AAP | ASSOCIATION OF AMERICAN PUBLISHERS

The Association of American Publishers (AAP) is the national trade association for book, journal, and education publishers in the United States, including large, small, and specialized publishing houses from across the country.

We respectfully submit this testimony in opposition to Section 2 of S220. This section of the bill is preempted by federal Copyright Law, would harm the livelihoods of authors, is a threat to Vermont's economy and national interests, and ignores a record-breaking number of "digital check-outs" from public libraries.

These "digital check outs" are made possible because publishers have long offered discounted access to public libraries, for them to make digital formats available to their patrons under controlled terms, as a supplement to physical books, which by far remain the most popular formats. Publishers have without question served public libraries and their communities very well in the digital age—to the point that today more patrons than ever before can access for free, at the push of a button, a plethora of award winning and best-selling literary works that they might otherwise have purchased from booksellers.

As there is no problem in the library market—but considerable concern about competitive businesses—AAP joins hundreds of thousands of creators in opposing Section 2 of S220.

Section 2 of S220 is clearly preempted by federal law and therefore unconstitutional.

The United States Copyright Act governs the distribution of literary works in all formats, including the transmission of eBook formats to library patrons pursuant to copyright licenses from publishers. The state of Vermont may not enforce legislation that duplicates or frustrates the objectives of the Copyright Act.

As such, Section 2 of S220 is clearly preempted and therefore unconstitutional. If enacted, this section of the bill would subject Vermont and its taxpayers to all of the liability, legal fees, and expenses that would attach, and which affected parties in the creative industries would have no choice but to pursue.

The Copyright Act is directly authorized by the "Copyright Clause" of the U.S. Constitution; it dates back to 1790 and has been carefully updated by the U.S. Congress in its discretion as needed, after comprehensive consideration. A lengthy but uniform federal law, the Copyright Act is the legal foundation of the publishing industry and all other creative industries. Moreover, the Copyright Act attaches to numerous copyright treaties and free trade agreements that the United States has led, adopted, and implemented, and which it is charged with fully enforcing.

The aim of Section 2 is not theoretical. Inexplicably, it would expose copyright owners to serious penalties and liabilities that it has no right to impose. To put a fine point on the unconstitutional conflict, Section 2 of S220 seeks to punish copyright owners for exercising the very rights and remedies that federal law so clearly affords them!

We are aware that legislation like Section 2 of S220 has been pushed to policymakers in other states, under outrageously false legal and business assertions. Thankfully, these bills have been rejected. In late

2021, Governor Hochul vetoed a similar New York bill stating that "because the provisions of this bill are preempted by federal copyright law, I cannot support this bill."

In 2022, a federal district court in Maryland found a similar bill "unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act" and because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Ass'n of American Publishers v. Frosh, 2022].

And last year in Virginia, a virtually identical bill was unanimously rejected in committee by the state legislature due to a plethora of legal and business concerns.

Section 2 of S220 would harm the livelihoods of authors.

The Copyright Act is the basis of invaluable creativity and innovation in the marketplace, for which we owe American authors our gratitude and respect. The basic bargain of the Copyright Act is economic. It serves the public by encouraging authorship and publication, including through modern delivery models.

If enacted, Section 2 of S220 would directly devalue the intellectual property of authors and therefore their right to seek market compensation. Under a scheme that would reduce the copyright interests of authors to an artificially capped system of government rates, authors could not sustain their crafts, to the great detriment of readers everywhere. Such a precedent would be frontally at odds with the Constitutional mandate of copyright law. In short, the kind of regime that Section 2 envisions would threaten the entire creative economy that is so critical to the state of Vermont and the Nation.

Section 2 of S220 would threaten Vermont's economy and national interests.

Section 2 of S220 would undermine private sector investments that make literary works of all formats and genres possible, including poetry, novels, children's books, biographies and many other forms of entertainment and information that drive the creative economy.

In addition to these immediate impacts, Section 2 would limit the downstream economic contributions of the publishing ecosystem which results in jobs and revenue for truckers, warehouses, manufacturers, and many other industries. In 2021, the copyright industry was responsible for an estimated $2.9 trillion dollars, or 12.52% of the U.S. economy. Simply put, Section 2 would destabilize a significant sector of the U.S. economy – and U.S. employment – that rely on incentives and protections of federal law.

It is for this reason that **the groups who stand in opposition to Section 2 of S220 represent hundreds of thousands of creators** including the Association of American Publishers, the Authors Guild, American Booksellers Association, Copyright Alliance, Independent Book Publishers Association, News Media Alliance, Motion Picture Association, Recording Industry Association of America, and Software & Information Industry Association, among others.

Section 2 of S220 ignores a record-breaking number of digital checkouts in library markets.

American publishers are extremely proud of their role in championing public libraries, including their transitions to the digital age. As digital "check-outs" are booming, we note that Section 2 is at best a solution in search of a problem, or at worst an effort to force businesses to subsidize public institutions at the expense of themselves and other stakeholders.

Today, the reading public has unprecedented library access to literary works in eBook as well as audiobook formats. This fact is true even while publishers compete rigorously and simultaneously to serve readers in the commercial marketplace. Indeed, library e-lending has exploded to the point that commercial revenue for eBooks continues to decline as library check-outs increase. In 2023, readers borrowed more than 662 million eBooks, audiobooks, digital magazines, comics, and other digital content, nineteen percent more than the record-breaking numbers of 2022.

Moreover, libraries enjoy special licenses from publishers that permit them to do things that readers in the consumer markets may not do. Libraries make eBooks available over and over again to their patrons, at an aggregate cost that is nowhere close to the per-reader rates. This balance is critical. Authors, publishers, and bookstores would not survive if every consumer could instead immediately "borrow" a digital version of every book that they might otherwise decide to purchase. Indeed, no industry of any kind could function if forced to give unfettered free access while also trying to recoup investments.

CONCLUSION

In closing, American intellectual property is a point of pride for both local and global economies. Today's literary market is agile and offers consumers more choices than ever before, including digital formats that customers can enjoy in the comfort of their own homes. Especially now, in the face of challenging economic times, the success of authors depends on the success of publishing houses and the incredibly important commercial markets they support. Section 2 of S220 seeks to unconstitutionally intervene in this market and disrupt the balance between art and commerce that it has so carefully struck.

For all of the reasons outlined above and more, we therefore respectfully urge the Senate Education Committee to remove Section 2 from S220.

We appreciate the opportunity to present these views to the Senate Education Committee.

Respectfully submitted,

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