

Statement of

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before the

House Committee on Judiciary

Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet

Hearing on the

**Protecting and Enhancing Public Access to Codes Act
(Pro Codes Act) H.R. 4072**

April 21, 2026

Chairman Issa, Ranking Member Johnson, and distinguished members of the Subcommittee — thank you for the opportunity to submit this testimony on behalf of the National Fire Protection Association (NFPA).

Most Americans do not realize how much their safety depends on a public-private partnership that has worked for more than a century: independent, nonprofit standards development organizations (SDOs) create consensus safety standards; governments at every level incorporate those standards by reference; and the public benefits from technical standards that are expert-built, frequently updated, and broadly accessible.

This system works. It has made Americans significantly safer, reduced fire incidents and deaths, and delivered high-quality standards without burdening taxpayers. And there is no viable alternative that preserves independence and maintains the quality and responsiveness that this system provides.

NFPA is a nonprofit. As the technology and complexity of life has evolved over the decades, NFPA is proud to have made the people of our country safer from fire and electrical risks. NFPA's work is ongoing. The public needs and benefits from that work now more than ever.

NFPA strongly supports enactment of the Pro Codes Act. The Act will preserve and strengthen the private-public partnership. It will do this by reaffirming that privately authored, consensus-based standards retain their copyright protection when they are incorporated by reference. The Act will promote free online public access to the text that has been incorporated. The Act balances important considerations of copyright policy, public safety, and public access to incorporated works. That balance will sustain the funding that makes the creation of consensus-based standards possible in the first place; ensure that taxpayers do not have to bear the significant costs of creating and sustaining that work; and will promote meaningful public access.

Congress has the power to set national policy in this area. Congress has the expertise committed to it by the Constitution to balance all the interests at stake. NFPA strongly urges Congress to pass the Pro Codes Act.

NFPA's History and Mission

NFPA was founded in 1896 to reduce deaths, injuries, and loss from fire and electrical-related hazards. At its origin, NFPA was a committee of insurers, engineers, and others who wanted to address the lack of uniform standards for fire sprinkler installation. The lack of uniformity caused huge problems, most notably, the inability to effectively fight fire in turn-of-the-century Boston. Those founders issued a report that evolved into NFPA 13, the *Standard for the Installation of Sprinkler Systems*. From that success, the founders formally organized as the National Fire Protection Association. NFPA has always been a self-funded, nonprofit association.

For nearly 130 years, NFPA has developed codes and standards that protect lives and property across this country and around the world. We develop and update more than 300 of them through a transparent, consensus-based process that is open to participation by the public. Our standards address fire, electrical, and life safety problems. They are used by insurance companies, industry, manufacturers, contractors and government, though we do not develop them for the government or any one stakeholder. We develop them to solve safety challenges in furtherance of our nonprofit mission. These standards are the subject of continued research and innovation to stay current with technology and evolving risk.

NFPA's flagship work, the National Electrical Code® or NEC® (NFPA 70®), is the world's leading standard for electrical safety and provides the benchmark for safe electrical design, installation, and inspection to protect people and property from electrical hazards. Federal agencies, state and local governments, public and private organizations, and similar parties throughout the world rely on the NEC precisely because of its technical rigor and public safety value.

No one disputes that NFPA's standards have helped make the United States significantly safer: while wildfire risks have continued to take prominence, fire incidents since 1980 have declined by 54 percent, and home fire deaths have declined by 44 percent over the

same period. These are improvements in public safety that reflect NFPA's continual work to update its state-of-the-art codes and standards and broader awareness and reliance on those works.

NFPA's history is also one of continuous innovation in response to emerging risks. In recent years, we have led the development of standards addressing active shooter and hostile event preparedness (NFPA 3000). We have maintained NFPA 1600, *Standard on Continuity, Emergency, and Crisis Management*, which has been recognized as a national preparedness benchmark. We have also recently developed NFPA 855 to address the safe installation of stationary energy storage systems. In addition, NFPA 800 a new battery safety code is currently under development. These efforts illustrate NFPA's longstanding commitment to anticipate hazards and provide practical, consensus-based tools to protect communities.

