AN UPDATED PRO CODES ACT: ENHANCING PUBLIC ACCESS TO PRIVATELY COPYRIGHTED LAWS

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Often, private organizations composed of subject matter experts draft technical standards that describe safety recommendations or "best practices" for certain industries. Legislators and regulators on the federal, state, and local levels will, on occasion, provide legal weight to these privately created standards by incorporating them by reference into the law. Following these standards thus becomes mandatory, but the American people frequently do not have free and unrestricted access to them: The standards' private copyright holders often charge users high fees to even read them. To address this issue, Congress is currently considering the Pro Codes Act, legislation intended to balance the importance of having these private organizations develop industry standards while also ensuring that citizens have sufficient access to the laws that govern them. The present draft of the legislation, however, falls short of truly providing Americans with access to these critical technical standards. This Note proposes various provisions that would strengthen the Pro Codes Act and more appropriately balance the interests of both standards development organizations and the American public.

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"[T]he Roman despot Caligula . . . had laws written in fine print and hung them high up on pillars so that they were not available to nor readable by the Roman citizens affected by such laws."

— *United States v. Kilkenny*.[1]

INTRODUCTION

In 2022, an estimated 6,200 children in the United States were treated in emergency rooms as a result of fallen or tipped-over home furniture.[2] Seeking to prevent these dangerous situations, the U.S. Consumer Product Safety Commission (CPSC) promulgated a new regulation that "prescribes safety requirements for clothing storage units . . . to protect children up to 72 months of age from tip-over-related death or injury."[3] This regulation specifies that all clothing storage units that meet certain criteria "shall comply" with "ASTM F2057-23, *Standard Safety Specification for Clothing*

1. 493 F.3d 122, 126 (2d Cir. 2007) (citing 1 William Blackstone, Commentaries *46).

2. Adam Suchy, U.S. Consumer Prod. Safety Comm'n., Product Instability or Tip-Over Injuries and Fatalities Associated With Televisions, Furniture, and Appliances: 2023 Report 12 tbl. 2 (2024), https://www.cpsc.gov/s3fs-public/2023_Annual_Tip_Over_Report_Posted_2024Feb_FINAL_0.pdf [https://perma.cc/BRE5-EKWG].

3. 16 C.F.R. § 1261.1 (2025).

Storage Units."[4] But the mandatory, legally binding requirements detailed in *ASTM F2057-23* that are designed to reduce child injuries are *not* available in the Code of Federal Regulations (CFR)[5] or the Federal Register.[6] Instead, the CPSC regulation merely *incorporates by reference ASTM F2057-23*,[7] which is a privately created and copyrighted set of standards drafted by ASTM International, a nongovernment organization that develops safety and regulatory standards.[8] As such, the CPSC directs individuals and organizations interested in reading the complete *ASTM F2057-23* standard to either (1) purchase the publication directly from ASTM International[9]—which costs ninety-nine dollars[10]—or (2) travel to view a free library copy at a federal office building near Washington, D.C.[11] The relative inaccessibility of this binding law creates a substantive barrier that prevents the American people from reading—or even knowing—the contents of these mandatory regulations.

This issue of incorporation by reference (IBR) extends far beyond the subject of furniture tip-overs. Estimates indicate that the CFR today contains over twenty-seven thousand incorporations by reference to standards that are often not fully and freely accessible to the public.[12] Indeed, both executive and congressional mandates specifically encourage or—in some instances—require government agencies to utilize references to external

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4. Id. § 1261.2.

5. See id.

6. See Safety Standard for Clothing Storage Units, 88 Fed. Reg. 28,403 (May 4, 2023) (codified at 16 C.F.R. § 1261).

7. 16 C.F.R. § 1261.2.

8. See ASTM Int'l, Helping Our World Work Better 4 (2023), https://www.astm.org/media/wysiwyg/Helping-Our-World-English.pdf [https://perma.cc/X94C-CZ4M] ("More than 30,000 people from 155+ countries create and update standards through ASTM International, one of the world's most respected standards development organizations.").

9. See 16 C.F.R. § 1261.2 (stating that the public "may also obtain a copy [of *ASTM F2057-23*] from ASTM International").

10. ASTM Int'l, ASTM F2057-23: Standard Safety Specification for Clothing Storage Units (2023). Members of the public can purchase either a print copy or a PDF copy of *ASTM F2057-23* for ninety-nine dollars from ASTM's website. ASTM F2057-23: Standard Safety Specification for Clothing Storage Units, ASTM Int'l, https://www.astm.org/f2057-23.html [https://perma.cc/CR5B-24UA] (last visited Aug. 6, 2025). A read-only online version of the document that cannot be downloaded or printed is currently viewable in ASTM International's digital reading room. Reading Room, ASTM Int'l, https://www.astm.org/products-services/reading-room.html [https://perma.cc/YG54-HV8Z] (last visited Aug. 6, 2025). ASTM provides this read-only access voluntarily, and no law prevents the revocation of this access. See Off. of the Fed. Reg., Incorporation by Reference in the CFR, Nat'l Archives, https://www.archives.gov/federal-register/cfr/ibr-locations.html [https://perma.cc/8V8Q-JEFU] (last visited Sep. 7, 2025) ("There is no legal requirement that the general public be able to freely access IBR material online.").

11. See 16 C.F.R. § 1261.2 ("[*ASTM F2057-23*] is available for inspection at the U.S. Consumer Product Safety Commission and at the National Archives and Records Administration (NARA).").

12. Standards Incorporated by Reference (SIBR) Database, Nat'l Inst. Standards & Tech., https://sibr.nist.gov/ [https://perma.cc/3VBJ-SVSF] (last visited Aug. 6, 2024).

standards when possible.[13] Such incorporated references to privately developed standards appear in regulations related to nearly every sector of the economy, "from transportation systems and robotics to the construction of nuclear power plants."[14] Furthermore, attempts to standardize an industry by reference to materials not publicly available extend beyond the federal administrative law and regulatory spaces: Legislative bodies on the state and local levels have also deployed IBR when drafting laws, often leaving crucial municipal regulations (such as model building codes) locked behind a paywall.[15] This Note argues that the most effective solution to increase access to incorporated standards is for Congress to pass a modified version of the Pro Codes Act that includes specific, additional pro-access provisions.

Part I of this Note discusses the background of this "incorporation by reference" practice and further explains the extent to which modern law and regulation rely on it. Part I also details steps that Congress has taken to alter the copyright status of works incorporated by reference and elaborates upon the recently introduced Protecting and Enhancing Public Access to Codes (Pro Codes) Act. Part II explains the problems that IBR creates for Americans and describes why attempts to place all incorporated materials into the public domain are dangerous to our nation's regulatory practices. It also elaborates on why proposals to solve this problem through judicial, executive, and private means are insufficient, inconsistent, or unlikely. In Part III, this Note concludes by proposing a new piece of federal legislation that builds on the basic principles of the Pro Codes Act while incorporating new provisions that will improve Americans' capacity to access incorporated standards.

I. THE ORIGINS AND EXTENT OF INCORPORATION BY REFERENCE

A. *Overview of Incorporation by Reference*

Standards Developing Organizations (SDOs) are private nongovernment organizations that develop "voluntary consensus standards" that provide standardized recommendations and guidelines for a particular industry to "assur[e] quality, compatibility, and other highly desired market characteristics."[16] SDOs in the United States are numerous, produce voluntary standards in nearly every sector of our economy, and include organizations such as the American Petroleum Institute, the

13. See infra notes 33–35 and accompanying text.

14. About, Stop the Pro Codes Act, https://www.stopprocodesact.com/about [https://perma.cc/ZN98-HC37] (last visited Aug. 27, 2025).

15. See, e.g., Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (discussing a situation in which privately developed model building codes were adopted by local governments to become the official building codes of two small towns in Texas).

16. Peter L. Strauss, Private Standards Organizations and Public Law, 22 Wm. & Mary Bill Rts. J. 497, 499–500 (2013) (internal quotation marks omitted).

American Dental Association, the American Concrete Institute, the Specialty Vehicle Institute of America, and the Telecommunications Industry Association.[17] Lawmakers and regulators often attempt to harmonize certain areas of law through "standardization by reference" to standards created by these SDOs, which transforms the SDO-developed standards from voluntary to obligatory.[18] In these instances, government lawmakers typically incorporate (and make binding) an external standard by *referencing* that standard in the text of the law *without reproducing* the full standard in the written law.[19]

This practice of incorporation by reference benefits government lawmakers in several ways. First, relying on SDO-created standards allows the government to effectively outsource the development of regulations and standards to private expert bodies that would otherwise need to be created through government funding and effort.[20] SDOs are generally made up of subject matter experts, and their voluntary standards are often developed in concert with relevant private sector actors and function as a means of assuring "quality, compatibility, and other highly desired market characteristics" in a specific industry.[21] The incorporation of these standards into the law allows agencies and government groups to "protect public safety by integrating federal regulatory requirements with an extensive, pre-existing private regulatory infrastructure."[22] This practice thus prevents government organizations such as the CPSC from having to reinvent the wheel and develop complex, technical regulation specifications in-house and on the taxpayer's dime. Indeed, government agencies rely on SDO standards because they often impose no cost to the taxpayer,

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17. Am. Nat'l Standards Inst., ANSI Accredited Standards Developers 18, 27, 186, 193 (2025), https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/ANSI%20Accredited%20Standards%20Developers/AUG2025ASD.pdf [https://perma.cc/BD5D-K6TC].

18. See, e.g., Strauss, supra note 16, at 502–03 ("At the federal level, the conversion of standards into legal obligations through incorporation by reference had its origin . . . in the hope of giving a kick-start to new federal safety programs, by converting to legal obligations consensus standards already in place.").

19. See, e.g., supra notes 2–11 and accompanying text.

20. See Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2257 (adopted Dec. 8, 2011) ("[Incorporation by reference] furthers important, substantive regulatory policies, enabling agencies to draw on the expertise and resources of private sector standard developers to serve the public interest."); Press Release, Sen. Chris Coons, Senators Coons, Cornyn, Tillis, Whitehouse Introduce Legislation to Ensure Copyright Protection and Public Access to Safety Standards (Mar. 16, 2023), http://coons.senate.gov/news/press-releases/senators-coons-cornyn-tillis-whitehouse-introduce-legislation-to-ensure-copyright-protection-and-public-access-to-safety-standards [https://perma.cc/L8HW-HP5Z] [hereinafter Sen. Coons, Press Release] ("Safety standards protect lives and property, and our country's exceptional system for developing them is independent, consensus-based and doesn't cost the taxpayer a dime." (quoting Jim Pauley, President & CEO, Nat'l Fire Prot. Ass'n)).

21. Strauss, supra note 16, at 499.

22. Emily S. Bremer, On the Cost of Private Standards in Public Law, 63 U. Kan. L. Rev. 279, 282 (2015) [hereinafter Bremer, Cost].

as agencies can "incorporate" SDO standards without paying any sort of licensing fee or other compensation to the SDO.[23] Furthermore, incorporating these standards "by reference" rather than reproducing them completely in the CFR (or another relevant law compilation) is a "more efficient process"[24] that "protect[s] the utility of the Federal Register and the Code of Federal Regulations, reducing their otherwise necessary size by thousands of printed pages."[25]

But this practice comes with potent drawbacks. The only accessibility requirement of incorporated standards is that they be "reasonably available to the class of persons affected thereby."[26] As implemented, "reasonably available" merely means that a physical copy of the IBR standard must be available for examination in a Washington, D.C., reading room.[27] In most instances, the only alternative means for accessing SDO standards—other than traveling to the nation's capital—is to purchase them directly from the SDO.[28] These fees vary significantly, from $76 for a copy of *ASTM F2167-22: Standard Consumer Safety Specification for Infant Bouncer Seats*[29] to $825 for an annual subscription needed to access *NCPDP*

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23. See Stop the Pro Codes Act, https://www.stopprocodesact.com/ [https://perma.cc/8FFZ-D8GJ] (last visited Aug. 6, 2025) ("SDOs . . . are incapable of preventing citation [to an SDO standard] by a governmental agency into laws or regulations.").

24. Shyamkrishna Balganesh, Authoring the Law, 68 J. Copyright Soc'y U.S.A. 353, 406 (2021).

25. Strauss, supra note 16, at 502. Several scholars have critiqued whether this motivation to limit the size of the CFR is relevant in the modern digital age. See id. at 523 ("The arrival of the Internet and the creation of agency electronic reading rooms have both eliminated the space-saving rationale for incorporation by reference and created new obligations of government transparency."); see also Pamela Samuelson, Questioning Copyrights in Standards, 48 B.C. L. Rev. 193, 222 (2007) ("[T]he Internet and World Wide Web now make it very cheap and easy to disseminate standards.").

