



7 February 2024

The Independent Book Publishers Association respectfully submits the following testimony with regard to Vermont Senate Bill 220 (S220). Publishers and librarians share common goals as a result of their symbiotic relationship. While our association supports the general goal of this legislation, to provide libraries with the funding and support they need to carry out their important mission in society, we strongly oppose Section 2 of the proposed legislation, which, if enacted, would violate our members' rights under federal copyright law and the United States Constitution by unconstitutionally regulating literary works by dictating licensing terms from copyright owners to libraries for eBook formats.

The Independent Book Publishers Association is a national non-profit association of nearly 4,000 small and mid-sized publishers, as well as author-publishers, including members from the State of Vermont. IBPA works to promote the rights and professional interests of our publisher members. Our membership would be directly impacted by Section 2 of S220.

While the Independent Book Publishers Association and its membership would like nothing more than for all books to be available to libraries in every format, we strongly oppose the legislative initiative taken by the drafters of Section 2 of S220 to achieve this otherwise laudable goal.

Section 2 of S220 would represent a fundamental, unprecedented intrusion into the free exercise of copyright by both authors and publishers by restricting certain licensing terms for digital materials under the guise of unfair and deceptive trade practices. When the State dictates licensing terms for copyrighted materials it violates the free exercise of Copyright under 17 U.S.C. §106. Only Congress, not the State, has the right to regulate copyright. In a lengthy written opinion analyzing the similar proposed legislation in other states, dated August 30, 2021, Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office, stated, "we conclude that under current precedent, the state laws at issue are likely to be found preempted." Meaning that the state laws interfere with the authority of Congress and thus violate the Supremacy Clause of the U.S. Constitution.

As the court recognized in the case *AAP v. Frosh*, concerning similar legislation passed by the Maryland legislature, "[i]t is clear from the text and history of the Copyright Act that the balance of rights and exceptions is decided by Congress alone" and "[s]triking the balance between the

critical functions of libraries and the importance of preserving the exclusive rights of copyright holders... is squarely in the province of Congress and not this Court or a state legislature.” States cannot avoid federal preemption by recasting restrictions on the exercise of copyrights as protections against unfair, deceptive, or unconscionable conduct, such as is the case with Section 2 of S220. Absent an evidentiary record that clearly establishes actual fraud or misrepresentation, bills restricting price and licensing terms will be preempted where the supposed misconduct the state law aims to remedy is no more than the perception by the state that the licensor negotiated a favorable deal.

The Supremacy Clause is not the only constitutional concern raised by Section 2 of S220. As the sale of electronic literary products by definition represents interstate commerce, this legislation would also directly violate article 1, section 8, clause 3 of the Constitution, which gives Congress the right to regulate interstate commerce. Imposing terms on publishers from the several states in their commercial relationship with Vermont libraries, and ultimately the State of Vermont itself, interferes with interstate commerce which is the exclusive purview of the Congress of the United States.

Section 2 of S220 would ultimately compel publishers to accept licenses they might otherwise choose not to or, tragically, to not offer their works to libraries at all. Under this proposed legislation, publishers would lose the ability to control to whom they license their works and on what terms, eviscerating their rights under 17 U.S.C. §106. The Supreme Court already decided this issue in its 1999 decision in *Orson, Inc. v. Miramax* expressly in which it ruled that states cannot infringe upon the rights of copyright holders: “The state may not mandate distribution and reproduction of a copyrighted work in the face of the exclusive rights to distribution granted under §106.” The law at issue in that case, just as Section 2 of S220 would do, “direct[ed] a copyright holder to distribute and license against its will and interests.”<sup>1</sup>

It is the contention of the Independent Book Publishers Association that Section 2 of S220 suffers from the same constitutional defects that led to the Federal court decision in the *AAP v. Frosch* case last year to swiftly strike down similar legislation enacted in Maryland, finding it “unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act.” It held that the now-overturned Maryland law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>2</sup> Maryland declined to appeal this well-reasoned decision.

While we are sympathetic to the motivations underlying this legislation, a law that sweeps in thousands of small publishers and self-published authors who cannot manage distribution and licensing at scale is not the right approach and is in fundamental violation of federal copyright law. We concur with United States District Judge Deborah Boardman, who, in the *AAP v. Frosch* case, stated: “Libraries serve many critical functions in our democracy. They serve as a repository of knowledge — both old and new — and ensure access to that knowledge does not depend on wealth or ability. They also play a special role in documenting society’s evolution. Congress has underscored the significance of libraries and has accorded them a privileged status on at least one occasion, legislating an exception to the Copyright Act’s regime of exclusive rights that permits

---

<sup>1</sup> *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999).

<sup>2</sup> *Ass'n of Am. Publishers, Inc. v. Frosch*, No. DLB-21-3133, 2022 U.S. Dist. LEXIS 105406 (D. Md. June 13, 2022).

libraries to reproduce copyrighted material so it may be preserved in the public record across generations. See 17 U.S.C. § 108. Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media. However, striking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders is squarely in the province of Congress and not this Court or a state legislature.”<sup>3</sup>

We respectfully request that Section 2 be deleted from S220 and that the bill to support Vermont libraries be adopted without this provision. The inclusion of this provision in the final bill could undermine the otherwise laudable intent of S220. We hope that you will reject Section 2 in light of the broader legal context and possible serious repercussions of this legislation for hardworking independent publishers and self-published authors already facing serious challenges in the current economic environment.

Respectfully submitted,



Andrea Fleck-Nisbet  
CEO  
Independent Book Publishers Association



Dr. Kurt Brackob  
Advocacy Committee  
Independent Book Publishers Association

---

<sup>3</sup> United States District Court for the State of Maryland, Case 1:21-cv-03133-DLB Document 19 Filed 02/16/22, p. 27.