

The logo for The Authors Guild, featuring a stylized 'AG' in teal with horizontal lines through the letters, followed by the text 'THE Authors Guild' in a black serif font.

# THE Authors Guild

March 22, 2021

The Authors Guild respectfully submits the following testimony in opposition to Senate bill 432 (SB432) and its companion House bill 518 (HB518), 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 Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation. A significant number of our members are self-published writers working in various genres and forms who would be directly impacted by SB432.

It goes without saying that the Guild and its member authors would like nothing more than for all books in every format to be available to libraries, but we firmly disagree with the legislative approach taken by the drafters of SB432/HB518 to give effect to the otherwise laudable policy of expanding Maryland libraries' access to digital books. While many self-published authors have strong relationships with and license their works to libraries, creating a requirement that they offer licenses on "reasonable terms" to libraries will create an undue burden on many more who simply don't have the resources or sophistication to manage licensing at scale, yet the legislation makes no distinction between a large publisher and distributor like Amazon and small, individual creators.<sup>1</sup> Furthermore, it also sweeps in thousands of other writers who publish short works online through their blogs and websites, or put out online literary journals. All of these writers would be subject to potential violations of Maryland's unfair, abusive, or deceptive trade practice laws if they do not "offer to license" their electronic publications to Maryland libraries.

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<sup>1</sup> The legislation defines "publisher" as any "person in the business of manufacturing, promulgating, and selling books, journals, magazines, newspapers, or other literary productions," which sweeps in thousands of self-published writers and writers who publish their works online within its ambit.

Beyond the myriad ways in which the bills would prejudice writers, the legislation suffers from constitutional defects that makes its demise in courts all but certain. First, as the Association of American Publishers states in its testimony, “SB432 would impermissibly undermine the long-established and unambiguous legal framework enacted by Congress to govern the distribution of copyrighted works.”<sup>2</sup> That copyright law is an exclusively federal domain 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.”<sup>3</sup> The principle of federal supremacy in this area is also well-established 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.<sup>4</sup> Requiring that anyone “who offers to license and electronic book to the public” also “offer to license the electronic book to public libraries in the state on reasonable terms” encroaches upon the exclusive distribution right secured by federal copyright law for the benefit of the owner.

Second, by creating a mandatory license, and compelling authors to make their works available, the legislation prejudices the freedom of expression rights of authors and their publishers. Authors’ rights under copyright, which the U.S. Supreme Court has called the “engine of free from expression,”<sup>5</sup> are not unrelated to their constitutional rights to free speech and expression. The legislation encroaches upon this freedom not only by mandating a certain manner of commercial dealing under penalty of law but by mandating when and how their expression is made available.

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<sup>2</sup> AAP Testimony

<sup>3</sup> 17 U.S.C. 301

<sup>4</sup> 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).

<sup>5</sup> *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985)

We are deeply sympathetic to the motivations underlying this legislation, but responding to the practice by a dominant player of deliberately withholding its electronic books from libraries with 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. We also ask the legislature to take into account the prevailing practice in the publishing industry—which is to expand distribution to libraries and foster their growth. At the onset of the Covid19 crisis, most major publishers made electronic resources freely available to libraries.<sup>6</sup> The Authors Guild itself has been a vocal proponent of expanding library funding so that libraries can grow their digital collections.<sup>7</sup> The practices of one or two actors in the industry should not gloss over 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 respectfully oppose SB432 and HB518 and ask that you reconsider your approach in light of the broader legal context and possible serious repercussions of this legislation for hard-working, self-published authors.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Mary Rasenberger', is centered on the page. The signature is fluid and cursive, with the first name 'Mary' and the last name 'Rasenberger' clearly distinguishable.

Mary Rasenberger  
CEO, The Authors Guild

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<sup>6</sup> <https://publishers.org/aap-news/covid-19-response/>

<sup>7</sup> [https://www.authorsguild.org/wp-content/uploads/2020/06/Libraries-Pelosi-McCarthy-Letter.cd\\_.pdf](https://www.authorsguild.org/wp-content/uploads/2020/06/Libraries-Pelosi-McCarthy-Letter.cd_.pdf)