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# Copyright in Standards Incorporated by Reference into Law and the Pro Codes Act

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## Copyright in Standards Incorporated by Reference into Law and the Pro Codes Act

This report explains the current law and litigation concerning copyright protection for technical standards developed by private organizations and subsequently incorporated by reference into federal, state, or local law.

Technical standards—such as fire safety and building codes—play an important role in protecting public health and safety, as well as ensuring compatibility and interoperability in particular industries. Current federal policy generally requires federal agencies to use privately developed, voluntary consensus standards, instead of “government-unique” standards. Private standards-developing organizations (SDOs) often develop these standards by bringing together experts and stakeholders in particular areas and reaching consensus on effective technical solutions. SDOs may fund their activities by publishing and selling copies of their standards (e.g., an electrical code handbook) to people who use those standards (e.g., a property developer).

Privately developed standards are used by federal, state, and local governments in various ways. In particular, governments may incorporate such standards into law or regulation by reference. For example, a state or locality may adopt a privately developed electrical code, making that standard a legal requirement for the electrical design of a building in that jurisdiction. Other incorporated-by-reference (IBR) standards may serve as a reference or as guidance, but do not formally impose legal obligations.

Copyright grants the author of a creative work the exclusive right to copy and sell their work, among other things. As an original work of authorship, standards are generally entitled to copyright protection if they are created by a private entity. Copyright protection, when applicable, allows SDOs to prevent third parties from making and distributing unauthorized copies of their standards. SDOs may thus rely on copyright to fund their standards-development activities.

When technical standards are incorporated into law, maintaining copyright protection on them can raise constitutional and other concerns about public access to the law. Under federal law, standards incorporated by reference into federal regulations must be made reasonably available to interested parties. State and local governments also often rely on IBR standards, and may have differing policies for public access. Many SDOs choose to make their standards available in some form online.

Some public-access and government-transparency organizations have disregarded SDOs’ copyright assertions and posted technical standards for free download online. These groups argue that IBR standards lose copyright protection once they are incorporated into law, or that their activities are a permitted fair use of SDOs’ copyrighted material. Several copyright disputes between SDOs and public-access organizations have led to protracted litigation in multiple forums.

Despite decades of decisions, courts have not reached consensus on whether technical standards remain protected by copyright after they are incorporated into law. Various U.S. Courts of Appeals for different regional circuits reached seemingly conflicting conclusions on that question in the 1980s–2000s. Following a 2018 decision by the D.C. Circuit in *American Society for Testing and Materials v. Public.Resource.Org* (*ASTM v. PRO I*), the case law has increasingly focused on whether copyright’s fair use doctrine permits public-access groups to make IBR standards available online. Following *ASTM v. PRO I* and the Supreme Court’s 2020 decision on a related issue in *Georgia v. Public.Resource.Org*, recent cases have typically ruled against SDOs’ copyright infringement claims, mainly on fair use grounds.

A bill introduced in the 118th Congress, the Pro Codes Act (H.R. 1631 and S. 835), seeks to address this issue legislatively. The Pro Codes Act would explicitly provide that otherwise copyrightable IBR standards retain their copyright protection even after a government incorporates them into law. At the same time, the bill would require that SDOs make IBR standards publicly accessible online in a readable format at no monetary cost to users. The Pro Codes Act would not require SDOs to make IBR standards available for printing or download, and SDOs could require users to agree to terms and conditions before accessing the standards.

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## Introduction

For decades, federal courts weighed competing legal arguments about the copyright status of privately authored material that is later copied or incorporated by reference into federal, state, or local laws and regulations.<sup>1</sup> A bill introduced in the 118<sup>th</sup> Congress, the Pro Codes Act,<sup>2</sup> seeks to address this issue legislatively. The Pro Codes Act would make clear that copyright protection applies to privately authored, incorporated-by-reference (IBR) standards, while also requiring that the standards be made publicly accessible online in a readable format at no monetary cost to users.<sup>3</sup> This report explains the current law and litigation surrounding copyright in IBR standards.

Current federal policy generally encourages agencies to use privately developed “voluntary consensus standards” instead of “government-unique standards.”<sup>4</sup> Private standards-developing organizations (SDOs)<sup>5</sup> often develop these standards, which are then used by the government for various purposes.<sup>6</sup> Federal regulations require that standards incorporated by reference into federal regulations be made “reasonably available to interested parties.”<sup>7</sup> State and local governments also often rely on IBR standards, and may have differing policies for public access.<sup>8</sup>

Technical standards—such as communications standards or fire safety and building codes—are typically original works of authorship entitled to copyright protection.<sup>9</sup> Copyright protection, when applicable, allows SDOs to prevent third parties from making and distributing unauthorized copies of their standards.<sup>10</sup> SDOs may rely on copyright to earn money through selling copies of their standards (e.g., an electrical code handbook) to people who use those standards (e.g., a property developer).<sup>11</sup> Copyright may thus allow SDOs to recoup the cost of developing standards, which includes consulting with experts and stakeholders in particular industries and technical areas to reach consensus on effective technical solutions.<sup>12</sup>

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<sup>1</sup> See, e.g., *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, No. 22-7063, 2023 WL 5918491, at \*5 (D.C. Cir. Sept. 12, 2023) [hereinafter *ASTM v. PRO II*]; *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 444 (D.C. Cir. 2018) [hereinafter *ASTM v. PRO I*]; *Veeck v. S. Bldg. Code Cong. Int’l*, 293 F.3d 791 (5th Cir. 2002); *Bldg. Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980).

<sup>2</sup> H.R. 1631, 118th Cong. (2023); S. 835, 118th Cong. (2023). As H.R. 1631 and S. 835 are substantively identical, this report will hereinafter cite only to H.R. 1631 (as introduced) for simplicity.

<sup>3</sup> *Id.* § 3.

<sup>4</sup> WHITE HOUSE OFFICE OF MANAGEMENT AND BUDGET, *OMB Circular No. A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* 17 (Feb. 10, 1998) (revised Jan. 27, 2016), [https://www.whitehouse.gov/wp-content/uploads/2020/07/revised\\_circular\\_a-119\\_as\\_of\\_1\\_22.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf).

<sup>5</sup> *Resources: Standards Developing Organizations (SDOs)*, AM. NAT’L STANDARDS INST., [https://www.standardsportal.org/usa\\_en/resources/sdo.aspx](https://www.standardsportal.org/usa_en/resources/sdo.aspx) (last visited Aug. 8, 2023).

