

ALA American Library Association

American Library Association Endorses New York e-Book Legislation

October 2021

The American Library Association (ALA) urges Governor Hochul to sign S2890B (May)/A5837B (Jean-Pierre) into law. These bills passed both the N.Y. Senate and the Assembly unanimously.

The Need for Legislation

The legislation is intended to enable public libraries to continue in the digital age to fulfill their mission of providing the public with access to information. As the SB2890B Bill Memo recognizes, “public libraries provide equitable access to information to all.” Libraries increasingly are providing New Yorkers with access to digital content. The Bill Memo recognizes that digital content such as e-books “are particularly useful for senior citizens, people with disabilities, and others who may find digital content more accessible and manageable than paper books.” Furthermore, during the height of the pandemic, when the physical premises of most public libraries in the state were closed, libraries were able to continue lending e-books, thereby allowing New York residents to continue reading for education & learning, economic purposes, and personal development.

Libraries can purchase physical books from any outlet at the same price as any other customer, and then lend them to users. In contrast, the lending of e-books requires the licensing of the e-books from the publishers’ partners who provide the technical infrastructure for the lending. As the e-book licensing market has evolved, libraries have encountered three distinct problems.

First, some publishers have released some titles only as e-books, and have refused to license these titles to libraries. Because these titles are not available as physical copies, libraries have simply not been able to provide these titles to their users in any form. This discriminates against New Yorkers who cannot afford to purchase the titles themselves. For several years, Amazon Publishing has followed this practice of publishing certain titles only as e-books but refusing to license them to libraries. Amazon has recently agreed to license the titles to the Digital Public Library of America (though this has not yet been implemented), but it could revert to its previous practice at any time as its discretion.

Second, some publishers have imposed embargoes on the licensing of e-books to libraries. For example, a publisher might allow a library to purchase only one license for a title for the first eight weeks the title is on the market, as happened in 2019 with Macmillan Publishers. The Bill memo correctly states that “such embargoes undermine the democratic and educational function of library systems.” The Bill memo additionally states that:

this discriminatory practice will restrict access in ways that harm library systems and those they serve. Many library patrons are lower income or face barriers to other means of information access. These new licensing restrictions mean patrons may be forced to wait much longer to borrow books, as only one title is made available per library system. Additionally, these restrictions will financially burden library systems that will have to purchase more titles to keep up with demand following the two-month embargo. Finally, it significantly restricts access to titles for New Yorkers have find digital content more accessible than paper books.

During the pandemic, publishers such as Macmillan have suspended their embargoes, but nothing prevents them from resuming this practice.

Third, the publishers impose a significantly higher price on library e-book licenses than on consumer licenses: between three to five times as much. At the same time, the library license typically lasts only two years or 26 circulations whereas consumer licenses typically last for a lifetime. Either the higher price or the limited duration might be justified as replicating the physical market, where a book may become unusable after 25 circulations. However, forcing libraries to pay a higher price for a license of limited duration is nothing more than price gouging enabled by the publishers' market power over e-book licensing--a market power that does not exist with physical books.

The legislation addresses these three problems. It requires e-books to be licensed to New York libraries if they are licensed to New York consumers; it prohibits the embargoes of e-book licenses to libraries; and it requires that e-books be licensed to libraries on reasonable terms. The legislation 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.

Response to AAP Objections

The Association of American Publishers (AAP) has attacked this legislation not on the merits, but by arguing that it is preempted by federal law. AAP made the same argument unsuccessfully in Maryland before enactment of similar legislation. The New York Senate and Assembly likewise rejected the preemption argument.

The U.S. Copyright Act Does Not Preempt the e-Book Legislation

U.S. Senator Thom Tillis (R-N.C.) on May 26, 2021 requested the U.S. Copyright Office to analyze whether the e-book legislation in New York and Maryland was preempted by the U.S. Copyright Act. On August 30, 2021, Shira Perlmutter, the Register of Copyrights and Director of the U.S. Copyright Office, wrote a [response](#) opining that “under current precedent, the state laws at issue are likely to be found preempted.” As discussed below, there are significant gaps in the Copyright Office’s analysis.

1. The Copyright Office correctly recognized that there are two distinct forms of preemption: express preemption under section 301(a) of the Copyright Act; and conflict preemption where the state law interferes with the functioning of a regime created by the Copyright Act. In its advocacy against the state ebook legislation, AAP focused on preemption under section 301(a). Likewise, Senator Tillis in his letter specifically cited section 301(a). The Copyright Office properly dismissed the section 301(a) argument. It observed that section 301(a) addresses only states' grants of legal or equitable rights equivalent to copyright. The state legislation, by contrast, "seeks to regulate the identity of licensees and the terms upon which licenses may granted, rather than granting rights." Accordingly, the Copyright Office found that section 301(a) does not preempt the state legislation.

