Before the United States Congress
House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet
Hearing on Protecting U.S. Leadership in Codes Development and Enhancing Public Access

April 21, 2026

Testimony of Jonathan Band on Behalf of the Library Copyright Alliance

Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee:

Thank you for the opportunity to share the library perspective on the Pro Codes Act. I represent the Library Copyright Alliance (LCA), which consists of the American Library Association (ALA) and the Association of Research Libraries (ARL). ALA is a nonprofit professional organization of more than 50,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. ARL is a nonprofit association of 123 research libraries in North America, including university libraries, public libraries, government and national libraries.

My testimony has three parts. First, I will explain the library interest in this issue; how libraries rely on the government edicts doctrine to provide public access to the law. Second, I will discuss our concerns with the Pro Codes Act and how it could interfere with public access to the law. Third, I will propose a better way forward: governments directly incorporating standards into the law, rather than just incorporating them by reference.

I. Libraries Rely on the Government Edicts Doctrine to Provide Public Access to the Law

Libraries rely on the government edicts doctrine to provide meaningful access to government information for researchers, students, and the general public. The doctrine holds, as Chief Justice Roberts explained in Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020), that "no one can own the law." Because every citizen is presumed to know the law and should have free access to it, this principle that copyright does not extend to the law is rooted in the constitutional rights to due process and free expression.[1]

Libraries equip citizens with the information required to participate in democracy.[2] This is a core library function. Through their collections and services, libraries help patrons exercise their First Amendment right of access to information and "ensure that [the] constitutionally protected 'discussion of governmental affairs' is an informed one," enabling "citizen[s] to effectively participate in and contribute to our republican system of self-government." Globe Newspaper Co. v. Super. Ct. for Cty. of Norfolk, 457 U.S. 596, 604–05 (1982). On dedicating his presidential library, President Franklin Delano Roosevelt noted that, when examining the recorded history of "the building of permanent institutions like libraries and museums for the use of all the people, it has been among democracies that such building has flourished"; and that the link between libraries and democracies was especially clear in the United States, "because we believe that people ought to work out for themselves, and through their own study, the determination of their best interest."[3]

Throughout the United States, citizens rely on libraries for access to information. To help patrons exercise their rights and responsibilities as citizens, libraries must be able to provide access to, and preserve, government edicts. Law libraries, public libraries, and research libraries all play a role in this effort.

Law libraries serve legal professionals, academics, and, in particular, community residents with pressing legal needs or simple intellectual curiosity about the law. A study at the Arthur Neef Law Library at Wayne State University in Detroit, for example, showed that more than 70 percent of walk-in reference requests came from individuals unaffiliated with the

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[1] *See also* U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, Sec. 313.6(C)(2) (2021).

[2] This section of the testimony is based on the *amicus* brief LCA associations filed with the Supreme Court in *Georgia v. Public.Resource.Org.*

[3] Franklin Delano Roosevelt, *Speech of the President: Dedication of the Franklin D. Roosevelt Library, June 30, 1941*, 4–5 Franklin: Access to the FDR Library's Digital Collection, https://perma.cc/W4RB-GYMG (from transcript, omitting phrases included in prepared remarks but omitted from the delivered address).

university, and 45 percent of those requests came from community patrons.[4] The experience at Wayne State is typical. Another survey found that 98 percent of law libraries offer reference or research services to self-represented litigants and that 70,500 of them take advantage of those services each month.[5] Public libraries partner with law libraries to provide legal information to citizens. Patrons view their public libraries as a "comfortable entry point" to access all kinds of information, "thus making [the library] a known and comfortable place to seek legal information."[6] Public libraries are thus a primary gateway for citizens interacting with their government. Nearly all public libraries—97 percent—assist patrons in completing online government forms.[7] And more than 75 percent of American public libraries assist patrons who need to access and use online government services, providing information about, for example, "Medicare, Immigration, Social Security, and Taxes."[8]

Access to information and assistance is particularly important in states like Georgia, where, according to one legal needs assessment, a majority of households experienced one or more civil legal problems, and almost three-quarters of those households attempted to solve these problems without formal legal assistance.[9]

Research libraries, law libraries, and other memory institutions also preserve government edicts, maintaining a reliable record as governments and laws change over time.[10]

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[4] Beth Applebaum *et al.*, *Bringing Law to the Community: Facilitating Access to Justice in Metropolitan Detroit*. Paper presented at the 2016 International Federation of Library Associations ("IFLA") World Library and Information Congress ("WLIC") Conference, Columbus, Ohio, 3 (2016), https://perma.cc/5L42-HVRA.