<sup>6</sup> See *U.S. Standards System: Government Use of Standards*, AM. NAT’L STANDARDS INST., [https://www.standardsportal.org/usa\\_en/standards\\_system/government\\_use\\_standards.aspx](https://www.standardsportal.org/usa_en/standards_system/government_use_standards.aspx) (last visited Aug. 8, 2023).

<sup>7</sup> 1 C.F.R. § 51.5(b)(2) (2019); 5 U.S.C. § 552(a)(1). See also *Incorporation by Reference in the CFR*, ADMIN. CONF. OF U.S. (Dec. 8, 2011), <https://www.acus.gov/recommendation/incorporation-reference>.

<sup>8</sup> See *ASTM v. PRO I*, 896 F.3d 437, 442 (D.C. Cir. 2018) (reviewing requirements for incorporation of standards by references in the District of Columbia).

<sup>9</sup> 17 U.S.C. § 102(a).

<sup>10</sup> See 17 U.S.C. § 106.

<sup>11</sup> Press Release, Sen. Chris Coons, Protecting and Enhancing Public Access to Codes (Pro Codes) Act of 2023 (Mar. 16, 2023), [https://www.coons.senate.gov/imo/media/doc/pro\\_codes\\_act\\_one\\_pager.pdf](https://www.coons.senate.gov/imo/media/doc/pro_codes_act_one_pager.pdf).

<sup>12</sup> *About the ANSI Incorporated by Reference (IBR) Portal*, AMERICAN NATIONAL STANDARDS INSTITUTE, <https://ibr.ansi.org> (last visited, Aug. 8, 2023).

When technical standards become incorporated into the law, however, maintaining copyright protection on them may raise a “serious constitutional concern” about public access to the law.<sup>13</sup> Various public-access and government-transparency organizations—such as Public.Resource.Org, Inc. (PRO)—have disregarded SDOs’ copyright assertions and posted technical standards for free online.<sup>14</sup> These groups argue that IBR standards lose copyright protection once they are incorporated into law, or that their activities are a permitted fair use of SDOs’ copyrighted material.<sup>15</sup> Citing both old and recent Supreme Court case law,<sup>16</sup> public-access groups argue that because all citizens are entitled to freely access and debate the law under the Constitution’s Due Process Clause and the First Amendment,<sup>17</sup> access to it cannot be conditioned on the consent of a copyright holder (here, the SDO). Several copyright disputes between SDOs and public-access organizations have led to protracted litigation.<sup>18</sup>

This debate has generated congressional interest as well. On July 19, 2023, the House Committee on the Judiciary held a markup hearing on the Pro Codes Act.<sup>19</sup>

This report provides background on the issue of copyright for IBR standards and explains the ongoing litigation in *American Society for Testing and Materials v. Public.Resource.Org (ASTM v. PRO)* and similar cases.<sup>20</sup> It also analyzes the potential relevance of the Supreme Court’s 2020 decision in *Georgia v. Public.Resource.Org (Georgia v. PRO)*, which concerned claims of copyright in the official annotations to Georgia’s state code.<sup>21</sup>

## Copyright Basics

Copyright protects fixed, creative works of authorship, including literary works.<sup>22</sup> Although facts themselves are not copyrightable, written explanations about facts (e.g., a scientific textbook) and original arrangements of facts are copyrightable.<sup>23</sup> In general, then, a manual of technical standards is an original work to which copyright applies, and the author or copyright holder has the exclusive right to copy and distribute that work (among other rights).<sup>24</sup> Another person who copies that work without the copyright holder’s permission may infringe the copyright and be liable for damages and other legal remedies.<sup>25</sup>

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<sup>13</sup> *ASTM v. PRO I*, 896 F.3d at 447.

<sup>14</sup> See, e.g., *Global Public Safety Codes*, INTERNET ARCHIVE, <https://archive.org/details/publicsafetycodes?tab=collection&query=public.resource.org> (last visited Aug. 8, 2023).

<sup>15</sup> See, e.g., *ASTM v. PRO I*, 896 F.3d at 446.

<sup>16</sup> See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

<sup>17</sup> See generally Cong. Rsch. Serv., *Historical Background on Free Speech Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE\\_00013537/](https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE_00013537/) (last visited Aug. 16, 2023); Cong. Rsch. Serv., *Overview of Due Process*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt5-5-1/ALDE\\_00013721/](https://constitution.congress.gov/browse/essay/amdt5-5-1/ALDE_00013721/) (last visited Aug. 16, 2023).

<sup>18</sup> See generally Isaiah Poritz, *Copyrights Are Murky for Laws Referring to Outside Safety Codes*, BLOOMBERG LAW, Mar. 24, 2023, <https://news.bloomberglaw.com/ip-law/copyrights-are-murky-for-laws-referring-to-outside-safety-codes>.

<sup>19</sup> Markup of H.R. 1631, H.R. 4250, and H.R. 4639 Before the H. Comm. on the Judiciary, 118<sup>th</sup> Cong. (2023); H.R. 1631, 118<sup>th</sup> Cong. (2023), <https://judiciary.house.gov/committee-activity/markups/hr-1631-hr-4250-and-hr-4639>.

<sup>20</sup> 597 F. Supp. 3d 213 (D.D.C. 2022).

<sup>21</sup> *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

<sup>22</sup> 17 U.S.C. § 102(a)(1).

<sup>23</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>24</sup> See 17 U.S.C. § 106.

<sup>25</sup> *Id.* §§ 501–505.

At least four legal limitations on copyright, however, might apply to IBR standards. First, under the statutory “government works” doctrine, copyright protection is unavailable for “any work of the United States Government.”<sup>26</sup> That includes works (such as this report) created by federal officers and employees as part of their official duties.<sup>27</sup> Second, under the judicially developed “government edicts” doctrine, copyright does not vest in works created by judges and legislators (including state officers) in the course of their official judicial and legislative duties.<sup>28</sup> Third, under the fair use doctrine, courts permit certain socially valuable uses of copyrighted works that would otherwise be infringing, based on balancing factors such as the purpose of the use, the nature of the copyrighted work, the amount used, and any potential economic harm from the use.<sup>29</sup> Fourth, under the idea/expression distinction and merger doctrine, copyright protection does not extend to facts or ideas;<sup>30</sup> when there are only a few ways to express an idea, the expression is said to “merge” with the idea, and neither is copyrightable.<sup>31</sup>

SDOs may also have trademark rights in the symbols they use to identify themselves as a source of goods and services, such as a logo on the cover of a standards manual.<sup>32</sup> Although trademark claims have also arisen in litigation between public-access groups and SDOs,<sup>33</sup> they are not analyzed in this report.

