

March 25, 2021

Memorandum in Opposition to Georgia Senate Bill 226 (SB226)

The Authors Guild, the Comic Book Legal Defense Fund, and the American Booksellers Association respectfully submit this memorandum in opposition to Georgia Senate Bill 226 (SB226), which, if enacted, would violate our members' constitutional right to free expression and their rights under federal copyright law.

The Authors Guild is a national non-profit association of approximately 10,000 professional, published writers of all genres, including historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. The Authors Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation.

Comic Book Legal Defense Fund is a non-profit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians, educators, and readers. CBLDF provides legal referrals, representation, advice, assistance, and education in furtherance of these goals.

Founded in 1900, the American Booksellers Association is a national not-for-profit trade organization that supports more than 2,000 independent bookstores across the country. These stores are community centers that serve a unique role in sharing a love of books, promoting the open exchange of ideas, enriching the cultural life of communities, and creating economically vibrant neighborhoods.

Section 8 of SB226 Runs Afoul of the Principle of Federal Preemption and Would Violate Authors' Rights under Federal Copyright Law

Copyright law is an exclusively federal domain, as is plain from the reading of Section 301 of the Copyright Act, which states 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."¹ The principle of federal copyright preemption is also well-established in the case law. Upholding the principle of federal preemption of copyright, and, in particular, the 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.² Further, under sections 106(1) and 106(3) of the Copyright Act only the copyright owner

¹ 17 U.S.C. 301

² See, e.g., *Close v. Sotheby's, Inc.*, 894 F.3d 1061 (9th Cir. 2018) (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).

has the rights, respectively, to reproduce and distribute copies of the work, or to license another to do so in their stead.

Section 8 of Georgia Senate Bill 226 widely and broadly encroaches on federal supremacy law by forcing the publication of works protected by federal copyright on the local board of education's websites for public review for four years if the works are "determined by the local board of education *not* to be harmful to minors." While falling short of completely usurping the copyright owner's exclusive rights to control reproduction and distribution of their works, the bill, nevertheless, mandates that "each local board of education shall make accommodation in its material licensing agreements that public access for electronic review of such material shall be made available to accomplish the purposes of this paragraph."

This requirement is severely detrimental not only for copyright owners but also Georgia educators and students. Copyright owners, out of concern for the evisceration of the commercial value their works from being freely and publicly available online, would be forced to make the difficult choice of granting what is essentially a compulsory license to local boards of education, or to withdraw licenses to Georgia boards of education, which in turn would severely limit the range of educational materials available to Georgia's educators and students. What's more, the fact that Georgia would apply these requirements with respect to works that *have not* been determined to be obscene guarantees that its deleterious effects would not be limited to a few works whose value is in question but would reach hundreds if not thousands of books and works published in other media.

Georgia Senate Bill 226 Violates Authors' Rights to Free Speech and Expression

The bill also poses a great threat to the free speech and expression rights of authors. What Senate Bill 226 does is essentially penalizes authors by deliberately causing the value of their works to decline. With the exception of self-published authors, authors assign the rights of publication in their publishing contracts. As such, they would have no control over a publisher's decision to allow their works to be available on a local board of education's website or withdrawal from licenses to Georgia educators. Yet their earnings from their hard work—already at historic lows with half of all full-time writers earning under the federal poverty line from their writings—would suffer under both scenarios.³ If their publisher lets the local boards of education put their works on a website, not only would they be accessible to anyone on the internet, they could be easily copied and pirated by anyone. If the publisher withdraws from licensing, the author loses out again. And while publishers may be able to easily absorb losses from one or two titles, authors cannot. With each lost sale, authors lose income that further entrenches their ever-precarious state. Causing an author to lose income—*especially* when their work, as determined by a local board of education, does not violate the community standards for obscenity with regards to minor, and such, enjoys full First Amendment protection—is clearly censorious and strikes at the heart of authors' constitutionally guaranteed rights of speech and expression.

³ <https://www.authorsguild.org/industry-advocacy/authors-guild-issues-report-exploring-the-factors-leading-to-the-decline-of-the-writing-profession/>

For these reasons, we respectfully, but stridently, oppose Georgia Senate Bill 226.

Respectfully submitted,



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