THE Authors Guild

State of Vermont General Assembly

February 6, 2024

Testimony in Opposition to S.220

The Authors Guild respectfully submits the following testimony in opposition to S.220, specifically Section 2 of the bill. With over 14,000 members, the Authors Guild is the oldest and largest professional association of published writers of all genres including historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. Since its founding in 1912, the Guild has worked to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and fair contracts.

We strongly oppose Section 2 of S.220 because it prejudices the exclusive rights guaranteed by federal copyright law to our members and all authors. In June 2022, a federal court in Maryland ruled that state laws regulating copyright licensing were "unconstitutional and unenforceable" on grounds that they violated the Supremacy Clause of the U.S. Constitution. Likewise, in December 2023, New York's governor vetoed a state bill mandating terms for library ebook licenses on grounds that it likely violated federal law. We want to strongly caution this body against enacting Section 2 of S.220 in light of compelling legal authority against state law restrictions on copyright licenses similar to the restrictions laid out in Section 2 of S.220.

A. Section 2 of S.220 is Pre-empted by Federal Law

Copyright incentivizes authors to write books and publishers to publish them by creating economic value for books; without it, few books get written and published. Recognizing the importance of creating an economy for books throughout the nation, the Founders placed copyright law in the hands of Congress,[1]

Section 301 of the current copyright law – the 1976 Copyright Act – is unambiguous on the principle of federal supremacy, stating that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . [that] come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title."[2] Upholding the principle of federal preemption of copyright, and, in particular, the

[1] Art. 1, Sec. 8, cl. 8
[2] 17 U.S.C. 103

copyright owner's exclusive rights, courts across the federal circuits have struck down state laws that interfere with the copyright owner's right to control his or her work.[3]

Section 2 of S.220 encroaches upon Congress' exclusive authority under the U.S. Constitution to enact legislation within the scope of copyright by mandating the terms on which publishers license books to Vermont libraries, including by prohibiting publishers' from restricting numbers of licenses, duration of the licenses, and downstream uses of the licenses. Such restraints create the equivalent of a "compulsory license" and are a direct assault on rights holders' copyrights under federal law.

As Authors Guild members rely on enforceable copyrights to protect their work and to maintain a robust publishing ecosystem system that provides them with the financial ability to be able to continue to write for the public good, the Guild has a strong interest in protecting authors' exclusive rights to license their works to whom they chose on the terms they chose as the Constitution and the federal copyright law provide.

B. The Compulsory License Requirements of S.220 Will Harm Our Member Authors' Earnings

The licensing restrictions on publishers will have a considerable impact on authors' incomes from their contracts with publishers. Authors earn a living from royalties from book sales and shares of licensing income. Under a typical contract, an author receives 25% of the publisher's net receipts from the disposition of electronic licenses, including those to libraries. The unconstitutional restrictions on publishers' ability to license to libraries would impact the market for electronic licenses and authors' earnings, which is already at historic lows.

According to the most recent Authors Guild income survey—the largest and most comprehensive of its kind— the median income for **full-time authors** from their books was $10,000 in 2022, and their total median earnings from their book and other author-related income combined (books and other sources) was $20,000. When looking at **full-time authors** whose books are in **commercial** markets (i.e, excluding academic, scholarly, and educational books), the median book income was $15,000 and median author-related income was $25,000. This means half of all full-time authors continue to earn below minimum wage in many states from *all* their writing related work, and well below the federal minimum wage of just $7.25/hour from their books.

For many writers practicing their profession is already becoming untenable, and we are at a serious risk of losing many talented writers and many important voices to financial precarity.

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[3] See, e.g., Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018x) (finding requirement for re-sellers of fine art to pay artist a 5% royalty on sales within California violated section 301 of Copyright Act because it conflicted with exclusive distribution right under section 106(3)); Author's Guild v. Google, Inc., 770 F. Supp. 2d 666, 681 (S.D.N.Y. 2011) (noting that "[a] copyright owner's right to exclude others from using his property is fundamental and beyond dispute" and "[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property"); Rodrige v. Rodrigue, 218 F.3d 432, 436-42 (5th Cir. 2000) (finding that Louisiana's community property law could not interfere with the copyright author's right to control his or her work).

Needless to say, without a healthy publishing ecosystem that allows authors to earn a sustainable living from their books, we would not have books to fill our libraries.

C. The Licensing Requirements of S.220 Encumbers Freedom of Expression

The requirements laid out in Section 2 of S.220 encumber the freedom of expression of authors and their publishers. Authors' rights under copyright, which the U.S. Supreme Court has called the "engine of free from expression,"[4] are directly related to their constitutional rights to free speech and expression. Section 2 thus encroaches upon this freedom by mandating particular terms for commercial dealing.

D. Section 2 of S.220 is Premised on a Non-Existent "Problem" of Supply and Access

The prevailing practice in the publishing industry by far is to provide libraries with copies of their books in ebook form, and to our knowledge, all of the large and mid-size publishers do already provide libraries with licenses to all of their ebooks. Moreover, at the onset of the Covid19 crisis, most major publishers made electronic resources *freely* available to libraries and schools.[5] The Authors Guild has been a vocal proponent of these pandemic privileges; we have also supported and lobbied for additional funding to enable libraries to grow their digital collections.[6]

Proponents of library licensing bills cannot point out a pattern of recalcitrance or obstruction by publishers with respect to licensing their digital content to libraries; instead their justifications for the extreme measure of compulsory licensing rely on two atypical cases: Amazon previous withholding its imprints from libraries (a stance it has since changed), and Macmillan's proposed embargo limiting libraries to one copy each for new books for a period of eight weeks from publication that they quickly abandoned in response to complaints from the library community. The supply of ebooks to libraries, simply put, is not a problem in need of a solution. The prior practices of one or two actors in the industry should not color the long and enduring history of authors' and publishers' support for libraries, and they certainly should not result in extreme consequences for the entire industry.

We oppose S.220 for the reasons discussed above and respectfully request that it be withdrawn in light of the broader legal context, disruptions to the copyright system, and the possible serious repercussions for hard-working authors.

It goes without saying that the Authors Guild and its member authors believe that books should be available to libraries and schools in every format, but we strongly object to a legislative approach that creates a mandate and interferes with authors' and publishers' fundamental rights under constitutionally based copyright law to license their works on terms they chose. Such an approach is clearly preempted by federal law, overly and unjustifiably broad, impractical,

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[4] Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).
[5] https://publishers.org/aap-news/covid-19-response/
[6] https://www.authorsguild.org/wp-content/uploads/2020/06/Libraries-Pelosi-McCarthy-Letter.cd_.pdf

unnecessary, and harmful to the very people who make those books possible in the first place: authors and their publishers.

Respectfully submitted,

The Authors Guild