## Case Law on Copyright in IBR Standards

The copyright status of IBR standards has been litigated in a number of significant federal cases since at least the 1980s. Despite more than 40 years of history, courts have not reached a definitive consensus on (1) whether technical standards remain protected by copyright after they are incorporated by reference into law, or (2) if IBR standards are protected, whether the fair use doctrine or the Constitution permits third parties to make them publicly available despite the copyright.

On the first issue—whether incorporation by reference into law puts standards into the public domain—several decisions by the federal courts of appeals have reached seemingly inconsistent conclusions.<sup>34</sup> Following the D.C. Circuit’s 2018 ruling in *ASTM v. PRO I* and the Supreme Court’s 2020 decision in *Georgia v. PRO*,<sup>35</sup> recent cases have increasingly avoided the broader copyrightability issue and focused instead on the fair use doctrine, while typically ruling against SDOs’ copyright infringement claims.<sup>36</sup>

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<sup>26</sup> *Id.* § 105(a).

<sup>27</sup> *Id.* § 101; see also U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 313.6(C)(1) (3d. ed. 2021), <https://www.copyright.gov/comp3/docs/compendium.pdf> [hereinafter COPYRIGHT OFFICE COMPENDIUM].

<sup>28</sup> See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020); COPYRIGHT OFFICE COMPENDIUM § 313.6(C)(2). As a formal matter, the “government edicts” doctrine is a long-standing judicial interpretation of the term “author” as used in the Copyright Act. *Georgia v. PRO*, 140 S. Ct. at 1507. It is motivated by the “animating principle” that “no one can own the law.” *Id.*

<sup>29</sup> 17 U.S.C. § 107. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1274 (2023).

<sup>30</sup> See 17 U.S.C. § 102(b); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991).

<sup>31</sup> See *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988).

<sup>32</sup> See generally CRS In Focus IF12456, *An Introduction to Trademark Law in the United States*, by Christopher T. Zirpoli (2023).

<sup>33</sup> See, e.g., *ASTM v. PRO I*, 896 F.3d 437, 454 (D.C. Cir. 2018).

<sup>34</sup> See *infra* “Conflicting Decisions by the Federal Courts of Appeals (1980–2002).”

<sup>35</sup> See *infra* “The D.C. Circuit’s 2018 Ruling in *ASTM v. PRO I*” and “The Supreme Court’s Ruling in *Georgia v. PRO* (2020).”

<sup>36</sup> See *infra* “Developments After *Georgia v. PRO*.”

## Conflicting Decisions by the Federal Courts of Appeals (1980–2002)

Several of the early cases in this area involve model building codes. For example, *Building Officials and Code Administrators International v. Code Technology Inc.*<sup>37</sup> concerned a model building code privately developed by the plaintiff, known as BOCA for short, and later adopted in substantial part by the Commonwealth of Massachusetts under a license. BOCA sold book copies of its model code under the title *Commonwealth of Massachusetts State Building Code* and sued a competitor for copyright infringement when it published a competing book version of the Massachusetts code.<sup>38</sup> Although the district court awarded a preliminary injunction to BOCA, the U.S. Court of Appeals for the First Circuit reversed.<sup>39</sup> Without ruling “definitively” on the issue given the procedural posture, the First Circuit implied that, because “[d]ue process requires people to have notice of what the law requires of them,” Massachusetts’s adoption rendered the official building code “freely available for copying by anyone, notwithstanding BOCA’s copyright.”<sup>40</sup>

In *Veck v. Southern Building Code Congress International*, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, largely agreed with the First Circuit, albeit over the dissent of six judges.<sup>41</sup> The dispute in *Veck* involved a model building code adopted by two Texas towns and made available on a noncommercial website run by Peter Veck.<sup>42</sup> The developer of the building codes sent a cease-and-desist letter to Veck, which led to litigation.<sup>43</sup> On appeal, the Fifth Circuit held that “as law, the model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives.”<sup>44</sup> The court rested its conclusion on two doctrinal rationales: the Supreme Court’s government-edicts cases (discussed below),<sup>45</sup> and the merger doctrine (reasoning that adoption as law makes the codes uncopyrightable “facts”).<sup>46</sup>

The U.S. Courts of Appeals for the Second and Ninth Circuits, in contrast, have held that reference to or adoption of a work by a governmental body does not automatically result in a loss of copyright protection. *CCC Information Services v. MacLean Hunter Market Reports* addressed the copyright in a compendium of used car valuations called the “Red Book.”<sup>47</sup> The Second Circuit rejected an argument that the Red Book fell into the public domain because state law referenced Red Book information to set minimum values for car insurance payouts.<sup>48</sup> The court noted that a rule that standards fell into the public domain once incorporated into law “would raise very substantial problems under the Takings Clause of the Constitution.”<sup>49</sup> It also suggested

<sup>37</sup> 628 F.2d 730 (1st Cir. 1980).

<sup>38</sup> *Id.* at 732.

<sup>39</sup> *Id.* at 736.

<sup>40</sup> *Id.* at 732–35.

<sup>41</sup> 293 F.3d 791 (5th Cir. 2002).

<sup>42</sup> *Id.* at 793.

<sup>43</sup> *Id.* at 794.

<sup>44</sup> *Id.* at 793.

<sup>45</sup> See *id.* at 795–800 (citing *Banks v. Manchester*, 128 U.S. 244 (1888)); see *infra* “The Supreme Court’s Ruling in *Georgia v. PRO* (2020)” (discussing *Banks* and the Supreme Court’s other 19<sup>th</sup> century government-edicts cases).

<sup>46</sup> See *Veck*, 293 F.3d at 801–03 (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) and 17 U.S.C. § 102(b)).

<sup>47</sup> 44 F.3d 61, 63 (2d Cir. 1994).

<sup>48</sup> See *id.* at 74 (“We are not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.”).

