Statement of

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Hearing on

Protecting U.S. Leadership in
Codes Development and Enhancing Public Access

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Chairman, Ranking Member, and distinguished Members of the Subcommittee:

Thank you for the opportunity to appear before you today to discuss Protecting U.S. Leadership in Codes Development and Enhancing Public Access and in particular, the Protecting and Enhancing Public Access to Codes Act, commonly known as the Pro Codes Act, H.R. 4072. I appreciate the Subcommittee's attention to this important issue, which sits at the intersection of copyright law, public access, and the continued safety and well-being of communities across the United States.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization that is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. We represent the copyright interests of over 2 million individual creators, including established authors and artists, performers and photographers, and software coders and songwriters, as well as a new generation of creators. We also represent the copyright interests of over 15,000 organizations in the United States, across the spectrum of copyright disciplines. These include motion picture and television studios, record labels, music publishers, book and journal publishers, newspaper and magazine publishers, video game companies, software and technology companies, visual media companies, sports leagues, radio and television broadcasters, database companies, standard development organizations and many more. While each of these organizations may come to the Copyright Alliance with somewhat different experiences, views, and interests, they all fall under the Copyright Alliance umbrella for one unifying reason—their strong support for the value and importance of copyright and protecting the rights of human creators and copyright owners.

At its core, the Pro Codes Act addresses a fundamental and increasingly urgent question: how can we ensure that the high-quality copyrightable codes and standards that underpin modern American life continue to be developed and updated, while also promoting public access to those standards when they are incorporated by reference into the law?

The history of safety codes and standards is a testament to what copyright can accomplish. For more than a century, America has relied on a unique and highly effective public-private partnership to develop the technical standards that govern everything from the buildings we occupy to the electrical systems we depend upon and the fire safety measures that protect our lives and the lives of our friends and family. These standards are created by Standards Development Organizations (SDOs), which are typically private, nonprofit entities composed of engineers, scientists, safety experts, industry stakeholders, and public representatives.

The valuable work performed by these SDOs cannot be overstated. Developing a modern building code or electrical standard requires extensive research, testing, technical drafting, and consensus-building among diverse stakeholders with high levels of knowledge and expertise. It

involves incorporating evolving scientific knowledge, adapting to new technologies, and learning from past failures and safety incidents. This process is time-consuming, laborious, resource-intensive, and requires a high level of expertise. It is a process that produces codes and standards that are invaluable to the safety and well-being of Americans across the United States that is both costly to produce and difficult, if not impossible, for government entities to replicate.

SDOs fund this work through a self-sustaining model. They invest their own resources into the creation of these standards and recoup those investments through the publication, licensing, and sale of their copyrighted codes and standards and materials based on those works. As a result, copyright protection is essential to SDOs and the creation and dissemination of codes and standards. Copyright protections provide the economic incentive that allows SDOs to undertake the substantial costs associated with developing and continually updating these works of critical importance to the nation.

It should come as no surprise to anyone on this Subcommittee, that federal, state, and local governments throughout the country have come to rely heavily on the expertise of SDOs and the standards and codes they produce. Rather than attempting to draft highly technical standards from scratch, legislatures and regulatory bodies frequently incorporate these privately developed codes and standards into law by reference. This practice allows federal, state, and local government entities to leverage expert-driven, consensus-based standards while maintaining flexibility to update regulations as those standards evolve.

This long and successful marriage between SDOs and government bodies has been under attack by for profit companies like UpCodes that freeride on that work and undercut the SDO's ability to recoup the extensive costs necessary to create those works and future works. While UpCodes and certain groups like EFF claim they are promoting public access, the records of these cases do not reflect any true lack of access or availability. That position seems largely convenient in an effort to strip or weaken copyright more generally. The analyses and holdings from the resulting federal court decisions cannot assess the broader policy implications and reflects a growing lack of clarity in how copyright law applies when standards are incorporated by reference into the law.

