Position Statement on Proposed eBook Laws and Their Impact on Independent Publishers

The Independent Book Publishers Association (IBPA)—the largest publishers association in the US with over 4,100 members— weighs in on legislation to regulate eBooks being considered in various states.

Authors, publishers, and librarians all want published materials to be widely available to the public. However, several states are considering legislative measures aimed at regulating the sale of eBooks by publishers to public libraries that are both misguided and potentially harmful to copyright holders, small business owners, and the public. Bills to this effect are currently under consideration in Hawaii, Massachusetts, Rhode Island, Kentucky, and Connecticut. These proposals are based on a law previously adopted in Maryland, the first state to enact such a law on May 30, 2021.

The Maryland Library Association (MLA) in their July 27, 2021, press release about the legislation stated, *"Maryland's public libraries are committed to making sure that all members of our community have equitable access to library resources. When libraries were shut out of the marketplace of ideas and information, Maryland's public libraries acted to ensure that readers of all ages, borrowing from Maryland's public libraries, would have access to a full range of high-quality informational and literary titles, and the same access as the retail marketplace."*

At first glance, this seemed like something that authors, publishers, and librarians could all applaud. A closer review of the actors who are propelling this legislation reveals motivations aimed at supporting the corporate interests of Big Tech at the expense of content creators, publishers, small business owners, and ultimately, the libraries this legislation is supposedly meant to protect. Laws being proposed in other states all purport to have similar aims to the one Maryland ultimately adopted and their verbiage is largely analogous. At present, two related versions of such bills are circulating.

Background

The driving force behind these legislative proposals is an organization funded by Big Tech, known as Library Futures. For many years, Big Tech, which is comprised of the most dominant companies

in the technology industry, has pursued an agenda to attempt to undermine Copyright Law for their own purposes, with the goal of making all content freely available on the internet. In these cases, they are using libraries as a means to pursue this agenda which, if successful, would ultimately undermine the very libraries they claim to support. The individual sponsors of these legislative initiatives, however, may have laudable intent, but there are serious deficiencies that they overlook.

The Maryland law and subsequent legislative efforts started as a response to a trial program instituted by MacMillan Publishers Ltd. on November 1, 2019, which placed a two-month embargo on the sale of new-release eBook titles to the library market. This highly controversial policy was abandoned by the Big Five publishers in March 2020 at the onset of the pandemic. During the short time that it was in effect, librarians and others vehemently opposed the policy. ALA Senior Director for Public Policy & Government Relations, Alan Inouye, told *Publishers Weekly*, for example, that "*equitable access to digital content is more important than ever as libraries continue to serve their communities amid rapidly changing circumstances*."[1]

The Maryland eBook Law

The MLA, backed by Library Futures, appealed to the Maryland State Legislature to help address these matters, arguing that the terms offered by the Big Five for eBooks and audiobooks *generally speaking* are not reasonable and that renegotiation of these terms through the power of the state, is necessary.

The Independent Book Publishers Association took a strong stance against the Maryland law. It is IBPA's belief that the state is not a neutral arbitrator on these matters as libraries form part of the state apparatus. To compensate for state budget concerns, instead of providing libraries with additional funding, the state, using such legislation, could compel terms only advantageous to the state and its interests, placing the legal and financial burden on individual publishers.

The American Association of Publishers (AAP) filed a lawsuit in Federal Court in Maryland challenging the constitutionality of the Maryland law and IBPA declared its full support for their legal challenge. The law was ultimately struck down in the case of *AAP v. Frosh*. The Maryland law and other related proposals are promoted as consumer protection statutes. However, a closer analysis reveals an alarming attack on the rights of authors and publishers guaranteed under the United States Copyright Act and the United States Constitution by imposing on publishers a state-dictated licensing scheme. The Maryland eBook Law[2] stated its purpose as "*requiring a publisher who offers to license an electronic literary product to the public also to offer to license the electronic literary product to public libraries in the State on "reasonable terms" that would enable public libraries to provide library users with access to the electronic literary product*."

