Perspectives from FSF Scholars
May 20, 2022
Vol. 17, No. 26

State Restrictions on Ebook License Prices Are Preempted by Federal Law

by

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I. Introduction and Summary

Federal law secures a copyright owner's right to decide whether to distribute a copyrighted work, to whom, and when. But bills introduced in several state legislatures in 2021 and 2022 seek to regulate prices and other terms by which authors and publishers of literary works may license e-book and digital audiobooks to public libraries. Price regulation of ebook licensing to libraries is unwise and contrary to federal copyright law. States interested in expanding public libraries' ebook collections should instead dedicate additional money from state treasuries to libraries.

A February 2022 decision by a U.S. District Court correctly determined that Maryland's law mandating licensing of ebooks and digital audiobooks to public libraries in that state on "reasonable terms" is preempted by federal copyright law. The decision in *Association of American Publishers v. Frosh* should put other states on notice against imposing forced licensing or other rate and access mandates on authors and publishers of e-books. However, it appears that advocates of state ebook licensing regulation may be contemplating whether the state bills can be amended to evade the result in *Frosh*. In Rhode Island, for example, several amendments to

H7113 were proposed by Library Futures that would remove the bill's forced access mandate and instead regulate the prices and other terms on which ebooks may be licensed to public libraries. Yet price-related restrictions on ebook licensing would still be subject to preemption.

Section 106(3) of the Copyright Act of 1976 secures a copyright owner's exclusive right "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." A copyright is a type of property right, and one of the core incidents of property ownership is the right to make exclusive use determinations regarding the property. As the Supreme Court observed in in *Stewart v. Abend* (1990), "a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." Since a copyright owner can outright refuse to distribute a copyrighted work, it follows that the copyright owner can condition that refusal on prospective licensees agreeing to specified prices or terms of use. The "nationally uniform system for the creation and protection of rights in a copyright work" established by Congress and recognized by the Supreme Court and lower courts is premised on copyright owners' possessing market freedom to set the price offerings and other terms for the licensing of creative works.

Although the decision in *Frosh* focused on the compulsory license aspect of Maryland's law, the court recognized that the right of distribution is "a right that necessarily includes the right to decide whether, when, or whom to distribute." A copyright owner's choice regarding prices and volume or length of use terms are conditions that may be placed whether, when, and to whom copyrighted works are distributed. Also, in *Orson v. Miramax* (1999) and *Close v. Sotheby's, Inc.* (2018), U.S. Courts of Appeal for the Third and Ninth Circuits similarly dismissed the idea that the right of distribution is narrowly confined to a copyright owner's initial decision about whether or not to distribute his or her creative work.

Any state law that seeks to dictate price-related terms for licensing copyrighted ebooks and digital audiobooks directly regulates the exclusive right of distribution secured in Section 106(3) of the 1976 Act. State-level restrictions on prices and other licensing terms make it practically impossible for an author or publisher to exercise their market freedom and seek to optimize their financial returns on their creative labors. Certainly, state-imposed regulation of prices and on the number or duration of ebook licenses poses obstacles to the significant federal objective of protecting the individual rights of copyright owners. And for those reasons, state-imposed restrictions on prices and other ebook licensing terms are subject to conflict preemption.

It also remains a distinct possibility that state-level price regulation of ebook licenses as well as other limits on other licensing terms may be subject to express preemption. Section 301(a) of the 1976 Copyright Act states that "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 . . . are governed exclusively by this title." In an August 2021 letter, the U.S. Copyright Office acknowledged that "some courts have analyzed state-imposed *limitations* on the exclusive rights granted in section 106 as a question of express preemption." "Literary works" are expressly protected under Section 102(a)(1) of the 1976 Act. And a court considering a state's price-related restrictions on ebook licensing may conclude that the law's conferral of a price break on public

libraries limits a copyright owner's distribution right – and on that basis conclude the law is expressly preempted.

State ebook licensing bills such as Illinois SB3167 and Rhode Island H7113 purport to rely on the state's authority to prevent unfair and deceptive trade practices. But as federal court decisions such as *Frosh* have recognized, preemption turns on whether federal purposes behind the 1976 Act have been significantly frustrated – and not on the ostensible source of the state's authority regarding trade practices or contracts.

