March 17, 2023

Dear Mr. Langer:


If enacted, the Bill would amend the Copyright Act to make clear that a standard that is protected upon fixation under § 102(a) of the Act “shall retain such protection, notwithstanding...
that the standard is incorporated by reference, if the applicable standards development organization … makes all portions of the standard so incorporated publicly accessible online at no monetary cost.” § 123(b). A copy of the Bill is attached as Attachment A to this letter.

The Bill, of course, is proposed legislation, not an act of Congress. See Reply Br. 8 (discussing prior proposed legislation on this issue). Appellants apprise the Court of this development as it is potentially relevant to the history of legislative activity in this area, a subject that is discussed in Appellants’ briefing. See Opening Br. 6-8, 35; Reply Br. 8, 10, 13-14, 20; cf. United States v. Corona-Rivera, 503 F. Appx. 500, 503 (9th Cir. Dec. 20, 2012) (referring to 28(j) letter regarding proposed amendment to Sentencing Guidelines).

Very truly yours,

/s/ Kelly M. Klaus

Kelly M. Klaus

Attachment

Cc: Counsel via ECF
118TH CONGRESS
1ST SESSION

S. ______

To amend title 17, United States Code, to reaffirm the importance of, and include requirements for, works incorporated by reference into law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. COONS (for himself, Mr. CORNYN, Mr. TILLIS, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on ______

A BILL

To amend title 17, United States Code, to reaffirm the importance of, and include requirements for, works incorporated by reference into law, and for other purposes.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,
3 SECTION 1. SHORT TITLE.
4 This Act may be cited as the “Protecting and En-
5 hancing Public Access to Codes Act” or the “Pro Codes
6 Act”.
7 SEC. 2. FINDINGS.
8 Congress finds the following:
(1) Congress, the executive branch, and State and local governments have long recognized that the people of the United States benefit greatly from the work of private standards development organizations with expertise in highly specialized areas.

(2) The organizations described in paragraph (1) create technical standards and voluntary consensus standards through a process requiring openness, balance, consensus, and due process to ensure all interested parties have an opportunity to participate in standards development.

(3) The standards that result from the process described in paragraph (2) are used by private industry, academia, the Federal Government, and State and local governments that incorporate those standards by reference into laws and regulations.

(4) The standards described in paragraph (3) further innovation, commerce, and public safety, all without cost to governments or taxpayers because standards development organizations fund the process described in paragraph (2) through the sale and licensing of their standards.

(5) Congress and the executive branch have repeatedly declared that, wherever possible, governments should rely on voluntary consensus standards
and have set forth policies and procedures by which
those standards are incorporated by reference into
laws and regulations and that balance the interests
of access with protection for copyright.

(6) Circular A-119 of the Office of Management
and Budget entitled “Federal Participation in the
Development and Use of Voluntary Consensus
Standards and in Conformity Assessment Activi-
ties”, issued in revised form on January 27, 2016,
recognizes the benefits of voluntary consensus stand-
ard incorporation by reference, stating that
“[i]f a standard is used and published in an agency
document, your agency must observe and protect the
rights of the copyright holder and meet any other
similar obligations.”.

(7) Federal agencies have relied extensively on
the incorporation by reference system to leverage the
value of technical standards and voluntary consensus
standards for the benefit of the public, resulting in
more than 23,000 sections in the Code of Federal
Regulations that incorporate by reference technical
and voluntary consensus standards.

(8) State and local governments have also rec-
ognized that technical standards and voluntary con-
sensus standards are critical to protecting public
health and safety, which has resulted in many such
governments—

(A) incorporating those standards by ref-
erence into their laws and regulations; or

(B) entering into license agreements with
standards development organizations to use the
standards created by those organizations.

(9) Standards development organizations rely
on copyright protection to generate the revenues
necessary to fund the voluntary consensus process
and to continue creating and updating these impor-
tant standards.

