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

Updated October 19, 2026

Congressional Research Service
https://crsreports.congress.gov
R47656

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R47656

October 19, 2026

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

This report explains the current law concerning copyright protection for technical standards developed by private organizations and subsequently incorporated by reference into federal, state, or local law. It reviews the outcomes and reasoning of prominent case law on the issue from the federal courts and the potential effect of legislative proposals introduced in recent Congresses.

Technical standards—such as fire prevention and building codes—play an important role in protecting public health and safety, as well as ensuring compatibility and interoperability in particular industries. Federal policy generally encourages federal agencies to use privately developed, voluntary consensus standards, instead of "government-unique" standards. Private standards-developing organizations (SDOs) often create 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 references or as guidance but do not formally impose legal obligations.

SDOs may rely on copyright protection to fund their standards-development activities. Copyright grants authors of creative works (e.g., books) 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, may allow SDOs to prevent third parties from making and distributing unauthorized copies of their standards.

When technical standards are incorporated into law, maintaining copyright protection on them can raise constitutional and policy 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 use IBR standards and may have differing policies for public access. Many SDOs choose to make their standards available in some form online, even if they assert copyright ownership over the IBR standards, while charging for printed copies or online versions with greater functionality than the free online versions.

Some public-access organizations, as well as commercial entities, have disregarded SDOs' copyright assertions and posted technical standards online, including making them available for download. 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 brought by SDOs 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. U.S. Courts of Appeals for different regional circuits reached seemingly conflicting conclusions on that question in the 1980s–2000s. Following the U.S. Court of Appeals for the District of Columbia Circuit's decision in *American Society for Testing and Materials v. Public.Resource.Org* (*ASTM v. PRO I*), 896 F.3d 437 (D.C. Cir. 2018), courts have increasingly focused on whether copyright's fair use doctrine permits public-access groups or commercial entities to make IBR standards available online. After *ASTM v. PRO I* and the Supreme Court's decision on a related issue in *Georgia v. Public.Resource.Org*, 590 U.S. 255 (2020), recent cases have generally ruled against SDOs' copyright infringement claims, mainly on fair use grounds, although the results have not been uniform.

The Pro Codes Act (H.R. 4072 in the 119th Congress) 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 available online in a readable, accessible 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 incorporated by reference into federal, state, or local laws and regulations.[1] The Pro Codes Act,[2] a bill introduced in the 118th and 119th Congresses, seeks to address this issue legislatively. The bill would clearly establish that copyright protection applies to privately authored, incorporated-by-reference (IBR) standards, while also requiring that the standards be made publicly accessible online at no monetary cost to users.[3] 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."[4] Private standards-developing organizations (SDOs)[5] often develop these standards, which are then used by private parties and the government for various purposes.[6] Federal regulations require that standards incorporated by reference into federal regulations be made "reasonably available to interested parties."[7] State and local governments also often rely on IBR standards and may have differing policies for public access.[8]

Technical standards—such as communications standards or fire safety and building codes—are typically original works of authorship entitled to copyright protection.[9] Copyright protection, when applicable, allows SDOs to prevent third parties from making and distributing unauthorized copies of their standards.[10] 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

[1] *See, e.g.*, Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 82 F.4th 1262, 1265 (D.C. Cir. 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).

[2] H.R. 4072, 119th Cong. (2025); H.R. 4009, 119th Cong. (2025); H.R. 1631, 118th Cong. (2023); S. 835, 118th Cong. (2023). Of the two bills introduced as the Pro Codes Act in the 119th Congress, H.R. 4009 appears to be identical to H.R. 4072, except that H.R. 4009 contains a provision requiring the Comptroller General to prepare a report "on the financial impact to Federal, State, and local governments in the United States associated with acquiring access to standards incorporated by reference into law" within two years of the bill's enactment. See H.R. 4009, § 4. For simplicity, this report will cite to the H.R. 4072 version.

[3] *See* H.R. 4072, § 3.

[4] 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* at 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://perma.cc/TRC3-7YU9].

[5] *Resources: Standards Developing Organizations (SDOs)*, AM. NAT'L STANDARDS INST., https://www.standardsportal.org/usa_en/resources/sdo.aspx [https://perma.cc/Q9YY-LG8U] (last visited Oct. 15, 2026).

[6] *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://perma.cc/VAW6-QZGD] (last visited Oct. 15, 2026).

[7] 1 C.F.R. § 51.5(b)(2) (2023); 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 [https://perma.cc/FF9H-UEPD].

[8] *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).

[9] 17 U.S.C. § 102(a).