How NFPA's Consensus, Self-Funded Model Works

NFPA develops standards through an open, balanced, consensus-based process accredited by the American National Standards Institute (ANSI). ANSI accreditation signifies that development procedures satisfy essential requirements for openness, balance, consensus, and due process, including broad participation, consideration of all views, and rights of appeal.¹

NFPA's process of standards development is rigorous and transparent. NFPA convenes more than 250 Technical Committees composed of thousands of volunteers from the public, industry, academia, and government. The Technical Committees review public input, deliberate in public meetings, and ballot on draft text, all under a framework that prevents any single interest from dominating. This multi-stage process typically spans two or more years for a given standard and repeats on a three-to-five-year update cycle to ensure that requirements reflect current science, technology, and field experience.

NFPA independently funds our standards-development model. This is by design. We do not take money from industries affected by our standards. We do not rely on government funding for standards development. Instead, we recoup the substantial cost of creating and updating our works the same way that countless other copyright authors do: by selling and licensing the right to copy and distribute our works to the professionals and enterprises that use those works as day-to-day tools of their trade. Our self-funded model ensures neutrality because we do not need to take money from industry. It also widens participation because we do not operate a "pay to play" set of committees that require payment for participation. The result is that standards are independent from undue influence and a technical meritocracy with broad participation.

¹ <https://www.ansi.org/american-national-standards/ans-introduction/essential-requirements>.

I want to be clear: the work of creating and maintaining our standards is resource-intensive. NFPA does not pay the volunteers who participate in our process. But we bear the costs of technical staff, program managers, editorial and production teams, information technology, and hundreds of multi-day meetings each year. NFPA fronts the investment costs, but then is able to generate revenue from professional formats and uses while still providing public reading access, as well.

Who Benefits—and How

The Public: The public benefits directly from safer homes, workplaces, and communities produced by clear, current, and careful technical standards that are used broadly (whether incorporated by reference or not). Well-funded standards are high quality. The decades-long declines in fire incidents and home fire deaths underscore the life-saving value of rigorous codes implemented at scale.

Beyond safety, standards deliver everyday benefits that most Americans take for granted. The reason you can charge an electric vehicle at any charging station in all 50 states or plug a phone charger into the same type of electrical outlet anywhere in the country is because of nationally consistent standards. That consistency doesn't happen by accident—it's the product of the consensus-based process that SDOs like NFPA have maintained for more than a century.

The public also benefits when standards are independently self-funded by the SDO, because the standards are not subject to undue corporate or special-interest influence. The neutral system as it exists today benefits public safety in ways that cannot be replicated with a different funding model.

The public also benefits from SDOs that make their standards accessible online for read-only access without charge, like NFPA. Federal law requires that incorporated materials be “reasonably available” to the class of persons affected thereby. Reasonable availability can be met through reasonably priced published or online materials. Some SDOs—including NFPA—make incorporated standards available for free online, read-only access. This ensures transparency to the broader public while at the same time protecting our works from copying by people who would simply copy and sell them.

The Government: Governments benefit by leveraging expert-developed standards instead of duplicating expensive, specialized, and rapidly evolving technical work through the political or agency process. The funding model is incredibly efficient for government. Rather than requiring taxpayers to fund this safety benefit, costs are borne by the professionals and industries that rely on and work with these standards. Those professionals have to pay relatively little money for copies of or access to our works that the professionals use in their trade. That relatively low cost is properly paid by professionals and businesses that benefit from the standardization and from having clear,

high-quality standards. There is no better system: it is not efficient or better for government to take on the task of creating and updating standards.

National standards also prevent the fragmentation that would result if each state developed its own codes independently. In a world where every state maintained its own electrical code, for example, manufacturers would have to develop state-specific products, interstate commerce would be seriously disrupted, and the burden of developing and maintaining those codes would fall on state governments—and ultimately on taxpayers. The current system avoids all of that.