[5] Self-Represented Litigation Network, "Key Findings and Takeaways," *Open to the Public: How Law Libraries Are Serving Self-Represented Litigants Across the Country* (2019), https://arcg.is/1LfmT5**.**

[6] Brian D. Anderson, *Meaningful Access to Information as a Critical Element of the Rule of Law: How Law Libraries and Public Libraries Can Work Together to Promote Access*. Paper presented at the 2016 IFLA WLIC Conference, Columbus, Ohio, 4 (2016), https://perma.cc/V6EH-5G4H [hereinafter "*Meaningful Access*"].

[7] American Library Association ("ALA"), *State of America's Libraries 2019: A Report of the American Library Association*, 11 (Kathy S. Rosa ed., 2019), https://perma.cc/W5A3-AKKD**.**

[8] John Carlo Bertot *et al.*, *2014 Digital Inclusion Survey: Survey Findings and Results*, Information Policy and Access Center 52 (2015), https://perma.cc/L24W-NYNY.

[9] A.L. Burruss Inst. of Pub. Serv. and Research at Kennesaw State Univ., *Civil Legal Needs of Low and Moderate Income Households in Georgia* 11–12, 25 (2009), https://perma.cc/3GUL-9SJ3 (sponsored by the Committee on Civil Justice, Supreme Court of Georgia Equal Justice Commission).

[10] ARL's membership includes 21 Federal depository libraries that serve as stewards for collecting, preserving, and providing free access for all users to Government information as part of the Federal Depository Library Program (FDLP). These libraries maintain free, no-fee access to print and digital collections. In addition, information specialists are available at these libraries to assist researchers with locating Federal information.

Preservation, while crucial to the development of law and public institutions, is an endeavor that private publishers "may not have the interest, financial incentive or expertise" to undertake.[11] For example, the Georgetown University Law Library, with contributions from many other libraries, has pursued several projects to preserve historic state legal codes in a user-friendly format.[12] Preservation requires the making of multiple copies.

In addition to preservation, libraries participate in projects that transform legal records into datasets that can be put to a range of uses through application programming interfaces.[13] Through these and similar efforts, libraries serve citizens who seek access to the law for diverse reasons. See Veeck v. S. Bldg. Code Cong. Int'l, 293 F.3d 791, 799 (5th Cir. 2002) ("Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse."). Accordingly, partial access to the law is insufficient. To support the full range of needs and interests that move citizens to seek access to the law, libraries depend on a clear, comprehensive, and administrable government edicts doctrine.

II. The Pro Codes Act Interferes with the Government Edicts Doctrine

The Supreme Court in Georgia v. Public.Resource.Org made crystal clear that edicts of government of all levels were uncopyrightable elements of the public domain. The Pro Codes Act would attempt to reverse this foundational legal principle in a narrow but significant way: by affirming copyright ownership over standards that are incorporated by reference. It has long been the policy of the U.S. Government to rely on the expertise of standards development organizations (SDOs) to develop voluntary consensus standards that are then incorporated by reference in the Code of Federal Regulations.[14] State and local governments follow the same practice. The reliance on the expertise of private sector experts in the development of legal obligations is good public policy, and that's what is occurring right now in this hearing.

However, incorporating standards into regulations by reference, as opposed to directly incorporating the standards by verbatim copying into the text of the regulation, is a historical practice based in large measure on the cost of physical printing. It was less expensive for the Government Printing Office (now the Government Publishing Office) to publish–and thus for the users to buy–a slimmer Code of Federal Regulations with many provisions incorporated by

[11] Statement of James G. Neal, Vice President for Information Services and University Librarian, Columbia University, Before the Subcommittee on Courts, Intellectual Property and the Internet, U.S. House of Representatives Committee on the Judiciary, Apr. 2, 2014 at 2, https://perma.cc/Y9BL-R3GT (hearing on preservation and reuse of copyrighted works).
[12] Hilary T. Seo, *Preserving Print Legal Information*, 96 Law Libr. J. 581, 588–89 (2004).
[13] *See* Library Innovation Lab, *Project: Case Law Access Project*, https://perma.cc/9747-L2FV.
[14] *See* Circular A–119 of the Office of Management and Budget, ''Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities" (Jan. 27, 2016).

reference. If the user needed to consult a specific incorporated standard, the user could find it in a library[15] or purchase a copy of the standard, without having to purchase all the other incorporated standards.