26. 5 U.S.C. § 552 (2018). As it relates to rulemakings, agencies must also "[d]iscuss, in the preamble of the final rule, the ways that the materials it incorporates by reference are reasonably available to interested parties and how interested parties can obtain the materials" and "[s]ummarize, in the preamble of the final rule, the material it incorporates by reference." 1 C.F.R. § 51.5(b)(2)–(3) (2024).

27. See Strauss, supra note 16, at 503 (explaining that the "reasonably available" requirement has not been implemented to demand more than "requiring single copies to be deposited with the National Archives and retained in agency libraries" (internal quotation marks omitted)); James M. Sweeney, Note, Copyrighted Laws: Enabling and Preserving Access to Incorporated Private Standards, 101 Minn. L. Rev. 1331, 1338 (2017) ("'Reasonably available' simply means providing a physical copy for inspection in Washington, D.C.").

28. See Nina A. Mendelson, Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards, 112 Mich. L. Rev. 737, 806 (2014) ("[W]e must consider the message the government sends by providing free access to IBR rules only in a Washington, D.C., reading room and acquiescing in private entities' charging significant fees for access.").

29. ASTM Int'l, ASTM F2167-22: Standard Consumer Safety Specification for Infant Bouncer Seats (2022); see also ASTM F2167-22: Standard Consumer Safety Specification for Infant Bouncer Seats, ASTM Int'l, https://www.astm.org/f2167-22.html [https://perma.cc/FA65-XQUC] [hereinafter *ASTM F2167-22* Purchase Page] (last visited Aug. 6,

Formulary and Benefit Standard, Implementation Guide, Version 60.[30] Even if one was willing to pay these high fees, the relevant SDO sometimes removes privately copyrighted standards from sale, thus preventing even judges from knowing what "the law" commands.[31]

B. *History and Extent of Incorporation by Reference*

President Ronald Reagan's administration issued Circular A-119,[32] which "directs [federal] agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical."[33] In 1988, the formation of the Commerce Department's National Institute of Standards and Technology (NIST) provided a bureaucratic mechanism to effectuate this preference for privately created standards.[34] In 1996, Congress passed the National

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2025) (purchase page for the standard). *ASTM F2167-22* was incorporated by reference into the law by 16 C.F.R. § 1229.2 (2025).

30. Nat'l Council for Prescription Drug Programs, NCPDP Formulary and Benefit Standard, Implementation Guide, Version 60 (2023); see also Access to Standards, Nat'l Council for Prescription Drug Programs, https://standards.ncpdp.org/Access-to-Standards.aspx [https://perma.cc/KN46-P9UR] (last visited Aug. 6, 2025) (explaining that an NCPDP subscription is necessary to view the organization's incorporated standards); Join Today, Nat'l Council for Prescription Drug Programs, https://ncpdp.org/Join-Today.aspx? [https://perma.cc/4KZV-M4NH] (last visited Sep. 21, 2025) (allowing users to sign up to be an NCPDP member and to pay the annual fee). *NCPDP Formulary and Benefit Standard, Implementation Guide, Version 60* was incorporated by reference into the law by 45 C.F.R. § 170.205(u)(1) (2025).

31. See, e.g., Getty Petroleum Mktg., Inc. v. Cap. Terminal Co., 391 F.3d 312, 320 (1st Cir. 2004) (per curiam) (discussing a lawsuit in which neither the federal district court judge nor the attorneys could find the text of a particular incorporated safety standard, which prevented the judge from determining a company's responsibilities to pay for fire prevention equipment); see also infra notes 177, 189 and accompanying text. In one of the most egregious instances of this practice, the Sheet Metal and Air Conditioning Contractors (SMACNA) discontinued the sale of a 1985 standard regarding air-duct leakage that had been incorporated into federal law, but SMACNA nonetheless accused Public.Resource.Org of copyright infringement when the latter organization published the standard on its own website. Corynne McSherry, EFF Fights Courtroom Shenanigans After Wrongheaded Copyright Claim Blocks Publication of Federal Law, Elec. Frontier Found. (May 29, 2013), https://www.eff.org/deeplinks/2013/05/eff-fights-courtroom-shenanigans-after-wrongheaded-copyright-claim-blocks (on file with the *Columbia Law Review*). Public.Resource.Org sued to protect its right to publish the standards, and SMACNA ultimately declined to defend this lawsuit in court. Id.

32. OMB Circular No. A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546 (Feb. 19, 1998).

33. Id. at 8554.

34. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5111–5115, 102 Stat. 1107, 1427–33 (codified as amended at 15 U.S.C. §§ 271–286 (2018)). NIST is tasked with (among other duties) "cooperat[ing] with other departments and agencies of the Federal Government, with industry, with State and local governments, with the governments of other nations and international organizations, and with private org-anizations in establishing standard practices, codes, specifications, and voluntary consensus standards." Id. § 5112(b)(9), 102 Stat. at 1429.

Technology Transfer and Advancement Act of 1995, *requiring* federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies . . . as a means to carry out policy objectives or activities."[35]

Relying on these rules, federal regulators have allowed the number of federally incorporated SDO standards to balloon in recent years. Today, the CFR contains over twenty-seven thousand IBR standards,[36] a figure that has more than doubled in the last decade.[37] This CFR approximation both underestimates the total number of federal-level incorporations[38] and does not account for state, local, or judicial incorporations.

C. *Previous Legislative Actions*

For the most part, Congress has been hesitant to pursue legislative change that would so dramatically alter either the copyright system or the nation's regulatory practices. Although the Constitution gives the legislative branch the authority to grant copyrights,[39] Congress has largely let the battle over the status of incorporated standards play out in the courts[40] and executive agencies.[41] But in 2012, Congress expressed at least some degree of amenability to legislative actions expanding access to IBR standards. After an SDO told a congressional office that it would need to pay one thousand dollars for a copy of a pipeline safety standard that had been incorporated into the law by agency regulation,[42] Congress enacted

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35. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775, 783 (codified as amended in 15 U.S.C. § 272). Some scholars have argued that this Act and OMB Circular A-119 only apply to "technical standards," which are allegedly different from "regulatory standards or requirements." Strauss, supra note 16, at 559 (internal quotation marks omitted). Thus far, however, agencies have largely "failed to note the differentiation" between these two categories of standards in practice. Id. at 530.

36. Nat'l Inst. of Standards & Tech., supra note 12.

37. See Bremer, Cost, supra note 22, at 280 n.6 (stating that, as of December 2014, the CFR contained over eleven thousand total incorporations by reference).

38. See Emily S. Bremer, Incorporation by Reference in an Open-Government Age, 36 Harv. J.L. & Pub. Pol'y 131, 135 n.11 (2013) [hereinafter Bremer, Open-Government] (noting that the SIBR Database "underestimates the total number of regulatory incorporations, because it includes only *standards*" and "[o]ther kinds of materials which may be copyrighted . . . are routinely incorporated by reference" (emphasis added)); Nat'l Inst. of Standards & Tech., supra note 12 (noting that the SIBR Database does not include incorporation records related to several federal agencies, such as the Department of Transportation).

39. See U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

40. See infra section II.B.

41. See infra section II.C.

42. See Bremer, Open-Government, supra note 38, at 175 (attributing the passage of 49 U.S.C. § 60102(p) to Congress's negative experience attempting to access the SDO's pipeline standards); Charles Duan, Mandatory Infringement, 75 Fla. L. Rev. 219, 241 (2023) (same). But see An Edicts of Government Amendment, Public.Resource.Org, https://

49 U.S.C. § 60102(p), which provided that the Pipeline and Hazardous Materials Safety Administration (PHMSA) "may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site."[43] For the next decade, Congress did not pick up the issue of expanding access to IBR standards.

In 2023, Senator Chris Coons (D-DE) and Representative Darrell Issa (R-CA) returned to the topic by introducing the Protecting and Enhancing Public Access to Codes Act (Pro Codes Act), a piece of federal legislation that proposed a solution for inaccessible IBR standards.[44] Echoing 49 U.S.C. § 60102(p), the most updated version of this Act provided that:

> A standard to which copyright protection subsists under section 102(a) [of the Copyright Act] at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if the applicable standards development organization, within a reasonable period of time after obtaining actual or constructive notice that the standard has been incorporated by reference, makes all portions of the standard so incorporated publicly accessible online at no monetary cost and in a format that includes a searchable table of contents and index, or equivalent aids to facilitate the location of specific content.[45]

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public.resource.org/edicts/ [https://perma.cc/XC25-WKTE] (last visited Aug. 6, 2025) (attributing the passage of 49 U.S.C. § 60102(p) to congressional shock at "the high cost of crucial, legally-mandated safety documents during the BP Gulf Oil Spill").

43. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (codified at 49 U.S.C. § 60102(p) (2018)). To satisfy this statutory provision, PHMSA's website features hyperlinks to the webpages of SDOs that "have posted free viewable copies of their [incorporated] standards." Pipeline & Hazardous Materials Safety Admin., Standards Incorporated by Reference, DOT, https://www.phmsa.dot.gov/standards-rulemaking/pipeline/standards-incorporated-reference [https://perma.cc/T44A-QJMY] (last updated Jan. 13, 2025). PHMSA's website also affirms that the agency "will provide temporary access to any standard that is incorporated by reference per 49 U.S.C. § 60102(p) or proposed for incorporation that is not otherwise available from the relevant SDO." Id. To request this temporary access to an incorporated standard, an individual or business must email PHMSA with their request and include their phone number, physical address, and email address. Id. Studies researching the effect of 49 U.S.C. § 60102(p) have found that it largely failed at truly expanding free access to IBR standards and even impaired PHMSA's ability to regulate. Bremer, Cost, supra note 22, at 282 (explaining that "the law did not much expand the free online availability of PHMSA's incorporated standards" and even "threatened PHMSA's ability to protect public safety" when the agency could not successfully negotiate agreements to make SDO standards publicly available).

44. S. 835, 118th Cong. (2023); H.R. 1631, 118th Cong. (2023). The updated version of the bill introduced in the 119th Congress is H.R. 4009, 119th Cong. (2025).

45. H.R. 4009, 119th Cong. (2025).

Although the 118th Congress did not pass the Pro Codes Act,[46] the legislation sparked intense public debate about the ideal copyright status of IBR codes. SDO supporters of the Pro Codes Act argued that it would "help to preserve the current system . . . which incentivizes standards development organizations to continue creating codes and standards that benefit society, the economy, and public safety" while also "guaranteeing that the public has access to [standards] when they are incorporated by reference into law."[47] Various members of Congress have expressed their support for this legislation.[48] A wide variety of SDOs have also announced their endorsement of the Pro Codes Act, including the Copyright Alliance, the International Code Council, the American Hospital Association, and the National Fire Protection Association.[49]

Public interest organizations and legal scholars, however, have raised concerns about the Act's "publicly accessible online" provision, contending that this specific phrasing would allow for SDOs to provide "access" that is hindered by unideal document formatting, cumbersome login requirements, and the use of issue-prone online "reading rooms."[50] Those opposed to the Act allege that "[w]hen standards are made available [as specified in the Act], they are often inaccessible to people with print

46. Although a majority of the House of Representatives voted to pass the Act in July 2024, it fell two votes short of satisfying the two-thirds majority vote requirement necessary to suspend the House rules and pass the Act without debate. See Roll Call 357—Bill Number: H. R. 1631, Clerk of the U.S. House of Representatives (Jul. 22, 2024), https://clerk.house.gov/Votes/2024357 [https://perma.cc/PJQ8-5T5D]. The full Senate never voted on the Act. See S.835—Pro Codes Act, Congress.gov, https://www.congress.gov/bill/118th-congress/senate-bill/835 [https://perma.cc/NV2S-SDQH] (last visited Aug. 6, 2025).

47. Press Release, Copyright All., Copyright Alliance CEO Issues Statement in Support of Pro Codes Act (Mar. 16, 2023), https://copyrightalliance.org/press-releases/support-pro-codes-act/ [https://perma.cc/VYS6-6XCL] (internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.).

48. See, e.g., Sen. Coons, Press Release, supra note 20; Press Release, Congressman Darrell Issa, Congressman Issa, Ross Introduce Legislation to Protect Public Access to Federal Rules (Mar. 18, 2023), https://issa.house.gov/media/press-releases/congressman-issa-ross-introduce-legislation-protect-public-access-federal [https://perma.cc/K4JW-XR4M].