[10] *See* 17 U.S.C. § 106.

property developer).[11] Copyright may thus enable 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.[12]

When technical standards become incorporated into law, however, maintaining copyright protection on them may raise a "serious constitutional concern" about public access to the law.[13] 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.[14] These groups argue that IBR standards lose copyright protection once they are incorporated into law or that their activities are permitted as a fair use of SDOs' copyrighted material.[15] Citing both old and recent Supreme Court case law,[16] 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,[17] 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.[18]

This debate has generated congressional interest. In the 118th Congress, the House Committee on the Judiciary marked up the Pro Codes Act and reported it favorably out of committee.[19] A motion to suspend the rules and pass the bill failed to reach the required two-thirds majority on the House floor.[20] The bill was reintroduced in the House in the 119th Congress.[21]

This report provides background on the issue of copyright for IBR standards and explains the litigation in *American Society for Testing and Materials v. Public.Resource.Org* (*ASTM v. PRO*) and similar cases.[22] It also analyzes the relevance of the Supreme Court's 2020 decision in *Georgia v. Public.Resource.Org* (*Georgia v. PRO*), which concerned claims of copyright in the

[11] 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://perma.cc/EHZ3-ZL67].

[12] *About the ANSI Incorporated by Reference (IBR) Portal*, AM. NAT'L STANDARDS INST., https://ibr.ansi.org [https://perma.cc/2M9T-2XFQ] (last visited Oct. 15, 2026).

[13] *ASTM v. PRO I*, 896 F.3d at 447.

[14] *See, e.g.*, *Global Public Safety Codes*, PUBLIC.RESOURCE.ORG, INTERNET ARCHIVE, https://archive.org/details/publicsafetycode?tab=collection&query=public.resource.org [https://perma.cc/ME9M-5UXX] (last visited Oct. 15, 2026).

[15] *See, e.g.*, *ASTM v. PRO I*, 896 F.3d at 446.

[16] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020).

[17] *See generally* Libr. of Cong., *Historical Background on Free Speech Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-7-1/ALDE_00013537/ (last visited Oct. 15, 2026); Libr. of Cong., *Overview of Due Process*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-5-1/ALDE_00013721/ (last visited Oct. 15, 2026).

[18] *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 [https://perma.cc/4T3L-VAZ8].

[19] *See* H.R. REP. NO. 118-601, at 1 (2024), https://www.congress.gov/118/crpt/hrpt601/CRPT-118hrpt601.pdf [https://perma.cc/9XG6-H6CD]; Markup of H.R. 1631, H.R. 7737, H.R. 3591, H.R. 3269, H.R. 7581, and H.R. 4951, Before the H. Comm. on the Judiciary, 118th Cong. (Apr. 16, 2024), https://judiciary.house.gov/committee-activity/markups/markup-hr-1631-hr-7737-hr-3591-hr-3269-hr-7581-and-hr-4951 [https://perma.cc/NN7F-7HLJ].

[20] *See* CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, *Roll Call 357, 118th Cong., 2d Sess.* (July 22, 2024), https://clerk.house.gov/Votes/2024357 [https://perma.cc/5DRL-PRCL].

[21] H.R. 4072, 119th Cong. (2025).

[22] 597 F. Supp. 3d 213 (D.D.C. 2022).

official annotations to Georgia's state code.[23] Finally, it reviews the specific changes proposed by the Pro Codes Act and considerations for Congress.[24]

Copyright Basics

Copyright protects fixed, creative works of authorship, including literary works.[25] Although facts themselves are not copyrightable, written explanations about facts (e.g., a science textbook) and original arrangements of facts are copyrightable.[26] 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).[27] 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.[28]

At least four legal limitations on copyright, however, might apply to particular IBR standards or uses of them. First, under the statutory "government-works" doctrine, copyright protection is unavailable for "any work of the United States Government."[29] That includes works (such as this report) created by federal officers and employees as part of their official duties.[30] 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.[31] Third, under the fair use doctrine, courts may permit certain uses of copyrighted works that would otherwise be infringing, based on balancing statutory factors such as the purpose of the use, the nature of the copyrighted work, the amount used, and the potential economic harm from the use.[32] Fourth, under the idea/expression distinction and merger doctrine, copyright protection does not extend to facts or ideas;[33] when there are only a few ways to express an idea, the expression is said to "merge" with the idea, and neither is copyrightable.[34]

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.[35] Although trademark

[23] Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020).

[24] *See infra* "The Pro Codes Act" and "Considerations for Congress."

[25] 17 U.S.C. § 102(a)(1).

[26] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[27] *See* 17 U.S.C. § 106.

[28] *Id*. §§ 501–505.

[29] *Id*. § 105(a).

[30] *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 [https://perma.cc/SGM6-NQY4] [hereinafter COPYRIGHT OFFICE COMPENDIUM].

