

Response to Statement of the Association of American Publishers Concerning SB432/HB518

The March 24, 2021 statement of the Association of American Publishers (“AAP”) in opposition to SB432/HB518 incorrectly argues that these bills are preempted by federal copyright law and violate the U.S. Constitution.

First, the bills are not preempted by federal copyright law. The AAP cites section 301 of the U.S. Copyright Act as authority for its argument that federal copyright law preempts the bills. In fact, section 301 was adopted by Congress in 1976 to preempt state copyright laws—laws that created rights that are “equivalent to any of the exclusive rights within the general scope of copyright.” Courts around the country have repeatedly held that section 301 does not preempt state laws relating to contracts because contract rights are not “equivalent” to the exclusive rights of copyright. Central to those courts’ analysis is that the existence of a contract constituted an “extra element” not present in copyright law. Because the bills regulate license terms, they are completely outside the scope of section 301. It should be noted that 21 years ago, Maryland adopted the Uniform Computer Information Transactions Act (“UCITA”), which regulates licenses for copyrighted works such as software and databases. Publishers strongly supported the adoption of UCITA, and did not argue that its regulation of licenses was preempted by section 301 of the Copyright Act.

Second, the bills would not force an involuntary transfer of ownership that is prohibited under section 201(e) of the Copyright Act. The bills do not force publishers to transfer any of their exclusive rights; the publishers’ rights remain undiminished. The bills simply provide that if a publisher licenses an e-book to the public in Maryland, the publisher must also license the e-book to a public library on reasonable terms. In other words, the bills prevent unreasonable discrimination against public libraries.

Third, the bills do not impermissibly regulate interstate commerce. The “conditions” the bills place on out-of-state publishers are truly minimal; they just cannot unreasonably discriminate against public libraries. Significantly, the bills could have gone much further; they could have required that publishers license e-books to libraries on precisely the same terms as they license e-books to the general public. After all, this is the status quo with physical books—a publisher cannot force a bookstore to charge a library more than it charges individual consumers. Nonetheless, the bills recognize that there are practical differences between the lending of e-books and the lending of physical books, and accordingly allow for a degree of price discrimination. However, that price discrimination cannot be unreasonable.

The state has a sufficient interest in imposing this modest condition on publishers. Some publishers altogether refuse to license e-books to libraries. Others license e-books only on unreasonable terms, effectively charging libraries ten or even twenty times as much as the general public. This significantly restricts the ability of publicly-funded libraries to broadly serve the educational and cultural needs of Maryland residents.

Fourth, the bills do not raise due process concerns. Paragraphs (B) and (C) of the bills provide sufficient guidance on what constitutes “reasonable terms.” Paragraph (B) mandates that library

e-book licenses contain terms restricting the number of users to whom a library may allow to access an e-book simultaneously; restricting the number of days a library can allow a user to access a book; and requiring a library to use technological measures that protect a publisher's copyrights. Paragraph C further provides that a publisher cannot limit the number of e-book licenses a library can purchase on the same day an e-book is made available to the public. Paragraphs B and C, therefore, provide a detailed framework within which publishers and libraries can negotiate in good faith on a more level playing field than currently exists. Additionally, the bills apply only prospectively; they do not disturb any e-book licenses already in place. In short, the bills satisfy the publishers' due process rights.

The intent of this legislation is not to deprive authors of the compensation they deserve, nor to facilitate copyright infringement. Rather, the legislation is intended to enable libraries to continue in the digital age to fulfill their mission of providing the public with access to information. Publishers have taken advantage of their market power over e-book licensing--a market power that does not exist with physical books--to deal unfairly with libraries. These bills will simply require publishers to behave more fairly, as they did in the past. Hopefully, the publishers will respond by offering better terms to libraries. If publishers unilaterally do not offer adequate terms, libraries are prepared to negotiate in good faith to reach terms that are acceptable to all parties. Enforcement actions are the last, and least desirable, resort. For literally centuries, libraries have partnered with publishers to provide the public with broad access to books. This legislation will help restore the equilibrium that digital technology has disrupted. We urge its passage.