<sup>49</sup> *Id.* at 74. See generally Cong. Rsch. Serv., *Overview of the Takings Clause*, CONSTITUTION ANNOTATED, (continued...)

that fair use might permit some noncommercial uses of the work, which could mitigate due process concerns.<sup>50</sup>

Finally, in *Practice Management Information Corp. v. AMA*, the Ninth Circuit addressed a copyright claim in the Physician’s Current Procedural Terminology (CPT), a taxonomy of medical procedures and associated codes developed by the American Medical Association.<sup>51</sup> In the 1970s, Congress instructed the Health Care Financing Administration (HCFA) to establish a system for identifying physicians’ services for Medicare and Medicaid reimbursement forms.<sup>52</sup> HCFA chose to adopt the CPT and incorporate it by reference into federal regulations.<sup>53</sup> A medical book publisher sued for a declaratory judgment that the CPT became uncopyrightable once HCFA required the use of CPT code numbers.<sup>54</sup> The Ninth Circuit held that the Supreme Court’s government-edict cases did not apply, relying largely on public policy arguments.<sup>55</sup> The court observed that “[n]on-profit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency.”<sup>56</sup> It also found that any due process concerns were sufficiently addressed by AMA’s own publication of the CPT.<sup>57</sup>

## The D.C. Circuit’s 2018 Ruling in *ASTM v. PRO I*

More recent judicial examinations of copyright in IBR standards can be found in *ASTM v. PRO*, an ongoing, decade-long litigation in the federal courts of the District of Columbia.<sup>58</sup> In 2013, several SDOs sued PRO for copyright infringement after PRO made thousands of technical standards available for free download online.<sup>59</sup> PRO raised several copyright and constitutional defenses, arguing that “citizens must have free access to the law.”<sup>60</sup> The district court rejected PRO’s arguments, holding that the SDOs had valid copyrights that PRO infringed.<sup>61</sup>

The U.S. Court of Appeals for the D.C. Circuit reversed the district court’s ruling.<sup>62</sup> Its opinion observed that technical standards are “as diverse as they are many,” and that governmental bodies incorporate them by reference in ways that “var[y] widely by jurisdiction.”<sup>63</sup> In particular, some IBR standards “define one’s legal obligations,” while others “serve as mere references but have

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[https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE\\_00013280/](https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE_00013280/) (last visited Aug. 8, 2023); CRS Report R47562, *The Takings Clause of the Constitution: Overview of Supreme Court Jurisprudence on Key Topics*, by Adam Vann (2023).

<sup>50</sup> *CCC Info. Servs.*, 44 F.3d at 74 n.30.

<sup>51</sup> 121 F.3d 516, 517 (9th Cir. 1997).

<sup>52</sup> *Id.* at 518.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* at 518–20.

<sup>56</sup> *Id.* at 519.

<sup>57</sup> *Id.* (“[T]he due process requirement of free access to the law . . . may be relevant but does not justify termination of the AMA’s copyright. There is no evidence that anyone wishing to use the CPT has any difficulty obtaining access to it.”)

<sup>58</sup> *See* 896 F.3d 437 (D.C. Cir. 2018).

<sup>59</sup> *Id.* at 444.

<sup>60</sup> *Id.* at 446.

<sup>61</sup> *See id.* at 444–45.

<sup>62</sup> *Id.* at 458.

<sup>63</sup> *Id.* at 441–42.

no direct legal effect.”<sup>64</sup> In part because of the many different uses of IBR standards, the appeals court chose not to make a broad ruling on the “serious constitutional concerns” raised by PRO under the First Amendment and Due Process Clause.<sup>65</sup> Instead, the court took a “narrower approach” focused on the fair use doctrine.<sup>66</sup> On that statutory ground, the court held that the district court erred in granting summary judgment to the SDOs because there was a genuine factual dispute on the fair use issue.<sup>67</sup> Although the court’s analysis of the fair use factors suggested that it thought that PRO’s use was likely fair,<sup>68</sup> the D.C. Circuit ultimately remanded the case to the district court for further proceedings.<sup>69</sup>

Later decisions in the *ASTM v. PRO* litigation followed the Supreme Court’s intervening decision in *Georgia v. PRO*, and so are discussed separately below.<sup>70</sup>

## The Supreme Court’s Ruling in *Georgia v. PRO* (2020)

While litigating against ASTM in the D.C. Circuit, PRO was also defending against a separate copyright infringement claim by the State of Georgia in a case that ultimately reached the Supreme Court. *Georgia v. PRO* involved the copyrightability of the annotations to the Official Code of Georgia Annotated (OCGA).<sup>71</sup> (Annotations to statutes or judicial decisions typically provide commentary, explanations, or context about the code provision or judicial opinion.<sup>72</sup>) LexisNexis, a private company, prepared those annotations under a work-for-hire agreement with a Georgia state entity called the Code Revision Commission.<sup>73</sup> Under that agreement, Lexis did the work of drafting the annotations, but the Commission held the copyright in them.<sup>74</sup> In return, Lexis received the exclusive right to publish and sell the OCGA and committed to make an unannotated version of the code available online for free.<sup>75</sup> After PRO posted a digital version of the OCGA online, the Commission sued PRO for copyright infringement.<sup>76</sup>

*Georgia v. PRO* focused on whether the OCGA was ineligible for copyright under the government-edicts doctrine, as developed through a trio of 19<sup>th</sup>-century Supreme Court cases:

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<sup>64</sup> *Id.* at 442–43.

<sup>65</sup> *See id.* at 447.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 453.

<sup>68</sup> *See id.* at 449–53 (analyzing the fair use factors as applied to PRO’s distribution of IBR standards and suggesting that “in many cases, it may be fair use for PRO to reproduce part or all of a technical standard in order to inform the public about the law”).

<sup>69</sup> *Id.* at 448–49. Judge Katsas’s concurring opinion in *ASTM v. PRO I* expressed his view that as “a matter of common sense . . . access to the law cannot be conditioned on the consent of a private party.” *Id.* at 458 (Katsas, J., concurring). Citing *BOCA* and *Veeck*, he argued that the result may be based on the First Amendment, the Due Process Clause, the idea/expression distinction, or the fair use doctrine. *Id.* at 459.

<sup>70</sup> *See infra* “Developments After *Georgia v. PRO*.”

<sup>71</sup> *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

<sup>72</sup> *See id.* at 1504 (“[A]nnotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and . . . often include editor’s notes that provide information about the origins of the statutory text . . . .”); *Annotation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>73</sup> *Georgia v. PRO*, 140 S. Ct. at 1505.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

*Wheaton v. Peters*,<sup>77</sup> *Banks v. Manchester*,<sup>78</sup> and *Callaghan v. Myers*.<sup>79</sup> Those cases all involved copyright in the work product of judges. Under *Wheaton* and *Banks*, federal and state judicial opinions—or any “products of the labor done by judicial officers in the discharge of their judicial duties”—are not copyrightable and “free for publication for all.”<sup>80</sup> Under *Callaghan*, however, exposition *about* judicial opinions authored by private parties (or even a state court reporter)—such as headnotes, tables of contents, case summaries, and the like—are copyrightable.<sup>81</sup>

