

TO: Rep. Ruth Balser and the Joint Committee on Tourism, Arts and Cultural Development
FROM: The Massachusetts Library Association Legislative Committee and Massachusetts Library Community Stakeholder Working Group
DATE: 01/31/22
RE: H4120 Amendments

Memorandum

This memo is about the strategic choice between simply adding the Massachusetts voice to the existing voices surrounding current and proposed eBook laws in several states, with the likelihood of legal challenges due to the federal preemption problems explained in this memo; **or** pursue an entirely separate but complementary basis, under Massachusetts contract and consumer protection law as proposed in the amendment below, that establishes equivalent protections in eBook purchasing practice for libraries.

Introduction

eBooks today play an essential role in ensuring that libraries fulfill their mission of providing broad, open, non-discriminatory, and equitable access to information and reading materials for all Massachusetts residents. Current eBook distribution practices have largely not followed the traditional practices associated with printed materials. This practice presents a foundational challenge to delivering on the core library mission, one of acquiring and lending books. As a result, specifically of the current eBook business models, there are serious fiscal, social, cultural, and legal implications that thwart a library's traditional lending functions as technology advances, occurring as a result of disregarding the correct applicable historical precedents and acquisition/lending models.

As themselves consumers in a market, libraries of all types have a long-standing practice of buying books and lending them to their patrons, whether accomplished as individual actors or through library consortia or networks. Public and school libraries in particular play a vital role in delivering this access to a wide range of users, many of whom do not have the resources or desire or need to purchase their own individual copies; this is also the case with special libraries such as the talking book library that serve particular populations. In some cases, having materials available through libraries frequently also acts as a product-marketing opportunity for authors and publishers, prompting those who can and desire to purchase their own copies.

Presently, eBooks are, in most cases, actually rented or leased to libraries or library consortia via restrictive and expensive licensing agreements, and in other cases, also withheld from the library market. This system is unlike that for print books, where libraries only have to purchase once and may lend to their community continually according to established lending rules and practices. Under these eBook agreements libraries are subject to increasingly restrictive license constraints, from the number of times an eBook can be loaned to a time-limit on the license or the individual loan-period. The more flexibility in the agreement, the higher the price skyrockets, often at a much and disproportionately higher markup than what the average consumer pays for the same title, or a library might pay for the print copy. As a result, many Massachusetts libraries face financial and practical challenges in making eBooks available to their patrons, which jeopardize their ability to fulfill their mission. In some cases, some electronic materials might not be made available at all.

The exorbitant costs and burdensome restrictions of these eBook contracts are thus draining resources from many Massachusetts local libraries and/or the consortia to which they belong, forcing them to make difficult choices to try and provide a consistent level of service and get books – print or electronic copies – in the hands of their patrons. However, with eBook contracts eating up ever larger portions of libraries’ budgets, given the disproportionate costs, delivering the same level of service will be impossible

Purpose of the Amendment to H4120

The following revised suggested language is designed to empower libraries *as consumers* to fulfill their missions of providing access to information for all Massachusetts patrons by ensuring that *contractual* agreements between libraries and publishers contain fair licensing terms for the acquisition of electronic literary materials at reasonable yet competitive prices, whether managed directly or through consortia and aggregator contracts.

This bill is proposed pursuant to the power inherent in the Commonwealth to protect public policy and promote 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 open and nondiscriminatory access to literary materials.

Due to the unequal bargaining power between publishers/distributors and libraries and the pattern of abuse of market power by publishers/distributors, the Commonwealth has a sufficiently compelling interest in adopting this legislation to protect the interests of Massachusetts citizens in accessing information through the use of libraries.

Libraries must continually replace items in their digital catalogs because of the restrictive nature of current licensing agreements, instead of focusing library collection budgets on procuring new material and providing educational services to the public.¹ Despite spending as much as \$84 to license books normally purchased for \$14.99 for example, most agreements offered to libraries limit item licenses to two years, at which point the exact same materials must be re-purchased.² Some libraries pay a cost per circulation fee on top of initial fees, entering into de facto rental agreements at unrestrained prices.³ Further, there are some electronic materials that are simply not available to libraries to license from some publishers and distributors. Or, worse, publishers have even attempted an outright embargo sales of eBooks to libraires, sometimes called “windowing,” falsely claiming the that “library lending was cannibalizing sales.”⁴

Today, libraries have no choice but to enter into these agreements if they are to even approximate continuing their core missions, let alone meet their responsibility of maintaining historical copies of published works. Prior to the pandemic, digital lending was already sharply on the rise; spending on electronic materials increased at five times the pace of physical materials in the years prior to 2019.⁵ When COVID-19 shuttered library facilities, digital lending increased almost 40%. As libraries have reopened, that number has not declined.⁶

This bill seeks to help libraries and publishers, and associated entities carry on their traditional roles to the benefit of all. It is not intended to hinder publishers’ innovation in the digital space but rather to allow libraries to participate in it fully, as consumers. Without this state intervention, libraries will continue to struggle to afford electronic literary materials for their patrons. They will be forced to devote increasing portions of their budgets to license agreements or face losing their ability to provide digital information for the citizens of Massachusetts altogether.

¹ Andrew Albanese, *Hachette Book Group Changes Library E-book Terms*, PUBLISHERS WEEKLY (Jun. 17, 2019), <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/80486-hachette-book-group-changes-library-e-book-terms.html>.