49. Tell Congress to Pass the Pro Codes Act, Int'l Code Council, https://www.procodesact.com/ [https://perma.cc/6D8T-KJWA] (last visited Aug. 6, 2025). But not all major SDOs have endorsed the Pro Codes Act. For example, the American Society of Mechanical Engineers and ASTM International have joined an advocacy coalition that claims the Pro Codes Act would "[p]ut[] the entire standards-writing industry in jeopardy and risk[] American public safety and national security." About, Stop the Pro Codes Act, supra note 14.

50. See Ass'n of Rsch. Librs., The Real Truth About the "Pro Codes" Act 4 (2024), https://www.arl.org/wp-content/uploads/2024/03/The-Real-Truth-about-the-Pro-Codes-Act.pdf [https://perma.cc/EME6-72DF] (internal quotation marks omitted) (stating that the Act would allow SDOs to provide standards access through "reading rooms [with] technical and legal limitations that create barriers to users," such as "prohibit[ing] users from copying, printing, or downloading text" and requiring users to enter "personal information" before being granting access to the "reading rooms").

disabilities; the public is restricted in how they can use and share to the standards; and they must sacrifice their personal privacy for the privilege [to access the standards online]."[51] Representative Zoe Lofgren (D-CA) echoed similar concerns during a congressional markup of the Pro Codes Act, describing the difficult and invasive steps necessary for one to access standards on SDO websites under the Act.[52] These critics of the Pro Codes Act share a common belief: "When it comes to mandates adopted into law, any barriers to access, however small, are unacceptable."[53]

II. THE DRAWBACKS OF THE STATUS QUO AND PREVIOUSLY PROPOSED SOLUTIONS

The United States has long embraced the idea that "the law" should be known by and accessible to the people.[54] The increasing reliance on laws written and controlled by private organizations, however, has placed significant segments of our binding rules behind paywalls.[55] Although "[e]very citizen is presumed to know the law,"[56] incorporated SDO

51. Am. Council of the Blind et al., Re: Opposition to S. 835, the "Protecting and Enhancing Public Access to Codes Act" (Pro Codes Act) 1 (2024), https://www.arl.org/wp-content/uploads/2024/04/Pro-Codes-Judiciary.pdf [https://perma.cc/39ZB-G4FA]; accord Canyon Brimhall, The Pro Codes Act Attempts to Copyright the Law. But Is It Constitutional?, R St. Inst. (Dec. 4, 2024), https://www.rstreet.org/commentary/the-pro-codes-act-attempts-to-copyright-the-law-but-is-it-constitutional/ [https://perma.cc/YH7L-M5NT] (stating that the Pro Codes Act "would allow companies to upload their standards in ways that are difficult to access, read, or understand" and would "give SDOs the right to require the creation of an account . . . in order to read the codes").

52. See House Judiciary GOP, Markup of H.R. 1631, H.R. 7737, H.R. 3591, H.R. 3269, H.R. 7581, and H.R. 4951, at 59:37 (Youtube, Apr. 16, 2024), https://www.youtube.com/watch?v=Qy5ZOzD90WE (on file with the *Columbia Law Review*) [hereinafter Pro Codes Act 2024 House Markup] (statement of Rep. Lofgren) ("[P]eople cannot be held to a standard of law if they have to pay or give up personal rights or information to know what that law is.").

53. Brimhall, supra note 51.

54. See, e.g., Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886) ("Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access . . . and that it is against sound public policy to prevent this . . . ."); James Madison, Notes of Debates in the Federal Convention of 1787, at 434 (Ohio Univ. Press 1966) (1840) ("The people have a right to know what their Agents are doing or have done . . . ." (quoting James Wilson)); see also D.R. Jones, Under the Umbrella: Promoting Public Access to the Law, 29 J. Intell. Prop. L. 1, 4–5 (2021) ("It is a fundamental principle of law in the United States that the government must make laws known to people since people must obey the laws.").

It should be emphasized that this Note deals with the theme of "access to the law" in its most basic sense: the ability to physically read and know the written law. It does not address more complicated issues related to the accessibility of the legal system generally or the capacity of nonlawyers to understand "the law."

55. See 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 5.12[A] (2025) (describing the "increasing trend toward state and federal adoptions of model codes"); see also supra notes 36–37 and accompanying text.

56. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1507 (2020) (internal quotation marks omitted) (quoting *Nash*, 6 N.E. at 560).

standards today are often inaccessible to the American population. As discussed, many IBR SDO standards are accessible only by either purchasing the standard from the SDO or by traveling to a reading room in Washington, D.C.[57] According to some SDOs, this status quo is unproblematic or even necessary.[58] These organizations aspire to have their voluntary consensus standards incorporated into the law due to the financial incentives that incorporation brings. Much of the revenue gained by SDOs stems from their sale of standards (particularly, binding standards), which, in turn, allows them to fund the development of updated standards.[59] Furthermore, "those directly governed by a particular standard should find the cost of obtaining it . . . both trivial in relation to their other costs and beneficial to them in avoiding the otherwise substantial cost of personally obtaining the same information."[60] This business focus, however, ignores that (1) individuals outside of major businesses may have interests in knowing these IBR laws and (2) citizens more generally have the right to know the laws that bind them.[61] While it is widely agreed that private standards development is beneficial for American society,[62] the status quo must be improved upon to ensure that the American people, small businesses, and interested parties can know *and follow* the laws of this nation. The principle that ignorance of the law is no excuse for having broken it[63] can only be effectuated if authorities do not write the law on high pillars in the town square or lock it behind the paywalls of privately run storefronts.

57. See supra notes 26–28 and accompanying text.

58. See, e.g., About, Stop the Pro Codes Act, supra note 14 ("[The current] standards development system has worked for decades, providing health and safety codes and standards for the most integral components of our society from transportation systems and robotics to the construction of nuclear power plants.").

59. See Tell Congress to Pass the Pro Codes Act, supra note 49 ("[C]opyright protection for the codes and standards [that SDOs] develop . . . ensures [that SDOs] can recoup development costs and are incentivized to create new codes and keep existing ones updated . . . .").

60. Strauss, supra note 16, at 508. This claim has some merit: It is unlikely that major furniture manufacturers such as Williams-Sonoma or IKEA would struggle to pay the ninety-nine-dollar cost to access *ASTM F2057-23*. See FY24 Year in Review, IKEA, https://www.ikea.com/global/en/our-business/how-we-work/year-in-review-fy24/ [https://perma.cc/4H7T-ZUEL] (last visited Aug. 6, 2025) (listing IKEA's fiscal year 2024 sales as over forty-five billion euros); Williams-Sonoma, Inc. (WSM), Yahoo Fin., https://finance.yahoo.com/quote/WSM/ (on file with the *Columbia Law Review*) (last visited Aug. 13, 2025) (listing Williams-Sonoma's market capitalization as over twenty-five billion dollars).

61. See supra note 54 and accompanying text.

62. See supra notes 20–25 and accompanying text.

63. See, e.g., Letter from Thomas Jefferson to André Limozin (Dec. 22, 1787), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0460 [https://perma.cc/3GBL-WY8J] ("[I]gnorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can be always pretended.").

As this Note argues, the best way to increase access to IBR standards in the current political climate is for Congress to pass a modified version of the Pro Codes Act that includes additional pro-access provisions. Despite receiving much support,[64] the Pro Codes Act leaves fundamental gaps that will still prevent Americans from reading the laws that bind them. These gaps can be closed with commonsense modifications to the legislation, which this Note discusses in Part III. Prior to discussing these modifications, this Note addresses the variety of alternative judicial, administrative, and private remedies that others have previously proposed and explains why they are insufficient to address the problem at issue.

A. *Placing Standards in the Public Domain*

Activists in the copyright space most commonly propose that all incorporated SDO works that have the binding force of law should be placed in the public domain. Many have argued that such a rule should stem from congressional legislation[65] or from a judicial interpretation of existing copyright law.[66] In this vein, organizations like Public.Resource.Org[67] and the Electronic Frontier Foundation[68] advocate for and bring suit in court to expand access to copyrighted IBR standards. Carl Malamud, the founder of Public.Resource.Org, has embraced the idea that these rules should be in the public domain,[69] and his

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64. See, e.g., Tell Congress to Pass the Pro Codes Act, supra note 49 (listing various organizations, SDOs, and members of Congress that support the Pro Codes Act).

65. See, e.g., An Edicts of Government Amendment, supra note 42 ("As this Committee considers revisions to the Copyright Act, there is one simple change that would make a world of difference to the functioning of our system of government, which is to specify . . . that 'edicts of government . . . are not copyrightable for reasons of public policy.'" (second alteration in original) (quoting U.S. Copyright Off., Compendium of Copyright Office Practices II § 206.01 (1984))); see also Sweeney, supra note 27, at 1362 ("This Note suggests that Congress create a provision specifically altering the copyright of a protected work that has been given legal force, by assigning that work to the public domain.").

66. See infra section II.B.

67. See Carl Malamud, Public.Resource.Org, Comment Letter on Commercial Diving Operations—Reopening of Comment Period 3 (Oct. 23, 2015), https://www.regulations.gov/comment/USCG-1998-3786-0216 [https://perma.cc/D622-DA9V] (arguing that "it is essential that citizens of the United States have the ability to freely read and speak the law" and that "materials proposed to be incorporated by reference would be under severe restrictions on access and use").

68. See Freeing the Law With Public.Resource.Org, Elec. Frontier Found., https://www.eff.org/cases/publicresource-freeingthelaw (on file with the *Columbia Law Review*) (last visited Aug. 6, 2025) ("Private organizations must not be allowed to abuse copyright to control who can read and speak the law, or where and how laws can be accessed.").

69. See id. ("Technical standards incorporated into law are some of the most important rules of our modern society. In a democracy, the people must have the right to read, know, and speak about the laws by which we choose to govern ourselves." (internal quotation marks omitted) (quoting Carl Malamud, President & Founder, Public.Resource.Org)).

organization has made these arguments before Congress, administrative agencies, and U.S. courts of appeals.[70]

But a unilateral rule placing IBR works into the public domain would threaten to impair the important contributions that SDOs make in the realm of standards development.[71] Professors Melville and David Nimmer assert that the wholesale placement of IBR works into the public domain could "prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes."[72] The Administrative Conference of the United States has emphasized the "significant value of the public–private partnership in standards,"[73] and a blanket public domain assignment jeopardizes that partnership, as SDOs have repeatedly emphasized that their business models rely on the purchase of their model codes and standards.[74] Without this revenue, some SDOs claim that they would be unable to benefit society with their expertly developed modern standards.[75] Furthermore, requiring SDOs' works to be placed in the public domain when they are incorporated into the law could raise issues under the Takings Clause of the U.S. Constitution, which prohibits the government from taking "private property" for "public use" without providing "just compensation."[76] Members of the judiciary and legal scholars have acknowledged this concern,[77] although some have argued that the Takings Clause is not

70. See, e.g., Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437, 444 (D.C. Cir. 2018) (making this argument before a court of appeals); supra notes 65, 67 and accompanying text (making this argument before Congress and administrative agencies).

71. See Facility Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 968 (E.D. Mo. 2023) (noting "potential risks of adopting a bright line rule that any privately developed model code adopted into state law automatically becomes part of the public domain" because it "could disincentivize private organizations from developing, publishing, and updating essential technical regulations and may raise significant concerns under the Takings Clause").

72. Nimmer & Nimmer, supra note 55, § 5.12[A].

73. Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2258 (adopted Dec. 8, 2011).

74. See, e.g., About, Stop the Pro Codes Act, supra note 14 (arguing that "mak[ing] standards available for free online" could "strip [SDOs] entirely of their ability to generate revenue"); Press Release, Copyright All., supra note 47 ("Without effective copyright protections, there is grave risk that [SDOs] will no longer be able to produce the high-quality codes and standards that the public and lawmakers have come to rely on." (internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.)); supra note 59 and accompanying text.

75. See supra note 74 and accompanying text.

76. U.S. Const. amend. V.

77. See, e.g., CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc., 44 F.3d 61, 74 (2d Cir. 1994) ("[A] rule that the adoption of [an IBR standard] by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution."); Emily S. Bremer, Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference, 71 Admin. L. Rev. 315, 334 (2019) (posing the question: "[If] [c]opyright protection for

applicable in those instances in which SDOs market their codes to government agencies and actively pursue the incorporation of their standards.[78] Despite ambiguity as to whether copyrights are "private property" to which the Takings Clause would apply,[79] automatically placing all IBR standards into the public domain would jeopardize a regulatory system highly reliant on the private development of necessary safety standards and would risk requiring the government to retroactively pay for all standards that have been previously incorporated.

