



**State of Illinois General Assembly
Consumer Protection Committee**

February 1, 2022

Testimony in Opposition to House Bill no. 4470

The Authors Guild respectfully submits the following testimony in opposition to Illinois assembly bill HB4470. With over 12,000 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 HB4470 because it prejudices the exclusive rights guaranteed by federal copyright law to our members and all 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 mandates 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, unnecessary, and harmful to the very people who make those books possible in the first place: authors and their publishers.

A. HB4470 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

HB4470 encroaches upon Congress’ exclusive authority under the U.S. Constitution to enact legislation within the scope of copyright by requiring “[a]ny publisher who offers a contract or license for electronic literary product acquisition to the public...to license the electronic literary product to libraries...on reasonable terms;” and by prohibiting certain other contractual provisions including restrictions on “the number of licenses for electronic books or digital audiobooks that libraries may purchase on the same date available to the public.” These provisions attempt to amend federal copyright law, by severely limiting an author’s or publisher’s ability to decide to whom, when and on what terms to license their works, crating the equivalent of what is called a “mandatory” license under copyright law. As such, they are preempted by the Copyright Act. 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. HB4470 Encumbers Freedom of Expression

HB4470’s compulsory license encumbers 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. The legislation encroaches upon this freedom by mandating particular terms for commercial dealing—under penalty of law.

C. Satisfying HB4470’s Requirements is Impractical for Authors

HB4470 makes no distinction between large publishers, like the big 5 and Amazon Publishing, on the one hand, and small publishers, non-profit publishers, or indeed even individual self-published authors. It creates the thoroughly impractical requirement on all publishers regardless of size, individual authors and bloggers to produce digital materials in lendable form in the same manner that large, multinational corporations can.

A significant number of our members are self-published writers working in various genres and forms who would be directly impacted. Many of them struggle to get their books into libraries since the traditional library market is not well set up to evaluate and purchase self-published books on scale. To be clear, few libraries possess the platforms to lend digital material to patrons

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).

⁴ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

directly. They rely on publishers granting rights to intermediary platforms like Overdrive, Hoopla, and Bibliotheca, which host and serve ebooks and audiobooks on behalf of libraries directly to their patrons. Most independently-published authors do not have access to these library aggregator services, nor the mass volume of titles to justify creating or entering into a partnership with them.

HB4470 defines “electronic book” to include “text document that has been converted into or published in a digital format,” potentially sweeping in blogs, online literary journal pieces, and other short articles, stories and poems published online, whether on the writer’s own website, online publications’ sites, or third-party platforms like Medium. The vast majority of these writers lack the facility to make their writings license-able to libraries and schools, and moreover, most libraries (and even more schools) do not have an interest in licensing these works. Yet, all of these writers would be subject to potential violations of Illinois’s unfair and deceptive trade practice laws under HB4470 if they do not “offer to license” their ebooks and audiobooks to Illinois libraries and schools on terms decreed in the law. If such laws become widespread, writers would need to track and comply with their requirements in as many as 50 states, or face legal penalties in those jurisdictions.

D. HB4470 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 HB4470 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, and especially those who publish independently. We also want to emphasize that in December a similar bill in New York was

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

vetoed by the governor on grounds that it conflicted with federal law, and that the legality of Maryland's library ebook licensing law is currently being litigated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary" followed by a stylized flourish that extends to the right.

Mary Rasenberger
CEO, The Authors Guild