

Library Futures eBooks Policy Paper: Mitigating the Library eBook Conundrum Through Legislative Action in the States



Executive Summary

To mitigate the eBooks conundrum, Library Futures is recommending the adoption of state laws based on state contract law, state consumer protection, state procurement law, and contract preemption. The Library Futures model eBooks bill is based on the recent eBook legislation and resulting litigation, as outlined below. This model bill language is designed to nullify efforts by the publishers to use the threat of copyright and federal preemption lawsuits against the library community and the public, by harnessing the coercive power of the state to protect against harmful eBook contracts.

Currently, a number of publishers and eBook aggregators are preventing libraries from acquiring eBooks with licensing (or purchasing) terms that make it impossible for libraries to fully meet their standard access and preservation missions. Often, eBook licenses offered to libraries come with many restrictions on use and/or are prohibitively expensive,¹ or worse, sometimes are not available to libraries at any price.² And when they are available, eBooks can cost a library three to 10 times the consumer prices for the same eBook.³ Further, most libraries have little, if any, bargaining power and are rarely able to change the terms of the contracts offered to them by publishers. As a result, many libraries face financial and practical challenges in making eBooks available to their patrons and are unable to develop their own digital collections.

In response to the unavailability of equitable terms and fair pricing, library associations in several states are working on various solutions to the eBook problem for libraries. Each legislative solution is focused on providing a pathway for libraries to obtain licensing terms more

¹ David Moore, [Publishing Giants Are Fighting Libraries on eBooks](#) (2022)

² ALA News, [ALA turns to Congress as Macmillan ignores public call to reverse library eBook embargo](#) (2019)

³ Jennie Rothschild, [Hold On, eBooks Cost HOW Much? The Inconvenient Truth About Library eCollections](#) (2020)

suited to normal library use. As of June 2022, six states have active bills to address many of these issues. Library Futures supports policies that help libraries fulfill their essential role of making knowledge and culture available and accessible to all, and therefore supports legislation that aims to equitize the eBook marketplace. To that end, we have developed model legislative language that we believe will hold up against legal challenges.

This issue goes much deeper than just the unsustainably high prices for eBooks. Legally, traditional library lending is protected by the “first sale doctrine,” which establishes that ownership confers the right to lend. But new eBook formats have been used to frustrate the public purpose of first sale, and Library Futures believes that legislation is necessary to restore the mission of all libraries to acquire, preserve, maintain, and share materials, even with new technologies.

The Maryland and New York Bills

Last year, Maryland lawmakers, with help from the non-profit organization Reader’s First, and the Maryland Library Association, unanimously passed a bill requiring that publishers “shall offer” licensed eBooks to Maryland public libraries “on reasonable terms.”⁴ The bill effectively stated that if a publisher offered any eBook to the public, then it must also offer libraries a license to that eBook at a “reasonable” price. Notably, what constitutes “reasonable” was left undefined. A similar measure in New York, based on the Maryland law, was also passed (virtually unanimously) in summer 2021.

The Association of American Publishers (“AAP”) opposed both measures and ultimately filed a lawsuit against Maryland to overturn Maryland’s eBooks law. The publishers argued that the law created a “shadow Copyright Act” that gave libraries “unprecedented control” over transactions with publishers. Following the AAP lawsuit in Maryland, New York Governor Kathy Hochul vetoed the New York eBook bill. Governor Hochul echoed the AAP’s position in her statement explaining why she vetoed the bill, noting that the language forcing publishers to sell to a library illegally preempts federal copyright law.

The U.S. Copyright Office, a division of the Library of Congress, examined the new Maryland state law in a report reviewing the eBook law’s legality. In its report, 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 U.S. law.⁵ The Office concluded that a court considering state legislation with language like the Maryland law “would likely find it preempted under a conflict preemption analysis.”⁶

⁴ Matt Enis, [AAP Sues Maryland Over Law Requiring Publishers to License Ebooks to Libraries Under “Reasonable Terms”](#) (2021)

⁵ See [U.S. Copyright Office’s Reply Letter to Sen. Thom Tillis](#) (2020)

⁶ Ibid.