The problem with incorporating standards by reference is that it created a legal grey area. If a standard were directly incorporated by verbatim copying into the text of the regulation, the copied portions unquestionably would fall under the government edicts doctrine, and would enter the public domain. But the copyright status of a standard that was only incorporated by reference is less obvious. Although LCA members believe that such a standard enters the public domain, the Supreme Court has not yet ruled directly on this issue.[16] As a practical matter, this ambiguity was not that consequential during the analog era because the law was fairly inaccessible. If the user wanted to consult law, the user either had to go to the library, which had purchased a copy of the standard; or the user could buy a copy of the standard himself. Regardless of the copyright status of the standard, there typically was little economic incentive for a competing publisher to publish the standard because of all the costs associated with physical publishing, which would have to be passed on to the user.

In the digital era, all this changed. Now, public interest organizations such as Public.Resource.Org could scan a standard and place it online at virtually no cost, which enabled it to provide free access to the law. The cost barrier imposed by the expense of physical printing had been eliminated, thereby elevating the importance of the copyright status of the incorporated standard.

LCA strongly supports the broadest availability of the law. We believe that once a portion of a standard is incorporated into the law, whether by verbatim copying into the text of a statute or by reference, that portion enters into the public domain and can be posted freely online. Obviously, this means that users are less reliant on libraries than they have been in the past to learn what the law is; users can find the law on sites maintained by public interest groups such as Public.Resource.Org. But libraries remain interested in the public domain status of standards incorporated by reference for the purpose of preserving and researching the historical record of what the law has been, as well as promoting the public interest in access to the law.

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[15] Indeed, the Administrative Conference of the United States specifically recommended that government agencies promote the availability of incorporated materials by making "incorporated materials available in libraries." Administrative Conference of the United States, *Incorporation by Reference* (Dec. 8, 2011), *acus.gov/document/incorporation-reference#-ftn6*.

[16] *Id*. at n.3 and 4.

The Pro Codes Act attempts to claw standards incorporated by reference out of the public domain by including the following provision in a new 17 U.S.C. § 123:

> A standard to which copyright protection subsists under section 102(a) at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if the 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.

The claimed purpose of this amendment is ensuring that standards development organizations have the financial incentive to develop standards important for health, safety, and technological progress. LCA has the following observations concerning the proposed legislation.

1. The Pro Codes Act is Unconstitutional

The Government Edicts Doctrine is rooted in the constitution. As noted above, allowing a private entity exclusive ownership of the law would run contrary to the rights of free expression and due process enshrined in the First and Fifth Amendments. The constitutional argument is developed further in the various amicus briefs ALA and ARL have joined in copyright cases concerning incorporation of standards by reference.[17] Although copyright is authorized by the Constitution, the intellectual property clause does not empower Congress to overturn fundamental constitutional rights. See Silvers v. Sony Pictures Ent., Inc., 402 F.3d 881, 883–84 (9th Cir. 2005).

We acknowledge the bill's attempt to limit its adverse impact on the public by requiring a degree of public accessibility, but this public accessibility requirement is insufficient to cure the bill's constitutional infirmity. In particular, the bill does not require the full text of the publicly accessible version to be searchable, downloadable, or reproducible. Thus, the bill, if it were enacted, would still interfere with individuals' ability to understand, and comment upon, their legal obligations.

2. The Pro Codes Act Would Limit Public Access to the Law.

Because of the limited, read-only nature of its public accessibility requirement, the Pro Codes Act would make it more difficult for members of the public to access the law when

[17] *See, e.g.*, Brief of *Amici Curiae* Public.Resource.Org, *et al.*, in *American Society for Testing & Materials, v. Upcodes.*

provisions have been incorporated by reference.