B. *Judicial Involvement*

Over the years, disputes about access to SDO materials that have been incorporated by reference in the law have appeared before various courts. Courts have contemplated (and occasionally ruled) that materials incorporated by reference have limited or completely dissolved copyright protection as a result of their incorporation. Nevertheless, judicial solutions to increase access to IBR works not only are detrimental to the extent that they could possibly unilaterally place IBR works into the public domain[80] but also have been inconsistently determinative in cases that have arisen so far. Courts of appeals have split as to whether IBR standards lose copyright protection upon incorporation,[81] and it is unclear how recent Supreme Court decisions will impact this issue.[82] The following sections discuss this ambiguity in courts' rulings as it relates to the dominant doctrines of copyright law that scholars argue could be used to justify a judicial rule placing IBR works into the public domain.

1. *Government Edicts Doctrine*

a. *Early Cases.* — The government edicts doctrine is the most oft-cited area of copyright law through which some have argued that incorporated standards might lose copyright protection and enter the public domain. Generally, Congress prescribes the guidelines and extent of copyright

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incorporated materials, including standards, could be eliminated legislatively, . . . would the incorporation by reference of a standard into a regulation effectuate a taking that requires compensation under the Constitution's Takings Clause?").

78. See Int'l Code Council, Inc. v. UpCodes, Inc., No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *14 (S.D.N.Y. May 27, 2020) (stating that, when an SDO "undisputedly encourages the adoption of its model codes into law as a general matter," this solicitation "counsels against according . . . Takings Clause concerns particularly great weight").

79. See Kevin J. Hickey, Cong. Rsch. Serv., R47656, Copyright in Standards Incorporated by Reference Into Law and the Pro Codes Act 10–11 & nn.123–124 (2023) (examining and summarizing many scholarly works on the subject and reaching the conclusion that "[t]he weight of authority" suggests that copyrights *are* subject to the Takings Clause).

80. See supra section II.A.

81. See infra section II.B.1.a.

82. See infra section II.B.1.b.

protections in the United States.[83] But the unique government edicts doctrine refers to the *judicially created* doctrine holding that (certain) government materials cannot be copyrighted.[84] The government edicts doctrine was formed by a series of three Supreme Court decisions from the nineteenth century: In *Wheaton v. Peters*, the Court held that neither judges nor court reporters can hold copyright in judicial opinions.[85] In *Banks v. Manchester*, the Court expanded this principle, stating that judges cannot hold copyright in *any* writings they create "in their capacity as judges," including statements of cases and headnotes that do *not* carry the force of law.[86] Finally, in *Callaghan v. Myers*, the Court held that a court reporter *can* hold copyright in the explanatory materials they create, such as case headnotes, tables of contents, and indices.[87] The Supreme Court did not take up another government edicts doctrine case until 2020.[88]

During the intervening 125 years, various courts made attempts to interpret and apply these nineteenth-century holdings. Some circuits formulated a broad interpretation of the government edicts doctrine, holding that *any* binding legal materials—including IBR standards—could *not* be copyrighted. The First Circuit embraced this theory in its 1980 decision *Building Officials & Code Administrators v. Code Technology, Inc.*,[89]

83. See U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

84. See Balganesh, supra note 24, at 360 ("The rule denying copyright protection to edicts of government (the 'government edicts doctrine') can be traced back to nineteenth century judicial opinions. In the years since, it has continued to remain a common law doctrine, operating without direct recognition in the text of the copyright statute.").

85. 33 U.S. 591, 668 (1834) (holding "that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right").

86. 128 U.S. 244, 253 (1888) (holding that "[j]udges . . . can themselves have no pecuniary interest or proprietorship, as against the public at large, in . . . whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves").

87. 128 U.S. 617, 649 (1888) (holding that "the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index" are "work[s] of the reporter" that "may be the lawful subject of copyright"); see also id. at 647 ("[I]n the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government[,] . . . [a court reporter] is not deprived of the privilege of taking out a copyright, which would otherwise exist.").

88. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).

89. 628 F.2d 730 (1st Cir. 1980). This case involved a model building code created and copyrighted by Building Officials and Code Administrators International, Inc. (BOCA) that was ultimately chosen to become the official "Commonwealth of Massachusetts State Building Code." Id. at 732. BOCA sued a publisher that attempted to sell copies of this building code, claiming that it had copyright in the work and could be the only authorized seller of it. Id. Interpreting the government edicts doctrine, the First Circuit held that "[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." Id. at 734. The court grounded this framing of

and the Fifth Circuit followed suit in its 2002 en banc decision in *Veeck v. Southern Building Code Congress International, Inc.*[90] Other circuits, however, rejected a broad interpretation of the government edicts doctrine. Contrary to the First and Fifth Circuits, the Second Circuit *upheld* protections for an IBR standard in its 1994 decision *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,[91] and the Ninth Circuit reached a similar conclusion in its 1997 ruling in *Practice Management Information Corp. v. American Medical Ass'n.*[92] The Supreme Court effectively resolved

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the government edicts doctrine in due process: "[I]f access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them." Id.; see also id. at 734–35 ("[T]he holder of a copyright has the right to refuse to publish the copyrighted material . . . and may prevent anyone else from doing so, thereby preventing any public access to the material. . . . [T]his . . . can[not] be squared with the right of the public to know the law . . . ." (citing Fox Film Corp. v. Doyal, 286 U.S. 123 (1932))). Although the court declined to decide this case finally (as this appeal was merely on the matter of a preliminary injunction), the court asserted that "the same policies applicable to statutes and judicial opinions" under the government edicts doctrine may "apply equally to regulations of this nature." Id. at 735.

90. 293 F.3d 791 (5th Cir. 2002) (en banc). The Fifth Circuit found these early Supreme Court cases to "enunciate the principle that 'the law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law." Id. at 800. Based on this interpretation, the Fifth Circuit held that a website's sharing of a privately developed model building code did *not* infringe the code author's copyright because the model codes had been adopted "wholesale" as the official building codes of two Texas towns. Id. at 804. The court affirmed 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." Id. at 799.

91. 44 F.3d 61 (2d Cir. 1994). This case involved the copyright status of a privately developed compilation of used car values that had been incorporated by reference into the law by various state insurance statutes and regulations. Id. at 63. Regarding whether this compilation had entered the public domain, the court stipulated that it was "not prepared to hold that a state's reference to a copyrighted work as a legal standard . . . results in loss of the copyright." Id. at 74; see also id. at 73 (rejecting the argument that "if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection"). Specifically, the court noted that such a holding could potentially violate the Takings Clause of the Constitution. Id. at 74. For more discussion of the Takings Clause as it relates to IBR standards, see supra notes 76–79 and accompanying text; infra section III.B.4.

92. 121 F.3d 516 (9th Cir. 1997), amended by, 133 F.3d 1140 (9th Cir. 1998). In this case, the Ninth Circuit declined to hold that a privately authored coding system that was incorporated into a government reimbursement scheme through publication in the Federal Register lost its copyright protection. Id. at 521. The court discussed two factors that it believed underpinned the Supreme Court's decision in *Banks*: the goals of copyright and the due process requirement of free access to the law. Id. at 518–19. On this first point, the Ninth Circuit explained that, "'[t]o vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity,' a matter of particular significance in this context because of 'the increasing trend toward state and federal adoptions of model codes.'" Id. at 518 (quoting 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.06[C], at 5–92 (1996)). On the free access question, the court stated that the "due process requirement of free access to the law[] may be relevant" but that it did not "justify termination of the [plaintiff's] copyright" when "[t]here is no evidence that anyone wishing to use the [IBR code] has any difficulty

this circuit split in 2020 when it took up its first government edicts doctrine case since the 1800s.

b. *Georgia v. Public.Resource.Org, Inc.* — In *Georgia v. Public.Resource.Org, Inc.*, the Supreme Court addressed whether the State of Georgia could hold copyright in an annotated version of its state code and charge individuals to access it.[93] In this case, the annotated state code was voted on and approved by the state legislature, and the only *official* version of the state code that could be cited by parties in court was the annotated version.[94] Clarifying the meaning of its three early government edicts cases, the Supreme Court held:

> The animating principle behind [the government edicts doctrine] is that no one can own the law. "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should have free access" to its contents. Our cases give effect to that principle in the copyright context through construction of the statutory term "author." Rather than attempting to catalog the materials that constitute "the law," the doctrine bars the officials responsible for creating the law from being considered the "author[s]" of "*whatever work* they perform in their capacity" as lawmakers.[95]

Under this new interpretation of the government edicts doctrine as a ban on *lawmakers* being "authors" of works created in their capacity as lawmakers (rather than a ban on the copyright of "the law" more generally), private standards likely *retain* their copyright protection after being incorporated into the law. SDOs are not "authors" that create works "in their capacity as lawmakers."[96] Although IBR standards become "the law" upon incorporation, *Georgia v. Public.Resource.Org, Inc.* indicates that classification as "the law" has no impact on copyright protections under the government edicts doctrine: "Instead of examining whether given material carries 'the force of law,' [courts] ask only whether the author of the work is a judge or a legislator."[97] In this clarified framework of the government edicts doctrine, the model building codes at issue in *Building*

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obtaining access to it" and where "[t]he [plaintiff's] right under the Copyright Act to limit or forgo publication of the [IBR code] poses no realistic threat to public access" because "[t]he [plaintiff] has no incentive to limit or forgo publication." Id. at 519.

93. 140 S. Ct. 1498, 1505 (2020).

94. Id. at 1504–05.

95. Id. at 1507 (second and third alterations in original) (footnote omitted) (citations omitted) (first quoting Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886); then quoting Banks v. Manchester, 128 U.S. 244, 253 (1888)).

96. Id.

97. Id. at 1513; see also Ronald Mann, Opinion Analysis: Sharply Divided Bench Rejects Georgia's Copyright in Annotations of Georgia Statutes, SCOTUSblog (Apr. 27, 2020), https://www.scotusblog.com/2020/04/opinion-analysis-sharply-divided-bench-rejects-georgias-copyright-in-annotations-of-georgia-statutes/ [https://perma.cc/NUX6-N8PQ] (summarizing the holding in *Georgia v. Public.Resource.Org, Inc.* as affirming that "the 'government edicts' doctrine . . . prevent[s] copyright protection for . . . annotations of . . . statutes that are prepared at the behest of the legislature").

Officials & Code Administrators and *Veeck* would likely have had their copyrighted status upheld.[98]

2. *Fair Use Doctrine.* — Since *Georgia v. Public.Resource.Org, Inc.*, the government edicts doctrine has fallen out of favor as a theoretical judicial tool for improving the incorporation by reference problem.[99] Professor Shyamkrishna Balganesh summed up this impact most accurately: "The government edicts doctrine . . . does not—when understood through the authorship rationale—operate as a blunt instrument to deny copyright protection to any expression that the government renders obligatory."[100] As such, many courts post-*Georgia v. Public.Resource.Org, Inc.* have turned to the doctrine of fair use to find that the sharing of privately developed codes incorporated into the law is not copyright infringement,[101] a solution echoed, in part, by Professors Nimmer and Nimmer.[102]

The fair use doctrine is a statutory affirmative defense to copyright infringement that involves a judicial balancing of four factors:

> (1) the purpose and character of the use . . . ;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[103]

Many recent decisions about incorporated standards that rely on the fair use doctrine are grounded in *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, a pre-*Georgia v. Public.Resource.Org, Inc.* decision

98. But see Canadian Standards Ass'n v. P.S. Knight Co., 112 F.4th 298, 307 (5th Cir. 2024) (relying on *Veeck* post-*Georgia v. Public.Resource.Org, Inc.* to hold that "because [an SDO's] model codes are incorporated into Canadian law, [defendant's] copying of those codes is not infringement"), cert denied, 145 S. Ct. 1135 (2025) (mem.).

99. See Int'l Code Council, Inc. v. UpCodes, Inc., No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *8 (S.D.N.Y. May 27, 2020) ("Because [an SDO] is a private party that lacks the authority to make or interpret the law, the Government Edicts doctrine is clearly not dispositive of this case. But the doctrine provides significant guidance that this Court must keep in mind when addressing . . . the [adopted codes].").