The law defined a Publisher as a "*person in the business of manufacturing, promulgating, and selling books, audio books, journals, magazines, newspapers, or other literary productions…*" This broad definition sweeps in publishers of all sizes, including self-published authors, all of whom would be subject to the terms of the law regardless of what state they operate in. Most

[1] https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/82715-macmillan-abandons-library-e-book-embargo.html

[2] Chapter 412 of 2021 Laws of Maryland

problematic, however, is that "reasonable terms" is likewise ill-defined, being left to the purview of the state.

A declaration by the executive board of the Maryland Library Association, issued on July 14, 2021, gives insight into where the Maryland authorities may want to take this. In addition to forbidding publishers from restricting when libraries can access a book or how many copies can be obtained, the MLA stated: *"The Maryland General Assembly further encouraged the development of basic eBook and eAudiobook license terms that use print as a model."*

The State clearly intended to dictate that publishers remain tied to a print model that is not necessarily applicable to the electronic book market or economically advantageous to publishers with the continual advent of new technologies. By print model, the MLA proposes a scheme to calculate eBook pricing based on a lending equivalent using the average number of loans of a typical print book before a replacement copy is required as a basis for pricing. For the state to impose such a model would stifle innovation, prohibit publishers from adapting their business models to the demands of technological innovation and places an undue financial burden on publishers to adhere to this model. It is important to emphasize again that this law applies to *all* publishers, big and small, including author-publishers. While larger publishers may have the resources to absorb the economic impact of such impositions, most small publishers do not. This makes the matter of serious concern to members of the Independent Book Publishers Association.

Constitutional Issues

Along with the decision in the case of *AAP v. Frosh*, the unconstitutionality of the Maryland law was also recognized when an almost identical law passed in New York State was ultimately vetoed by the governor of that state for similar reasons.

Both the Maryland legislation that has already been adjudicated and other similar legislative proposals invoke several basic Constitutional issues. Most importantly, the proposed legislation violates Article VI, Clause 2 of the United States Constitution, known as the Supremacy Clause, which states: *"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."*

Understanding the above, it is clear that laws such as the one adopted in Maryland engage in a fundamental, unprecedented intrusion into the free exercise of copyright by both authors and publishers. When the State is allowed to dictate what it considers "reasonable terms," it violates the free exercise of Copyright under 17 U.S.C. §106. Only Congress, not the State, has the right to regulate copyright. In a lengthy written opinion that analyzed the Maryland eBook Law and other proposed state laws, dated August 30, 2021, Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office, stated, "we conclude that under current precedent, the state laws at

issue are likely to be found preempted."[3] In other words, the state laws interfere with the authority of Congress and thus violate the Supremacy Clause of the U.S. Constitution.

The Supremacy Clause is not the only constitutional issue raised by these proposals. As the sale of electronic literary products by definition represents interstate commerce, these proposals directly violate article 1, section 8, clause 3 of the Constitution, which gives Congress the right to regulate interstate commerce. Imposing terms on publishers from the several states in their commercial relationship with libraries in the various states, and ultimately the state itself, the law clearly interferes with interstate commerce which is the exclusive purview of the Congress of the United States.

Finally, the proposed legislation, as was true of the Maryland eBook Law, also violates the due process clause of the 5th amendment as they are unduly vague and do not give an author or publisher a reasonable understanding of what constitutes "reasonable terms" under the law. This is troubling as anyone who violates this law could be held criminally liable and face fines or imprisonment. As a result, the law must spell out in understandable terms what constitutes a violation of the law. This will impose an undue burden on small publishers and author-publishers who cannot afford the legal resources to sort through the complexities of the regulatory framework that will ultimately define the intent of the legislature. Thus, such legislation clearly violates the due process clause.

