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State Laws Forcing Publishers to License Ebooks to Libraries Are Unlawful

by

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I. Introduction and Summary

On February 16, the U.S. District Court for the District of Maryland granted a preliminary injunction against a state law that sought to give public libraries a special right of forced access to privately-owned copyrighted literary works in ebooks and digital audiobooks. The District Court rightly determined that the Maryland law is preempted, and therefore unlawful, because it clearly conflicts with federal objectives of the Copyright Act in establishing a uniform national policy that protects the exclusive rights of copyright owners. The court's in-depth, well-reasoned application of constitutional principles and federal law in *Association of American Publishers v. Frosh* should be persuasive to any state legislators or courts considering laws similar to Maryland's.

It would be foolish for states to imitate Maryland House Bill 518's misguided attempt to require publishers of literary works in ebook and other electronic formats to offer licenses to public libraries on terms and conditions set by state law. As the District Court in *AAP v. Frosh* recognized, under Section 106 of the Copyright Act, copyright owners possess exclusive rights to decide who can distribute or make available their copyrighted works and on what terms and

conditions. State laws that force publishers to license copyrighted works to libraries clearly conflict with federal law.

The Constitution's Article I, Section 8 Copyright Clause laid the groundwork for uniformity in copyright law by granting Congress authority to secure the exclusive right of authors to their writings. In the Copyright Act of 1790, the First Congress adopted a law providing that the authors of books "shall have the sole right and liberty of printing, reprinting, publishing and vending" their creative works. Section 106(3) of the Copyright Act of 1976 broadened those rights into the exclusive right of distribution, which uniformly secures a copyright owner's control over who may distribute copies of the work and on what terms and conditions.

An important constitutional implication of federal policy uniformity is that state laws that interfere with the exclusive rights of copyright owners are preempted by federal law. In Supreme Court jurisprudence, "conflict preemption" occurs when a state law poses an obstacle to the achievement of a significant federal policy objective.

Bills introduced in states such as Connecticut, Illinois, Maryland, Massachusetts, Missouri, New York, Rhode Island, and Tennessee purport to give public libraries a compulsory license to lease copyrighted literary works in ebook and other digital formats according to standards set by state law, such as "reasonable terms." The state bills differ in some details but they include stiff civil penalties and, in at least some instances, criminal penalties.

One such bill, Maryland HB 518, was enacted by that state's legislature in May 2021. After a legal challenge was filed, U.S. District Court determined in *AAP v. Frosh* that Maryland HB 518 is preempted by federal copyright law and it issued an injunction prohibiting the state from enforcing the law. As the District Court recognized, "[i]t is clear the Maryland Act likely stands as an obstacle to the accomplishment of the purposes and objectives of the Copyright Act" in implementing a national uniform system for protecting copyrighted works. By forcing publishers to offer to license their works to public libraries on terms that the state deems reasonable, Maryland HB 518 imposes restrictions of copyright owners' exclusive right of distribution that conflict with copyright owners' exclusive right to distribute or make available their works to whom and on what terms and conditions they choose. This is in conflict with the objectives of federal law.

Also, the District Court recognized that the Maryland law runs counter to the Court of Appeals for the Third Circuit's 1999 decision in *Orson, Inc. v. Miramax Film Corporation.* As the Third Circuit held, and the District Court agreed, states cannot require copyright owners to offer to license copyrighted work to one portion of the public following their initial decision to offer to license the same work to a different portion of the public.

States possess power to address certain unfair and deceptive trade practices within their borders. And the District Court in *AAP v. Frosh* acknowledged that state authority may extend to trade practices involving the distribution of copyrighted works in situations where copyright owners already have agreed to license their works. But the court concluded that such authority does not enable a state to force copyright owners to license their works against their will. Moreover, the District Court determined that the exercise of state authority in an attempt to rectify perceived

imbalances in the digital marketplace does not overcome the preemptive effect of the national uniform policy securing exclusive rights in copyrighted works, including the right of distribution.

The decision in *AAP v. Frosh* validates the U.S. Copyright Office's legal opinion regarding state bills like Maryland's and New York's as expressed in an August 2021 letter. The Copyright Office concluded that "a court considering the state legislation at issue would likely find it preempted under a conflict preemption analysis." States should heed the views of the Copyright Office, the expert agency charged with administering copyright law. For instance, New York Governor Kathleen Hochul wisely issued a December 2021 veto of a bill that would have mandated publishers license ebooks to libraries in that state. Her veto message explained that the New York bill conflicted with federal copyright law.

