



Position Statement on the Maryland eBook Law and Its Impact on Small Publishers and Authors

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Introduction

Certainly, authors, publishers, and librarians all want published materials to be widely available to the public, but the Maryland law and similar proposed measures are highly problematic.

Recently, a series of laws were proposed in several states aimed at regulating the sale of eBooks by publishers to public libraries. On May 30, 2021, Maryland became the first state to enact such a law. According to the Maryland Library Association (MLA) in their July 27, 2021 press release about the legislation:

“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 argument seems like one authors, publishers, and librarians could all applaud. There are, however, issues to explore that the MLA is not addressing here.

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Background

The Maryland law and other such efforts were a response to a trial program instituted by MacMillan on November 1, 2019, which placed a two-month embargo on the sale of new release eBooks to the library market. This highly controversial policy was abandoned by the Big Five publisher in March 2020 at the onset of the pandemic. During the short time 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 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. It is IBPA’s belief, however, 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 can, using this legislation, compel terms only advantageous to the state and its interests, regardless of the interests of publishers.

Certainly, authors, publishers, and librarians all want published materials to be widely available to the public, but the Maryland law and similar proposed measures are highly problematic. While the State of Maryland positions the law as a consumer protection statute, a closer analysis of the Maryland eBook Law reveals an alarming attack on the rights of authors and publishers guaranteed under the United States Copyright Act and the United States Constitution through the imposing on publishers of a state-dictated licensing scheme. The Maryland eBook Law² states 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 defines a Publisher as “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 problematic, however, is that “reasonable terms” is likewise ill-defined, being left to the purview of the State of Maryland.

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

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

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 intends to dictate that publishers remain tied to a print model that is not necessarily applicable to the electronic book market and 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 and prohibit publishers from adapting their business models to the demands of technological innovation. 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.

The American Association of Publishers (AAP) Response to The Maryland eBook Law

The law, which went into effect on January 1, 2022, prompted a response from the American Association of Publishers (AAP) which filed a lawsuit asserting that the state law is an unconstitutional violation of the Copyright Act. The AAP appealed for an immediate injunction while the merits of the case are reviewed by the courts. This is a fundamental issue facing the publishing industry as laws similar to the one passed in Maryland are pending in other states. For example, an almost identical law was passed in New York state, but was ultimately vetoed by the governor of that state.

According to the AAP, the legislation invokes several basic Constitutional issues. For one, the Maryland eBook Law 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 seems clear that the State of Maryland is engaged 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 analyzing 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.” Meaning that 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 the AAP’s lawsuit. As the sale of electronic literary products by definition represents interstate commerce, the Maryland Law also directly violates 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 the Maryland libraries, and ultimately the State of Maryland itself, the law clearly interferes with interstate commerce which is the exclusive purview of the Congress of the United States.

Finally, the Maryland eBook Law also violates the due process clause of the 5th amendment as it is unduly vague and does 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 even 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, the Maryland eBook Law clearly violates the due process clause.

The Issue at Hand

Maryland complains that libraries pay more for licenses than individual consumers pay to buy a book, but ignores the fundamental difference between the two markets. Should a publisher be forced to grant a license on terms equivalent to individual 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.

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, we need to ensure the publisher is not intimidated into doing so on terms that are very disadvantageous to their economic interests.

For example, the State of Maryland 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 support of the lawsuit filed by the American Association of Publishers.

Keith Kupferschmid, CEO of the Copyright Alliance, of which IBPA is a current member, has declared:

“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 also took a firm position in support of the AAP lawsuit. 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 went on to point out:

“The law prejudices authors, including by sweeping in small publishers, self-published authors, and 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 weighed in, 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 [Maryland] law 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.”

The bottom line is, the Maryland eBook Law forces publishers to accept licenses they might otherwise choose not to. In other words, under this law, publishers 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 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, like the Maryland Law, “direct[ed] a copyright holder to distribute and license against its will and interests.”

The importance of the issues raised by the Maryland eBook Law cannot be overemphasized. This law and laws like it, if not successfully challenged in the courts, will directly affect IBPA

membership which consists 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 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.... 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.³

The Independent Book Publishers Association applauds this decision and declares its full support for the AAP lawsuit challenging the validity of the Maryland eBook Law and other such legislative schemes.

³ United States District Court for the State of Maryland, Case 1:21-cv-03133-DLB Document 19 Filed 02/16/22, p. 27.