



June 6, 2016

Senate Judiciary Committee  
 State Capitol, Room 2187  
 Sacramento, CA 95814

RE: Opposing AB 2880

Dear Chair Jackson:

The undersigned organizations are writing to you to express our strong opposition to AB 2880, legislation that would grant for the first time a blanket authorization to state entities to assert copyright over taxpayer-funded work. Such an authorization will have negative impacts on citizen speech, government openness, and access to public records. Today, citizens are entitled to free and unfettered access to public records, require no permission from state government, and do not need to rely on a legal defense to access and utilize government works, with very few exceptions. AB 2880 changes this in favor of state copyrights.

Contrary to arguments made by proponents, this legislation does not clarify current law but rather turns current law on its head. Court decisions currently in force interpret California law and the California Constitution to create a strong presumption of public access and public use of state records.<sup>1</sup> And these cases establish a rule that state agencies

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<sup>1</sup> See *County of Santa Clara v Superior Court* (2009) 170 Cal. App. 4th 1301 (Finding that the Court “must reject the County’s suggestion that copyright law gives it a right to control the public’s use of the basemap data by requiring all who receive copies to sign an end-user agreement. Not only is such a result contrary to the letter of PRA, but, as explained below, it would have a chilling effect on the public’s ability to use and discuss records bearing on the activities of their own government.”); See also *City of Inglewood v. Teixeira* (2015 WL 5025839 (C.D. Cal. August 20, 2015) (Relying on *Santa*

cannot use federal copyright law to restrict the public's use of state records, except in specific areas where the Legislature has already identified a need and granted specific authorization. Reflecting the same policy, federal government employees are prohibited from asserting copyright in their records and work product.

AB 2880 would explicitly override these decisions and establish a default rule that *all* state records can be restricted by copyright, with new limitations on public access and use that could be enforced with federal litigation. Proponents have offered no rationale as to why such a drastic change in state copyright policy for public records is necessary. If the original rationale for the bill was to address concerns involving the disposition of trademarks in state contracts, the approach of AB 2880 has no connection to those problems. In fact, the hastily added Section 8's constitutional findings and declarations unequivocally state that this legislation requires a new exception to the California Public Records Act (CPRA), eroding the state's strong policy of allowing public access and use of state records.

The fundamental flaw in the bill's approach is that federal copyright law imposes restrictions on the dissemination and use of written and audiovisual materials. Applied automatically to all state records, those restrictions cannot be reconciled with the strong policy of open government reflected in the CPRA and the California Constitution. Compounding this problem, copyright is a strict liability regime that doesn't require any showing of carelessness or intent to profit. The conflict between these two legal regimes means that copyright should not be applied presumptively to all state records across the board, as this bill would do.

AB 2880's provisions demonstrate this conflict. The newly added Section 6253.11(b) provides that an agency cannot deny a request for disclosure on copyright grounds but can limit the requesting party's use of public records with a license that is consistent "with the rights provided under this chapter and that is considered an act of fair use" but not commercial uses. It is unclear what liability risks citizens would face should they infringe a state copyright in a way that does not constitute a fair use and is not a commercial use, because fair use is often a fact-specific determination. Equally troubling is the bill's reservation of statutory damages that can be as high as \$150,000 per infringed work even if the actual financial harm to the state is zero. That means a citizen who republishes, copies, or adapts taxpayer-funded state records could find herself facing a risk of life-altering damages—a threat that will discourage research and reporting on public data and chill citizen participation in government.

Proponents have argued that the bill contains a presumption towards releasing works back into the public domain. However, Section 13988.3(b)(1)'s provisions establish a three-part test of commercial value, third party interest, and a generalized "state's interest" in various forms of intellectual property. Under that test, essentially any state record could still be subject to copyright. Agencies could plausibly argue that any of their publications, photographs, pamphlets, videos, writings, and related materials have some

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*Clara* to reject a city's copyright claim against a citizen that the court found to be motivated by a desire to "stifle Defendant's political speech after he harshly criticized the City's elected officials.").

commercial value. Any work that is identifiably a state government work arguably implicates trademark interests that would preclude public domain status. As a result, likely no works created by the state government under AB 2880 will enter the public domain should it become law.

As organizations that have long advocated for freedom of speech, open government, and access to public records, we urge the Senate Judiciary Committee to reject AB 2880 and preserve citizens' right to unfettered access to public records, and to share and disseminate those records.

Sincerely,

Electronic Frontier Foundation  
First Amendment Coalition  
American Library Association  
Data Coalition  
Californians Aware  
Northern California Association of Law Libraries  
Sunlight Foundation  
Association of Research Libraries  
Creative Commons  
Association of College and Research Libraries  
Student Press Law Center  
Demand Progress  
Niskanen Center  
OpenTheGovernment.org  
Fight for the Future  
Free Law Project  
Government Accountability Project  
Bill of Rights Defense Committee/Defending Dissent Foundation  
Public Knowledge  
Creative Commons USA  
American Society of News Editors  
Association of Alternative Newsmedia  
Greater Western Library Alliance