Ebooks are made widely available for licensed use by public libraries in the U.S. According to Overdrive, 102 libraries systems worldwide facilitated 1 million borrows of ebooks and digital audiobooks from digital library collections in 2020. Supporters of state ebook licensing would like for ebook price offerings to public libraries to be roughly equal to ebook sales prices for retail consumers. But there is a reasonable market rationale for setting different price points for retail consumers and libraries, arising from the fact that the retail sale of a copy of an ebook to a single customer is distinct from the licensing of an ebook copy to a library for checkout by multiple patrons.

And federal copyright law secures the market freedom of authors and publishers to set those price points as well as other terms for licensing ebooks. Instead of imposing price-related restrictions that are contrary to federal law, state legislators who wish to help public libraries expand their digital literary collections should allocate additional funds from their state treasuries to libraries for procuring access to ebooks.

II. U.S. Copyright Law Favors Market Freedom in Licensing Copyrighted Works

The U.S. Constitution's Article I, Section 8 Copyright Clause delegates to Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] And in chapter 3 of our book, *Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform* (Carolina Academic Press, 2020), Free State Foundation President Randolph May and I describe the longstanding policy of liberty of contract and free market underpinnings of U.S. copyright policy.[2] Consistent with the Constitution and free market premises, the Copyright Act of 1976 sets forth a uniform nationwide legal framework for protecting copyrights.

Importantly, Section 106(3) of the 1976 Act secures to copyright owners the exclusive right "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."[3] This right of distribution includes a copyright owner's right to decide who they will distribute copies to or license their creative work to – and on what terms and conditions. Freedom to determine prices, amount of usage, and other terms for licensing use of copyrighted content is integral to a copyright owner's distribution right.

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[1] U.S. CONST. Art. I, § 8, Clause 8.
[2] See Randolph J. May and Seth L. Cooper, *Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform* (Carolina Academic Press, 2020).
[3] 17 U.S.C. §106(3)

III. State Legislation Seeks to Regulate Licensing of Copyrighted Ebooks

But bills introduced in several state legislatures in 2021 and 2022 have sought to restrict the distribution right of authors and publishers of literary works in e-book and digital audiobook formats. For example, in 2021 legislatures in Maryland and New York passed legislation requiring and regulating e-book leasing to public libraries in their respective states.[4] This year, similar legislation has been introduced in states such as Connecticut, Illinois, Massachusetts, Missouri, Rhode Island, and Tennessee.

Although the state bills vary in details, they all appear to require that publishers who offer to sell or lease copyrighted ebooks and digital audiobooks to at least one segment of the public also must license their works in those same formats to public libraries for use by library patrons. Also, the bills require that ebooks and digital audiobooks must be made available to public libraries on "reasonable terms" or on terms reasonably similar to those offered to the general public.[5]

For the most part, the bills leave it up to state courts to determine whether specific price terms offered by publishers satisfy state law. But some state bills include specific restrictions on pricing. Illinois SB3167, for instance, expressly regulates prices to libraries by providing that for any license that limits the total circulations of an ebook, the price to libraries "shall be no more than 100% of the list (retail) price offered to consumers."[6]

Aside from forced licensing to public libraries and price regulation, the state bills bar or limit other terms in licensing ebooks to public libraries, including the amount of content or volume of use. For example, Rhode Island H7113 prohibits any ebook license that includes "a limitation on the number of licenses for electronic books that libraries or schools may purchase on the same date available to the public."[7]

Under the state bills for ebook licensing, authors and publishers who are found to be in violation are subject to civil penalties that include stiff fines and, in some instances, criminal fines and jail time.[8]

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[4] *See* Md. Code Ann., Educ. § 23-701-702 (2022), enjoined from enforcement by *Association of American Publishers v. Frosh*, No. DLB-21-3133, Memorandum Opinion, U.S. Dist. Ct. Md. (February 16, 2022); New York Assembly, A05837 (2021); 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.

[5] *See, e.g.*, An Act Relating to Commercial Law – Electronic Book Licenses to Libraires and Schools, RI-H7133 (2022), § 6-59-2, at: http://webserver.rilegislature.gov/BillText22/HouseText22/H7113.htm.

[6] Equitable Access to Electronic Literature Act, IL-SB3167, §10(1)(i) at: https://www.ilga.gov/legislation/102/SB/10200SB3167.htm.

[7] RI-H7133, § 6-59-2(2).

[8] *See, e.g.*, *Frosh*, at 7 (citing Md. Code Ann., Educ. § 23-701-702, § 13-411(a)).