[31] *See* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 263–64 (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*, 590 U.S. at 265. It is motivated by the "animating principle" that "no one can own the law." *Id.*

[32] 17 U.S.C. § 107. *See, e.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 527–28 (2023).

[33] *See* 17 U.S.C. § 102(b); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 356 (1991).

[34] *See* Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 607 (1st Cir. 1988).

[35] *See generally* CRS In Focus IF12456, *An Introduction to Trademark Law in the United States*, by Christopher T. Zirpoli (2023).

claims have also arisen in litigation between public-access groups and SDOs,[36] they are not analyzed in this report.

Case Law on Copyright in IBR Standards

Federal courts have considered the copyright status of IBR standards in a number of significant decisions since the 1980s. Despite decades of litigation, 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—decisions by the federal courts of appeals have reached seemingly inconsistent conclusions.[37] Following the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit's) 2018 ruling in the *ASTM v. PRO I* case and the Supreme Court's 2020 decision in *Georgia v. PRO*,[38] 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.[39]

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

Several of the early cases on the copyrightability of IBR standards involve model building codes. For example, *Building Officials and Code Administrators International v. Code Technology Inc*.[40] 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, which sold book copies of its model code under the title *Commonwealth of Massachusetts State Building Code*, sued a competitor for copyright infringement when it published a competing book version of the code.[41] Although the district court awarded a preliminary injunction to BOCA, the U.S. Court of Appeals for the First Circuit (First Circuit) reversed.[42] Without ruling "definitively" on the issue given the case's 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 of BOCA's model code as its official building code rendered it "freely available for copying by anyone, notwithstanding BOCA's copyright."[43]

In *Veeck v. Southern Building Code Congress International*, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), sitting en banc, largely agreed with the First Circuit, albeit over the dissent of six judges.[44] The dispute in *Veeck* involved a model building code adopted by two

[36] *See, e.g.*, ASTM v. PRO I, 896 F.3d 437, 454 (D.C. Cir. 2018).

[37] *See infra* "Conflicting Decisions by the Federal Courts of Appeals (1980–2002)."

[38] *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)."

[39] *See infra* "Developments After *Georgia v. PRO*."

[40] 628 F.2d 730 (1st Cir. 1980).

[41] *Id*. at 732.

[42] *Id*. at 736.

[43] *Id.* at 732–35.

[44] 293 F.3d 791 (5th Cir. 2002).

Texas towns and made available on a noncommercial website run by Peter Veeck.[45] The developer of the building codes sent a cease-and-desist letter to Veeck, which led to litigation.[46] 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."[47] The court rested its conclusion on two doctrinal rationales: the Supreme Court's government-edicts cases (discussed below)[48] and the merger doctrine (reasoning that the codes' adoption as law made them uncopyrightable "facts").[49]

In contrast to the First and Fifth Circuits, the U.S. Courts of Appeals for the Second and Ninth Circuits (Second Circuit and Ninth Circuit, respectively) have held that adoption of a privately developed standard by a governmental body does not automatically result in a loss of copyright protection. In *CCC Information Services v. MacLean Hunter Market Reports*, the Second Circuit addressed the copyright in a compendium of used car valuations called the "Red Book."[50] The court 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.[51] The court reasoned 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"[52] and suggested that fair use might permit some noncommercial uses of the work, mitigating due process concerns.[53]

Finally, in *Practice Management Information Corp. v. American Medical Association*, the Ninth Circuit addressed a copyright claim in the Physician's Current Procedural Terminology (CPT), a taxonomy of medical procedures and associated numerical codes developed by the American Medical Association (AMA).[54] 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.[55] HCFA chose to adopt the CPT and incorporate it by reference into federal regulations.[56] A medical book publisher sued for a declaratory judgment that the CPT became uncopyrightable once HCFA required the use of CPT code numbers.[57] The Ninth Circuit held that the copyright remained valid because the Supreme Court's government-edicts cases did not apply, relying largely on public policy arguments.[58] The court observed that "[n]on-profit organizations that develop these model codes and standards warn they will be

[45] *Id*. at 793.

[46] *Id*. at 794.

[47] *Id*. at 793.

[48] *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 19th-century government-edicts cases).

[49] *See Veeck*, 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)).

[50] 44 F.3d 61, 63 (2d Cir. 1994).

[51] *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.").

[52] *Id*. *See generally* Libr. of Cong., *Overview of the Takings Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE_00013280/ (last visited Oct. 15, 2026); CRS Report R47562, *The Takings Clause of the Constitution: Overview of Supreme Court Jurisprudence on Key Topics*, by Adam Vann (2023).

