

The Honorable Chuck Schumer
Majority Leader
United States Senate
Room S-221, The Capitol Room
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
United States Senate
S-230, The Capitol
Washington, DC 20515

July 16, 2024

Re: Opposition to amendment 2157 in the National Defense Authorization Act (NDAA)

Dear Leader Schumer and Leader McConnell:

The undersigned organizations write to express our strong opposition to [amendment 2157](#) to the National Defense Authorization Act (NDAA), offered by Senators Coons, Cornyn, Hirono, and Tillis. Like the Pro Codes Act (S. 835) on which it is based, this amendment would extend copyright protection to standards that are incorporated by reference into law. In previous letters, we expressed concern that Congress has not held a hearing on the Pro Codes Act. Attaching this non-germane amendment to the NDAA would subvert regular order and deny this proposal a public, transparent, deliberative process. We ask the Senate to reject this non-germane amendment to the NDAA.

In addition to our procedural concerns, the undersigned organizations share the substantive concerns that this amendment would undermine a fundamental purpose of copyright law: to provide public access to knowledge.

Amendment 2157 would limit access to publicly beneficial standards

Under this amendment, standards development organizations would retain their copyright in a standard that is incorporated by reference into law, so long as the standard is made “publicly accessible” online. However, this amendment would likely entrench some of the most obstructive current practices of standards development organizations, providing read-only access to the codes and limiting their use through restrictive licenses that prohibit copying, printing, and linking. When standards are made available in this way, the public is restricted in how they can use and share the standards. Often, SDOs require users to provide their personal information to access the standards, which raises privacy concerns. The amendment explicitly permits SDOs to require this, and the protections against abuse of this information are not sufficient.

No one owns the law

Although a standard might be developed by an industry group to promote its interests, once it is incorporated into law by reference, it belongs to everyone. Under the “government edicts doctrine,” works created by government employees have the force of law and belong to the public domain. Libraries and other repositories rely on the government edicts doctrine to preserve and provide access to the cultural record, including all elements of the law.

Courts have recognized that no one can own the law. Last year, the D.C. Circuit stated that legal text “falls plainly outside the realm of copyright protection.”¹ In 2020, the Supreme Court of the United States reaffirmed that “if every citizen is presumed to know the law, it needs no argument to show . . . that all should have free access to its contents.”² Extending copyright protection to the law is unconstitutional under the First, Fifth, and Fourteenth Amendments, which guarantee the public’s right to read, share, and discuss the law.

Providing access to the law is fair use

Even if standards incorporated into the law by reference *could* retain copyright protection, their reproduction would be a fair use. In September 2023, the D.C. Circuit ruled that making standards incorporated by reference publicly available is a lawful fair use that serves a nonprofit, educational purpose of providing the public with a free and comprehensive repository of the law.³ The court correctly applied copyright law in determining that the substantial public benefits of free and easy access to the law, including government-mandated codes and standards, must be considered against any potential monetary losses to the copyright holders.

Rather than passing a non-germane amendment to the NDAA, we urge Congress to engage with our organizations and the public to meet its ostensible goal of making mandatory regulations available online for free so people can know, share, and comment on them, while preserving appropriate incentives for developing standards useful for incorporation by reference. Extending copyright protection to elements of the law will only serve to unnecessarily impede public access to US law.

Sincerely,

American Economic Liberties Project

American Federation of State, County and Municipal Employees (AFSCME)

American Library Association (ALA)

Association of Research Libraries (ARL)

Authors Alliance

Center for Democracy & Technology

Copia Institute

eBook Study Group

Electronic Frontier Foundation (EFF)

Fight for the Future

¹ *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1268 (D.C. Cir. 2023).

² *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498, 1507 (2020).

³ *American Society for Testing & Materials v. Public.Resource.org, Inc.*, 82 F.4th 1262 (D.C. Cir. 2023).

Foundation for American Innovation

iFixit

Library Futures, NYU Engelberg Center

Program on Information Justice and Intellectual Property Project on the Right to Research

Public Citizen

Public Knowledge

Public.Resource.Org (PRO)

Repair.org

Society of American Archivists (SAA)

SPARC

Wikimedia Foundation