(10) The people of the United States have a
strong interest in—

(A) ensuring that standards development
organizations continue to utilize a voluntary
consensus process—

(i) in which all interested parties can
participate; and

(ii) that continues to create and up-
date standards in a timely manner to—

(I) account for technological ad-
vances;

(II) address new threats to public
health and safety; and
(III) improve the usefulness of those standards; and

(B) the provision of access that allows people to read technical and voluntary consensus standards that are incorporated by reference into laws and regulations.

(11) As of the date of enactment of this Act, many standards development organizations make their standards available to the public free of charge online in a manner that does not substantially disrupt the ability of those organizations to earn revenue from the industries and professionals that purchase copies and subscription-access to those standards (such as through read-only access), which ensures that the public may read the current, accurate version of such a standard without significantly interfering with the revenue model that has long supported those organizations and their creation of, and investment in, new standards.

(12) Through this Act, and the amendments made by this Act, Congress intends 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.
SEC. 3. WORKS INCORPORATED BY REFERENCE INTO LAW.

(a) IN GENERAL.—Chapter 1 of title 17, United States Code, is amended by adding at the end the following:

“§ 123. Works incorporated by reference into law

“(a) DEFINITIONS.—In this section:


“(2) INCORPORATED BY REFERENCE.—

“(A) IN GENERAL.—The term ‘incorporated by reference’ means, with respect to a standard, that the text of a Federal, State, local, or municipal law or regulation—

“(i) references all or part of the standard; and

“(ii) does not copy the text of that standard directly into that law or regulation.

“(B) APPLICATION.—The creation or publication of a work that includes both the text of a law or regulation and all or part of a standard that has been incorporated by reference, as
described in subparagraph (A), shall not affect
the status of the standard as incorporated by
reference under that subparagraph.
“(3) STANDARD.—The term ‘standard’ means a
standard or code that is—
“(A) a technical standard, as that term is
defined in section 12(d) of the National Tech-
nology Transfer and Advancement Act of 1995
(15 U.S.C. 272 note); or
“(B) a voluntary consensus standard, as
that term is used for the purposes of Circular
A-119.
“(4) STANDARDS DEVELOPMENT ORGANIZA-
TION.—The term ‘standards development organiz-
ation’ means a holder of a copyright under this title
that plans, develops, establishes, or coordinates vol-
untary consensus standards using procedures that
incorporate the attributes of openness, balance of in-
terests, due process, an appeals process, and con-
sensus in a manner consistent with the requirements
of Circular A–119.
“(5) PUBLICLY ACCESSIBLE ONLINE.—
“(A) IN GENERAL.—The term ‘publicly ac-
cessible online’, with respect to material, means
that the material is displayed for review in a readily accessible manner on a public website.

“(B) RULE OF CONSTRUCTION.—If a user is required to create an account or agree to the terms of service of a website or organization in order to access material online, that requirement shall not be construed to render the material not publicly accessible online for the purposes of subparagraph (A), if there is no monetary cost to the user to access that material.

“(b) STANDARDS INCORPORATED BY REFERENCE INTO LAW OR REGULATION.—A standard to which copyright protection subsists under section 102(a) at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if the applicable standards development organization, within a reasonable period of time after obtaining actual or constructive notice that the standard has been incorporated by reference, makes all portions of the standard so incorporated publicly accessible online at no monetary cost.

“(c) BURDEN OF PROOF.—In any proceeding in which a party asserts that a standards development organization has failed to comply with the requirements under subsection (b) for retaining copyright protection with respect to a standard, the burden of proof shall be on the
1 party making that assertion to prove that the standards
2 development organization has failed to comply with those
3 requirements.”.

4 (b) **TECHNICAL AND CONFORMING AMENDMENT.**—
5 The table of sections for chapter 1 of title 17, United
6 States Code, is amended by adding at the end the fol-
7 lowing:

   “123. Works incorporated by reference into law.”.