[53] *CCC Info. Servs.*, 44 F.3d at 74 n.30.

[54] 121 F.3d 516, 517 (9th Cir. 1997).

[55] *Id*. at 518.

[56] *Id.*

[57] *Id*.

[58] *See id*. at 518–20.

unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency."[59] It found that any due process concerns were sufficiently addressed by AMA's own publication of the CPT.[60]

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 the *American Society for Testing and Materials v. Public.Resource.Org* (*ASTM v. PRO*) case, a decade-long litigation in the federal courts of the District of Columbia.[61] In 2013, several SDOs sued PRO for copyright infringement after PRO made thousands of technical standards available for free download online.[62] PRO raised several copyright and constitutional defenses, arguing that "citizens must have free access to the law."[63] At the trial level, the U.S. District Court for the District of Columbia rejected PRO's arguments, holding that the SDOs had valid copyrights that PRO infringed.[64]

In *ASTM v. PRO I*, the D.C. Circuit reversed the district court's ruling.[65] 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."[66] In particular, some IBR standards "define one's legal obligations," while others "serve as mere references but have no direct legal effect."[67] 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.[68] Instead, the court took a "narrower approach" focused on the fair use doctrine.[69] 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.[70] Although the court's analysis of the fair use factors suggested that that PRO's use was likely fair,[71] the D.C. Circuit ultimately remanded the case to the district court for further proceedings.[72]

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[59] *Id*. at 519.

[60] *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.").

[61] *See* ASTM v. PRO I, 896 F.3d 437 (D.C. Cir. 2018).

[62] *Id.* at 444.

[63] *Id*. at 446.

[64] *See id*. at 444–45.

[65] *Id*. at 458.

[66] *Id*. at 441–42.

[67] *Id*. at 442–43.

[68] *See id*. at 447.

[69] *Id*.

[70] *Id*. at 453.

[71] *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").

[72] *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.

Later developments in the *ASTM v. PRO* litigation followed the Supreme Court's intervening decision in *Georgia v. PRO* and so are discussed separately below.[73]

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).[74] (Annotations to statutes or judicial decisions typically provide commentary, explanations, or context about the code provision or judicial opinion.)[75] LexisNexis (Lexis), a private company, prepared those annotations under a work-for-hire agreement with a Georgia state entity called the Code Revision Commission (the Commission).[76] Under that agreement, Lexis drafted the annotations, while the Commission held the copyright in them.[77] 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.[78] After PRO posted a digital version of the full OCGA online—including the annotations—the Commission sued PRO for copyright infringement.[79]

Georgia v. PRO focused on whether the annotations were ineligible for copyright under the government-edicts doctrine, as developed through a trio of 19th-century Supreme Court cases: *Wheaton v. Peters*,[80] *Banks v. Manchester*,[81] and *Callaghan v. Myers*.[82] 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."[83] 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.[84]

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.[85] Chief Justice Roberts's majority opinion read the Court's government-edicts cases to establish "a straightforward rule based on the identity of the author."[86] 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

[73] *See infra* "Developments After *Georgia v. PRO*."

[74] Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020).

[75] *See id.* at 260 ("[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).

[76] *Georgia v. PRO*, 590 U.S. at 261.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 262.

[80] 33 U.S. 591 (1834).

[81] 128 U.S. 244 (1888).

[82] 128 U.S. 617 (1888).

[83] *Banks*, 128 U.S. at 253.

[84] *Callaghan*, 128 U.S. at 650; *see also Georgia v. PRO*, 590 U.S. at 265.

[85] *Georgia v. PRO*, 590 U.S. at 262.

[86] *Id*. at 263.

whether the work is binding (like a statute) or not binding (like an annotation).[87] The "animating principle" underlying that rule is that "no one can own the law."[88]

Applying that 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 effectively authored by the legislature in the course of its legislative duties.[89] The Court thus held that the annotations were not copyrightable.[90]

Developments After *Georgia v. PRO*

SDOs and groups making IBR standards available online have disputed the relevance of *Georgia v. PRO* to their copyright disputes.[91] Public-access groups cite the case for its pronouncement that "no one can own the law" and argue that incorporation by reference transforms privately authored standards into uncopyrightable government edicts.[92] For their part, SDOs contend that the key to the Court's decision in *Georgia v. PRO* was that the Georgia Code annotations were authored *by the legislature*.[93] In contrast, most IBR standards are created independently of the government. *Georgia v. PRO* established that the government-edicts doctrine does not apply to "private parties" who "lack the authority to make or interpret the law."[94]

There have been significant decisions in at least six federal cases involving copyright in IBR standards after *Georgia v. PRO*. All of the decisions that addressed the issue held that the government-edicts doctrine did not apply to standards privately developed by SDOs and thus concluded that the SDOs retained a valid copyright in their standards. The majority of these cases nonetheless found that the defendant's copying of IBR standards was justified, primarily under the fair use doctrine. This section briefly reviews the facts and holdings in these cases.