Respect for private property rights also should dictate that state lawmakers reject legislation that would require publishers, against their will, to license ebooks and digital audiobooks to public libraries or any other subset of the public on terms and conditions set by state law. The Copyright Clause's grant of power to Congress to secure to authors the "exclusive right" to their writings was informed by the natural rights understanding of copyrights as a property right rooted in an individual's right to the fruits of his or her own labors. And a core component of private property ownership is *exclusive* use – the ability to control the terms of the property's use and to exclude trespassers and others who, without the property owner's agreement, seek to use or appropriate the property for their own benefit. Compulsory licenses and rate controls on copyrighted works, such as those adopted in Maryland, necessarily are at odds with the foundational property rights and exclusivity premises contained in the Copyright Clause.

Most Americans would agree that public libraries serve important functions and are deserving of support in various ways. We agree. But the District Court decision in *AAP v. Frosh*, the legal opinion of the Copyright Office, the New York veto, and respect for the property rights of copyright owners should dictate that state legislators and courts not allow public libraries unjustifiably to take advantage of authors and publishers of ebooks and digital audiobooks.

II. Copyright, the Constitution, and Federal Preemption

In our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015), we showed that federal copyright protections for literary works were foremost in the minds of the Founders when they drafted and ratified the Constitution of 1787. In his 1787 memorandum, "Vices of the Political System of the United States," one of the sharp criticisms that James Madison leveled at the Articles of Confederation was "the want of uniformity in the laws concerning… literary property."[1]

The Constitution laid the groundwork for uniformity in copyright law. Article I, Section 8, contains the Copyright Clause, and it grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive

[1] James Madison, "Vices of the Political System of the United States" (1787) (quoted in *Randolph J. May and Seth L. Cooper, The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015), at 49).

Right to their respective Writings and Discoveries."[2] And as a member of the First Congress, Madison helped establish the first nationwide law to secure protections in books and other creative works by helping to pass the Copyright Act of 1790. The preamble to the 1790 Act proclaims that the statue was passed "for the encouragement of learning, by securing the copies of maps, Charts, [a]nd books, to the authors and proprietors of such copies, during the times therein mentioned."[3] Section 1 of the 1790 Act provided that the authors of books "shall have the sole right and liberty of printing, reprinting, publishing and vending" their creative works.[4]

Since the 1790 Act, Congress has retained and even enlarged the protection of the exclusive rights secured for the owners of copyrighted works. Under Section 106 of the Copyright Act of 1976, a copyright owner enjoys exclusive rights to control reproductions, create derivatives, distribute copies, and publicly display or perform the copyrighted property.[5] In particular, Section 106(3) recognizes the exclusive right of copyright holders 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."[6] Section 106(3)'s protections for the exclusive right of distribution were intended by Congress to broaden pre-existing rights to "publish" and to "vend" copies of creative works.[7] The exclusive right of distribution secures a copyright owner's right to control who will distribute copies of the work and on what terms and conditions.

An important consequence of this longstanding federal policy favoring uniformity and market freedom for copyright owners is that state laws that interfere with the exclusive rights of copyright owners are preempted by federal law. The constitutional basis for federal preemption is the Article VI, Section 2 Supremacy Clause, which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[8]

In Supreme Court jurisprudence, "express preemption occurs when 'Congress expressly states its intent to preempt state law.'"[9] Section 301(a) of the Copyright Act contains an unmistakably broad express preemption provision:

> On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103,

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[2] U.S. CONST. Art. I, § 8, cl. 8.
[3] Act of May 31, 1790, Ch. 15, 1 Stat. 124, preamble.
[4] Act of May 31, 1790, Ch. 15, 1 Stat. 124, § 1.
[5] *See* 17 U.S.C. § 106.
[6] 17 U.S.C. § 106(3).
[7] *See* Peter S. Menell, "In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age," 59 *J. Copyright Soc'y U.S.A.* 1, 5 (2011) (concluding, based on examination of text and legislative history, that Congress's intent behind the right of distribution was to broaden pre-existing rights to "publish" and to "vend" copies of creative works due to "unforeseen technical advances" decades into the future).
[8] U.S. CONST. Art. VI, § 2, cl. 8.
[9] *Frosh*, at 9-10 (quoting *Decohen v. Capital One, N.A.*, 703 F.3d 213, 223 (4th Cir. 2012) (citing *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1994)).

> whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.[10]

Section 301(a) is best understood as providing express preemption state law grants of "legal and equitable rights" equivalent to the exclusive rights secured by federal law.[11] But conflict preemption applies to state-imposed restrictions on exclusive rights secured by federal law.[12] Under Supreme Court jurisprudence, "conflict preemption" occurs when state laws poses "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.[13] As will be discussed, state legislation that forces publishers to license ebooks and other electronic literary products to public libraries and on terms and conditions ultimately defined by state law should be held unlawful under conflict preemption doctrine.

III. State Laws That Force Publishers to License Copyrighted Books to Libraries on Terms and Conditions Set by State Law

In 2020 and 2021, legislation that seeks to confer on public libraries a special right of access to copyrighted works in digital formats, including ebooks and audiobooks, has been introduced in states such as Connecticut, Illinois, Maryland, Massachusetts, Missouri, New York, Rhode Island, and Tennessee. Although the bills differ in some of their details, in essence, they all appear to require that publishers who offer copyrighted literary works to the general public in electronic formats such as ebooks and digital audiobooks also must license them for use by public libraries and their patrons on "reasonable terms" or on terms reasonably similar to those offered to the general public, leaving it to courts to decide whether the specific terms offered by publishers meet that state law's standard. The state bills include stiff civil penalties and, in at least some instances, criminal penalties.

Public libraries and other advocates for these bills have claimed, among other things, that many publishers have refused to license literary works to libraries in digital formats or that they charge higher prices to libraries than to the general public for the same digital literary products. Supporters of those bills have also claimed that legislation is needed to give public libraries negotiating leverage against what they characterize as large publishers.

However, those claims range from dubious to at least highly debatable. For instance, many publishers make ebooks and digital audiobooks available to libraries – and to their patrons for checkout – through OverDrive. According to a declaration filed by AAP's CEO Maria Pallante in *AAP v. Frosh*, "more than 100 public library systems exceed[ed] one million digital checkouts"

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[10] 17 U.S.C. § 301(a).
[11] *See* Letter from Shira Perlmutter, Register of Copyrights, U.S. Copyright Office, to Sen. Thom Tillis (August 30 2021), at 3.
[12] *See* Letter from Shira Perlmutter, Register of Copyrights, at 3-4. *See also AAP v. Frosh*, No. DLB-21-3133 (D. Md. 2022), at 9 (internal cites omitted).
[13] *Frosh*, at 10 (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (additional cites omitted)).

using OverDrive.[14] Also, it is entirely reasonable for a publisher to charge a consumer less for a purchase of an ebook or digital audiobook than it would charge a library for the same item because the library can lend out the electronic literary product to multiple library users. And the state bills are not limited in application to the largest publishers, but also sweep in smaller publishers.

But leaving aside policy arguments regarding public libraries and contours of the ebook and digital audiobook publishing marketplace, the state bills that propose to regulate licensing of copyrighted works in electronic formats are beset by significant legal problems of which state policymakers ought to be aware. A case in point is a Maryland bill that became a law – but with a short shelf life.

IV. Maryland Compulsory Licensing Law for Electronic Literary Works

In May 2021, the Maryland legislature enacted Maryland House Bill (HB) 518.[15] The bill passed both chambers of the Maryland legislature without a single "no" vote, though it became law without the signature of the Governor Larry Hogan. According to the Maryland HB 518:

> [A] publisher who offers to license an electronic literary product to the public shall 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.[16]

Maryland HB 518 defines "electronic literary product" as either "[a] text document that has been converted into or published in a digital format that is read on a computer, tablet, smart phone, or other electronic device" or "[a]n audio recording of a text document, read out loud in a format that is listened to on a computer, tablet, smart phone, or other electronic device."[17] Additionally, the law expressly permits certain types of licensing terms – such as "limitation[s] on the number of users a public library may simultaneously allow to access an electronic literary product."[18] At the same time, it expressly prohibits other types of licensing terms – such as "limitation[s] on the number of electronic literary product licenses a public library may purchase on the same date the electronic literary product license is made available to the public."[19]