100. Balganesh, supra note 24, at 410.

101. See, e.g., Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 82 F.4th 1262, 1267 (D.C. Cir. 2023) ("[Defendant's] copying of material incorporated by reference into law, for free dissemination to the public, was fair use."); Facility Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 973 (E.D. Mo. 2023) ("[T]he Court is persuaded that [defendant's] posting of the [SDO's standards] that have been adopted into law likely constitutes fair use."); Nat'l Fire Prot. Ass'n v. UpCodes, Inc., No. CV 21-5262 DSF (E), 2021 WL 4913276, at *2 (C.D. Cal. Aug. 9, 2021) (stating that "[t]he Court need not reach the parties' various arguments about the importance of authorship and merger, or whether guiding notes are part of the law" because the plaintiff did not demonstrate that "[defendant's] reproduction of its standards is not fair use").

102. See Nimmer & Nimmer, supra note 55, § 5.12[A] ("[F]ailure to allow widespread access to governing law could . . . require recognition of a fair use defense for a defendant who reproduced such a copyrighted code for his own personal use." (footnote omitted)).

103. 17 U.S.C. § 107 (2018).

from the D.C. Circuit in which the court reached a determination that "in many cases, it may be fair use . . . to reproduce part or all of a technical standard in order to inform the public about the law."[104] Here, the D.C. Circuit held that "standards incorporated by reference into law are, at best, at the outer edge of 'copyright's protective purposes.'"[105] The court explained that because IBR standards "fall at the factual end of the fact-fiction spectrum"[106] and because "the consequence of the incorporation by reference [at issue] is virtually indistinguishable from a situation in which the standard had been expressly copied into law,"[107] Public.Resource.Org's online posting of several incorporated standards could qualify for a fair use defense.[108]

This fair use doctrine, however, is not a permanent solution to expand access to incorporated codes, as the application of the fair use factors "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[109] With the fair use status of IBR standards being "assessed standard by standard and use by use,"[110] the fair use doctrine requires both SDOs and public access organizations to spend time and resources litigating in court over the access to specific standards. A legislative solution clarifying the copyright status of IBR standards would limit the need for parties to appear in court and would provide a sense of consistency for SDOs that develop these critically important standards.[111]

3. *Merger Doctrine*. — It has also been argued that IBR standards should be considered part of the public domain under copyright's merger doctrine. Copyright law protects the *expression of ideas* but does not protect

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104. 896 F.3d 437, 453 (D.C. Cir. 2018).

105. Id. at 451 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

106. Id.

107. Id. at 452. But the court stipulated that "where the incorporation does not lend to such easy substitution, fair use is harder to justify." Id.

108. In this case, the district court had granted summary judgment to the SDOs, but the D.C. Circuit reversed and remanded for further factual development. Id. at 458. When it later reached the merits, the D.C. Circuit found that Public.Resource.Org's posting of the incorporated standards was a fair use. See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 82 F.4th 1262, 1267, 1272 (D.C. Cir. 2023) (finding fair use when the "[t]he first three [fair use] factors strongly support holding that Public Resource's posting of incorporated standards was fair use" and that "the fourth fair-use factor does not significantly tip the balance one way or the other").

109. *Campbell*, 510 U.S. at 577; accord *Am. Soc'y for Testing & Materials*, 896 F.3d at 451 ("Faithfully reproducing the relevant text of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value, but whether [Public.Resource.Org's] specific use serves that value must be assessed standard by standard and use by use.").

110. *Am. Soc'y for Testing & Materials*, 896 F.3d at 451.

111. But see Hickey, supra note 79, at 13 (stating that, "even if the Pro Codes Act were enacted, groups like [Public.Resource.Org] may still assert fair use arguments").

ideas themselves.[112] Under the merger doctrine, however, "expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself."[113] In these instances, "the idea 'merges' with the expression, such that a given idea is inseparably tied to a particular expression."[114]

"[M]ost merger cases involve works that are uncopyrightable when first created," but "some courts have held that an initially copyrightable work may be disqualified for copyright protection over time."[115] The Fifth Circuit applied the merger doctrine in *Veeck* and invalidated the plaintiff's copyright in its model building codes because, upon incorporation into the law, the model codes "were transformed into the 'fact' and 'idea' of the towns' building codes" such that the defendant thus "could not express the enacted law in any other way."[116] But the Ninth Circuit rejected

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112. See 17 U.S.C. § 102(b) (2018) ("In no case does copyright protection for an original work of authorship extend to any idea . . . ."); see also Baker v. Selden, 101 U.S. 99, 105 (1879) ("The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. . . . The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.").

113. BellSouth Advert. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436, 1442 (11th Cir. 1993) (internal quotation marks omitted) (quoting Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991)); see also Kohus v. Mariol, 328 F.3d 848, 856 (6th Cir. 2003) ("To this end, the merger doctrine establishes that '[w]hen there is essentially only one way to express an idea, the idea and its expression are inseparable [i.e., they merge,] and copyright is no bar to copying that expression.'" (alterations in original) (quoting Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 606 (1st Cir. 1988))). This rationale, which has its roots in "preventing anticompetitive behavior," seeks to ensure that future creators are able to express ideas "without seeking permission from [a] copyright owner." Shubha Ghosh, Legal Code and the Need for a Broader Functionality Doctrine in Copyright, 50 J. Copyright Soc'y U.S.A. 71, 101–02 (2003).

114. Nimmer & Nimmer, supra note 55, § 13D.29 (citing Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Grp., 348 F. Supp. 2d 845, 854 (E.D. Mich. 2004)).

115. Samuelson, supra note 25, at 215. This process mirrors aspects of trademark law's genericide doctrine. Paul Goldstein, Goldstein on Copyright § 2.3.2.1 (3d ed. 2025). This doctrine dictates that "a once-viable trademark may become unprotectable because widespread public use of the mark as a common name for a product or service causes it to lose its source significance." Samuelson, supra note 25, at 219; see also 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:1 (5th ed. 2025) ("[I]f one seller develops trademark rights in a term which a majority of the relevant public then appropriates as the name of a product, the mark is a victim of 'genericide' and . . . the designation enters the 'linguistic commons' and is free for all to use.").

116. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 802 (5th Cir. 2002) (en banc). In this case, the Fifth Circuit invalidated the plaintiff's copyright on two distinct grounds: the government edicts doctrine, see supra note 90 and accompanying text, and the merger doctrine.

Scholars such as Professor Shubha Ghosh have argued for an even broader interpretation of the merger doctrine, asserting that courts should apply the doctrine by considering "whether protection of the expression would foreclose or limit potentially valuable uses of the work," rather than deploying "a mechanical application of categories like ideas and expression." Ghosh, supra note 113, at 104, 109. Under this framework, the merger doctrine in the similar case of *Practice Management Information Corp. v. American Medical Ass'n.*[117] There, the court stated that it "has not allowed the owners of copyrights in expressions mandated by industry standards to use their copyrights to stifle independent creative expression in the industry."[118] Nevertheless, the court further stipulated that the copyright of the code at issue "simply prevents wholesale copying of an existing system" but does not "stifle independent creative expression in the medical coding industry" or "prevent . . . competitors from developing comparative or better coding systems and lobbying the federal government and private actors to adopt them."[119] As such, the Ninth Circuit rejected the argument that the merger doctrine should invalidate the copyright of an IBR standard.[120]

The Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* seems to refute the Fifth Circuit's arguments in *Veeck.* According to the Court, the general principle that "'[e]very citizen is presumed to know the law[]' and . . . 'should have free access' to its contents"[121] is "give[n] effect . . . in the copyright context through construction of the statutory term 'author' . . . [r]ather than attempting to catalog the materials that constitute 'the law.'"[122] In other words, the "materials that constitute 'the law'" are only exempt from copyright protection insofar as they are drafted by a lawmaker acting in their lawmaking capacity.[123] Even though SDO-drafted IBR standards are "the law," they are not works created by "officials responsible for creating the law" acting "'in their capacity as' lawmakers."[124] Thus, under *Georgia v. Public.Resource.Org, Inc.*'s focus on authorship, it is unlikely that the merger doctrine will be deployed as a means of expanding access to IBR standards.

4. *Systems, Methods of Operation, and Procedures.* — Beyond the government edicts, merger, and fair use doctrines, some scholars have argued that certain technical standards incorporated into the law should be ineligible for copyright protection under the general prohibition on the copyright of procedures, processes, systems, and methods of operation.[125] Professor Pamela Samuelson explains that, under § 102(b) of the

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Ghosh contends that courts considering issues of incorporated standards should pay attention to whether "protection would constrain too many uses." Id. at 104.

117. 121 F.3d 516, 520 n.8 (9th Cir. 1997), amended by, 133 F.3d 1140 (9th Cir. 1998).

118. Id. (citing Sega Enters. Ltd. v. Accolade, Inc, 977 F.2d 1510, 1523–24 (9th Cir. 1992)).

119. Id.

120. Id. at 520.

121. 140 S. Ct. 1498, 1507 (2020) (quoting Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886)).

122. Id. (quoting Banks v. Manchester, 128 U.S. 244, 253 (1888)).

123. Id.

124. Id. (quoting *Banks,* 128 U.S. at 253).

125. 17 U.S.C. § 102(b) (2018).

Copyright Act, coding systems should be ineligible for copyright.[126] Coding systems are technical standards that "typically use numbers, abbreviations, or other symbols to represent certain data elements in accordance with rules or organizing principles."[127] According to Samuelson, "Such codes and other systematic organizations of information are certainly uncopyrightable if they are dictated by rules or functionality."[128] She further identifies several additional factors that "may be relevant to whether systematic organizations of information are unprotectable under § 102(b)."[129] These factors are:

> (1) when the system is a useful art and copyright in it would give patent-like protection, (2) when second-comers need to use the system to compete or communicate effectively, (3) when systematizing information is necessary to achieve efficiencies, (4) when the system is incidental to uncopyrightable transactions or processes, and (5) when systematizing the information will produce social benefits from uniformity and the social costs of diversity would be high.[130]

But courts have inconsistently applied such a theory of § 102(b).[131] In fact, several courts have *upheld* copyright protections for coding systems (some of which had been incorporated by reference into the law). For example, in *Practice Management Information Corp. v. American Medical Ass'n*, the Ninth Circuit upheld the copyright of a privately developed coding system that had been incorporated into federal law despite § 102(b)'s prohibition on the copyright of systems.[132] The Ninth Circuit reached this holding even though it referred to the copyrighted work at issue as a "system" eleven times throughout the opinion.[133] Judge Frank Easterbrook, writing for the Seventh Circuit, reached a similar conclusion when he affirmed the copyright protection of a taxonomy system for dental procedures in *American Dental Ass'n v. Delta Dental Plans Ass'n*.[134]

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126. Samuelson, supra note 25, at 196.

127. Id. Examples of such coding systems would include: (1) a company's product identification numbering system in which each digit in a specific identification number signifies a relevant characteristic of the product, see Southco, Inc. v. Kanebridge Corp. (*Southco III*), 390 F.3d 276, 278 (3d Cir. 2004) (en banc); and (2) a numbering system used to identify (with great specificity) different surgical procedures completed by dentists, see Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977, 979 (7th Cir. 1997).

128. Samuelson, supra note 25, at 214–15.

129. Id. at 215.

130. Id.

131. See Balganesh, supra note 24, at 410 n.276 (stating that, "[f]or the most part, courts have . . . refused to apply § 102(b) consistently" as it relates to the copyright status of coding systems).

132. 121 F.3d 516, 520 (9th Cir. 1997), amended by, 133 F.3d 1140 (9th Cir. 1998).

133. Id. at 517–21.

134. 126 F.3d 977, 977 (7th Cir. 1997) (addressing a copyrighted coding system in which "[a]ll dental procedures are classified into groups; each procedure receives a number, a short description, and a long description"). In this decision, Judge Easterbrook rejected the argument that the dental coding scheme at issue could qualify as a system under § 102(b):

Judge Easterbrook also expressed great concern that a blanket, judicially determined prohibition on the copyright of taxonomies would strip the copyright from many important SDO-created coding systems, including "manuals issued by the Financial Accounting Standards Board," "tests and answers devised by the Educational Testing Service," and "most commercial software."[135]

Some courts, however, have accepted a slightly broader theory of § 102(b), in line with Samuelson's arguments. Writing for the Third Circuit, then-Judge Samuel Alito asserted in the *Southco, Inc. v. Kanebridge Corp.* series of cases that a taxonomy system used to assign identification numbers to a company's various products was *not* protectable under § 102(b). Judge Alito stated that, "For purposes of copyright law, . . . Southco's numbering system itself and the actual numbers produced by the system are two very different works."[136] He further explained that, "[b]ecause ideas may not be copyrighted, Southco does not assert any claim of copyright in its numbering *system,* but instead focuses on *the part numbers themselves.*"[137] The Sixth Circuit similarly rejected the copyright of a taxonomy system in *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*[138] Each of these cases, however, held that a *system* was not copyrightable because it was an *idea* rather than because of § 102(b)'s prohibition on the copyright of "systems."