The first case, *International Code Council v. UpCodes, Inc.*,[95] involved 40 model building codes that the defendant UpCodes (a commercial entity) made available online in both free and paid subscription versions.[96] The district court held that the government-edicts doctrine was "not dispositive" because the codes were privately developed, but still provided "significant guidance."[97] 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."[98] To make that determination, the court considered five "guideposts":

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[87] *Id*. at 266.

[88] *Id*. at 265.

[89] *Id*. at 276–68.

[90] *Id*. at 269. Justice Thomas, joined by Justices Alito and Breyer, dissented in *Georgia v. PRO*, reading the Court's 19th-century cases to forbid copyright in statutes and regulations but to permit copyright in nonbinding annotations that "lack[] legal force." *Id*. at 279 (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 292–93 (Ginsburg, J., dissenting).

[91] *See, e.g.*, Facility Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 964 (E.D. Mo. 2023).

[92] *See, e.g.*, Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 597 F. Supp. 3d 213, 231 (D.D.C. 2022), *aff'd*, ASTM v. PRO II, 82 F.4th 1262, 1273 (D.C. Cir. 2023).

[93] *See Facility Guidelines*, 677 F. Supp. 3d at 964.

[94] *Georgia v. PRO*, 590 U.S. at 265.

[95] No. 17 Civ. 6261, 2020 WL 2750636 (S.D.N.Y. May 27, 2020).

[96] *Id.* at *2–3.

[97] *Id.* at *8.

[98] *Id.* at *16.

> (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.[99]

Ultimately, the court relied on *BOCA*, *Veeck*, and the fair use doctrine to hold that the plaintiff SDO could not prevent UpCodes's online posting of IBR standards as adopted into law.[100] The court also found, however, that the SDO may have an infringement claim for UpCodes's copying of material that intermingled adopted law with unenacted parts of the model codes.[101]

The second case is *ASTM v. PRO*. On remand from the D.C. Circuit's decision in *ASTM v. PRO I*, the district court issued a lengthy opinion addressing the fair use issue.[102] 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.[103] At the same time, the court held that PRO's use of the standards (i.e., making them publicly 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.[104]

The D.C. Circuit affirmed that decision on appeal, holding that "non-commercial dissemination of [IBR] standards, as incorporated by reference into law, constitutes fair use."[105] 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 earlier decision.[106] The court emphasized that the purpose of PRO's use was nonprofit and educational[107] and that the legal force of IBR standards places them "at the outer edge of copyright's protective purposes."[108] 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 that favored PRO.[109]

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[99] *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)).

[100] *See id.* at *17, *28.

[101] *See id.* at *7, *29. Subsequently, the district court's separate dismissal of the false advertising and unfair competition claims was appealed to the Second Circuit, which reversed in part and remanded. *See* Int'l Code Council, Inc. v. UpCodes Inc., 43 F.4th 46, 64 (2d Cir. 2022). The case returned to the district court and awaits trial after the close of discovery. *See* Joint Stipulation Concerning the Extension of Expert Discovery, International Code Council v. UpCodes, Inc., No. 1:17-cv-06261 (S.D.N.Y. May 12, 2026).

[102] Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 597 F. Supp. 3d 213 (D.D.C. 2022), *aff'd*, ASTM v. PRO II, 82 F.4th 1262, 1273 (D.C. Cir. 2023).

[103] 597 F. Supp. 3d at 231 ("Unlike in *Georgia* [*v. PRO*], there is no evidence here that state legislators hired Plaintiffs to draft the standards.").

[104] *See id.* at 240–41.

[105] *ASTM v. PRO II*, 82 F.4th at 1265.

[106] *See supra* "The D.C. Circuit's 2018 Ruling in *ASTM v. PRO I*."

[107] *ASTM v. PRO II*, 82 F.4th at 1267–68.

[108] *Id.* at 1268 (quoting ASTM v. PRO I, 896 F.3d 437, 451 (D.C. Cir. 2018)).

[109] *Id.* at 1271–72. On remand, the court entered a stipulated judgment wherein PRO agreed to take down 32 standards and leave online the 184 standards found to be a fair use. *See* Order, ASTM v. PRO, No. 1:13-cv-012150TSC (D.D.C. July 30, 2024).