*Georgia v. PRO* presented the Court with an “unusual” situation in which annotations about the law—which would be copyrightable if written by a private entity—were published under Georgia’s authority as part of the official Georgia state code.<sup>82</sup> Chief Justice Roberts’s opinion for the Court read the government-edicts cases to establish “a straightforward rule based on the identity of author.”<sup>83</sup> Under that rule, “copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties,” regardless of whether the work is binding (like a statute) or not binding (like an annotation).<sup>84</sup> The “animating principle” underlying that rule is that “no one can own the law.”<sup>85</sup>

Applying its rule, the majority in *Georgia v. PRO* found that because Lexis made the annotations under an agreement with an “arm” of the Georgia state legislature, the annotations were authored by the legislature in the course of its legislative duties.<sup>86</sup> The Court thus held that the annotations were not copyrightable.<sup>87</sup>

## Developments After *Georgia v. PRO*

SDOs and public-access groups dispute the relevance of *Georgia v. PRO* to their ongoing copyright disputes.<sup>88</sup> Public-access groups cite the case for its pronouncement that “no one may own the law” and argue that incorporation by reference transforms privately authored standards into uncopyrightable government edicts.<sup>89</sup> For their part, SDOs contend that the key to the Court’s decision in *Georgia v. PRO* was that the OCGA annotations were authored *by the legislature*.<sup>90</sup> In contrast, most IBR standards are created independently of the government. Under *Georgia v.*

<sup>77</sup> 33 U.S. 591 (1834).

<sup>78</sup> 128 U.S. 244 (1888).

<sup>79</sup> 128 U.S. 617 (1888).

<sup>80</sup> *Banks*, 128 U.S. at 253.

<sup>81</sup> *Callaghan*, 128 U.S. at 650; *see also Georgia v. PRO*, 140 S. Ct. at 1507.

<sup>82</sup> *Georgia v. PRO*, 140 S. Ct. at 1505.

<sup>83</sup> *Id.* at 1506.

<sup>84</sup> *Id.* at 1508.

<sup>85</sup> *Id.* at 1501.

<sup>86</sup> *Id.* at 1508–09.

<sup>87</sup> *Id.* at 1509. Justice Thomas, joined by Justices Alito and Breyer, dissented in *Georgia v. PRO*, reading the 19<sup>th</sup>-century cases to forbid copyright in statutes and regulations, but to permit copyright in nonbinding annotations that “lack[] legal force.” *Id.* at 1515 (Thomas, J., dissenting). Justice Ginsburg, joined by Justice Breyer, dissented separately, arguing that the annotations were copyrightable even under the majority’s rule because, on the facts, the annotations were not actually made in the course of the legislature’s official duties. *Id.* at 1523 (Ginsburg, J., dissenting).

<sup>88</sup> *See, e.g., Facility Guidelines Inst. Inc., v. UpCodes, Inc.*, No. 22-CV-01308, 2023 WL 4026185, at \*3 (E.D. Mo. June 15, 2023).

<sup>89</sup> *See, e.g., ASTM v. PRO*, 597 F. Supp. 3d 213, 231 (D.D.C. 2022), *aff’d*, No. 22-7063, 2023 WL 5918491 (D.C. Cir. Sept. 12, 2023).

<sup>90</sup> *See Facility Guidelines*, 2023 WL 4026185, at \*3.

*PRO*, the government-edicts doctrine does not apply to “private parties” who “lack the authority to make or interpret the law.”<sup>91</sup>

At least three federal district courts have decided cases involving copyright in IBR standards following *Georgia v. PRO*. All three held that the government-edicts doctrine did not apply, but largely ruled against the SDOs’ copyright claims on other grounds. One of these decisions was appealed and upheld by the appellate court.

The first case, *International Code Council v. UpCodes, Inc.*,<sup>92</sup> involved 40 model building codes that the defendant UpCodes made available online in both free and paid subscription versions.<sup>93</sup> The court held that the government-edicts doctrine was “not dispositive” because the codes were privately developed, but still provided “significant guidance.”<sup>94</sup> Attempting to synthesize the “apparent contradictions” in the case law discussed above, the court found the key issue was whether privately authored model codes had “become the law.”<sup>95</sup> To make that determination, the court considered five “guideposts”:

- (1) whether the private author intended or encouraged the work’s adoption into law;
- (2) whether the work comprehensively governs public conduct, such that it resembles a “law of general applicability”; (3) whether the work expressly regulates a broad area of private endeavor; (4) whether the work provides penalties or sanctions for violation of its contents; and (5) whether the alleged infringer has published and identified the work as part of the law, rather than the copyrighted material underlying the law.<sup>96</sup>

Ultimately, the court relied on *BOCA, Veeck*, and the fair use doctrine to hold that the plaintiff SDO could not prevent the online posting of IBR standards as adopted into law.<sup>97</sup> The court also noted, however, that the SDO may have an infringement claim for material that intermingles adopted law with unenacted parts of the model codes.<sup>98</sup>

The second case is the district court’s opinion in the *ASTM v. PRO* litigation addressing the fair use issues remanded by the D.C. Circuit.<sup>99</sup> That decision held that the SDOs had a valid copyright, reasoning that the government-edicts doctrine did not apply because the government did not author the IBR standards.<sup>100</sup> At the same time, the court held that *PRO*’s use of the standards (i.e., making them available to download for free online) was a fair use for 184 of the 217 standards at issue, including all those incorporated by reference into law verbatim.<sup>101</sup>

On appeal, the D.C. Circuit affirmed the district court’s fair use determination, holding that “non-commercial dissemination of [IBR] standards, as incorporated by reference into law, constitutes

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<sup>91</sup> *Georgia v. PRO*, 140 S. Ct. at 1507.

<sup>92</sup> No. 17 Civ. 6261, 2020 WL 2750636 (S.D.N.Y. May 27, 2020).

<sup>93</sup> *Id.* at \*2–3.

<sup>94</sup> *Id.* at \*8.

<sup>95</sup> *Id.* at \*16.

<sup>96</sup> *Id.* (citing *Bldg. Offs. & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) and *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002)).

<sup>97</sup> *See id.* at \*17, \*28.

<sup>98</sup> *See id.* at \*7, \*29.

<sup>99</sup> *ASTM v. PRO*, 597 F. Supp. 3d 213 (D.D.C. 2022), *aff’d*, No. 22-7063, 2023 WL 5918491 (D.C. Cir. Sept. 12, 2023).

<sup>100</sup> 597 F. Supp. 3d at 231 (“Unlike in *Georgia [v. PRO]*, there is no evidence here that that state legislators hired Plaintiffs to draft the standards.”).

