Re: HB 6246
Position: Oppose
Contact: cmohr@siia.net

Statement of the Software & Information Industry Association in Opposition to HB 2642

To the Chair and Members of the Committee:

The Software & Information Industry Association (SIIA) respectfully submits the following statement in opposition to HB 6246.

SIIA is the principal U.S. trade association for the software and digital content industries. With over 600 member companies, SIIA is the largest association of software and content publishers in the country, and they publish works in a variety of fields including scientific, technical and medical journals, education, and business to business material. Our members range from start-up firms to some of the largest and most recognizable corporations in the world. Many of our members are located in or do business in Rhode Island.

The legislation imposes price controls on licenses of electronic works to any educational institution or publicly accessible library in Rhode Island, requiring out-of-state copyright owner to impose "reasonable" terms on the use of electronic works or face an unfair trade practices action. It also attempts to impose a choice-of-law clause on businesses that are located outside the state.

Enactment of this legislation is ill-advised for both legal and policy reasons. From a legal perspective, the law is unenforceable. The federal copyright laws give the copyright owner a series of *exclusive* rights—among them, the rights to make and distribute copies. *See* 17 U.S.C. 106. In enacting it, Congress expressly intended to create a uniform series of rules governing the licensing of copyrighted works. The vibrancy of that market is not an accident, but a product of intentional federal design: one which this legislation attempts to thwart.

For decades, courts have consistently invalidated state legislation that "prohibits the copyright holder from exercising

rights protected by the Copyright Act." *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3d Cir. 1999). There, the Third Circuit invalidated a statute that limited the length of first-run exclusive licenses to theaters at 42 days.[1] Other examples abound.[2] Indeed, the Act specifically prohibits "action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright." State laws of the kind proposed in this bill are therefore preempted and unenforceable.

In addition, the legislation purports to invalidate the choice of law clauses in these contracts when an out of state company licenses to a Rhode Island educational institution. While the state has some rights to regulate its own internal market, it may not attempt to export that scheme beyond its borders. *See American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003). Here, the legislation requires entities who offer their works over the internet to comply with Rhode Island law, even if they have no contact with the state and the contracting is performed electronically: the publisher must comply or risk a deceptive trade practice lawsuit.

From a policy perspective, the legislation also will not work. Our members compete in a vibrant, competitive, and adaptive market for their intellectual property. During the pandemic, our members have bent over backwards to be sure that schools have had access to the instructional tools that they needed to keep their virtual and literal doors open. In other cases, these agreements can be handled via form contracts as the content is sold nationwide as a service. Rather than allow these agreements to form to particular needs, the legislation forces the inclusion of terms that neither the publisher nor the

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1 *See id.* at 386-87.

2 *See, e.g.*, *Close v. Sotheby's, Inc.,* 894 F.3d 1061 (9th Cir. 2018) (preempting California's state-mandated royalty on resale of certain kinds of art); *Rodrige v. Rodrigue*, 218 F.3d 432, 436-42 (5th Cir. 2000) (preempting Louisiana's community property law due to interference with the copyright owner's rights to license use of the work); *College Entrance Examination Board v. Pataki*, 889 F.Supp. 554 (N.D.N.Y.1995) (preempting state statute that interfered with rights of copyright owner in standardized tests);

institution needs or wants. The result will be higher prices for Rhode Island consumers.

We respectfully urge you to reject it.

Respectfully submitted,

/s/

Christopher A. Mohr
Vice President for
Intellectual Property and
General Counsel

May 3, 2021