

TO: House Committee on Corporations
FROM: Library Futures Foundation
DATE: 2/1/2022
RE: H7113 “An Act Relating to Commercial Law – Electronic Book Licenses to Libraires and Schools”

Dear Committee Members –

I write on behalf of Library Futures Foundation, a non-profit 501(c)(4) organization focusing on legislative change and policy. We champion the right to equitable access to knowledge and empower libraries to take control of their digital futures.

LFF supports the goals outlined in H7113 “An Act Relating to Commercial Law – Electronic Book Licenses to Libraires and Schools.” We believe that this act will support libraries in their mission of providing access to information for all by ensuring that contractual agreements between libraries and publishers contain clearly defined fair licensing terms for the acquisition of electronic literary materials. However, we are advising, based on the current landscape involving litigation and vetoes of similar eBooks laws in other states, that you consider friendly amendments below that will effectuate enough changes in H7113 to help avoid running afoul of the challenges documented below, with respect to activities in other states. These changes will still help protect the interests of Rhode Island libraries and their patrons by increasing access to eBooks under fair terms.

While digital content has been available in libraries for over a decade, acquiring that content has become a major roadblock for public institutions. Publishers set the terms of library contracts, filling complicated agreements with clauses, terms, and definitions that directly interfere with the library mission to provide ideal access, accessibility, preservation, and privacy.

Further, these licenses are not a purchase – the eBooks that your library buys are merely leased to them by intermediaries like Overdrive and publishers like HarperCollins – often at astronomical prices. For example, while a library collections budget may increase from \$100,000 to \$111,000 in ten years, the average price of an eBook has tripled, from \$15 to

\$45.¹ Further, libraries are forced to pay well over consumer market price - as much as \$84 to license books that can be purchased for \$14.99 individually.²

Using RI State Law

LFF supports an eBooks bill that is based firmly in state law to remedy many of these issues, including provisions that allows Rhode Island law to govern eBooks contracts, that harnesses state laws on unconscionability in licensing terms, and includes the use of Rhode Island's consumer protection law. These provisions are drafted pursuant to the power inherent in protecting public policy and promoting the life, education, public convenience, general prosperity, well-being of society, and the welfare of the state's population and economy -all of which are dependent on libraries' ability to continue, as technology advances, their traditional practice of providing nondiscriminatory access to literary materials.

For these reasons, we ask that the House Committee on Corporations move forward with this bill, but consider changes as outlined in Appendix A, to ensure that the goals and aspirations of the bill are still met. Again, these suggested changes could ensure that the bill still remedies the many issues in eBook licensing, but avoids known legal issues, and the specter of litigation, associated with the use of the exact same bill language as in the laws in Maryland and New York.¹⁰

Maryland eBook Litigation and the New York Veto

Other states have grappled with the same problems for eBooks in libraries. Maryland and New York were the first states to introduce legislation. And both these bills used some language

¹ Reader's First, *eLending Position Paper* at <https://static1.squarespace.com/static/53765f6fe4b060b2a3d3586b/t/5f3c51847ced48361daa1575/1597788550827/eLending+position+paper.pdf>

² American Library Association, *ALA 'concerned' over Hachette Book Group ebook and audio book lending model changes* <https://www.ala.org/news/press-releases/2019/06/ala-concerned-over-hachette-book-group-ebook-and-audio-book-lending-model> (June 17, 2019)

nearly identical to the original H7113.³

As the MD and NY bills were written, they were designed to solve only one of the problems with eBooks: that some publishers refuse to lease certain eBooks to libraries. The Maryland law, for example, *requires* publishers that offer eBooks to consumers in the state to also offer eBooks to libraries as well.

Maryland Law and Litigation

The U.S Copyright Office, a division of the Library of Congress, recently noted that the language used in the Maryland eBooks bill, which is also in H7113 as currently drafted, could be considered preempted by federal law. The U.S Copyright Office examined the new Maryland state law, on which H7113 is currently based, in a report reviewing the legality of the law. In the report, the Office noted the language that requires publishers to grant licenses to a public library on certain “reasonable” terms any time they “offer[] to license [the work] to the public.”⁴

As a result, the Office asserted that *because the Maryland law requires publishers to grant a license*, rather than regulating the terms of a license, “the legislation is closer in kind to the state law found to be preempted” by under U.S law.⁵ In other words, the states can’t pass laws that are in the purview of federal Congressional powers. The Office concluded that a court considering state legislation with language like the original H4120 “would likely find it preempted under a conflict preemption analysis.”⁶

The concern then is this: regardless of the merits or strength of the position, *such legislation, and any challenge to it, would have to wait for this case concerning copyright to be resolved*. Based on past litigation in this space, it could be many years of litigation and appeals.