<sup>101</sup> *See id.* at 240–41.

fair use.”<sup>102</sup> The D.C. Circuit’s 2023 decision, *ASTM v. PRO II*, focuses on the fair use issue and follows the analysis that the court sketched in its 2018 decision.<sup>103</sup> The court emphasized that the purpose of the use was for non-profit and educational purposes,<sup>104</sup> and that the legal force of IBR standards places them “at the outer edge of copyright’s protective purposes.”<sup>105</sup> Although the court acknowledged that “[c]ommon sense suggests that free online access to many of the [SDOs’] standards would tamp down the demand for their works,” it found the record evidence of actual market harm equivocal; in any event, that factor did not outweigh the other fair use factors favoring PRO.<sup>106</sup>

The final case, *Faculty Guidelines Institute v. UpCodes, Inc.*,<sup>107</sup> concerned building and design codes for health care facilities that UpCodes made available for free online.<sup>108</sup> As in the other post-*Georgia v. PRO* cases, the court held that the government-edicts doctrine did not apply because the codes were privately authored, though it noted that the doctrine “offers important insight into the analysis.”<sup>109</sup> Expressing sympathy with the “majority” view that “model codes that are adopted into state law, or incorporated by reference, are not subject to copyright infringement,”<sup>110</sup> the court ultimately denied the SDO’s motion for a preliminary injunction based on the fair use doctrine.<sup>111</sup>

## Takings Clause Issues

The Takings Clause of the Fifth Amendment states that “private property [may not] be taken for public use, without just compensation.”<sup>112</sup> In simple terms, the Takings Clause provides that the federal or state governments<sup>113</sup> may take an individual’s property only when (1) it is for a public use;<sup>114</sup> and (2) the government pays just compensation to the property owner.<sup>115</sup> For example, consistent with the Takings Clause, the government may use its eminent domain power to appropriate real property for the construction of a railroad, as long as it pays the owner the fair market value of the land.<sup>116</sup>

In decisions involving copyright in IBR standards, courts have sometimes invoked the Takings Clause as a reason to be cautious about holding that incorporation into law extinguishes the copyright in standards or model codes. For example, a recent district court decision noted that “a

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<sup>102</sup> *ASTM v. PRO II*, No. 22-7063, 2023 WL 5918491, at \*1, \*8 (D.C. Cir. Sept. 12, 2023).

<sup>103</sup> *See supra* “The D.C. Circuit’s 2018 Ruling in *ASTM v. PRO I*.”

<sup>104</sup> *ASTM v. PRO II*, 2023 WL 5918491, at \*3–\*4.

<sup>105</sup> *Id.* at \*4 (quoting *ASTM v. PRO I*, 896 F.3d 437, 451 (D.C. Cir. 2018)).

<sup>106</sup> *Id.* at \*6–\*7.

<sup>107</sup> No. 22-cv-01308, 2023 WL 4026185 (E.D. Mo. June 15, 2023).

<sup>108</sup> *Id.* at \*1.

<sup>109</sup> *Id.* at \*3–4.

<sup>110</sup> *Id.* at \*4.

<sup>111</sup> *See id.* at \*7–11.

<sup>112</sup> U.S. CONST. amend. V; *see generally* Cong. Rsch. Serv., *Overview of the Takings Clause*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE\\_00013280/](https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE_00013280/) (last visited Aug. 16, 2023).

<sup>113</sup> By in terms, the Fifth Amendment restricts only the federal government, but the Supreme Court has long held that the Takings Clause applies to state governments under the Due Process Clause of the Fourteenth Amendment. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984); *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 241 (1897).

<sup>114</sup> *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

<sup>115</sup> *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019).

<sup>116</sup> *See United States v. Miller*, 317 U.S. 369, 370–74 (1943).

bright line rule that any privately developed model code adopted into state law automatically becomes part of the public domain . . . may raise significant concerns under the Takings Clause.”<sup>117</sup> Other courts have rejected this reasoning, arguing that because SDOs urge governments to adopt their standards, the Takings Clause (which usually involves a coercive seizure of property) is inapplicable.<sup>118</sup>

Although courts have discussed the Takings Clause in conjunction with other arguments, none of the cases discussed above involved a formal takings claim, and it does not appear that any court has directly decided how the Takings Clause applies to IBR standards. Theoretically, *if* the courts ruled that IBR standards fell into the public domain upon adoption into law, an SDO might sue the federal or state government under the Takings Clause for compensation based on the loss of their copyright. Under federal law, property owners may sue the United States for takings claims or copyright infringement in the U.S. Court of Federal Claims.<sup>119</sup>

As a practical matter, SDOs have not sued governments for a taking based on their incorporation of standards by reference into law, instead suing third parties for copyright infringement based on their distribution of IBR standards.<sup>120</sup> There are many possible reasons why SDOs have not brought a Takings Clause claim. For one thing, the premise of that claim—that incorporation into law extinguishes copyright in IBR standards—is one that the SDOs have vigorously disputed in litigation.<sup>121</sup> For takings claims against state governments, another potential barrier is state sovereign immunity to copyright infringement claims.<sup>122</sup>

Given the lack of case law, the merits of a potential takings claim in this context are uncertain. To begin with, it is not completely settled that copyrights are “private property” subject to the

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<sup>117</sup> *Facility Guidelines Inst., Inc. v. UpCodes, Inc.*, No. 22-CV-01308, 2023 WL 4026185, at \*7 (E.D. Mo. June 15, 2023); *accord* *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Repts., Inc.*, 44 F.3d 61, 74 (2d Cir. 1994).

<sup>118</sup> *See* *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791, 803 (5th Cir. 2002) (“This is not, however, a ‘takings’ case, not least because [the SDO] urged localities to adopt its model codes. The issue in the case is not the voluntariness of the appropriation but the legal consequences . . .”); *accord* *Int’l Code Council, Inc. v. UpCodes, Inc.*, No. 17 CIV. 6261, 2020 WL 2750636, at \*13–14 (S.D.N.Y. May 27, 2020).

<sup>119</sup> *See* 28 U.S.C. §§ 1491, 1498(b); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

<sup>120</sup> *See, e.g., Int’l Code Council*, 2020 WL 2750636, at \*1.

<sup>121</sup> *See supra* “Case Law on Copyright in IBR Standards.”

<sup>122</sup> *See* *Allen v. Cooper*, 140 S. Ct. 994, 999 (2020). To the extent that the claim against the state is for a taking in violation of the Fifth and Fourteenth Amendments (as opposed to an ordinary statutory copyright infringement claim), *Allen* is arguably distinguishable. *See* *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019).