IBPA maintains that bills restricting certain licensing terms for digital materials under the guise of unfair and deceptive trade practices, unconscionability, violations of state consumer protection acts, or similar violations are equally unconstitutional and unenforceable for several reasons. The impact of the proscribed terms is to create a new copyright exception that approximates the effects of a "digital first sale" doctrine, which Congress (and federal agencies) has repeatedly rejected over the past 25 years. As a result, the bills interfere with Congress's role in defining the balance of rights and exceptions under copyright and would be preempted.

It is the position of the Independent Book Publishers Association that bills proscribing fundamental pricing and licensing terms stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. States cannot avoid federal preemption by recasting restrictions on the exercise of copyrights as protections against unfair, deceptive, or unconscionable conduct. Absent an evidentiary record that clearly establishes actual fraud or misrepresentation, bills restricting price and licensing terms will be preempted by federal law. The reason for this is the supposed misconduct the state law aims to remedy is no more than the perception by the state that the licensee negotiated an unfavorable deal.

Other Concerns

The sponsors of these legislative proposals complain that libraries pay more for licenses than individual consumers pay to buy a book, but they ignore the fundamental difference between the two markets. Should a publisher be forced to grant a license on terms equivalent to individual

[3] Letter from Shira Perlmutter, Register of Copyrights and Dir., United States Copyright Office, to Sen. Thom Tillis, Ranking Member, Subcomm. on Intellectual Prop., United States Senate (Aug. 30, 2021), https://copyright.gov/laws/hearings/2021-08-30-Response-to-Senator-Tillis-on-eBook-Licensing.pdf.

consumers when the library is buying them for public distribution and the consumer for themselves only? To do so would distinguish books from other copyrighted materials. For example, a consumer purchasing a film for private use will not pay the same price as a streaming service will pay for offering the film for public viewing.

Such initiatives would ultimately compel publishers to accept licenses they might otherwise choose not to or, tragically, to not offer their works to libraries at all. Under this proposed legislation, publishers would lose the ability to control to whom they license their works and on what terms, eviscerating their rights under 17 U.S.C. §106. The Supreme Court already decided this issue in its 1999 decision in *Orson, Inc. v. Miramax* expressly in which it ruled that states cannot infringe upon the rights of copyright holders: "*The state may not mandate distribution and reproduction of a copyrighted work in the face of the exclusive rights to distribution granted under §106." The law at issue in that case, just as the legislative proposals before various states would do, "direct[ed] a copyright holder to distribute and license against its will and interests*."[4]

Many small publishers and author-publishers might be willing to grant eBook and audiobook licenses to public libraries in principle, but due to the unequal bargaining power between a state agency and a small publisher or author-publisher, the publisher must not be intimidated into doing so on terms that are disadvantageous to their economic interests.

For example, a state could dictate a "standard" eBook and audiobook license that pays $1.00 per year for licensing unlimited copies to all libraries in the state. This would significantly impact the revenues from the sale of the book to the public and cause significant economic losses for small publishers and author-publishers, many of whom are Independent Book Publisher Association members.

The Interests of IBPA Members

The interests of the members of the Independent Book Publishers Association clearly align with those of other important trade organizations that have come out in opposition to such legislation.

Keith Kupferschmid, CEO of the Copyright Alliance, of which IBPA is a current member, declared with reference to the Maryland eBook law upon which the proposals in other states are based: *"We commend AAP for seeking to prevent the state of Maryland from creating what is effectively a compulsory license for literary works. The Maryland law raises serious constitutional and copyright law concerns. It is an alarming intrusion into the exclusive rights of copyright owners, and it sets a dangerous precedent…"*

The Author's Guild has also taken a firm position against such legislative proposals. Mary Rasenberger, CEO of the Authors Guild, called the law, "*not only an unconstitutional overreach into an area of federal authority, it is also an encroachment upon the exclusive rights guaranteed under copyright, a federal law that by its terms preempts all state and local laws*." Her official statement on behalf of the Authors Guild referring to the Maryland case went on to point out: *"The law prejudices authors, including by sweeping in small publishers, self-published authors, and*

[4] *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999).

authors of online works who simply don't have the resources to manage licensing at the scale required for them to be in compliance."