³ Other states Illinois have introduced eBook bills that are slightly different. See Equitable Access to Electronic Literature Act, SB3167 at <https://www.ilga.gov/legislation/102/SB/10200SB3167.htm>

⁴ Md. Code, Educ. § 23-702 (2021) available at https://mgaleg.maryland.gov/2021RS/chapters_noln/Ch_412_sb0432E.pdf

⁵ See U.S Copyright Office’s Reply Letter to Sen. Thom Tillis at https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4768-1.pdf

⁶ Ibid.

And the threat of litigation is real. As of December, the American Association of Publishers has sued the State of Maryland in federal court over the eBooks law based on the same exact legal interpretation as the U.S. Copyright Office.⁷ Again, at present H7113 is the language used in the Maryland bill, and, therefore, subject to the same increased risk of litigation if adopted as written.

Again, the strategic choice here we are recommending is to pursue an entirely separate basis for establishing equivalent protections in practice.

New York Veto

The NY eBook bill enjoyed broad support among the public and representatives when it moved through the legislative process in the NY Assembly. However, the Governor of New York has recently chosen to *veto* the bill that passed in their legislature, noting that the language, the same as the Maryland eBook law, forces publishers to sell to a library and that action *illegally preempts* federal copyright law.⁸

Copyright law is an important part of the set of rights and protections that enables a library to fulfill its mission to serve the community. And library stakeholders should wholeheartedly defend against challenges to the same. After all, libraires frequently rely on *fair use* and *first sale* doctrine; and we may take philosophical or legal issue with whether or not a challenge to the Maryland and related versions of their bills is indeed legitimately preempted by the federal question, but that is now immaterial to establishing a state-level law that would *in the shorter term* and *independently* improve the protections for libraries in Rhode Island.

As some of this memo directly suggests, a position based on consumer protection and contracts

⁷ The State of Maryland has recently filed a motion to dismiss this lawsuit, arguing that the AAP has mischaracterized the purpose and scope of the MD eBook law. See the Attorney General's motion at <https://storage.courtlistener.com/recap/gov.uscourts.mdd.504378/gov.uscourts.mdd.504378.10.1.pdf>

⁸ Andrew Albanese, *Hochul Vetoes New York's Library E-book Bill*, PUBLISHERS WEEKLY (Dec. 30, 2021) at <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html>

has a better chance of being unchallenged, at least when it comes to the exact same challenges and preemption that has happened with the Maryland and related cases. It is not that we wish to avoid such a challenge, rather that we would like to get a law passed on a different basis that equally or in some measure of substance, would meet the goals and protect the interests of Rhode Island libraries and their patrons.

To that effect, below is a draft of a friendly amendment designed to effectuate enough changes in H7113 to meet the goals and protect the interests of Rhode Island libraries and their patrons, while avoiding running afoul of the challenges documented above with respect to activities in other states. We thank the Committee for their time and consideration of these important issues.

Respectfully submitted,

Kyle K. Courtney on behalf of the Library Futures Foundation

Appendix A

H7113 Amendments

Summary: This draft language designates license agreements between libraries and publishers that contain certain prohibited provisions that are against the public policy of the State of Rhode Island, defines prohibited provisions, establishes causes of action, and outlines remedies.

Purpose: To make e-books and digital audiobooks accessible to libraries and their patrons in the Commonwealth of Rhode Island on fair terms.

Provisions: The first part provides definitions related to the bill. Later, the language defines the prohibited provisions. After, the bullet points describe the remedies for violation. And the last section provides for the severability of the different provisions in the language.

Amended Definitions

- (a) For purposes of this title, the following definitions apply:
- (1) “Digital audiobook” means a published work that is in the form of a voice recording (narrated) and is released as a digital audio file;
 - (2) “Electronic book” means a published work that is in written form and is released as a digital text file that may include accompanying digital image files;
 - (3) “Electronic literary materials” means digital audiobooks and/or electronic books;
 - (4) “Libraries” include:
 - (A) public libraries;
 - (B) public elementary school and secondary school libraries;
 - (C) tribal libraries;
 - (D) academic libraries;
 - (E) research/special libraries;
 - (F) talking book libraires
 - (G) archives; and
 - (H) library consortia
 - (5) "Publisher" means one whose business is the manufacture, promulgation, distribution, license, and/or sale of books, audiobooks, journals, magazines, newspapers, or other literary productions including those in the form of electronic literary materials; For the purposes of this bill the term ‘publisher’ shall also include *aggregators* who enter into contracts with libraries for the purposes of providing materials for purchase or license from the publishers.
 - (6) “Loan” means to create and transmit a copy of electronic literary material to a borrower, who may access the material for a limited time as determined by the loan period;
 - (7) “Loan period” means the duration for which a borrower may access electronic literary materials that have been loaned by a library before such access is revoked;
 - (8) “Technological protection measures” means any technology that enhances the secure loaning and/or circulation by a library of electronic literary

materials;