Takings Clause.<sup>123</sup> The weight of authority suggests that they are, however.<sup>124</sup> It is also not clear whether a court would view the hypothetical loss of the copyright based on incorporation into law as a per se taking (which must always be compensated),<sup>125</sup> or as a putative “regulatory taking” (under which whether compensation is required depends on judicial balancing of several factors).<sup>126</sup>

## The Pro Codes Act

The Pro Codes Act was introduced in the 118<sup>th</sup> Congress with the stated intention to “balance the goals of furthering the creation of standards and ensuring public access to standards that are incorporated by reference into law or regulation.”<sup>127</sup> Its findings section states that federal, state,

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<sup>123</sup> See Tom W. Bell, *Copyright As Intellectual Property Privilege*, 58 SYRACUSE L. REV. 523, 538 (2008) (describing the Takings Clause’s applicability to copyright as “unlitigated and, thus, still subject to dispute”). There is a large scholarly literature on this question and the closely related question of whether the Takings Clause should apply to patent rights. For arguments supporting the application of the Takings Clause to copyrights and patents, see, for example, Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 981–83 (2015) (arguing that the best reading of the Supreme Court’s precedent is that “copyrights are property for takings purposes”); Terry Hart, *Copyright and the Takings Clause*, COPYHYPE (Dec. 10, 2012), <https://www.copyhype.com/2012/12/copyright-and-the-takings-clause/> (arguing that “it’s reasonable to conclude that the Takings Clause would apply to copyrights”); Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U.L. REV. 689, 691 (2007) (arguing the 19<sup>th</sup>-century jurisprudence established that “patents were protected under the Takings Clause”); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 Fla. L. Rev. 529, 566–68 (1998) (arguing that Supreme Court precedent implies that patents, copyrights, and “to a lesser extent” trademarks should be covered by the Takings Clause). For arguments against applying the Takings Clause to copyrights or patents, see Robin Feldman, *Patents As Property for the Takings*, 12 N.Y.U. J. INTELL. PROP. & ENT. L. 198, 205 (2023) (arguing based on history and theory that “patents do not fall within the Fifth Amendment’s [Takings] Clause”); Bell, *supra*, at 539 (arguing that because “copyrights exist only by the grace of the Constitution, the Court’s definition of ‘property’ appears not to shelter copyright” under the Takings Clause); Davida H. Isaacs, *Not All Property Is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1, 3 (2007) (arguing that “patentholders are not entitled to a Takings Clause remedy”).

<sup>124</sup> See *Copyright Reform and the Takings Clause*, *supra* note 123, at 982 (“[T]he weight of scholarly opinion is that copyrights are property for takings purposes. And there is some direct evidence that the [Supreme] Court would agree.”). The Supreme Court has held that trade secrets, another type of “intangible” property, are protected by the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984). The Court has also repeatedly stated that patents are a protected property interest under the Fifth Amendment. See, e.g., *Horne v. Dep’t of Agric.*, 576 U.S. 350, 359–60 (2015) (“[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation . . .” (alteration in original) (quoting *James v. Campbell*, 104 U.S. 356, 358 (1881))). The reasoning of these decisions suggests that the Court may find that copyright is a form of intellectual property sufficiently like trade secrets and patents to be protected under the Fifth Amendment. See *E. Enters. v. Apfel*, 524 U.S. 498, 554 (1998) (Breyer, J., dissenting) (“The ‘private property’ upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property.” (emphasis added)). Notably, the Court has recently held that copyrights are a protected property interest under the Fourteenth Amendment’s Due Process Clause. See *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) (“Copyrights are a form of property [protected by the Fourteenth Amendment].”). There is also some case law in the lower federal courts on these issues. See, e.g., *Celgene Corp. v. Peter*, 931 F.3d 1342, 1358 (Fed. Cir. 2019) (assuming that “a valid patent is private property for the purposes of the Takings Clause”); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (“An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”).

<sup>125</sup> See, e.g., *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner [under the Takings Clause].”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (per se taking when “the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good”).

<sup>126</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–25 (1978).

<sup>127</sup> H.R. 1631, 118th Cong. § 2 (2023).

and local governments “benefit greatly” from SDO-created standards, which “further innovation [and] commerce” and are “critical to protecting public health and safety.”<sup>128</sup> The bill also states that SDOs ensure “all interested parties have an opportunity to participate” without “costs to governments or taxpayers,” and “rely on copyright protection” to fund the voluntary consensus process for creating and updating their standards.<sup>129</sup>

The Pro Codes Act would establish that a standard protected by copyright when it was created “shall retain such [copyright] protection, notwithstanding that the standard is incorporated by reference” into federal, state, or local law.<sup>130</sup> The bill would thus supersede *Veck* and similar cases that have held that such standards fall into the public domain once incorporated into law or regulation. To retain their copyright, however, SDOs must make “all portions of the standard so incorporated publicly accessible online at no monetary cost” within a “reasonable time.”<sup>131</sup> A party challenging an SDO’s copyright based on a failure to comply with this public-access requirement would bear the burden of proof.<sup>132</sup>

In short, the Pro Codes Act would provide that SDOs would retain copyright in IBR standards so long as they make that material publicly accessible online. The bill defines “publicly accessible” as “displayed for review in a readily accessible manner on a public website.”<sup>133</sup> The bill would not require that the material be made available to print, share, or download. The public-accessibility definition also allows SDO websites to require that users create an account or agree to terms of service to access IBR material, so long as there is no monetary cost to the user.<sup>134</sup>

Supporters of the Pro Codes Act, including SDOs such as the National Fire Protection Association, argue that their work creating standards provides “critical public benefits.”<sup>135</sup> If incorporation by reference destroys copyright protection, SDOs maintain that they will no longer be able to fund their activities by publishing, selling, and licensing their standards to professionals who use them.<sup>136</sup> SDOs also note that they already permit free viewing of their standards by the public online.<sup>137</sup>

Opponents of the Pro Codes Act, including public-access groups like PRO and internet-freedom groups like the Electronic Frontier Foundation, argue that no one should control who can read and distribute the law, including IBR standards.<sup>138</sup> They maintain that SDOs “have charged high fees and imposed other restrictions” to access their standards in the past.<sup>139</sup> They also object to the Pro Codes Act’s “limited” public-access requirement, which could require users to submit personal

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at § 3(a).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See, e.g.,* Jim Pauley, *Pro-Codes Bill Filed to Preserve Safety Code Copyright*, NAT’L FIRE PROT. ASS’N Mar. 3, 2022, <https://www.nfpa.org/News-and-Research/Publications-and-media/Blogs-Landing-Page/NFPA-Today/Blog-Posts/2022/03/03/Pro-Codes-bill-filed-to-preserve-safety-code-copyright>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id. See, e.g.,* List of NFPA Codes & Standards, NAT’L FIRE PROT. ASS’N, <https://www.nfpa.org/Codes-and-Standards/All-Codes-and-Standards/List-of-Codes-and-Standards> (last visited Aug. 3, 2023).