Industry: Industry benefits from high-quality and neutral standards. Builders, electricians, engineers, manufacturers, insurers, and facility operators all rely on NFPA standards because they trust them as professional tools. The widespread adoption and quality of the standards ultimately lowers compliance costs as compared to a more fragmented, unpredictable system. Because many consensus standards reflect best practices, incorporation by reference aligns regulation with industry best practice, which is economically efficient.

Industry also benefits from the speed and responsiveness of the consensus model, as compared to a political process. SDOs that have sufficient funding can pivot quickly to address emerging technologies and risks, like wildfires, lithium-ion battery safety, and solar power. That agility depends on sustained investment funded through copyright.

The Public-Private Partnership: Incorporation by Reference

As a matter of both longstanding practice, and intentional steps by Congress and federal agencies over time, the United States has embraced a public-private partnership with SDOs that create public safety codes and standards. This has historically worked—benefiting all sides—precisely because of incorporation by reference (IBR).

Governments at every level rely on these standards because they work. They turn to organizations like NFPA to solve safety challenges—not the other way around. The decision to incorporate standards by reference is made by lawmakers and regulators, based on their judgment that these standards provide the best available solutions.

I am not a lawyer or a historian, but I have come to understand a lot about the process and how it evolved.

First passed in the late 1960s, the Freedom of Information Act statute permitted agencies to rely on codes and standards and still meet federal publication requirements through IBR.

The requirement was that the material be “reasonably available to the class of persons affected thereby,” ensuring transparency and notice.²

Then, in the National Technology Transfer and Advancement Act of 1995 (NTTAA), Congress reinforced the public-private partnership by directing all federal agencies to use voluntary consensus standards and to participate with standards bodies except where doing so would be impractical or contrary to law. Congress thereby gave express recognition to the crucial role standards play in health, welfare, and competitiveness. Congress affirmed that the decentralized, consensus-based system has “served [the country] well for over a century.”³

More current and ongoing Executive Branch policy aligns with these statutes. Office of Management and Budget (OMB) Circular A-119 urges agencies to use private standards to eliminate taxpayer costs of government-unique standards, promote efficiency, and harmonize requirements. The 2017 revision to that Circular told agencies that they “must observe and protect the rights of the copyright holder.”⁴ The Office of the Federal Register considered the question of whether IBR’d codes and standards must be made available for free online posting, and concluded that such a requirement would weaken agencies’ ability to rely on voluntary standards and be contrary to the policies set forth in NTTAA and Circular A-119.⁵

Today, there are more than 23,000 references to privately developed standards in the Code of Federal Regulations alone — a number that only grows when state and local incorporations are included.

The long history of federal legislation and regulation makes codes and standards, and particularly those that are incorporated by reference, unique in a very practical way. The federal government has already decided that it will protect copyright through IBR. Until relatively recently, courts also respected the rights of private parties like SDOs. The Supreme Court’s government-edicts doctrine turns on the question of who authors a work. The doctrine bars copyright protection for works authored by judges and legislators in the course of their official duties. But voluntary consensus standards are not authored by government officials. They are authored by the SDOs who create them. The government-edicts doctrine does not strip copyright from such privately authored standards merely because a government later references them.

² 5 U.S.C. § 552(a)(1)(E). The final regulations required that agencies discuss the ways in which those materials are reasonably available, and explain how interested parties can access the materials. 1 C.F.R. § 51.5(b). But, critically, OFR did not require that agencies post the full text of standards on which they relied online. Instead, the agency specifically concluded that “Federal law [does not] require[] that all IBR’d standards . . . be available for free online.” 78 Fed. Reg. 60,784, 60,787 (Oct. 2, 2013) (notice of proposed rulemaking)

³ H.R. REP. NO. 104-390, pt. VII, at 23-24 (1995); Pub. L. No. 104-113, § 12, 110 Stat. 775, 782-83 (1996).

⁴ <https://www.whitehouse.gov/wp-content/uploads/2017/11/circular-119-1.pdf>

⁵ OFR, Final Rule on Incorporation by Reference, 79 Fed. Reg. 66,267, 66,268 (Nov. 7, 2014).

