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**Conflict Preemption Ruling Bars Enforcement of Maryland's Law on Forced
Ebook Licensing**

by

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On February 16, the U.S. District Court for the District of Maryland granted an injunction barring enforcement of a state law that requires publishers to lease their ebooks and digital audiobooks to public libraries on "reasonable terms." In [Association of American Publishers v. Frosh](#), the District Court determined that the Maryland law is preempted because it clearly conflicts with federal purposes of the Copyright Act in setting a uniform national policy for securing copyright owners' exclusive right of distribution. In a *Perspectives from FSF Scholars* paper published on March 21 titled "[State Laws Forcing Publishers to License Ebooks to Libraries Are Unlawful](#)," Free State Foundation President Randolph May and I explain how the court's sound application of legal principles should be instructive to others states and dissuade them from passing laws similar to Maryland's.

The Founding Fathers recognized the importance of a nationwide system for protecting copyrights. The Article I, Section 8 Copyrights Clause grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

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the exclusive Right to their respective Writings and Discoveries." And as James Madison observed in *Federalist No. 43*, the Constitution confers this authority on Congress because "[t]he States cannot separately make effectual provisions" for copyrights.

Section 106(3) of the Copyright Act of 1976 secures the exclusive right of copyright owners to authorize parties of their choosing "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." The right of distribution includes a copyright owner's right to control who will distribute copies of the work and on what terms and conditions.

The Maryland legislature passed House Bill 518 in May 2021. It provides that if a publisher offers to license an "electronic literary product" to the public at large, the publisher "shall offer to license" the same product to libraries "on reasonable terms that would enable public libraries to provide library users with access to the electronic literary product." Maryland's law amounts to a compulsory license to lease ebooks and digital audiobooks to libraries at prices deemed acceptable by the state's courts.

Under Supreme Court jurisprudence, "conflict preemption" occurs when state laws pose "an obstacle to the accomplishment of a significant federal regulatory objective" or when it is impossible for a party to comply with both federal and state laws. In *AAP v. Frosh*, the District Court concluded that Maryland's law conflicted with the right of publishers to decide who will distribute copies of literary work in ebook and digital audiobooks and on what terms and conditions. According to the court, Maryland could not force copyright owners to offer to license copyrighted works to one portion of the public following their initial decision to offer to license the same work to a different portion of the public.

Legislation similar to Maryland's law has been introduced in other states, including Connecticut, Rhode Island, Missouri, and Tennessee. For more on the District Court's decision in *AAP v. Frosh* and why state legislators should not force authors or publishers to license copyright works against their own wills, read our [paper](#).

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *Conflict Preemption Ruling Bars Enforcement of Maryland's Law on Forced Ebook Licensing* was published on the *Federalist Society Blog* on March 21, 2022.