<sup>138</sup> *See, e.g.,* Letter from Electronic Frontier Foundation et al., to Sens. Lindsey Graham and Dick Durbin, U.S. Senate Judiciary Comm. (Apr. 27, 2023), <https://law.resource.org/pub/us/cfr/regulations.gov/foia/senate.gov.20230427.pdf>.

<sup>139</sup> *Id.*

information to view IBR standards, and deny them the ability to print and download standards.<sup>140</sup> Under the Pro Codes Act, SDOs may choose to make only an “economy-class version” of the IBR standards available for free,<sup>141</sup> alongside paid versions with more functionality.

The Pro Codes Act speaks only to the existence of copyright in IBR standards, and would not explicitly address the fair use issue or constitutional defenses asserted by public-access groups in litigation.<sup>142</sup> Thus, even if the Pro Codes Act were enacted, groups like PRO may still assert fair use arguments like those accepted by the court in *ASTM v. PRO II*, although the enactment might be interpreted by courts to inform the fair use analysis. Even if a fair use defense failed, public-access groups may still rely on First Amendment and Due Process Clause arguments, which a statute cannot supersede. It is not clear, then, that enactment of the Pro Codes Act would resolve all the issues litigated in the cases discussed above.

## Considerations for Congress

Although it arises in a specialized context, debates over copyright in IBR standards ultimately involve the core policy tradeoff for copyright and other forms of intellectual property: balancing incentives for creation versus access to (and the cost of) creative works.

On the incentive side, Congress may consider whether judicial decisions—which have recently trended against SDOs’ copyright claims—have undercut SDOs’ ability to fund their operations through publishing and selling their standards. Some may question whether copyright protection for IBR standards is necessary, arguing that SDOs could fund their activities in other ways or combine IBR standards with other material to create an unambiguously copyrightable form of their work. Others, including many SDOs, maintain that copyright is needed for them to recoup the costs of standards creation.<sup>143</sup> On that view, uncertainty in current law may undermine SDOs and the social benefits they create for lawmakers, governmental agencies, and the public.

On the access side, Congress may consider what kind of public access to IBR standards is appropriate. As discussed above, different courts have reached different conclusions on the copyrightability of IBR standards or the permitted uses of such standards under the fair use doctrine. As a practical matter, many SDOs have made their work freely available to the public in some form, while some public-access groups have sought to facilitate greater public accessibility (e.g., permitting free downloads of IBR standards). The Pro Codes Act would require SDOs to provide a level of online access at no cost to users, but it would appear to allow SDOs to impose some conditions on viewing and to restrict downloading and printing. Congress may consider whether the status quo, the Pro Codes Act, or some other alternative provides sufficient public access to IBR standards.

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<sup>140</sup> *Id.*

<sup>141</sup> *Cf. Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1512 (2020) (expressing concern that allowing copyright in annotations to the official code of Georgia would create “economy-class” and “first-class” versions of state law).

<sup>142</sup> *See supra* “Case Law on Copyright in IBR Standards.”

<sup>143</sup> *See Why Voluntary Consensus Standards Incorporated by Reference into Federal Government Regulations Are Copyright Protected*, AM. NAT’L STANDARDS INST., <https://share.ansi.org/Shared%20Documents/About%20ANSI/Why-Voluntary-Consensus-Standards-Incorporated-by-Reference-into-Federal%20Government%20Regulations-Are-Copyright-Protected.pdf> (last visited Aug. 16, 2023) (“Another [SDO] business model relies on recouping these costs through revenue made possible from the copyright-protected sales and licensing of the standards themselves.”).

Given that the Copyright Act does not directly speak to the issue, the scope of the copyright in IBR standards has largely been developed by the courts. Another issue that Congress may consider, then, is whether it wishes to permit continued judicial development in this area, or to intervene through legislation such as the Pro Codes Act. As different regional federal appeals courts have reached different conclusions, legislation may have the benefit of promoting national uniformity on the issue. Alternatively, one may argue courts are better positioned to account for differences in IBR standards and uses of them through case-by-case application of doctrines such as fair use.

The Pro Codes Act represents one possible option for legislating in this area. On the inventive end of the spectrum, if Congress found that existing legal provisions<sup>144</sup> and market incentives are sufficient to facilitate public availability,<sup>145</sup> it might choose to strengthen SDOs' copyright without imposing online-access requirements. On the access end, if Congress found that copyright was unnecessary for SDOs, it could provide that incorporation by reference places an IBR standard in the public domain, perhaps by expanding the reach of the statute denying copyright to government works.<sup>146</sup>

Various statutory licensing regimes are another possibility. Under a statutory or “compulsory” license, the government permits a certain use of a copyrighted work—regardless of actual permission from copyright holder—while setting a royalty rate for that use by law.<sup>147</sup> Such a license could be structured in various ways, depending on whom Congress viewed as the appropriate entity to pay for the IBR standards. For example, one option would be to provide that incorporation extinguishes or diminishes copyright, but require the government to pay SDOs a set royalty when it incorporates a standard into law.<sup>148</sup> That approach would lose one benefit of the current system, however, in which technical standards are developed largely without cost to taxpayers. Another possible statutory license would allow public-access groups and others to make IBR standards publicly available despite SDOs' copyright claims, but require such groups to pay a set royalty for the various uses that have been disputed in litigation.

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<sup>144</sup> See 1 C.F.R. § 51.5(b)(2); 17 U.S.C. § 107.

<sup>145</sup> See *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 519 (9th Cir. 1997) (reasoning that there is “no realistic threat to public access” to the IBR standard because the SDO “has no incentive to limit or forgo publication”).

<sup>146</sup> See 17 U.S.C. § 105(a). This could raise Takings Clause concerns if applied retroactively. See *supra* “Takings Clause Issues.”

<sup>147</sup> *Compulsory License*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“A statutorily created license that allows certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty.”).

<sup>148</sup> See *Facility Guidelines Inst., Inc. v. UpCodes, Inc.*, No. 22-CV-01308, 2023 WL 4026185, at \*7 (E.D. Mo. June 15, 2023) (“Perhaps . . . [the] most equitable path forward involves the payment of a reasonable royalty or licensing fee when the government adopts a privately authored model code to offset the economic harm that results from free distribution to the public.”).

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