2. Turning to conflict preemption, the Copyright Office correctly recognized that "courts have allowed state regulation of the terms of copyright licenses in some instances." The Copyright Office stated "this is especially true where the state has demonstrated a pattern of abuse of market power of suppression of competition." The Copyright Office further acknowledged that "the legislative history cites a pattern of practices by large publishers that negatively impact Maryland citizens." The Copyright Office noted that many popular book titles are not available for public libraries to license at the same time ebooks are made available to the public, and that libraries are charged significantly more to license ebooks than the general public.

3. Nonetheless, on the basis of a single Third Circuit decision, *Orson v. Miramax*, 189 F.3d 377 (3d Cir. 1999), the Copyright Office opined that a court considering the state legislation at issue would likely find it preempted. In *Orson*, a state law required a film distributor to expand its distribution after 42 days by licensing another commercial exhibitor in the same geographic area. The *Orson* court found preempted such a regulation that "appropriated a product protected by the copyright law for commercial exploitation against the copyright owner's wishes." But the Copyright Office itself recognized that *Orson* might be distinguishable. In footnote 21 on the bottom of page 8, the Copyright Office conceded that *Orson* dealt with

forced *commercial* exploitation of copyrighted works; the state legislation at issue seeks to require licensing of works to libraries, which, while arguably a commercial transaction, ultimately serves a non-commercial goal of furthering the traditional mission of public libraries to provide free access to materials for their communities. It is unclear whether this would be a significant factor for a court considering the question of federal conflict preemption....

4. The Copyright Office further conceded on page 9 that:

To date neither the Supreme Court nor any other circuit courts (including the Second and Fourth Circuits, which have jurisdiction over New York and Maryland) have had occasion to consider whether state regulations seeking to require licensing of copyrighted works could avoid conflict preemption either generally or under narrow circumstances, such as upon a showing of a state interest that is sufficiently compelling and distinct from the Copyright Act's purposes.

In other words, the Copyright Office admitted that there was no controlling precedent suggesting preemption in Maryland or New York, and the one precedent from another jurisdiction was readily

distinguishable. Accordingly, the Copyright Office had no reasonable basis for concluding that a court considering the legislation “would likely find it preempted under a conflict preemption analysis.”

5. The Copyright Office stated that it would address “only the technical question of the state legislation’s potential federal preemption, and not the policy questions involved.” But as the Copyright Office conceded, a critical issue in a conflict preemption analysis is whether the state had a sufficiently compelling interest for adopting the legislation. This is a policy question that the Copyright Office did not attempt to answer. Additionally, the Copyright Office did not consider whether the legislation in fact is consistent with the structure and objectives of the Copyright Act by preserving the privileged status of libraries in the Act.

6. Moreover, the question of conflict preemption (as opposed to express preemption under section 301(a)) turns less on copyright law than on constitutional law. The Copyright Office does not have any particular expertise in interpreting the Constitution’s allocation of power between the states and the federal government.

7. In sum, the American Library Association does not agree with Copyright Office’s conclusion that a court likely would find the state legislation at issue preempted under a conflict preemption analysis. To the contrary, the Copyright Office letter further bolsters our view that the legislation is not preempted. Of course, only federal courts have the authority to decide the preemption question, should the question come before it.

AAP’s Other Arguments Have No Merit

1. The legislation would not force an involuntary transfer of ownership that is prohibited under section 201(e) of the Copyright Act. The legislation does not force publishers to transfer any of their exclusive rights; the publishers’ rights remain undiminished. The bill simply provides that if a publisher licenses an e-book to the public, the publisher must also license the e-book to libraries on reasonable terms. In other words, the bill prevents unreasonable discrimination.

2. The legislation does not impermissibly regulate interstate commerce. The “conditions” the bill places on out-of-state publishers are truly minimal; they just cannot unreasonably discriminate against libraries. Significantly, the bill could have gone much further; it 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 bill recognizes 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. As noted above, some publishers altogether refuse to license e-books to libraries. Others have imposed two-month embargoes on the e-book lending of popular titles. Many publishers license e-books only on unreasonable terms, charging libraries five times as much as the general public for a license that lasts only two years. This

significantly restricts the ability of libraries to broadly serve the educational, economic, and cultural needs of New York residents.

3. The legislation does not raise due process concerns. The bill provides sufficient guidance on what constitutes “reasonable terms.” Section 399nn(3)(a) provides that e-book licenses to libraries may 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. Section 399nn(3)(b) 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. The bill, therefore, provides a detailed framework within which publishers and libraries can negotiate in good faith on a more level playing field than currently exists. In short, the bills satisfy the publishers’ due process rights.

For the forgoing reasons, ALA respectfully urges Governor Hochul to sign S2890B (May)/A5837B(Jean-Pierre) into law.