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

³ *A New Twist in Ebook Library Licensing Fees*, THE AUTHORS GUILD (Jun. 21, 2019), <https://www.authorsguild.org/industry-advocacy/a-new-twist-in-ebook-library-licensing-fees/>

⁴ *You May Have to Wait to Borrow a New eBook from the Library* <https://www.npr.org/2019/11/01/775150979/you-may-have-to-wait-to-borrow-a-new-e-book-from-the-library>

⁵ *The Use and Cost of Public Library Materials: Trends Before the COVID-19 Pandemic* https://www.ims.gov/sites/default/files/2021-02/pls_fy18_research_brief.pdf.

⁶ Andrew Albanese, *PRH Once Again Extends Temporary E-book, Digital Audio Terms for Libraries*, PUBLISHERS WEEKLY (Oct. 22, 2021) <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/87696-prh-once-again-extends-temporary-e-book-digital-audio-terms-for-libraries.html>

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 use language nearly identical to the original H4120.⁷

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 H4120 as currently drafted, could be considered preempted by federal law. The U.S Copyright Office examined the new Maryland state law, on which H4120 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.”⁸

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.⁹ 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.”¹⁰

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.

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

⁷ Other states, such as Rhode Island and 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> and Electronic Book Licenses to Librarians and Schools at <http://webserver.rilin.state.ri.us/BillText/BillText22/HouseText22/H7113.pdf>

⁸ Md. Code, Educ. § 23-702 (2021) available at https://mgaleg.maryland.gov/2021RS/chapters_noln/Ch_412_sb0432E.pdf

⁹ 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

¹⁰ Ibid.

interpretation as the U.S. Copyright Office.¹¹ Again, at present H4120 is an exact clone of the Maryland bill, and, therefore, subject to the same increased risk of litigation if adopted as written.

Again, the strategic choice here is between adding the Massachusetts voice to the existing voices and getting frozen or legally challenged due the federal preemption problem or 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 both the exact same Maryland eBook law and the fact that the language forcing publishers to sell to a library *illegally preempts* federal copyright law.¹²

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 Massachusetts.

As some of this memo directly suggests, a position based on consumer protection and contracts 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 Massachusetts libraries and their patrons.

To that effect, below is a draft of a friendly amendment designed to effectuate enough changes in H4120 to meet the goals and protect the interests of Massachusetts libraries and their patrons, while avoiding running afoul of the challenges documented above with respect to activities in other states

¹¹ 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>

¹² 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>

H4120 Amendments

SECTION 1. Definitions¹³

(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; and*
 - (G) *archives*
 - (H) *library consortia, (in Massachusetts, also known as ‘networks).’*
- (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.

¹³ Items in **blue** constitute alternative provisions to be considered.

- (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 to license electronic books and digital audiobooks to the public shall offer to license the electronic books and digital audiobooks to libraries in the commonwealth on reasonable terms that would permit the libraries to provide their users with access to the electronic books and digital audiobooks. These licenses shall be available to all types of libraries in the commonwealth, including, but not limited to, school libraries, public libraries, academic libraries, and tribal libraries.]~~ DELETION OF THIS LANGUAGE PROPOSED¹⁴

(a) Any contract offered by a publisher to license electronic literary materials to the public in this state is governed by Massachusetts 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;

¹⁴ This is the language in H4120 that is a copy of the Maryland language, which is subject to a federal preemption lawsuit in Maryland and vetoed by the governor in NY.

(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:

(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.^{15 16 17}

(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.

Reasonable terms shall include:

~~(i) A limitation on the number of users to whom the libraries may simultaneously provide access to the electronic books or digital audiobooks;~~

~~(ii) A limitation on the number of days the libraries may provide a user with access to the electronic books or digital audiobooks; and~~

~~(iii) The use of technological protection measures that would prevent a user from~~

~~(1) maintaining access to the electronic books or digital audiobooks beyond the access period set forth in the license and~~

~~(2) providing other users with access to the electronic books and digital audiobooks.~~

~~Reasonable terms shall not include a limitation on the number of licenses for electronic books that libraries may purchase on the same date available to the public.~~

SECTION 4. Remedies

¹⁵ A subdued version of § 3(b)(2)(E) might read:

(E) Restricting the total number of times the library may loan any licensed electronic literary materials over the course of any license agreement to a number fewer than: i) 70 lends of electronic books; and ii) 100 lends of digital audiobooks

¹⁶ A subdued version of § 3(b)(2)(G) might read: (G) Restricting the duration of any licensing agreements to a length fewer than five years;

¹⁷ The subdued versions of provisions (E) and (F), above, may also be combined to read as follows: *Restricting the total number of times the library may loan any licensed electronic literary materials to a number fewer than [X] lends, or restricting the length of any license agreements to a length fewer than [Y] years, whichever comes first*

(a) Unconscionability¹⁸

(1) Contracts to license electronic literary materials that include prohibited provisions listed in Section 3 of this chapter are unconscionable within the meaning of Chapter 106, Section 2-302 in violation of Massachusetts 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

~~(c) A violation of this section shall be deemed an unfair and deceptive trade practice in violation of section 2 of chapter 93A.~~

(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 Section 2 of Chapter 93A, REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION, and any remedy provided pursuant to Chapter 93A 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.

¹⁸ Because of the high bar necessary to demonstrate that a contract or its terms are unconscionable, a subdued version of the bill might omit §4(a) altogether and rely solely on unfair and deceptive practice remedies.