A third case, *Faculty Guidelines Institute v. UpCodes, Inc*.,[110] concerned building and design codes for health care facilities that UpCodes made available online.[111] As in the other post-*Georgia v. PRO* cases, the district court held that the government-edicts doctrine did not apply because the codes were privately authored, although it noted that the doctrine "offers important insight into the analysis."[112] 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,"[113] the court ultimately denied the SDO's motion for a preliminary injunction based on the fair use doctrine.[114]

Two other federal suits against UpCodes resulted in reported judicial decisions. In *National Fire Protection Association, Inc. v. UpCodes, Inc*., the nonprofit National Fire Protection Association (NFPA) sued for infringement of its electrical codes and other building standards for fire safety.[115] As in the other lawsuits, UpCodes was sued for copyright infringement after scanning NFPA's standards and making them available online in both free and paid versions.[116] (For its part, NFPA makes its standards available in a free read-only version online but requires payment to print or download copies.)[117] On cross-motions for summary judgment, the court held that the merger and government-edicts doctrines did not apply, concluding that "NFPA owns a valid copyright in its standards, whether IBR-ed or not."[118] Turning to the fair use defense, the court held that factual disputes precluded a grant of summary judgment to UpCodes, noting that its use was commercial and at most "minimally transformative,"[119] that the parties disputed whether all of UpCodes's copied content was incorporated into law,[120] and that UpCodes failed to demonstrate a lack of market harm.[121] The case was settled prior to trial on the fair use issue.[122]

A different case against UpCodes was brought by ASTM, which alleged infringement of its building and construction standards.[123] In many ways, the dispute is similar to *ASTM v. PRO*, with the distinction that UpCodes—unlike the defendant in *ASTM v. PRO*—is a for-profit organization.[124] After the district court denied ASTM's motion for a preliminary injunction to prevent UpCodes from posting ASTM's IBR standards on UpCode's website, ASTM appealed to the U.S. Court of Appeals for the Third Circuit (Third Circuit). Relying heavily on the D.C. Circuit's analysis in *ASTM v. PRO II*, the Third Circuit concluded that "the commercial elements

[110] 677 F. Supp. 3d 955 (E.D. Mo. 2023).

[111] *Id.* at 961.

[112] *Id.* at 964.

[113] *Id.* at 964–69.

[114] *See id.* at 969–73. The plaintiff voluntarily dismissed the action following the court's denial of a preliminary injunction. *See* Notice of Voluntary Dismissal, Facility Guidelines Institute, Inc. v. UpCodes, Inc., No. 4:22-cv-01308 (E.D. Mo. June 19, 2023).

[115] 753 F. Supp. 3d 933, 942 (C.D. Cal. 2024).

[116] *Id.* at 943–44.

[117] *Id.* at 943.

[118] *See id.* at 946–53.

[119] *Id.* at 960.

[120] *Id.* at 963–64.

[121] *Id.* at 965–66.

[122] Order Retaining Limited Jurisdiction, Nat'l Fire Prot. Ass'n, Inc. v. UpCodes, Inc., No. 21-cv-05262 (C.D. Cal. Mar. 21, 2025).

[123] Am. Soc'y for Testing & Materials v. UpCodes, Inc., 172 F.4th 253, 259 (3d Cir. 2026).

[124] *See id.* at 262 (describing *ASTM .v. PRO II* as "factually similar"), 265 ("[U]nlike [PRO], the defendant in ASTM II, UpCodes is a for-profit entity. It derives revenue from its paid subscription tier, which grants users access to premium features and automation tools.") (citation omitted).

of UpCodes' use do not outweigh its transformative nature,"[125] and that—at least at the case's preliminary posture—the overall balance of the fair use factors favored fair use.[126]

The final case, *Canadian Standards Association v. P.S. Knight Company*, involved standards developed in Canada and incorporated by reference into Canadian law.[127] After the nonprofit SDO Canadian Standards Association (CSA) successfully sued Gordon Knight for copyright infringement in Canada based on his selling a version of CSA's Canadian Electrical Code, Knight moved his operations to Texas.[128] CSA then sued Knight and his company in U.S. federal court for infringing its copyrighted model codes.[129] The *CSA* case thus adds a choice-of-law complication to the usual copyright-in-IBR-standards litigation. The Fifth Circuit held that Canadian law applied to the issues of copyright validity and ownership,[130] and it was undisputed that CSA held a valid copyright in its standards under Canadian law, whether or not they were incorporated into law.[131] However, the court held that U.S. law applied to Knight's alleged infringement and concluded Knight's copying was therefore permissible under binding circuit precedent: namely, the court's prior en banc ruling in *Veeck*.[132]

Takings Clause Issues

If a government's incorporation by reference diminishes or eliminates copyright protection, it arguably raises questions under the Takings Clause of the Fifth Amendment. The Takings Clause states that "private property [shall not] be taken for public use, without just compensation."[133] In simple terms, the Takings Clause provides that the federal or state governments[134] may take an individual's property only when (1) it is for a public use[135] and (2) the government pays just compensation to the property owner.[136] 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 or highway, as long as it pays the owner the fair market value of the land.[137]

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

[125] *Id.* at 266.

