very revenue stream that sustains the cross-subsidized development of technical safety standards.

The economic consequences of such a shift are significant. If SDOs cannot rely on publication revenues, many would likely have to scale back or abandon development of standards that lack commercial scale. Government bodies could, in theory, step in with funding, but doing so would require major new appropriations and would risk politicizing technical work now performed through professional consensus.

The U.S. advantage in global standards setting has long rested on a decentralized ecosystem of private SDOs, drawing on volunteer expertise and sustained by intellectual property. Weakening the property rights that support this ecosystem would risk slowing code updates, reducing technical quality, and further risk ceding international leadership to rivals. China's "Standards 2035" plan,

for example, explicitly aims to supplant U.S. and European standards as global benchmarks.⁵⁰ A policy that destabilizes U.S. SDOs could inadvertently accelerate that shift.

The PRO Codes Act also raises a more general property-rights concern. Once Congress sets the precedent that state action extinguishes copyright, the principle could spread beyond standards. If textbooks, software, or other works used by government (or, indeed, other “deserving” third parties) were deemed incorporated into a work of “public concern,” would they also lose protection?

The PRO Codes Act’s narrow focus on civil-engineering codes masks the breadth of its doctrinal innovation. It would collapse the distinction between using a work in governance and expropriating it into the public domain. This is a distortion ultimately caused by using one particular business model as the spark to restructure copyright itself.

The PRO Codes Act would fundamentally alter the current balance of law and directly undermine the business models of the voluntary-adoption SDOs. Under existing doctrine, when a voluntary-consensus standard is incorporated by reference, it does not automatically fall into the public domain. Courts have occasionally curtailed copyright (for example, by recognizing nonprofit republication as fair use), but these rulings have been case-by-case and have left intact the broader rights of standards bodies outside those narrow contexts. Agencies guided by OMB Circular A-119 must ensure “reasonable availability,” a requirement that can be satisfied through limited reading rooms or online portals. This approach permits SDOs to continue selling full copies—which are searchable, printable, and portable—while meeting their public-access obligations.

The PRO Codes Act would replace that flexible system with a rigid statutory rule and would, in essence, codify the lobbying-oriented SDOs’ business model. Once a standard is incorporated by reference, it would have to be posted online for free. If the SDO failed to do so, it would lose its copyright altogether. This turns copyright from a stable property right into a contingent interest revocable by government action.

Even compliance would bring risks. By mandating open online posting, the bill strips SDOs of control over how their works are made available and threatens to erode revenue streams that depend on users purchasing official editions. In short, the bill destabilizes SDOs’ rights, undermines their ability to sustain their business model, and exposes them to uncompensated forfeiture of the intellectual property on which their work depends.

A more balanced policy response would start from the premise that copyright is worth preserving as the foundation of creative and technical enterprise. The problem with the lobbying-oriented model is not copyright *per se*, but the way it is coupled with lobbying for wholesale statutory adoption. The PRO Codes Act mistakenly attacks copyright across the board, rather than targeting the lobbying-

⁵⁰ Yi Wu, *China Standards 2035 Strategy: Recent Developments and Implications for Foreign Companies*, CHINA BR. (Jul. 26, 2022), <https://www.china-briefing.com/news/china-standards-2035-strategy-recent-developments-and-their-implications-foreign-companies>.

driven dynamics that generate actual problems in public access. In doing so, it threatens voluntary-adoption organizations that exemplify the public-interest rationale for copyright protection.

It is likely that the best approach to this issue is to do nothing, leaving courts to continue calibrating the balance through doctrines like fair use and the government-edicts rule. That approach already ensures nonprofit republication and public-domain status where texts are enacted verbatim, while leaving SDOs' revenue streams intact. In short, Congress should reject statutory "fair use" expansion in the form proposed by the PRO Codes Act. Codifying a blanket rule that incorporation extinguishes copyright unless the rightsholder gives away his property would put at odds two distinct issues: ensuring access to the law and preserving the economic incentives that sustain the private development of standards.

V. Conclusion

Copyright undergirds the distinct but fragile business models that sustain standards development. For voluntary-adoption SDOs, copyright revenues provide the cross-subsidies needed to maintain a vast portfolio of technical rules, most of which would never be commercially viable on their own. For lobbying-oriented SDOs, copyright plays a different role, functioning as part of a two-stage maneuver, alongside lobbying to secure wholesale adoption. Both models illustrate how property rights serve as the backbone of the standards ecosystem, even as they invite scrutiny from courts and policymakers.

The PRO Codes Act threatens to upend this balance by introducing compulsory licensing by stealth. By tying copyright to government incorporation, the bill does not merely guarantee access but distorts the structure of property rights, creating a precedent that could undermine innovation, erode U.S. competitiveness, and unsettle the careful balance between public access and private incentive. Framed as a transparency measure, it risks entrenching one contested business model, while destabilizing the broader ecosystem of standards development.

The economic stakes are clear. SDOs provide technical infrastructure on a scale and at a level of expertise that government bodies could not replicate without extraordinary cost. Their continued viability depends on predictable intellectual property protections. Undermining those rights in the name of transparency would erode the capacity for innovation and distort the broader architecture of property law.

In short, the PRO Codes Act is a miscalibrated response. It overcorrects problems created by lobbying-driven SDOs and, in doing so, threatens the sustainability of voluntary-adoption SDOs. The better path is not to abandon copyright, but to preserve and refine the flexible tools already available in law—fair use, licensing, and targeted judicial scrutiny. Those mechanisms have long balanced access with incentives, and they remain far better suited to the complexities of standards development than the blunt instrument of statutory compulsory licensing.