IV. District Court Rules That Forced Licensing of Ebooks Is Subject to Conflict Preemption

In February 2022, a U.S. District Court determined that Maryland's law mandating licensing of ebooks and digital audiobooks to public libraries in that state on "reasonable terms" is preempted by federal copyright law. In *AAP v. Frosh*, the District Court applied the Supreme Court's conflict preemption doctrine, under which state laws that pose "an obstacle to the accomplishment of a significant federal regulatory objective" or that make it impossible for a party to comply with both federal and state laws are preempted.[9] Relying on *Goldstein v. California* (1973) as well as lower court precedents, the District Court observed that "Congress passed the Copyright Act to serve public goals by protecting private rights" under "'a nationally uniform system for the creation and protection of rights in a copyright work.'"[10] And the court in *Frosh* 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" under Section 106(3).[11] (FSF President Randolph May and I further analyzed the *Frosh* decision in our March 2022 *Perspectives from FSF Scholars*, "State Laws Forcing Publishers to License Ebooks to Libraries Are Unlawful."[12])

The result in *Frosh* and the District Court's persuasive reasoning in that case should put other states on notice against imposing forced licensing or other rate and access mandates on authors and publishers of e-books. However, it appears that advocates of state ebook licensing regulation may be contemplating whether the state bills can be amended to evade the result in *Frosh*. In Rhode Island, for example, a series of amendments were proposed to H7113 by Library Futures that, if adopted, would remove the bill's forced access mandate but instead regulate the prices and other terms on which ebooks may be licensed to public libraries.[13] For instance, Library Futures has proposed that H7113 prohibit authors and publishers from offering ebook licenses "at a price substantially greater than that charged to the public for the same item" and similarly prohibit ebook licenses that include a cost-per-circulation fee to loan ebooks – unless the cost is "substantially lower in aggregate than the cost of purchasing the item outright.[14] It also has recommended that the legislation bar any ebook license that "[r]estricts the total number of times the library may loan any licensed electronic literary materials over the course 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."[15] But even price-related

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[9] *Frosh*, at 11.
[10] *Frosh*, at 10 (quoting 412 U.S. 546, 561).
[11] *Frosh*, at 11.
[12] Randolph J. May and Seth L. Cooper, "State Laws Forcing Publishers to License Ebooks to Libraries Are Unlawful," *Perspectives from FSF Scholars,* Vol. 17, No. 14 (March 21, 2022), at: https://freestatefoundation.org/wp-content/uploads/2022/04/State-Laws-Forcing-Publishers-to-License-Ebooks-to-Libraries-Are-Unlawful-032122.pdf.
[13] Library Futures Foundation, Testimony to the RI House Committee on Corporations Re: H7113 "An Act Relating to Commercial Law – Electronic Book Licenses to Libraires and Schools" (February 2, 2022), at: https://www.rilegislature.gov/Special/comdoc/House%20Corporations/2-1-2022--H7113--Library%20Futures%20Foundation.pdf.
[14] *Id.* at 8.
[15] *Id.* at 8.

regulation of ebook licensing would clash with copyright owners' distribution right secured by Section 106(3) of the 1976 Act.

V. The Right of Distribution Includes a Copyright Owner's Market Freedom to Select Prices and Other Terms for Licensing Creative Works

The exclusive right of distribution includes a copyright owner's right to decide the prices and other terms for licensing access to or use of his or her creative works. A copyright is a type of property right, and one of the core incidents of property ownership is the right to make exclusive use determinations regarding the property. The right of distribution thus enables a copyright owner to exclude a would-be licensee who is unwilling to agree to price or terms of use set by the copyright owner. As the Supreme Court observed in *Fox Film Corp v. Doyal* (1932), "[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."[16] Decades later, the court reiterated the same basic point in *Stewart v. Abend* (1990), wherein it explained that "a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work."[17] Since a copyright owner can outright refuse to distribute a copyrighted work, it follows that the copyright owner can condition that refusal on prospective licensees agreeing to specified prices or terms of use.

Indeed, the right of distribution would be hollow if a copyright owner lacked the authority to set prices or to define license terms such as the total number of licenses granted for a particular copyrighted work and the duration of the license. The "nationally uniform system for the creation and protection of rights in a copyright work" established by Congress and recognized by the Supreme Court and lower courts is premised on copyright owners' possessing market freedom to set price offerings and other terms for the licensing of his or her creative work.