Congress—not the courts—is best positioned to establish a consistent and fair approach to this issue. Congressional action is urgently needed to preserve the economic infrastructure that has facilitated the private development of world-class codes and standards for more than a century. Only Congress can address this tension by interpreting the law as it is written and setting the record straight when courts misinterpret the law and stretch (or threaten to stretch) it in ways that are unbalanced, unfair, and misguided.

Recent court cases underscore the problem. Litigation in federal courts has created uncertainty regarding the copyright status of standards that have been incorporated by reference into law. Some decisions have suggested that such incorporation could extinguish copyright protection entirely, while others have strained to deal with policy rationales on both sides in the inapt context of the fair use defense. This lack of clarity and misapplication of the law threatens to destabilize the entire standards development ecosystem. Moreover, when these courts misapply standards for copyrightability or fair use, the resulting analysis and decisions by these courts have a ripple effect that harms not only SDOs but also has the potential to harm other copyright owners too.

A clear example of this problem comes from a case decided earlier this month, in which the Court of Appeals for the Third Circuit concluded that UpCodes' distribution of ASTM's copyrightable standards was a transformative use (and on this basis wrongly found the use to be a fair use). The court found the UpCodes' use to be transformative because UpCodes was making ASTM's standards available to the public for free, while ASTM was making their standards available for a fee. According to the Court, the difference between "for free" and "for a fee" was the only thing that made their purposes different, which in turn made the use a transformative fair use. One can easily see how this bastardization of the transformative use could be misapplied to other copyrighted cases involving other types of works in a way that could result in court-sponsored run-of-the-mill piracy.

As courts continue to strain to balance these policy considerations, this situation threatens to only get worse. And as these court decisions get more skewed, it emboldens groups like UpCodes and

others to go even further, threatening the business model that SDOs, government bodies, and American citizens have come to rely on for decades. It is therefore imperative that Congress step in before even more damage is done.

The Pro Codes Act attempts to directly address this tension by providing that when a code or standard developed by an SDO is incorporated into law by reference, it does not lose its copyright protection solely by virtue of that incorporation. At the same time, it imposes an important condition: the portions of the code or standard that are incorporated into law must be made publicly accessible online, free of charge.

This approach ensures that the public has access to codes and standards that are incorporated by reference without cost, while clarifying the copyright protections that make the development of those standards possible in the first place. The benefits of this approach are substantial and far-reaching.

First, it preserves the incentives that drive the creation of high-quality standards. By maintaining copyright protection, the Act would ensure that SDOs can continue to fund their operations, invest in research and development, and update standards to reflect new technologies and best practices.

Second, it promotes public access. Anyone who must comply with these standards will be able to view the relevant standard online at no cost. This enhances transparency and promotes compliance.

Third, it benefits taxpayers and governments. Without this system, the burden of developing complex technical standards would likely fall on government agencies, requiring significant public funding and the creation of new bureaucratic infrastructure.

Fourth, it supports effective governance. Legislators and regulators can continue to rely on expert-developed standards rather than attempting to replicate that expertise within government, a task that would be both costly and inefficient.

On the other hand, if the Pro Codes Act is not passed in some form, copyright protection will continue to be undermined, with significant actual and potential consequences. SDOs may no longer be able to sustain the financial model that supports their work. The development of new standards and codes could slow or cease altogether. Existing standards may become outdated, failing to keep pace with advances in science and technology. Ultimately, this would have direct adverse implications for public safety, economic efficiency, and regulatory effectiveness.[1]

The Pro Codes Act would provide the certainty that is currently lacking in the courts. By clearly affirming that copyright protection is preserved and that free public access is necessary, it helps to reduce the risk of inconsistent judicial outcomes.