These cases indicate that courts have hardly reached a robust consensus regarding the applicability of § 102(b)'s reference to "systems" to SDO-developed coding schemes.[139] Furthermore, even if Samuelson's interpretation of § 102(b) was unilaterally applied by courts, only a limited number of IBR standards would enter the public domain: The cases discussed here have only involved taxonomy-like coding schemes, not complex, lengthy IBR standards.[140] As such, expanded use of this judicial practice would still retain much of the status quo and leave many of the most complex IBR standards in use today insufficiently accessible to the general public. In this way, the copyright prohibition for "systems,

"But what could it mean to call the Code a 'system'? This taxonomy does not come with instructions for use . . . . The Code is a taxonomy, which may be put to many uses. These uses may be or include systems; the Code is not." Id. at 980–81.

135. Id. at 978.

136. Southco, Inc. v. Kanebridge Corp. (*Southco I*), 258 F.3d 148, 151 (3d Cir. 2001).

137. *Southco III*, 390 F.3d 276, 282 (3d Cir. 2004) (en banc).

138. 402 F.3d 700, 707 (6th Cir. 2005). Stating that "[o]riginal and creative *ideas*" are not copyrightable under § 102(b), the court held that "all of the creative aspects" of the classification scheme at issue "are just that: ideas." Id.

139. See id. at 708 (describing the rationale of Judge Easterbrook's majority opinion in *American Dental Ass'n* as "rather opaque" (citing 126 F.3d at 979)).

140. E.g., supra text accompanying note 14; supra notes 29–30.

methods of operation, and procedures" is an unlikely vehicle to truly solve the issue of IBR standards' inaccessibility.[141]

C. *Administrative Remedies Have Failed to Improve the Situation*

Beyond seeking relief from the courts, many pro-access advocates have called for modifications to agency practices to ensure citizens have greater access to the law. Thus far, however, agencies have declined to embrace substantive policies improving this situation, and they lack incentives to do so.

In 2011, the Administrative Conference of the United States recommended that agencies make greater efforts to enable public access to incorporated legal texts, stating that the copyright of such works was "particularly problematic."[142] This recommendation, in part, motivated a coalition of legal scholars and practitioners to petition the Office of the Federal Register (OFR) to require free online publication of all texts that have acquired the force of law through incorporation by reference in a regulation.[143] Members of this coalition alleged that incorporated, binding materials cannot meet the statutory requirement of "reasonably

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141. A similarly limited theoretical argument for the judicial expansion of access to IBR standards is the scenes a faire doctrine. This doctrine, which was "originally developed to recognize that certain plot structures are to be expected from works exploring certain literary or dramatic themes, has been adapted, especially in the software copyright case law, to recognize that expressive choices of subsequent authors may become constrained over time by the emergence of industry standards." Samuelson, supra note 25, at 215 (footnote omitted). As Professor Samuelson explains:

> This doctrine "exclude[s] from protection . . . those elements of a work that necessarily result from external factors inherent in the subject matter of the work," such as "hardware standards and mechanical specifications, software standards and compatibility requirements, computer manufacturer design standards, industry programming practices, and practices and demands of the industry being served."

Id. at 217 (alternations in original) (quoting Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1375 (10th Cir. 1997)). In *Southco III*, Judge Edward Becker applied the scenes a faire doctrine, stating that Southco's taxonomy system merely consisted of "values—such as screw thread sizes, screw lengths, or ferrule types—[that] were determined by industry standards rather than through any exercise of originality by Southco." 390 F.3d at 288 (Becker, J., concurring). As such, the product numbers at issue were "determined solely by the part identity, rather than through some exercise of creative expression," which Judge Becker proposed as an independent justification for invalidating copyright protection for the system at issue. Id. Like the argument that coding systems should be denied copyright protection, the scenes a faire doctrine has been seldom applied to the issue of IBR standards. Even if it were applied, only taxonomy-like codes would be impacted. Complex regulatory standards would remain fully protected and insufficiently accessible. E.g., supra text accompanying note 14; supra notes 29–30.

142. See Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2257–58 (adopted Dec. 8, 2011).

143. Petition for Rulemaking on Incorporation by Reference (Off. of the Fed. Reg. Feb. 10, 2012), https://law.resource.org/pub/us/cfr/regulations.gov.docket.01/NARA-12-0002-0002.pdf (on file with the *Columbia Law Review*).

available"[144] if they "cannot freely be found in or through an agency's electronic library."[145] Nevertheless, the OFR declined to impose this more substantive proposed rule, asserting that it lacked the "resources" and "statutory authority" to overcome copyright interests.[146] Instead, OFR chose to implement a more limited requirement: "[A]gencies must set out, in the preambles of their proposed and final rules, a discussion of the actions they took to ensure the materials are reasonably available to interested parties and that they summarize the contents of the materials they wish to incorporate by reference."[147] This decision, coupled with broader inaction on the part of individual agencies,[148] has resulted in federal regulatory agencies standing on the sidelines when it comes to genuine attempts to improve access. This is hardly surprising, as agencies are statutorily compelled to utilize "technical standards" when possible,[149] and the current system of incorporation by reference allows them to use these standards for free. Without statutory modifications, agencies have little incentive to improve the public's access.

D. *Private Remedies Have Proved Insufficient*

Finally, some scholars have called for private SDOs to take steps that improve the public's capacity to use their developed standards.[150] Some SDOs have made commendable efforts in this regard by providing free

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144. See supra notes 26–27 and accompanying text.

145. Petition for Rulemaking on Incorporation by Reference, supra note 143.

146. Incorporation by Reference, 79 Fed. Reg. 66,267, 66,268, 66,273 (Nov. 7, 2014).

147. Id. at 66,267.

148. Regarding potential changes at the individual agency level, scholars like Professor Peter Strauss have called for agencies to "take the contractual route of purchasing the desired standard for an agreed price rather than permitting its price to be passed along to the affected public; . . . [and] [r]estrict the use of incorporation by reference . . . to technical standards, and not 'regulatory standards or requirements.'" Strauss, supra note 16, at 560–61 (quoting OMB Circular No. A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998)). By and large, these recommendations have yet to be embraced. See supra text accompanying notes 23, 36–37 (indicating that government entities tend not to pay for incorporated standards and that the number of federally incorporated regulatory standards has increased dramatically since Strauss's 2013 recommendations).

149. 15 U.S.C. § 272 (2018).

150. For example, in listing several such recommendations for individual SDOs, Strauss called for SDOs to

> assur[e] would-be commenters some form of free access to standards proposed for incorporation by reference during rulemaking notice-and-comment periods[;] . . . [w]ork with agencies to limit incorporations by reference where possible to relevant parts, and not the whole, of voluntary consensus standards[;] . . . [and] mak[e] any standard that incorporation has converted into legal obligations freely available.

Strauss, supra note 16, at 560.

digital copies of their incorporated standards on their websites.[151] In recent years, however, the government's reliance on incorporated standards has only increased,[152] and SDOs continue to maintain that charging citizens for binding IBR laws is a necessary aspect of their business models.[153] Americans' access to the law cannot be dependent on the voluntary goodwill of private organizations. Permanent, enduring, and authoritative solutions to this issue must be enacted through legislative means, effectuating in perpetuity some of the goals elaborated upon by Professor Peter Strauss[154] and others.

III. IMPROVING THE PRO CODES ACT

A. *The Pro Access Act*

This Note proposes that Congress pass legislation that draws from the high-level principles of the Pro Codes Act while making improvements to further protect public access to the law and address copyright scholars' and advocates' concerns. The mock-up legislative provisions below demonstrate the dominant principles that this Note argues should be included in any future legislative attempt at improving the issue of IBR standards:

> (1) A standard to which copyright protection subsists under section 102(a) of the Copyright Act at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if, at the time of incorporation or within ten years after the enactment of this Act:
>
> (a) The applicable standards development organization:
>
> (i) Consented to the incorporation by reference; and
>
> (ii) Authorized the relevant government agency or authority to make *publicly and freely accessible online* on a government website all portions of a given standard that have been incorporated into law; and
>
> (b) The relevant government agency or authority makes all portions of a given standard that have been incorporated into law *publicly and freely accessible online* on a government website.
>
> (c) "Publicly and freely accessible online" shall be defined as:

151. See, e.g., Free Access, Nat'l Fire Prot. Ass'n, https://www.nfpa.org/for-professionals/codes-and-standards/list-of-codes-and-standards/free-access [https://perma.cc/QU2N-4HMD] (last visited Aug. 6, 2025) ("As part of its commitment to enhancing public safety, NFPA makes its codes and standards available online to the public for free."). But these online codes exist in a "read-only" format, cannot be downloaded or printed, and can only be accessed if an aspiring viewer creates an account. Id.

152. See supra notes 36–37 and accompanying text.

153. See supra note 74 and accompanying text.

154. See Strauss, supra note 16.

(i) Available at no monetary cost on an internet website that does not require users to enter personal information to access the content therein; and

(ii) In a format that includes:

(1) A searchable table of contents and index (or equivalent aids to facilitate the location of specific content);

(2) The ability to both download and print the standard; and

(3) Any other functionalities and user permissions that may be available on digital copies of the standard as sold by the standards development organization.

(2) Beginning three years after the enactment of this Act, federal agencies and departments shall not incorporate standards without such consent and authorization from the applicable standards development organization.

(3) Federal agencies and departments shall make all portions of a given standard that have been incorporated into law, for which appropriate consent and authorization from the relevant standards development organization has been given, *publicly and freely accessible online* on a government website.

(4) Federal agencies and departments shall make all attempts to obtain such consent and authorization for standards that have been incorporated into federal regulatory law without such consent and authorization. If such consent and authorization cannot be obtained from the applicable standards development organization within seven years of the enactment of this Act, an agency or department should make reasonable efforts to remove the provision incorporating the standard.

B. *Overview*

Under this proposed legislation, which this Note will refer to as the Pro Access Act, the copyright of IBR standards is affirmed when government organizations and SDOs reach an agreement under which the relevant government authority will be able to share the incorporated standard (or the incorporated portions of a standard) on its website for the public to access. This version of the standard posted on the government website must be available to members of the public: (1) for free, (2) without requiring any form of login or account creation, and (3) in a format that allows for downloading, printing, and content searching. If the SDO agrees to this sharing, then it is confirmed to have copyright in the standard, allowing it to be the only seller of bound copies of the standard and digital versions of the standard with "value-added" nonbinding materials. This framework provides significant flexibility for government authorities to negotiate with SDOs to find mutually agreeable terms of incorporation while also providing substantial incentives for SDOs to utilize this system of copyright assurance.

1. *Flexibility for Government.* — Under this Pro Access Act, government entities have great latitude to negotiate with SDOs to find mutually agreeable terms under which the agency or government organization may share the standard online. These terms could include the agency choosing to purchase the copyright of SDO standards outright,[155] to license the standard from the SDO at a set rate,[156] to limit the portions of standards that are incorporated to only those specifically relevant to the regulation/law at issue,[157] or to adopt an alternative standard from a competing SDO that offers more favorable access terms.[158] This would undoubtedly "impose undesirable transaction costs on both [SDOs and government groups];"[159] however, requiring such costs to be borne by the government rather than the American public is a dramatic improvement on the status quo.[160]

One of the original sponsors of the Pro Codes Act, Representative Issa, argued that the status quo already enabled government entities to negotiate with SDOs to acquire, for example, advanced searching capabilities and no-login access for digital copies of incorporated standards.[161] But his claim ignores the reality that SDOs would be entirely disincentivized from even engaging in this bargaining. Currently, SDOs earn money (in part) by monopolizing not only the *sale of* but also *access to* the law. SDOs maximally profit off their incorporated standards when they are the only point of access. The relinquishment of control necessary

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155. Cf. Strauss, supra note 16, at 560 (contending that agencies should "take the contractual route of purchasing the desired standard for an agreed price rather than permitting its price to be passed along to the affected public").