[126] *Id.* at 271. More specifically, the court found that the first three factors likely favored fair use, while the fourth factor (market harm from the use) was "equivocal." *Id.*

[127] 112 F.4th 298, 300 (5th Cir. 2024).

[128] *See id.* at 301.

[129] *Id.* at 302.

[130] *See id.* at 303.

[131] *Id.* at 304.

[132] *See id.* at 304–05. *See supra* "Conflicting Decisions by the Federal Courts of Appeals (1980–2002)" (discussing the holding of *Veeck*). In dissent, Judge Douglas argued that *Veeck*'s holding was not binding because it was based on copyright validity, which was governed by Canadian law in the *CSA* case. *CSA*, 112 F.4th at 308 (Douglas, J., dissenting). With *Veeck* distinguished, Judge Douglas would have held that Knight's actions infringed CSA's copyright and were not a fair use. *Id.* at 308–09.

[133] U.S. CONST. amend. V; *see generally* Libr. of Cong., *Overview of the Takings Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5-9-1/ALDE_00013280/ (last visited Oct. 15, 2026).

[134] By its 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).

[135] *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

[136] *See* Knick v. Twp. of Scott, 588 U.S. 180, 189–92 (2019).

[137] *See* United States v. Miller, 317 U.S. 369, 370–74 (1943).

copyright in standards or model codes. For example, a recent district court decision noted that "a 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."[138] 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.[139]

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. If future court decisions were to rule 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.[140]

To date, 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.[141] 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 (and often successfully) disputed in litigation.[142] For takings claims against state governments, another potential barrier is state sovereign immunity to copyright infringement claims.[143]

Given the lack of case law on these Takings Clause issues, 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 Takings Clause,[144] although the weight of authority suggests that

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[138] Facility Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 968 (E.D. Mo. 2023); *accord* CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc., 44 F.3d 61, 74 (2d Cir. 1994).

[139] *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).

[140] *See* 28 U.S.C. §§ 1491, 1498(b); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

[141] *See, e.g.*, *Int'l Code Council*, 2020 WL 2750636, at *1.

[142] *See supra* "Case Law on Copyright in IBR Standards."

[143] *See* Allen v. Cooper, 589 U.S. 248, 251 (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, 588 U.S. 180, 189 (2019).

[144] *See* Tom W. Bell, *Copyright As Intellectual ~~Property~~ Privilege*, 58 SYRACUSE L. REV. 523, 538 (2008) (strikeout in original) (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/ [https://perma.cc/2BTP-PACN] (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 19th-centuty 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 (continued...)

they are.[145] 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)[146] or as a putative "regulatory taking" (which need be compensated only if a court concludes it goes "too far" based on balancing several factors).[147]

The Pro Codes Act

The Pro Codes Act was reintroduced in the 119th 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."[148] The bill states that federal, state, and local governments "benefit greatly" from SDO-created standards, which "further innovation [and] commerce" and are "critical to protecting public health and safety."[149] The bill also states that SDOs ensure "all interested parties have an opportunity to participate" without "cost to governments or taxpayers" and "rely on copyright protection" to fund the voluntary consensus process for creating and updating their standards.[150]

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.[151] The bill would thus supersede *Veeck* and similar cases that have held that such standards fall into the public domain once incorporated into law or

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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").

[145] *See Copyright Reform and the Takings Clause*, *supra* note 144, 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, 589 U.S. 248, 261 (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.").

[146] *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").

[147] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978).

[148] H.R. 4072, 119th Cong. § 2(12) (2025).

[149] *Id.* § 2(1), (4), (8).

[150] *Id.* § 2(4), (9), (10)(A)(i).