- (9) “Borrower” means a person or organization, including another library, to whom the library loans media of any sort;
- (10) “Remotely” means synchronously transmitted to receiving parties in such a way that the transmission appears in front of the receiving parties on an electronic viewing device without being recorded by the receiving parties;

SECTION 3. Contracts Between Libraries and Publishers

~~[Any publisher who offers a contract or license for acquisition of electronic books and digital audiobooks to the public shall offer to license such books to libraries and to elementary and secondary schools and educational institutions in the state on reasonable terms that would permit the libraries, schools and educational institutions to provide their users and students with access to such electronic books.]~~

~~DELETION OF THIS LANGUAGE FROM THE BILL IS PROPOSED⁹~~

- (a) Any contract offered by a publisher to license electronic literary materials to the public in this state is governed by Rhode Island law.
- (b) A contract shall contain no provision that:
 - (1) Precludes, limits, or restricts the library from performing customary operational functions, including any provision that:
 - (A) Precludes, limits, or restricts the library from licensing electronic literary materials;
 - (B) Precludes, limits, or restricts or limits the library’s ability to employ technological protection measures as is necessary to loan the electronic literary materials;
 - (C) Precludes, limits, or restricts the library’s right to make non-public preservation copies of the electronic literary materials;
 - (D) Precludes, limits, or restricts the library’s right to loan electronic literary materials via interlibrary loan systems; or
 - (2) Precludes, limits, or restricts the library from performing customary lending functions, including any provision that:

⁹ This is the language in H7113 that is a version of the Maryland language, which is subject to a federal preemption lawsuit in Maryland and vetoed by the governor in NY.

- (A) Precludes, limits, or restricts the library from loaning electronic literary materials to borrowers;
 - (B) Restricts the number of licenses for electronic literary materials that the library may acquire after the same item is made available to the public;
 - (C) Requires the library to acquire a license for any electronic literary material at a price substantially greater than that charged to the public for the same item, processing or hosting fees aside;
 - (D) Restricts the library's right to determine loan periods for licensed electronic literary materials;
 - (E) Restricts the total number of times the library may loan any licensed electronic literary materials over the course of any license agreement, or restricts the duration of any license agreement; unless the publisher also offers a license agreement to libraries for perpetual public use without such restrictions; at a price, which is considered reasonable i.e., is offered at, for example, no more than twice the list price being offered for licenses directly to the public or other reasonable pricing models.
 - (F) Requires the library to pay a cost-per-circulation fee to loan electronic literary materials, unless substantially lower in aggregate than the cost of purchasing the item outright
- (3) Restricts the library from disclosing any terms of any license agreement to other libraries.
 - (4) Requires, coerces, or enables the library to violate the law protecting the confidentiality of a patron's library records found in Chapter 78, Section 7.

SECTION 4. Remedies

(a) Unconscionability

(1) Contracts to license electronic literary materials that include prohibited provisions listed in Section 3 of this chapter are unconscionable within the meaning of RI Gen L § 6A-2-302 ("Unconscionable contract or clause") in violation of Rhode Island public policy and are deemed unenforceable and void. Any waiver of the provisions of this title is contrary to public policy and shall be deemed unenforceable and void.

(b) Unfair and Deceptive Practices

(1) Offers to license electronic literary materials that include a prohibited provision listed in Section 3 constitute unfair and deceptive acts within the meaning of RI Gen L § 6-13.1 et al. and any remedy provided pursuant to the law

shall be available for the enforcement of this chapter.

(2) Any publisher may seek the opinion of the Attorney General for guidance on how to comply with the provisions of this title.

(3) Actions for relief pursuant to this title may be brought by libraries, library officers, or borrowers and shall be prosecuted by the Attorney General.

(4) Parties shall be enjoined from enforcing license agreements that include a prohibited provision listed in Section 3 and the publisher in question shall be liable for a civil penalty which shall be imposed by the court.

SECTION 5. Severability

(a) The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.