In February 2022, the federal district court in Maryland agreed with the Office’s analysis, and ultimately found in favor of the publishers, issuing an injunction to stop the eBook law from going into effect. The court stated that federal copyright law provides full legal support for copyright owners to choose to sell, license, or withhold their works from anyone. Under the Copyright Act of 1976, *neither states nor the federal government can force copyright owners to license or sell materials to buyers.*

The court said plainly, “[t]he Act’s mandate that publishers offer to license their electronic literary products to libraries interferes with copyright owners’ exclusive right to distribute by dictating whether, when, and to whom they must distribute their copyrighted works. Accordingly, the Court finds that the Maryland Act likely stands as an obstacle to the accomplishment of the objectives of the Copyright Act and that it is likely preempted under the Supremacy Clause.”⁷ In June 2022, the Maryland eBooks law was deemed unconstitutional by Judge Deborah Boardman, with no need for a federal injunction.

Library Futures does not agree with the court’s determination that the Maryland law, and related bills, are indeed legitimately preempted by federal law, but since the case will not be appealed, the details of this issue are immaterial. Library Futures’ strategy has shifted to establishing a state-level law that would *in the shorter term* improve the protections for libraries.⁸

Comparison of Current State Bills

Several bills under consideration are modeled on or are direct copies of the Maryland bill—these bills contain the “shall offer” language that raises an increased risk of copyright and preemption litigation if adopted as written.

One such clone bill was introduced into the Massachusetts legislature. However, in late April 2022, the Massachusetts Library Association Legislative Committee, with the support of Library Futures and EveryLibrary, presented an amendment to the Maryland clone bill in Massachusetts. The new bill amendment removed the Maryland “shall offer” language and instead shifted the bill’s language into the purview of the state (*i.e.* contract law), clarifying that Massachusetts is within its rights to *regulate* rather than *mandate* contracts.⁹ The amendment is currently under consideration by Massachusetts legislators. You can read the Massachusetts Library Association Legislative Committee’s memo on the amendment [here](#).

⁷ [Ass’n of Am. Publishers v. Frosh, No. DLB-21-3133](#) (D. Md. Feb. 16, 2022)

⁸ In the long term, Library Futures supports a legal framework that logically extends the current paradigm for print books, in which any copy of the book, whether print or digital, can be lent to one person at a time, much like physical materials.

⁹ The Massachusetts Library Association Legislative Committee and Massachusetts Library Community Stakeholder Working Group, [Memorandum on H4120 Amendments](#) (2022)

Other bills can be characterized as “hybrid”; in other words, they contain the Maryland “shall offer” language, but are attempting to also couch the law under a state’s consumer protection statute.

Libraries, as purchasers, and therefore consumers under the definition of the law, could harness the coercive power of the state to protect libraries from “deceptive acts and practices” through the use of restrictive licensing terms, out-of-control costs, and other harmful aspects of the eBook agreements. States using this method are proposing eBook laws that would enable them to regulate license agreements, clarifying that states are within their rights to regulate—rather than mandate—contracts.

These “hybrid bills” include those in Tennessee, Illinois, Connecticut, and Rhode Island. Some of the bills in development also include remedies, which give libraries the ability to call on the power of the state or the courts.

The table below documents the differences in the provisions of current eBook legislation:

| State | Bill Title | Type of Bill | Key Provisions |
|-------|------------------------------------|---|---|
| MA | H4120 | MD Clone (Amendments proposed – pending) | 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 |
| MO | HB2210 / SB1095 | MD Clone | A publisher who offers to license electronic literary products, as defined in the bill, to the public shall also offer to license such products to public libraries under reasonable terms |
| TN | TN SB1955 / HB1996 | Hybrid | A publisher who offers to license an electronic literary product to the public must offer to license the electronic literary product to libraries in the state on reasonable terms , which would enable libraries to provide library users with access to the electronic literary product |