The District Court's decision in *Frosh* focused primarily on the Maryland law's mandate that an author's or publisher's decision to license a copyrighted work in ebook format to one segment of the public required that the same work also be licensed as an ebook to public libraries within the state.[18] For that reason, the court saw no need to specifically rule on the Maryland law's restrictions on pricing and other terms. However, the decision in *Frosh* acknowledged that the right of distribution is broader than just a copyright owner's initial decision about whether or not to distribute the creative work. The court described the right of distribution as "a right that necessarily includes the right to decide whether, when, or whom to distribute."[19] A copyright owner's choice regarding prices and volume or length of use terms are conditions that are placed whether, when, and to whom copyrighted works are distributed.

In *Orson v. Miramax*, the U.S. Court of Appeals for the Third Circuit similarly dismissed the idea that the right of distribution is narrowly confined to a copyright owner's initial decision

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[16] 286 U.S. 123, 127 (quoted in *Frosh*, at 12).
[17] 495 U.S. 207, 229 (1990) (citing *Doyal*, at 127). *See also Schnapper v. Foley*, 667 F.2d 102, 114 (D.C.Cir. 1981) (vesting "the liberty not to license rights in his work").
[18] *See, e.g., Frosh*, at 11.
[19] *Frosh* at 12.

about whether or not to distribute his or her creative work. As the Third Circuit wrote: "[Plaintiff] argues that once a copyright holder, such as [defendant], makes an initial distribution, a state is free to regulate the manner in which the work is thereafter distributed. We reject [plaintiff's] contention."[20]

The Third Circuit determined in *Orson* that a Pennsylvania law that limited exclusive first run license agreements between movie distributors and movie theaters in a geographical area to 42 days was contrary to the movie distributors' exclusive right of distribution under Section 106. As the Third Circuit explained, 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."[21]

In sum, any prospective state law that seeks to license the prices and other terms for copyrighted ebooks and digital audiobooks directly regulates the exclusive right of distribution secured in Section 106(3) of the 1976 Act. State-level restrictions on prices and other licensing terms make it practically impossible for an author or publisher to exercise their market freedom, secured by federal copyright law, in order to balance perceived supply and demand and thereby optimize their financial returns on their creative labors. Certainly, state-level restrictions on prices and on the number or duration of ebook licenses pose obstacles to the significant federal objective in protecting the individual rights of copyright owners. And for those reasons, state-imposed restrictions on prices and other ebook licensing terms are subject to conflict preemption.

VI. State-Level Restrictions on the Ebook Licensing May Also Be Subject to Express Preemption

The Ninth Circuit's decision *Close v. Sotheby's, Inc.* (2018) also rejected "an unduly narrow view of § 106(3). As the court explained: "That provision represents not merely copyright holders' ability to choose when to sell a copy of their work and to whom. It also represents copyright holders' ability to receive payment for selling copies of their work."[22] In *Close*, the Ninth Circuit concluded that a California law that required resellers of fine art works to withhold 5% of the sales price and remit it to the artist expanded and restricted the distribution right by conferring on artists unwaivable royalties on downstream sales and also forbidding them from fully alienating copies of their artwork. According to the court, the state law "fundamentally reshapes the contours of federal copyright law's existing distribution right," and therefore was preempted.[23]

Interestingly, the decision in *Close* rested on *express* preemption under Section 301(a) of the Copyright Act of 1976, and the Ninth Circuit never reached conflict preemption claims in that case. Section 301(a) states that "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 . . . are governed exclusively by this title." Courts applying Section 301(a) will find that a state law is preempted when (1) the subject matter of the state law falls within the subject matter of

[20] 189 F.3d 377, 385 (3d Cir. 1999) (en banc).
[21] *Orson*, at 385 (quoted by *Frosh*, at 13).
[22] 894 F.3d 1061, 1071 (9th Cir. 2018).
[23] *Close at*, 1071.

copyrighted works described in Sections 102 and 103 of the 1976 Act; and (2) the rights asserted under state law are equivalent to the exclusive rights contained in Section 106.[24] In an August 2021 letter, the U.S. Copyright Office acknowledged that "some courts have analyzed state-imposed *limitations* on the exclusive rights granted in section 106 as a question of express preemption."[25] "Literary works," including ebooks and digital audiobooks, are expressly protected under Section 102(a)(1) of the 1976 Act. And thus, it remains a distinct possibility that state-level price regulation of ebook licenses as well as other state-level limits on other licensing terms may be preempted on express preemption grounds as well as on conflict preemption grounds.