While we think the general framework set forth on the Pro Codes Act is a good one, we caution against any bill requires that an SDO (or any other copyright owner) comply with a formality—making the code or standard publicly available—in order for the SDO to maintain its copyright protection in their code or standard that has been incorporated by reference. The United States is a long-time member of the Berne Convention or the Protection of Literary and Artistic Works, the preeminent international agreement governing copyright standards in the world. Article 5(2) of the Berne Convention prohibits member states from imposing formalities—such as mandatory registration, renewal, or notice—on the enjoyment and exercise of copyright for foreign works. This ensures copyright is automatic upon creation, rather than conditioned on administrative procedures. Requiring that the standard or code be made available on a publicly accessible website could be construed as a formality to copyright protection in violation of our Berne Convention obligations. Even if a workaround was to make this bill applicable to U.S. copyright holders only (so that the United States does not violate its international obligations), taking this approach would put U.S.-based SDOs at a disadvantage to their foreign counterparts who would have no such obligation. Obviously, that is less than ideal. A better approach for all parties, not just SDOs, would be to tie making the code or standard publicly available to copyright

[1] Also, when outdated standards and codes are posted online, then scraped and ingested for AI training, this will result in incorrect and potentially dangerous outputs that AI users will rely on.

enforceability instead of copyrightability because by doing so we would avoid potential Berne Convention formality problems.

It is also important to emphasize that the Pro Codes Act is consistent with Constitutional principles and existing Supreme Court precedent. The legislation respects the distinction between works created by government officials in the course of their duties—which are not subject to copyright—and works created by private entities, which are entitled to protection. SDOs are private actors that lack the authority to make or interpret the law; their works therefore fall squarely within the scope of copyrightable subject matter.

The Act also advances, rather than undermines, due process and First Amendment values. By incentivizing free online access to standards and codes that have been incorporated by reference, it enhances fair notice and public awareness. At the same time, individuals remain free to engage in commentary, criticism, and scholarship related to codes and standards.

Some critics have suggested that the Pro Codes Act is unnecessary or that the issue should be left to the courts. Respectfully, that approach makes no sense. Litigation is inherently slow, expensive, and uncertain. It produces outcomes that are limited to specific cases, may vary across jurisdictions, and can lead to skewed interpretations of the law. In contrast, Congress has the authority and responsibility to establish clear, uniform rules that provide stability and predictability.

Some critics have also said that the Pro Codes Act is not necessary because the public already has access to codes and standards that are incorporated by reference through organizations, like UpCodes and Public.Resource.org, that are posting unauthorized copies of codes and standards online. But the Pro Codes Act provides a more balanced approach to ensuring free online access to all standards that are incorporated by reference, while also providing the necessary copyright protections to SDOs that will allow them to continue to focus resources on creating and updating vital health and safety standards. Third parties that post SDO works online for public download without authority harm the ability of SDOs to self-fund the creation and updating of codes and

standards. Moreover, some codes and standards are *not* currently available online. The Pro Codes Act will encourage more standards developers to increase public access to their publications.

Others have argued that eliminating copyright protection for incorporated standards would make compliance easier and less expensive. In reality, the opposite is true. Without the infrastructure provided by SDOs, governments would face the daunting task of developing and maintaining standards themselves, or risk relying on less rigorous, potentially biased alternatives. This could increase costs, reduce quality, and compromise safety.

In sum, the Pro Codes Act represents a pragmatic middle ground. It does not require choosing between public access and copyright protection. Instead, it achieves both. It ensures that the public can access the law while preserving the system that produces the law's technical content. This is the kind of legislative solution that is most effective: one that recognizes the legitimate interests on all sides and crafts a balanced approach while also serving the broader public good.

The timing for this legislation is critical. Courts are actively grappling with these issues, and the risk of divergent and incorrect interpretations is real. Acting now allows Congress to provide guidance before a patchwork of conflicting decisions takes hold.

In closing, the Pro Codes Act preserves a system that has worked effectively for more than a century. It ensures continued innovation in the development of safety standards, promotes transparency and access to the law, protects taxpayers, and supports sound governance.

For these reasons, I respectfully urge the Subcommittee and the full Committee to advance H.R. 4072. Doing so will provide the clarity, balance, and stability needed to ensure that America's system of codes and standards continues to serve the public interest for generations to come.

Thank you for your time and consideration. I look forward to answering your questions.