Violators of the Maryland law are subject to civil penalties of up to $10,000 per violation and $25,000 per repeat violation as well as criminal penalties of up to one year in prison or a $1,000 fine or both per violation.[20] Under Maryland HB 518, the Maryland Attorney General is authorized to bring enforcement actions to recover costs for the State, and any aggrieved party can bring actions for damages and receive awards of reasonable attorney's fees.[21]

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[14] *See* Declaration of Maria Pallante, CEO of AAP, ¶ ECF 7 (cited in *Frosh*, at 4).
[15] Md. Code Ann., Educ. § 23-701-702 (2022), available at: https://legiscan.com/MD/drafts/HB518/2021.
[16] *Frosh*, at 5 (internal quote omitted).
[17] *Frosh*, at 5 (internal quote omitted).
[18] *Frosh*, at 6 (internal quote omitted).
[19] *Frosh*, at 6 (internal quote omitted).
[20] *See Frosh*, at 7 (internal quote omitted).
[21] *See Frosh*, at 7 (internal quote omitted).

V. The Court Rules That Maryland's Law Conflicts With the Copyright Act

On February 16, 2022, the U.S. District Court determined in *AAP v. Frosh* that Maryland HB 518 is preempted by federal copyright law, and it enjoined the state from enforcing the law.[22] The District Court recognized that "Congress passed the Copyright Act to serve public goals by protecting private rights" through its implementation of "'a nationally uniform system for the creation and protection of rights in a copyright work.'"[23] The court observed that Congress included Section 301(a)'s "broad and absolute" preemption provision in order to attain national uniformity.[24] And given Maryland HB 518's restrictions on exclusive rights secured by the Copyright Act, the court analyzed the state's law in light of conflict preemption doctrine.

The District Court determined that "[i]t is clear the Maryland Act likely stands as an obstacle to the accomplishment of the purposes and objectives of the Copyright Act."[25] As the court recognized, publishers could avoid Maryland HB 518's requirement to "offer to license" to public libraries electronic literary products only by refraining from offering them to the public. It thus concluded that "[f]orcing publishers to forgo offering their copyrighted works to the public in order to avoid the ambit of the Act interferes with their ability to exercise their exclusive right to distribute."[26] The court similarly concluded that "forcing publishers to offer to license their works to public libraries also interferes with their exclusive right to distribute."[27]

The District Court described the exclusive right to distribute copyrighted works as "a right that necessarily includes the right to decide whether, when, or whom to distribute."[28] And it quoted the Supreme Court's statement in *Fox Film Corp v. Doyal* (1932) that "[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."[29]

In its analysis of Maryland HB 518, the District Court found that the reasoning of the Court of Appeals for Third Circuit in its 1999 decision in *Orson, Inc. v. Miramax Film Corporation* was applicable.[30] At issue in *Orson* was a Pennsylvania law that limited exclusive first run license agreements between movie distributors and exhibitors in a geographical area to 42 days unless such agreements included a provision to expand the distribution to second run theaters thereafter. According to the Third Circuit, if the state law "directly regulate[d] a right that is protected by federal copyright law, it must of necessity, [have] be[en] preempted under conflict preemption principles."[31] The Third Circuit determined that the Pennsylvania law "would impose on copyright holders, contrary to their exclusive rights under § 106, an obligation to distribute and

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[22] *See Frosh*, at 26-27 (internal quote omitted).
[23] *Frosh*, at 10 (quoting *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 382 (3d Cir. 1999) (en banc) (citing *Goldstein v. California*, 412 U.S. 546, 561 (1973)).]
[24] *Frosh*, at 10 (quoting *OpenRisk, LLC, v. Microstrategy Servs. Corp.*, 876 F.3d 518, 523 (4th Cir. 2017) (quoting *United States ex rel. Berge v. Bd. of Trs.*, 104 F.3d 1453, 1464 (4th Cir. 1997)).
[25] *Frosh*, at 11.
[26] *Frosh*, at 11.
[27] *Frosh*, at 11.
[28] *Frosh*, at 12.
[29] *Frosh*, at 12 (quoting 286 U.S. 123, 127).
[30] 189 F.3d. 377.
[31] *Frosh*, at 13 (quoting *Orson*, 189 F.3d at 385).