156. Cf. Zoie Mestayer, Note, Have Your Cake and Eat It Too: Providing Free Public Access of Copyrighted Standards Incorporated by Reference Into Law Through Compulsory Licensing, 51 AIPLA Q.J. 309, 351 (2023) (explaining that, in the context of a compulsory licensing regime for IBR standards, "[a] pre-determined annual fee is a moderate approach that would ease some of the hardship imposed on the agencies while encouraging them to innovate and reevaluate the standards they have incorporated in the past").

157. Cf. Strauss, supra note 16, at 561 (encouraging agencies to limit incorporation by reference to "only those elements of a voluntary consensus standard essential to its regulation").

158. Cf. Mendelson, supra note 28, at 802, ("[C]ontracting would have the salutary effect of permitting the agency to solicit bids to supply standards, thus increasing competition among groups to do so and enabling the agency to specify more open and accessible processes for standards development."); Mestayer, supra note 156, at 346 (discussing how a government contracting regime for IBR standards would allow agencies to "solicit bids from SDOs to promulgate standards, thereby increasing competition amongst SDOs and allowing agencies to include procedural safeguards that satisfy the Administrative Procedure Act . . . in the agreements").

159. Mestayer, supra note 156, at 346–47.

160. See Strauss, supra note 16, at 547 ("It seems problematic, however, to transform the prospective price for a taking—unmistakably a governmental obligation that may be judicially fixed if agreement on it cannot be reached—into a price unilaterally set by monopolists on private parties with little choice about purchase.").

161. Pro Codes Act 2024 House Markup, supra note 52, at 1:08:01 (statement of Rep. Issa).

to appease the desires of a single government entity in Representative Issa's hypothetical would be so substantial that it seems unlikely that SDOs would even contemplate agreeing to such terms.

Nevertheless, some agencies have demonstrated competency at negotiating with SDOs to lower some (but not all) barriers to access.[162] Extending this existing practice of agency–SDO negotiation, this legislative proposal allows for the methods by which standards are incorporated and made publicly accessible to flexibly adapt to different agency and SDO dynamics. As such, this proposal ensures that agencies "retain the flexibility to integrate private standards into public law as necessary to further the public interest and protect health and safety"[163] without placing the written law out of reach from the American people. It also allows for more agency involvement in "[e]ffectively outsourc[ed] rulemaking," improving the voice of the people's representatives in standards development itself without fully placing the burden of the work on the government's shoulders.[164]

2. *Incentives for SDOs.* — This legislation offers significant incentives for SDOs to negotiate with government entities and consent to the sharing of their standards on government websites in accordance with the Act. First and foremost, it allows SDOs to pursue compensation from government organizations and groups through means that fit best with an individual SDO's business model.[165] This guarantees SDOs compensation for their developed codes. Additionally, as the *Veeck* court discussed:

> [T]o enhance the market value of its model codes, [SDOs] could easily publish them as do the compilers of statutes and judicial opinions, with "value-added" in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out.[166]

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162. See Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2258 (adopted Dec. 8, 2011) ("[S]ome agencies have successfully worked with copyright owners to further . . . transparency and public–private collaboration. Some agencies have, for example, secured permission to make a read-only copy of incorporated material available in the agency's public, electronic docket during the pendency of the rulemaking proceeding relating to the material.").

163. Bremer, Cost, supra note 22, at 282. If a standard is sufficiently important such that failing to incorporate it would impair the agency's ability "to further the public interest and protect health and safety," id., then the agency can purchase that standard legitimately from the SDO or pay the price of a taking as determined by a court, see supra notes 155, 160 and accompanying text.

164. Strauss, supra note 16, at 545. Strauss has explained that negotiated government contracting of standards development would provide agencies with a greater voice in the development process and improve transparency. Id.

165. See supra text accompanying notes 155–160.

166. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 806 (5th Cir. 2002) (en banc); see also Goldstein, supra note 115, § 2.5.2.1(c) ("Trade organizations have powerful reasons stemming from industry standardization, quality control and self-regulation to

Some SDOs are already offering supplementary materials related to their standards at a premium cost.[167] Furthermore, while some SDOs may claim to depend extensively on the funding provided by the sale of their incorporated standards to the public,[168] some scholars have pushed back on this contention, asserting that SDOs "generally use the revenues they derive from selling or licensing the standards to subsidize other activities of their organizations, rather than to recoup investments in making the standards."[169] In this way, the Pro Access Act could help to eliminate perverse practices in the standards development industry, such as SDOs investing in "persuading governments to mandate use of their standards" instead of investing in the improvement of the standards themselves.[170] Thus, the Pro Access Act guarantees that SDOs are compensated for the efforts they put into standards development without allowing those standards to become a "cash cow"[171] that all users of a standard must independently purchase.

3. *Previously Incorporated Standards.* — The Pro Access Act also instructs federal agencies and authorities to attempt to receive retroactive consent and permission to share incorporated standards on government websites. While SDOs have ample incentives to engage in these negotiations,[172] it is almost certain that SDOs will be unable to reach agreement with the pertinent government entity as it relates to *some* percentage of the over twenty-seven thousand previously incorporated

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produce these codes; it is unlikely that without copyright they will cease producing them."); Samuelson, supra note 25, at 222 ("Even without copyright in the standards, [SDOs] can derive revenues from sales of print materials embodying the standard and value-added products or services.").

167. For example, ASTM International often offers "Standard + Redline Bundle[s]" that include both a digital copy of a certain standard and a "PDF redline," which is "a quick and easy way to compare all of the changes between the current, active standard and the previous version." *ASTM F2167-22* Purchase Page, supra note 29 (click the "i" symbol next to "What is a Redline?"). ASTM International charges an approximately twenty percent markup for "Standard + Redline Bundle[s]" as compared to only digital copies of a standard. See, e.g., id. (charging seventy-six dollars for a PDF copy of *ASTM F2167-22* while charging ninety-one dollars for the *ASTM F2167-22* "Standard + Redline Bundle").

168. See, e.g., Press Release, Copyright All., supra note 47 ("Without effective copyright protections, there is grave risk that [SDOs] will no longer be able to produce the high-quality codes and standards that the public and lawmakers have come to rely on." (internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.)).

169. Samuelson, supra note 25, at 222; see also id. ("It is simply not credible to claim that organizations like the [American Medical Association] and [American Dental Association] would stop developing standard nomenclature without copyright protection. The fields they serve need these standards for effective communication with other health care providers, insurers, and government agencies.").

170. Id. at 223.

171. See id. at 223–24 ("The long-term credibility of [SDOs] depends on their ability . . . to produce standards in which the [SDOs] do not have such a strong financial interest that they . . . abuse the standards process by making their standards into a cash cow that must be purchased by anyone affected by the standard.").

172. See supra section III.B.2.

federal standards.[173] In those cases, the standards at issue will not be posted on a government website in accordance with this proposed legislation, and the pertinent government agency will make reasonable efforts to remove the incorporation of such standards from regulatory law. As these unposted standards are: (1) removed from the regulatory landscape, (2) supplanted by updated standards over time, (3) replaced with standards created by competing SDOs with which the government has been able to reach an agreement, (4) determined by the courts to have limited or no copyright enforcement capabilities,[174] or (5) ultimately enter the public domain upon the expiration of their copyright,[175] the public will eventually gain access to *all* applicable IBR federal standards under this legislative framework. Furthermore, this review of previously incorporated standards, while a daunting task,[176] will have the added benefit of requiring agencies to clean up previously incorporated standards and address issues involving standards that are nonexistent, unsafe, and not available for purchase.[177]

4. *Constitutional Takings Concerns.* — The Takings Clause requires that the government pay "just compensation" when it takes private property for public use.[178] The requirements of this constitutional amendment "bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[179] While the applicability of the Takings Clause to copyrights is somewhat unclear,[180] the Pro Access Act's requirement that

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173. See supra note 12 and accompanying text.

174. See supra section II.B.

175. Copyright for works created by corporate authors expires ninety-five years after publication or 120 years after creation, whichever comes first. 17 U.S.C. § 302 (2018).

176. The proposed text of the Pro Access Act includes a seven-year period during which federal agencies will review their incorporations by reference and attempt to retroactively receive the appropriate consent and authorization. See supra section III.A. With the advice of federal administrative authorities, Congress could modify future drafts of this proposed legislation to allow a longer or shorter time period to accommodate the realistic time demands of this task without overburdening agencies.

177. See Public.Resource.Org, Comment Letter on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (Apr. 11, 2012), https://law.resource.org/pub/us/cfr/regulations.gov.docket.02/0900006480fed9f0.pdf [https://perma.cc/GSM2-74TN] [hereinafter PRO Comment Letter] (discussing an audit of all standards incorporated by reference in federal regulatory law and discovering that a number of incorporated standards were either no longer purchasable from the relevant SDO, were considered unsafe by modern scientific knowledge, or could not be located at all); see also Strauss, supra note 16, at 506 ("[T]he costs of rulemaking and limitations on agency resources have resulted in incorporated standards being left in place as legal obligations long after they have been abandoned by their creators as voluntary standards.").

178. U.S. Const. amend. V.

179. Armstrong v. United States, 364 U.S. 40, 49 (1960).

180. See Hickey, supra note 79, at 9–11 ("[I]t is not completely settled that copyrights are 'private property' subject to the Takings Clause."). But see id. at 10–11 & nn.123–124 (summarizing many scholarly works on the subject and reaching the conclusion that "the weight of authority" suggests that copyrights are subject to the Takings Clause).

SDOs and government authorities reach an agreement prior to incorporation of a standard avoids this potential constitutional issue.[181] As it relates to federal regulatory standards that have already been incorporated,[182] SDOs will have three options: (1) attempt to negotiate with government authorities to find agreeable circumstances by which the government may post the previously incorporated standard online (which very likely would include some form of compensation to the SDO),[183] (2) have their incorporated standards removed from federal regulatory law after seven years,[184] or (3) risk a court finding that infringing uses of the SDO's copyright constitute a fair use of the standard.[185]

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181. See Int'l Code Council, Inc. v. UpCodes, Inc., No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *14 (S.D.N.Y. May 27, 2020) (stating that, when an SDO "undisputedly encourages the adoption of its model codes into law as a general matter," this solicitation "counsels against according its Takings Clause concerns particularly great weight").

182. While the first provision in this draft of the Pro Access Act would impact standards incorporated by federal, state, and local governments, the provisions mandating actions from federal agencies and authorities would (naturally) *not* apply to state and local governments. As such, in its current form, the Pro Access Act would ostensibly "encourage" state and local governments that have incorporated (or will incorporate) standards by reference to negotiate with relevant SDOs and share those standards on their government websites. Congress cannot *require* state and local governments to act in a certain way due to the anticommandeering principle. See Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may n[ot] issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). As such, these more localized government entities may choose not to negotiate with SDOs or share the SDOs' standards on government websites. But the Takings Clause of the U.S. Constitution, which applies to state governments, could position SDOs whose copyrights have been stripped away by the action (or inaction) of state governments to sue for "just compensation" in court. See Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897) ("Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public."); see also Green v. Frazier, 253 U.S. 233, 238 (1920) (noting that "[b]efore the adoption of the Fourteenth Amendment," state governments' power of eminent domain "was unrestrained by any federal authority"). Therefore, the Pro Access Act, as it relates to state and local governments, would transform the status quo of prices for state-level incorporated standards being "unilaterally set by monopolists" and imposed on "private parties with little choice about purchase" into (at worst) "a taking—unmistakably a governmental obligation that may be judicially fixed if agreement on it cannot be reached." Strauss, supra note 16, at 547.

183. See supra section III.B.1.

184. See supra section III.A.

185. See Hickey, supra note 79, at 13 ("[E]ven if the Pro Codes Act were enacted, groups like [Public.Resource.Org] may still assert fair use arguments[,] . . . although the enactment might be interpreted by courts to inform the fair use analysis."); see also supra note 101. Although this version of the Pro Access Act affirms that copyright protections continue after incorporation, unauthorized private users of SDO copyrights will still also be able to assert First Amendment and Due Process Clause defenses to rebut a claim of copyright infringement under this legislative framework. Hickey, supra note 79, at 13.

C. *Breakdown of Proposed Provisions*

1. *Delayed Implementation.* — This Act, like the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011,[186] includes a delayed implementation requirement in order to allow federal agencies and departments the time necessary to formulate agency procedures for negotiating with SDOs (in accordance with provision (2)) and for reviewing previously incorporated standards and negotiating for the needed consent and authorization with the creators of those standards (in accordance with provisions (3) and (4)). The specific time delays detailed in the current draft of the Pro Access Act could be modified after receiving feedback from relevant agency officials about their expected capabilities and labor demands.