Rather than improve the problem of access to the law, the Pro Codes Act would codify existing restrictive practices of SDOs that provide read-only access through websites with limited functionality, and require users to create an account and agree to the terms of service in order to access material online. The Act explicitly permits the SDO to condition access to the standard on the user agreeing to terms of service unilaterally imposed by the SDO, and the collection of personally identifiable information. Conceivably, the terms of service could require the user to waive the ability to make a fair use copy of the material, or to copy unprotected ideas. Libraries have long warned that terms of service and license agreements are a mechanism by which publishers restrict uses that copyright law would otherwise permit.[18]

In short, the conditional copyright retention scheme that Pro Codes envisions would extend to SDOs sole copyright ownership over the law itself, allowing SDOs to further restrict users from downloading, printing, copying, annotating, translating, text-mining, incorporating into secondary works, sharing the standard with colleagues, or other uses that are lawful under copyright law. This could:

- Restrict public awareness of the law—including by consumers, workers, and businesses;
- Create unnecessary barriers to legal compliance;
- Impede first responders and safety professionals from understanding critical regulations;
- Escalate the cost of home ownership by increasing costs to builders;
- Restrict access for researchers, libraries and archives;
- Inhibit commentary and criticism; and
- Stifle innovation and economic growth.

3. The Pro Codes Act is Based on an Incorrect Premise

The basic premise of the Pro Codes Act is that without the incentive provided by copyright, SDOs would not undertake the costly process of developing standards, to the detriment of the public. This premise is incorrect. In the vast majority of cases, industry participants have an economic incentive to participate in the development of standards. Often, after they develop the standard, the SDOs lobby government entities to adopt the standards as law. The voluntary, consensus standards process is a critical element of what is in effect a system of self-regulation, which industry vastly prefers to regulation originating from government entities. In the absence of copyright protection, most SDOs would still develop

[18] In *X Corp. v. Bright Data Ltd.,* No. 23-cv-03698-WHA (N.D. Cal. 2024), a federal court found that a claim for breach of terms of service was preempted by the Copyright Act, and that enforcing the terms of service would effectively give X Corp. de facto copyright ownership over content it didn't own. However, this preemption theory has not yet been widely adopted by other courts.

standards and then request government entities to adopt them as regulations.

Moreover, in the recent copyright litigation concerning the unauthorized online posting of standards incorporated by reference, the SDOs have been unable to show that this posting caused any harm to the market for their publications incorporating their standards.[19] This is in part because these publications typically include explanatory material that is not incorporated by reference and therefore remains within the scope of copyright protection.

4. The Pro Codes Act Would Not Achieve the Certainty its Supporters Seek

Even if the Pro Codes legislation were enacted, the SDOs would not be able to prevent the reposting of their standards incorporated by reference with any certainty. Assuming *arguendo* that the legislation was constitutional, a court might still find that the reposting of a standard incorporated by reference was a fair use under 17 U.S.C. §107. After all, in the recent litigation concerning the reposting of standards, the courts have assumed that copyright still protected the standards, but permitted their reposting under a fair use theory. To be sure, the adoption of the legislation, including the Congressional findings concerning the benefits of copyright protection for standards incorporated by reference, might tilt the fair use calculus against the user in a particular case. But because of the continued availability of fair use, the legislation would just render this area of the law more confusing.

III. A Better Idea: Direct Incorporation

As noted above, incorporation by reference was an analog-era solution that was necessary when voluminous standards were available only in print. Today, reducing the volume of material in print is no longer an important consideration. Nonprofits like Public.Resource.Org and startups like UpCodes have demonstrated the ease and efficiency of providing public access to standards digitally. Now that standards are available digitally, and not only in print, it would be more efficient and effective for government agencies to incorporate standards directly into federal, state, local, tribal, or territorial codes, and to make the complete codes available online from the official agency website.

Accordingly, perhaps OMB Circular A-119 should be revised to encourage direct incorporation of standards. Or Congress could amend 5 U.S.C. § 552(a)(1) to require that agencies incorporate standards directly into regulatory text rather than by reference, and to define "reasonably available" as freely and publicly accessible online without account creation or terms of service conditions.

Before direct incorporation, the agency probably would have to request a royalty free

[19] *See American Society for Testing & Materials v. Upcodes*, __ F.4 __ (3rd Cir. 2026); *American Society for Testing & Materials v. Public.Resource.Org*, 82 F.4 1262 (D.C. Cir. 2023).

license from the SDO. We expect that most SDOs would eagerly grant such a royalty-free license because their objective in creating the standard in the first place was for it to be adopted by an agency as a regulation. Once the standard was incorporated into the regulation, the copyright in the incorporated portion of the standard would be extinguished.

In the rare circumstance where the SDO would not grant a royalty-free license, the agency could: 1) pay a royalty for a license if one were available; 2) incorporate the standard without permission, and pay "reasonable and entire compensation" under 28 U.S.C. § 1498(b) (or its state equivalent); or work with a more reasonable SDO.

I am happy to answer any questions the Subcommittee may have.