VII. Claimed State Authority Over Trade Practices and Contracts Do Not Supersede Exclusive Rights Secured by Federal Copyright Law

State ebook licensing bills such as Illinois SB3167 and Rhode Island H7113 purport to rely on the states' authority to prevent unfair and deceptive trade practices.[26] And Library Futures has emphasized a state's authority to regulate contracts.[27] Although commercial conduct and business contracts that incidentally involve copyrighted goods may, as a general matter, be subject to state authority, such characterizations are not a deciding factor in preemption analysis. As recognized by a U.S. District Court in *Storer Cable Communications v. City of Montgomery, Alabama* (1992), "local authorities, under the guise of trade regulation, cannot enact laws which . . . target and extinguish one or more of the exclusive rights granted under § 106… If this were not so, states could effectively extinguish copyright rights with their police power, a result which would surely frustrate the copyright scheme."[28]

A similar view was expressed by the District Court in *Frosh*:

> While the State may view the Act as necessary to correct an imbalance and expand library access to digital literary products, the salutary legislative purpose plays no role in the conflict preemption analysis. ...The "controlling principle" in Supremacy Clause cases is whether the state law "frustrates the full effectiveness of federal law." ... Here, it does. The State's characterization of the Act as a regulation of unfair trade practices notwithstanding, the Act frustrates the objectives and purposes of the Copyright Act.

Thus, when state legislation that takes direct aim at the licensing of literary works interferes with copyright owners' rights under federal law to determine whether and how to best market their creative works so as to generate returns, it is subjected to preemption. And the ostensible source of the state's authority does not save the state-level restrictions from preemption because federal purposes behind the 1976 Act have been frustrated.

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[24] *See, e.g., Close*, at 1069.
[25] Letter from Shira Perlmutter, Register of Copyrights, U.S. Copyright Office, to Sen. Thom Tillis (August 30 2021) (emphasis in the original).
[26] *See* IL-SB3167, §20; RI-H7133, §6-59-4.
[27] See Library Futures, Testimony, at 4-5.
[28] 806 F. Supp. 1518, 1536 (M.D. Ala. 1992).

VIII. States Should Consider Allocating More Money From State Budgets to Fund Expansion of Public Library Digital Collections

Ebooks are made widely available for licensed use by public libraries in the U.S. According to Overdrive, 102 libraries systems worldwide facilitated 1 million borrows of ebooks and digital audiobooks from digital library collections in 2020.[29] Supporters of state ebook licensing would like to see ebook price offerings to public libraries become roughly equal with ebook sales prices for retail consumers. But the advocates of such licensing fail to take seriously that there is a reasonable market rationale for setting different price points for retail consumers and libraries, arising from the fact that the retail sale of a copy of an ebook to a single customer is distinct from the licensing of an ebook copy to a library for checkout by multiple patrons. And federal copyright law secures the market freedom of authors and publishers to setting those price points as well as other terms for licensing ebooks. Instead of imposing price-related restrictions that are contrary to federal law, state legislators who wish to help public libraries expand their digital literary collections should allocate additional funds from their state treasuries to libraries for procuring access to ebooks.

IX. Conclusion

Bills introduced in several state legislatures in 2021 and 2022 seek to regulate prices and other terms by which authors and publishers of literary works may license e-book and digital audiobooks to public libraries. A February 2022 decision by a U.S. District Court correctly determined that Maryland's law mandating licensing of ebooks and digital audiobooks to public libraries in that state on "reasonable terms" is preempted by federal copyright law. Yet advocates of state ebook licensing regulation appear to be seeking ways for state legislation to evade the result in *Frosh* by not mandating licensing but instead regulating the prices and other terms on which ebooks may be licensed to public libraries. Yet price-related restrictions on ebook licensing are still subject to preemption.

Section 106(3) of the Copyright Act of 1976 secures a copyright owner's right to decide whether to distribute a copyrighted work, to whom, and when. The "nationally uniform system for the creation and protection of rights in a copyright work" established by Congress and recognized by the Supreme Court and lower courts is premised on copyright owners' possessing market freedom to set price offerings and other terms for the licensing of creative works. State legislators should not pass ebook licensing legislation that imposes price or other restrictions and conflicts with a copyright owner's right of distribution. Instead, state legislators who are interested in expanding public libraries' ebook collections should consider dedicating additional money from state treasuries to libraries.

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[29] Overdrive, Press Release: "Over 100 Public Libraries Exceed 1 Million Digital Book Checkouts in 2020" (January 12, 2022), at: https://company.overdrive.com/2021/01/12/over-100-public-libraries-exceed-1-million-digital-book-checkouts-in-2020/.

Further Readings

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