make available other copies of the work following their initial decision to publish and distribute copies of the copyrighted item."[32] The District Court found that *Orson* bolstered the conclusion that Maryland HB 518 is preempted because "[l]ike the Pennsylvania law, the Maryland Act imposes on publishers – against their will and interests – an obligation to offer to license copyrighted work to one portion of the public following their initial decision to offer to license the same work to a different portion of the public."[33]

Moreover, the fact that a state law's interference with the right of distribution involves non-commercial usage of copyrighted works by public libraries does not avoid a conflict with federal objectives of protecting exclusive rights in distributing copyrighted goods "to the public." The District Court observed that the "non-commercial nature of libraries is immaterial" and it was not relevant to the Third Circuit's decision in *Orson*.[34] Additionally, the District Court pointed to the special exception that Congress granted libraries in Section 108 of the Copyright Act, which permits them to reproduce copyrighted material for purposes of public records preservation. According to the court, this provision illustrated that "[s]triking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders…is squarely in the province of Congress and not this Court or a state legislature."[35]

Also, the District Court determined that a state's power to address unfair and deceptive trade practices does not enable it force copyright owners to license their works according to terms and conditions set by state law. The court acknowledged that a pair of early 1980s decisions by the Eastern District of Ohio and the Sixth Circuit upheld that state's prohibition of the practice of "blind bidding" or licensing motion pictures to theater owners for distribution without the theater owners first being able to view the motion pictures.[36] It found the two early 1980s decisions distinguishable: "The Ohio laws at issue did not mandate that copyright owners offer to license their copyrighted work. Rather, they regulated the manner of distribution after the copyright holder made the initial decision to distribute."[37] Here, the District Court relied again on the Third Circuit's reasoning in *Orson*, which contrasted lawful regulation of unfair trade practices in the film distribution industry with an unlawful state provision that interfered with a copyright holder's exclusive right to distribute.[38]

The applicability of the distinction between permissible state regulation of trade practices that incidentally involve copyrighted works already licensed for distributions and impermissible state regulation that requires copyrighted works be licensed and on what terms may not be readily apparent in every situation. But what is abundantly clear from the District Court's decision is that states cannot force copyright owners to license their copyrighted works on terms set by state law against the will of copyright owners.

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[32] *Orson*, at 386.
[33] *Frosh*, at 13-14.
[34] *See Frosh*, at 14 (quoting 17 U.S. § 106(3)
[35] *Frosh*, at 26 (citing 17 U.S.C. § 108).
[36] *Frosh*, at 15 (citing *Allied Artists Pictures Corporation v. Rhodes*, 496 F.Supp. 408 (E.D. Ohio 1980) ("*Allied Artists I*"), and *Allied Artists Picture Corporation v. Rhodes*, 679 F.2d 656 (6th Cir. 1982) ("*Allied Artists II*")).
[37] *Frosh*, at 16.
[38] *Frosh*, at 16-17 (internal cite omitted).

Importantly, the exercise of state authority in an attempt to rectify perceived imbalances in the digital marketplace in no way overcomes the preemptive effect of national uniform policy securing exclusive rights in copyrighted works, including the right of distribution. As the District Court observed, "the salutary legislative purpose plays no role in the conflict preemption analysis."[39] Rather, "'the controlling principle' in Supremacy Clause cases is whether the state law "frustrates the full effectiveness in federal law" and the court, without reservation, found that Maryland HB 518 frustrated the objectives and purposes of the Copyright Act.[40]

VI. The Court's Decision in *AAP v. Frosh* is Consistent With the Copyright Office's Position

The U.S. District Court's decision that Maryland HB 518 is preempted by federal copyright law validates the analysis and conclusion reached by the U.S. Copyright Office in an August 30, 2021, letter to Senator Thom Tillis. In that letter, the Copyright Office addressed legal issues raised by Maryland HB 518 and similar legislation from another state, New York Assembly Bill 5837. The Copyright Office analyzed the characteristics of the Maryland and New York bills, identified the relevant provisions of the Copyright Act as well as case law, and concluded that a "court considering the state legislation at issue would likely find it preempted under a conflict preemption analysis."[41] Although legal opinions of the Copyright Office are not binding on courts, its opinions represent the views of the expert agency charged with administering federal copyright law. States should heed the informed views of the Copyright Office that state law restrictions such as those contemplated in Maryland HB 518 and New York AB 5837 are preempted.