Recently, however, some courts have confused the issues and the policy considerations and found in favor of venture-backed private parties that want to build a business by copying and repackaging these standards. Those parties claim their conduct is justified because IBR'd standards are “the law.” That oversimplification ignores the special and unique circumstances surrounding voluntary consensus standards and IBR.

Codes and standards are not the law. They are privately authored works created by independent nonprofits to solve safety problems. Governments recognize their value and choose to reference them—but that does not make them governments’ work. The standard existed before any law referenced it, and the SDO that authored it still owns it.

The “Access” Argument Is a Manufactured Crisis

Access has never been a genuine issue. The real dispute is not over whether the public should be able to read incorporated standards; it is whether third parties should be allowed to copy, redistribute, repackage, and monetize those standards without permission. Those are very different things.

In the court proceedings, we have seen ideological organizations and for-profit businesses, but we have never seen genuine evidence of a member of the public unable to read an incorporated standard to any actual consequence. That is because NFPA and some other peer SDOs provide free read-only online access to all incorporated standards precisely to ensure transparency. Paid copies are also reasonably available: professionals who use standards in their work pay under \$170, for one of these works (even for the 900-page *NFPA 70: National Electrical Code*), or a reasonable monthly subscription fee for access to the entire NFPA catalog.

While trumpeting the slogan of public access to “the law” is convenient for parties on the other side of this issue, the result they are pushing for would create real harms. Counterfeit copies are a safety risk. If SDOs cannot protect their rights in their standards, counterfeits become that much more common. Businesses that rely on NFPA’s standards but pay nothing toward the substantial cost of creating them erode the entire model, jeopardizing independence and leading to fewer standards (or standards that cannot keep pace with technological advancements). This too undercuts safety and the strong benefits I have already discussed.

In short, there is a critical difference between the public’s interest in access to these works, and the present trajectory that includes permitting for-profit companies to appropriate, repackage, and commercially exploit privately authored standards in ways that supplant the funding model. The Pro Codes Act recognizes that difference by preserving copyright while promoting free online access to the incorporated text.

Why Now Is the Right Time for Congress to Solve This Issue

Congress should act now because balancing public access to incorporated standards with the copyright incentives that fund their creation is a quintessential policy judgment for Congress. Courts are addressing these disputes through doctrines that were not designed to resolve the full policy balance at issue here. Some decisions have suggested that incorporation by reference may alter copyright protection; others have turned to fair use; still others have emphasized different factual distinctions. That uncertainty emboldens infringers and threatens the sustainability of a system that the political branches have repeatedly endorsed. Think of the current system like a dam. These court decisions are putting cracks in it—and right now, only our feet are wet. But if Congress waits for the dam to break, the standards development system is not something that can be rebuilt after the fact.

There is no viable alternative to the current system. Government-developed standards would burden taxpayers and create a massive bureaucracy with no guarantee of matching the quality, breadth, or speed of what nonprofit SDOs produce today. An industry-funded model would place the cost of developing standards on the parties with the greatest financial interest in the outcome—an obvious conflict of interest that would compromise the independence on which the system's credibility depends.

Congress has already set the core framework and preference for voluntary consensus standards in the NTTAA. What remains is ensuring this framework is not undone. The Pro Codes Act offers the right balance of copyright protection, practical governance, responsible conservation of taxpayer money, and long-term public safety in a relatively simple statute. The Pro Codes Act confirms that privately authored, consensus standards do not lose copyright protection simply because they are incorporated by reference. The Act promotes free online access to the incorporated text for public reading, including in accessible formats. That is the pragmatic middle ground approach, and the one Congress should adopt.

Conclusion

The United States leads the world in safety and technical standards because it chose a public-private partnership that ensures the experts can be the leaders in their field, and the government can benefit through incorporation by reference. Copyright is the engine that sustains this system and ensures the best results in the standards that are created. Efforts by for-profit companies that want to freeride on this system have created uncertainty that must be fixed. Courts cannot reconstruct this policy. Congress can, and should, resolve the uncertainty by passing the Pro Codes Act, and reaffirming a partnership that enhances public safety.