While sympathetic to the intent of the law, Rasenberger added, "*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.*"

The International Publishers Association (IPA) also commented on the eBook legislation being proposed in the United States, stating that, "*The legislation would establish an obligation to license under terms and conditions mandated by the state, thereby impairing publishers' contractual freedom, and undermining the international legal framework as set out in the Berne Convention and the WIPO (World Intellectual Property Organization) Treaty, to which the United States is a contracting party.*"

Likewise, the Federation of European Publishers added that "*European Publishers are worried that the [eBook] law[s] would apply to European authors; that it unduly encroaches upon the author's exclusive right to control the transmission of his or her creative work*."

Such proposals to regulate eBook sales to libraries, if enacted, would have serious repercussions for IBPA's membership consisting of hardworking independent publishers and self-published authors who already face serious challenges in the current economic environment.

IBPA also believes that laws regulating and restricting eBook sales to libraries would especially burden minorities and other disenfranchised members of the publishing community who do not have the resources to challenge or comply with burdensome regulations across various states. One of IBPA's core values is "*Inclusivity, which ensures that people from all communities have equal opportunity to participate in IBPA and the business of publishing at all levels, so that everyone can find themselves in the content they read.*" Likewise, one of the strategic goals of our organization states that "*IBPA invites and promotes equitable participation by all persons in the association and the profession of independent publishing.* Enacting such legislation in states across the country would undermine these efforts by creating yet another unnecessary barrier to entry for members of disenfranchised communities, as well as damaging their ability to profit from their intellectual property.

The importance of the issues raised by these legislative initiatives cannot be overemphasized. Such laws, if not successfully challenged in the courts, will directly impact IBPA's membership consisting primarily of small and mid-sized publishers, along with self-published authors. In her opinion granting the preliminary injunction against the Maryland law requested by the AAP on February 16, 2022, Judge Deborah L Boardman declared: "*Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media. Striking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders, however, is squarely in the province of Congress and not this Court or a state legislature."*[5]

[5] United States District Court for the State of Maryland, Case 1:21-cv-03133-DLB Document 19 Filed 02/16/22, p. 27.

It is the contention of the Independent Book Publishers Association that the bills that continue to be proposed in various states suffer from the same serious constitutional defects that led to the Federal court decision in the *AAP v. Frosch* case swiftly striking down the legislation enacted in Maryland upon which they are based. The court found the law "*unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act.*" It held that the now-overturned Maryland law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[6] It is telling that the State of Maryland declined to appeal this well-reasoned decision.

While we are sympathetic to the motivations of many who propose such legislation, 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 and is in fundamental violation of federal copyright law. We concur with United States District Judge Deborah Boardman, who, in the *AAP v. Frosch* case, stated: "*Libraries serve many critical functions in our democracy. They serve as a repository of knowledge — both old and new — and ensure access to that knowledge does not depend on wealth or ability. They also play a special role in documenting society's evolution. Congress has underscored the significance of libraries and has accorded them a privileged status on at least one occasion, legislating an exception to the Copyright Act's regime of exclusive rights that permits libraries to reproduce copyrighted material so it may be preserved in the public record across generations. See 17 U.S.C. § 108. Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media. However, striking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders is squarely in the province of Congress and not this Court or a state legislature.*"[7]

The Independent Book Publishers Association applauded the decision of Judge Boardman to deem the Maryland eBook Law unconstitutional. Likewise, we believe her decision is applicable to other such legislative schemes currently being considered in various states. The resources of the states considering such legislation could be better spent than wasting taxpayer dollars pursuing such initiatives that stand in clear violation of Federal Copyright Law.

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[6] *Ass'n of Am. Publishers, Inc. v. Frosh*, No. DLB-21-3133, 2022 U.S. Dist. LEXIS 105406 (D. Md. June 13, 2022).
[7] United States District Court for the State of Maryland, Case 1:21-cv-03133-DLB Document 19 Filed 02/16/22, p. 27.