2. *Government Websites.* — While the original version of the Pro Codes Act allowed for public access to standards through SDOs' websites,[187] this Note's proposed legislation requires that IBR standards be available on government websites.[188] This requirement addresses several key issues with the status quo. First, making the government the distributor of standards prevents confusion, ambiguity, and unavailability. Explaining the results of an extensive audit of the Code of Federal Regulations conducted by Public.Resource.Org, Carl Malamud and David Halperin described several incorporated standards that, over time, have become "impossible to procure" because the relevant SDOs had stopped offering those standards for sale, meaning that some current binding laws are unavailable altogether.[189] To prevent these instances of binding laws becoming unavailable due to the whims of private organizations, it is imperative that IBR standards be shared through government-controlled mediums.

Additionally, SDO websites often present navigational challenges or obscure the location of freely available standards.[190] Allowing SDOs to be the distributors of binding law makes "challenges of locating IBR material on websites"[191] a matter of broad concern to Americans. Some scholars have specifically contended that "[m]aking SDOs the sole distributors of

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186. Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (codified at 49 U.S.C. § 60102(p) (2018)).

187. H.R. 4009, 119th Cong. (2025).

188. Cf. Mendelson, supra note 28, at 800 ("Ideally, reform [on the issues of IBR standards] would provide access to IBR rules through text or direct links on the Government Printing Office and Federal Register websites, and additionally through federal agency websites."); Strauss, supra note 16, at 561 (recommending that agencies "[m]ake incorporated standards public, as by posting them on agency websites").

189. PRO Comment Letter, supra note 177, at 10–11. They also detail instances in which the CFR incorporates (1) standards that failed to specify which version of the standard has been incorporated and (2) standards that seem to have never existed. Id.

190. See Mendelson, supra note 28, at 753 (describing the challenges in accessing free standards "reading rooms" on SDO websites because the freely available versions of the standards "are not easy to locate and the home pages of the websites do not advertise their existence" (internal quotation marks omitted)).

191. Id. at 790.

the law (or even portions of the law) is . . . a dereliction of" "the government's duty to make citizens aware of the law as quickly and thoroughly as possible."[192] These concerns can be ameliorated by ensuring that the *government* is the distributor of IBR materials under this new legislative framework. In this way, IBR standards will not be able to be hidden away in difficult-to-find pages of a website or removed from access altogether once the government has begun to maintain publicly available repositories of IBR standards.

3. *"Publicly and Freely Accessible".* — "When it comes to mandates adopted into law, any barriers to access, however small, are unacceptable."[193] The versions of SDO standards presented to the public through this legislation must be unencumbered by any restrictions differentiating them from the full versions of standards currently sold by the SDOs.

a. *No Monetary Cost.* — It is a foundational element of a democratic society that "'[e]very citizen is presumed to know the law' and . . . 'should have *free* access' to its contents."[194] As it relates to IBR standards, Congress has endorsed this principle in both the enacted Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011[195] and the proposed Pro Codes Act.[196] Although it is not practiced by all SDOs, this proposition is supported explicitly by numerous SDOs in their statements supporting the Pro Codes Act[197] and forms one of the fundamental cornerstones of the Pro Codes Act itself.

b. *No Credentials.* — One of the dominant critiques of the Pro Codes Act is that it allows SDOs to require that users create accounts and provide personal information in order to access freely provided IBR standards. This is problematic for two reasons: Requiring that users share information like their legal names or email addresses to access binding law is not only an unnecessary step that impedes one's access to the laws that govern them but also is a threat to privacy.[198] For example, the American

192. Brimhall, supra note 51.

193. Id.

194. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1507 (2020) (emphasis added) (quoting Nash v. Lanthrop, 6 N.E. 559, 560 (Mass. 1886)).

195. Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (codified at 49 U.S.C. § 60102(p) (2018)).

196. H.R. 4009, 119th Cong. (2025).

197. See, e.g., Press Release, Copyright All., supra note 47 ("If implemented, what the Pro Codes Act would do is simple—it would ensure that the codes and standards created by standards development organizations continue to be protected against infringers while guaranteeing that the public has access to them when they are incorporated by reference into law."(internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.)).

198. See Brian X. Chen, Everyone Wants Your Email Address. Think Twice Before Sharing It., N.Y. Times (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/technology/personaltech/email-address-digital-tracking.html (on file with the *Columbia Law Review*) ("An email address . . . can be linked to other data, including where you went to school, the make and model of the car you drive, and your ethnicity.").

Petroleum Institute (API) requires users to enter their first and last name, place of employment, and email address to access its "free" IBR standards.[199] Furthermore, API's website "automatically capture[s] certain information from the devices and browsers that [viewers] use including, but not limited to, [users'] IP address or mobile device identifier[s]."[200] In its privacy policy, API states that it may share this personal information with "business partners that help [API] . . . serve advertisements and content about API's mission."[201] API further claims that it "may provide [users'] personal information to law enforcement authorities,"[202] which creates the strange situation in which one needs to effectively offer their personal information to law enforcement authorities in order to even know what the law itself consists of. To circumvent such varied methods of data collection, one would need to (1) provide a false name and place of employment, (2) create and supply a new, anonymous email address,[203] and (3) utilize a virtual private network (VPN) to mask their IP address.[204] Americans should not be forced to engage in such convoluted practices to protect their privacy and personal information while accessing the laws that govern them. This proposed legislation improves on the Pro Codes Act by guaranteeing that these login barriers are not present for IBR standards in the future.

c. *Searchable Table of Contents.* — This Note and the Pro Codes Act agree that versions of binding IBR law available to the public need to have convenient mechanisms for navigating these standards in a digital format.[205] Many of these SDO standards are hundreds if not thousands of pages long and cover incredibly complex, technical subject matters.[206] To ensure usefulness, standards provided to the public through this legislation must include these searchability functions.

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199. IBR Reading Room, Am. Petroleum Inst., https://publications.api.org/Default.aspx [https://perma.cc/6XQ5-E7MU] (last visited Aug. 6, 2025).

200. Privacy Policy, Am. Petroleum Inst., https://www.api.org/privacy [https://perma.cc//V72E-RUU9] (last visited Aug. 6, 2025); see also Irma Šlekytė, What Can Someone Do With Your IP Address?, NordVPN: Blog (May 25, 2023), https://nordvpn.com/blog/what-can-someone-do-with-your-ip-address/ (on file with the *Columbia Law Review*) (discussing several "malicious purposes" for which a user's IP address may be exploited by external actors).

201. Privacy Policy, supra note 200.

202. Id.

203. See supra note 198.

204. See What Is a VPN?, Microsoft Azure, https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-vpn [https://perma.cc/5CWE-A3ZB] (last visited Aug. 7, 2025) ("A VPN, which stands for virtual private network, establishes a digital connection between your computer and a remote server owned by a VPN provider, creating a point-to-point tunnel that encrypts your personal data, masks your IP address, and lets you sidestep website blocks and firewalls on the internet.").

205. See H.R. 4009, 119th Cong. § 3 (2025) (proposing that IBR standards be "publicly accessible online at no monetary cost and in a format that includes a searchable table of contents and index, or equivalent aids to facilitate the location of specific content").

206. E.g., supra text accompanying note 14; supra notes 29–30.

d. *Download and Print.* — The inability to download and print incorporated SDO standards has been a major point of critique from access-focused organizations.[207] Almost all versions of standards currently provided for "free" by SDOs are limited to "read-only" access, meaning that the standards are only accessible while connected to the internet and cannot be printed (in part or in whole).[208] Representative Lofgren alleged that limiting functionalities such as these make standards "not accessible to the disabled," potentially "violat[ing] the Americans [With] Disabilit[ies] Act."[209] Allowing for the government-shared versions of these standards to be downloaded and printed (as proposed in the Pro Access Act) resolves these accessibility issues for users with disabilities and provides Americans with truly sufficient access to these vital documents. Furthermore, allowing users to download and print IBR standards will not destroy the SDOs' profitability, as SDOs will still be the sole authorized seller of printed and bound copies of their standards as well as enhanced digital versions of the standards.[210] In this light, SDOs' concerns about providing users with download and print capabilities are perhaps overstated. Additionally, to the extent that SDOs do consider these capacities to be too detrimental to their markets, a print and download requirement encourages SDOs to limit the portions of their standards that are incorporated by reference—as this preserves the content that they alone can provide to the public.[211] Critically, many of the standards

207. See, e.g., Ass'n of Rsch. Librs., supra note 50, at 4 (critiquing the Pro Codes Act because it would allow SDOs to "prohibit users from copying, printing, or downloading text").

208. See, e.g., Charles A. Samuels, Evelyn A. French & Evan Moore, CPSC Sued Over Lack of Access to Consensus Standard Incorporated Into CPSC Regulation, Mintz (May 26, 2020), https://www.mintz.com/insights-center/viewpoints/53846/2020-05-26-cpsc-sued-over-lack-access-consensus-standard [https://perma.cc/63XY-86DM] ("[ASTM International] has a virtual 'reading room' on its website where it states all of its standards incorporated by reference into a U.S. regulation are available for free for reading only (no downloading or printing)."); supra note 151.

209. Pro Codes Act 2024 House Markup, supra note 52, at 1:02:40 (statement of Rep. Lofgren).

210. See Samuelson, supra note 25, at 222 ("Even without copyright in the standards, [SDOs] can derive revenues from sales of print materials embodying the standard and value-added products or services."). Furthermore, consumers consistently purchase physical copies of written works that are nevertheless available for free online. To provide one example: Jane Austen's 1813 novel *Pride and Prejudice* sold over one million print copies between 2001 and 2021 in the United Kingdom alone. Jennifer Ruby, Jane Austen Takes Pride of Place for Book Sales in Lockdown as Sales of Her Famous Novel Soar, Daily Mail (Mar. 18, 2021), https://www.dailymail.co.uk/news/article-9378975/Jane-Austen-takes-Pride-place-book-sales-lockdown-sales-famous-novel-soar.html [https://perma.cc/M8Q8-CHAS]. A digital copy of *Pride and Prejudice* can be accessed for free online through Project Gutenberg. Jane Austen, Pride and Prejudice (Hugh Thomson illus., London, George Allen 1894) (1813) (ebook), https://www.gutenberg.org/cache/epub/1342/pg1342-images.html (on file with the *Columbia Law Review*).

211. See Strauss, supra note 16, at 560 (encouraging SDOs to "[w]ork with agencies to limit incorporations by reference where possible to relevant parts, and not the whole, of

developed and sold by SDOs are merely *voluntary* consensus standards that are nonbinding on the American people, so the business models of SDOs are not *entirely* reliant on the sale of incorporated materials.

e. *Other Functionalities and User Permissions.* — One of the original sponsors of the Pro Codes Act characterized the legislation as merely allowing SDOs to charge individuals "a nominal fee" for a copy of an incorporated standard with "enhanced capabilit[ies]."[212] While these enhanced capabilities are most commonly the ability to download and print a certain incorporated standard, they could conceivably include other features. As such, this catch-all provision of the Pro Access Act ensures that SDOs are not able to offer versions of incorporated, binding law that have enhanced technical functions beyond the version provided for free on a government website. In line with the Supreme Court's discussions, the copy of IBR standards available from a government organization must not be an "economy-class version" of the law.[213] If access to laws drafted by SDOs is going to be restricted from the citizenry—in violation of the general principle that the text of "the law" is available "for whatever use the citizens choose to make of it"[214]—then they must be available to the public in the maximally functional manner.

CONCLUSION

This Note's proposed modifications of the Pro Codes Act would address many of the dominant concerns activists have voiced about the legislation in its current form. Congress's need to remove the current ambiguity regarding the copyright of IBR standards and to affirm the people's access to the laws that bind them has positioned legislation like the Pro Access Act (or select provisions therein) as a valuable solution as Congress continues to grapple with how to address this decades-old issue.

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voluntary consensus standards, thus reducing the stakes in having the incorporated portions made public and arguably heightening the value of the standards as a whole").

212. Pro Codes Act 2024 House Markup, supra note 52, at 47:06 (statement of Rep. Issa).

213. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1512 (2020). The Court expounds upon this idea, stating

> Georgia minimizes the [Official Code of Georgia Annotated] annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws . . . [that] have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.

Id. (citations omitted).

214. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 799 (5th Cir. 2002).