VII. New York Governor's Veto of Similar a Bill Due to Copyright Concerns

The U.S. District Court's decision in *AAP v. Frosh* also validates New York Governor Kathy Hochul's veto of New York Assembly Bill 5837 on December 29, 2021.[42] Roughly identical to Maryland's law, the New York bill, if enacted, would have granted to public libraries in that state a special right of access to literary works in ebook and other digital formats, subject to rates deemed reasonable under state law. In her veto message, Governor Hochul correctly perceived that New York's bill clashed with the exclusive rights of copyright owners that are secured by federal law and that the bill's terms clearly were preempted.[43]

VIII. States Should Respect the Property Rights of Authors and Publishers

In addition to conflict preemption dictates, respect for private property rights should lead state lawmakers to reject any legislation that would require publishers to license ebooks and digital

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[39] *Frosh*, at 17.
[40] *Frosh*, at 17 (quoting *Perez v. Campbell*, 402 U.S. 637, 652 (1971) (additional cites omitted).
[41] Letter from Shira Perlmutter, Register of Copyrights, at 9.
[42] *See* New York Assembly, A05837 (2021) [legislation webpage], at https://www.nyassembly.gov/leg/?default_fld=%0D%0A&leg_video=&bn=A05837&term=0&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y#.
[43] *See* Andrew Albanese, "Hochul Vetoes New York's Library E-book Bill," *Publishers Weekly* (December 30, 2021), at: https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html.

audiobooks on terms and conditions set by state law. As we described in our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015), the Founders' political philosophy of natural rights holds that a person has a natural right or just claim to the fruits of his or her own labors – which are his or her private property. Indeed, several state laws that preceded the Constitution applied natural rights philosophy to copyrights, defining them as property rights that deserve to be protected and promoted for the good of individual creators and for the public. Thus, the drafting of the Constitution, including the Article I, Section 8 Copyrights Clause's grant of power to Congress to secure for limited times to authors the "exclusive right" to their writings was informed by the contemporary understanding of the natural rights basis for protecting copyrights. A core component of private property ownership – be it in real property, personal property, or intangible property – is *exclusive* use. This exclusivity involves a property owner's ability to exercise control over the terms of the property's use and to exclude others from using it contrary to those terms.

Compulsory licenses and rate controls on copyrighted works are at odds with the Constitution's natural property rights premises and the exclusivity expressed in the Copyrights Clause. In our book *Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform* (Carolina Academic Press, 2020), we critiqued a 2016 proposal by the Federal Communications Commission to force cable TV networks to license copyrighted video programming to third party video device makers according to terms set by the agency. We also urged Congress to reject any future imposition of compulsory licensing and rate regulation of copyrighted works because such onerous restrictions are antithetical to the property rights and free market foundations of American copyright law and policy. Similarly, even aside from their preemption by federal law, states ought to want to respect the private property rights of authors and publishers and not force them to license digitally formatted versions of their copyrighted works to public libraries on terms set by state law.

IX. Conclusion: Insights for State Lawmakers

The U.S. District Court's application of constitutional principles and federal law in *AAP v. Frosh* should be instructive to state legislators. As the District Court recognized, the purpose of the Copyright Act is to implement a national uniform system for protecting copyright works. But Maryland HB 518 poses an obstacle to that purpose, as it forces publishers to offer to license their works to public libraries on terms that the state deems reasonable. State restrictions on copyright owners' exclusive right of distribution are preempted by federal law.

States cannot require publishers to offer to license copyrighted work to one portion of the public following their initial decision to offer to license the same work to a different portion of the public. Although states possess important power to address unfair and deceptive trade practices within their borders, such power does not enable a state to force copyright owners to license their works against their own wills. Moreover, the exercising of state authority in an attempt to rectify perceived imbalances in the digital marketplace does not overcome the preemptive effect of national uniform policy securing exclusive rights in copyrighted works.

The District Court decision in *AAP v. Frosh*, bolstered by the expert opinion of the Copyright Office, and concern for private property rights should counsel state legislators against trying to boost libraries at the expense of authors and publishers of ebooks and digital audiobooks.

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Further Readings

Seth L. Cooper, "American Music Fairness Act Would Secure Copyrights in Sound Recordings," *Perspectives from FSF Scholars*, Vol. 17, No. 11 (February 24, 2022).

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