[151] *Id.* at § 3(a).

regulation. To retain their copyright under the Pro Codes Act, SDOs must make "all portions of the standard so incorporated publicly accessible online at no monetary cost" within a "reasonable period of time."[152] A party challenging an SDO's copyright would bear the burden of proving that the SDO failed to comply with this public-access requirement.[153]

In short, the Pro Codes Act would make clear that SDOs 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."[154] 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 and any personally identifiable information collected from the user is not used without their consent.[155]

Supporters of the Pro Codes Act, including SDOs such as NFPA, argue that their work creating standards provides "critical public benefits."[156] These SDOs maintain that if incorporation by reference destroys copyright protection, they will no longer be able to fund their activities by publishing, selling, and licensing their standards to professionals who use them.[157] Some SDOs answer public-access concerns by noting that they already permit free viewing of their standards by the public online.[158]

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.[159] They maintain that SDOs "have charged high fees and imposed other restrictions" to access their standards in the past.[160] They also object to the Pro Codes Act's "limited" public-access requirement, which could allow SDOs to require users to submit personal information to view IBR standards and deny them the ability to print, download, and disseminate standards.[161] Under the Pro Codes Act, these opponents argue, SDOs may choose

[152] *Id.*

[153] *Id.*

[154] *See id.* The definition also requires that the SDOs' public website "conform[] with the accessibility requirements of section 508 of the Rehabilitation Act of 1973." *Id.* This law requires that federal agencies "make their electronic and information technology (EIT) accessible to people with disabilities." *See generally IT Accessibility Laws and Policies*, GEN. SERVS. ADMIN., https://www.section508.gov/manage/laws-and-policies/ [https://perma.cc/LC9K-JVG2] (last visited Oct. 15, 2026).

[155] *See* H.R. 4072, § 3(a).

[156] *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 [https://perma.cc/QV9P-363B].

[157] *Id*.

[158] *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 [https://perma.cc/9SD4-HY3S] (last visited Oct. 15, 2026).

[159] *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 [https://perma.cc/8G6X-BZAQ] (hereinafter EFF Letter); Joint Letter from the Center for Democracy & Technology to the House Rules Committee Opposing Pro Codes Act (May 23, 2025), https://cdt.org/wp-content/uploads/2025/05/Pro-Codes-letter-May-2025.pdf [https://perma.cc/7H8S-7YB7].

[160] EFF Letter, *supra* note 159, at 1.

[161] *Id*.

to make only a limited version of the IBR standards available for free,[162] 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 and others in litigation.[163] Thus, even if the Pro Codes Act were enacted, groups like PRO or UpCodes could still make fair use arguments like those accepted by the court in *ASTM v. PRO II*.[164] Similarly, public-access groups could still assert First Amendment and Due Process Clause arguments to justify their actions. A statute cannot supersede these constitutional arguments. 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 trade-off for copyright: 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, albeit not uniformly—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.[165] 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 available to the public in some form, while some public-access groups have sought to facilitate greater public accessibility (e.g., permitting free printing or 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

[162] *Cf.* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 274–75 (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).

[163] *See supra* "Case Law on Copyright in IBR Standards."

[164] It is possible courts could rely on the potential enactment of Pro Codes (or another law on the issue) as informing their fair use analysis. On this view, courts might view such an enactment as reflecting a particular balance struck by Congress between copyright protection and access concerns, and so be wary of interpreting fair use to disrupt this balance. As a textual matter, however, the Pro Codes Act says nothing about fair use and does not amend the statutory fair use factors, as Congress has occasionally done in the past. *See* An Act to Amend Title 17, Pub. L. No. 102-492, 106 Stat. 3145, 3145 (1992) (providing that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors").

[165] *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%20-Regulations-Are-Copyright-Protected.pdf [https://perma.cc/9WTN-X5C2] (last visited Oct. 15, 2026) ("Another [SDO] business model relies on recouping these costs through revenue made possible from the copyright-protected sales and licensing of the standards themselves.").

consider whether the status quo, the Pro Codes Act, or some other alternative provides sufficient public access to IBR standards.

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 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. For example, courts applying the fair use doctrine could distinguish the uses of PRO (a nonprofit public-access organization) and UpCodes (a commercial entity that charges users for some versions of its services) under the first fair use factor.[166]

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[167] and market incentives are sufficient to facilitate public availability,[168] 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.[169]

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 the copyright holder—while setting a royalty rate for that use by law.[170] 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.[171] Under this approach, some costs of developing standards would shift to the government (and potentially, by extension, onto 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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[166] *See supra* "Developments After *Georgia v. PRO*." In practice, courts have not found that this distinction changed the ultimate outcome when balancing the fair use factors. *See, e.g.,* Am. Soc'y for Testing & Materials v. UpCodes, Inc., 172 F.4th 253, 265–66 (3d Cir. 2026) (finding that the first fair use factor weighed in favor of the defendant even though UpCodes was a "for-profit entity" because "the commercial elements of UpCodes' use do not outweigh its transformative nature").

[167] *See* 1 C.F.R. § 51.5(b)(2); 17 U.S.C. § 107.

[168] *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").

[169] *See* 17 U.S.C. § 105(a). This could raise Takings Clause concerns if applied retroactively. *See supra* "Takings Clause Issues."

[170] *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.").

[171] *See* Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 968–69 (E.D. Mo. 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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