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|--|----------------------------------|------------------|---|
| | | | - Couched in TN consumer protection statute |
| IL | EHB4470 / SB3167 | Hybrid | Any publisher who offers a contract or license for electronic literary product acquisition to the public shall offer to license the electronic literary product to libraries. A contract or license shall not restrict a library's right or ability to loan or circulate electronic books and digital audiobooks in specified ways. - Contains " reasonable terms " language - Couched in IL consumer protection statute |
| CT | CT SB131 | Hybrid | - Currently contains MD " shall offer " language, but also contains provisions prohibiting restriction of the number of times library may loan eBook and restricting loan period - Couched in CT consumer protection statute |
| RI | H7113 | Hybrid | MD-type "shall offer" language: - Requires publishers to provide eBook licenses to libraries and schools, when a publisher offers to license electronic books and digital audiobooks to the public, and to license such books on reasonable terms . Any violation of the chapter would be deemed an unfair and deceptive trade practice. - Couched in RI consumer protection statute - Reasonable terms "may include" basic CDL -type tech protection measures (but does not mention loan period/number of loans) - Shall not include provisions that limit a library's ability to lend eBooks using reasonable tech protection measures or making preservation copies |
| MD (determined unconstitutional by federal court) | SB0432 | Original MD bill | Requires publishers who offer to license an electronic literary product to the public to also offer to license the electronic literary product to public libraries in the State on reasonable terms |

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|--------------------------------------|---|----------|---|
| NY (vetoed by Governor) | A05837/ S02890 | MD Clone | Requires publishers to offer licenses for electronic books to libraries under reasonable terms ; defines terms; establishes penalties |
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[Click here](#) for an interactive map tracking legislative developments of these bills.

Library Futures Model Legislation

While the recently-introduced hybrid bills are a promising start, we believe that the inclusion of provisions that mirror Maryland’s “shall offer” language are problematic as they remain too close to the language that the federal court deemed unconstitutional.

The purpose of the Library Futures model bill is to empower libraries to fulfill their mission of providing broad and equitable access to information for all by ensuring that contractual agreements between libraries and publishers contain equitable licensing terms for the acquisition of electronic literary materials, and by ensuring that literary materials have at least the same utility in digital form as they have in analog form.

Accordingly, Library Futures proposes pursuing a separate basis for establishing equivalent protections in practice. In our view, *a law based on consumer protection, state contract law, state procurement law, and contract preemption has a better chance of being unchallenged*, at least when it comes to the exact same challenges and preemption that occurred with the Maryland law and related cases.¹⁰ Moreover, the Library Futures model legislation forgoes the ambiguity of the “*reasonable terms*” language. Allowing publishers to determine what is “reasonable” in the language of their various contract limitations allows publishers to continue dictating licensing terms, opening the door to same exploitative practices in the eBook market.

State procurement laws generally require a formalized process, with specific contractual terms and requirements for certain purchases. As a matter of policy, all specifications required of the purchase must be outlined by the state. By harnessing the power of a state’s procurement law, a state can require that all eBook contracts contain certain terms that are necessary for normal library operations. State procurement laws also ensure transparency in the purchasing process.

Importantly, the Library Futures model bill also contains vital remedies provisions. One such provision is the ability for courts to rule a contract “unconscionable.” Under this doctrine, a court

¹⁰ Courts around the country have repeatedly held that Section 301 of the Copyright Act does not preempt state laws relating to contracts because contract rights are not “equivalent” to the exclusive rights of copyright. *See, e.g. Forest Park Pictures v. Universal Television Network, Inc., No. 11-2011-cv (2d Cir. June 26, 2012).*

can rule that the terms of an eBook contract violate state policy, and therefore that they are unconscionable (*e.g.*, unfair). As a result, a court can refuse to enforce those contract terms. For example, any clause that restricts a library's right to make preservation copies of the electronic literary materials, as protected under Section 108, might be ruled unconscionable, as preservation has always been a core component of librarianship. These remedies, among others in the draft bill, distinguish the LF model bill from much of the current legislation.

Key provisions in the Library Futures model eBooks bill include clauses such as:

- Definitions:
 - (1) “digital audiobook” means a sound recording of a reading of any literary production that has been converted into or published in a digital audio file that may be listened to on a computer or portable electronic device;
 - (2) “electronic book” means a text document converted into or published in a digital format that may be read on a computer or portable electronic device;
 - (3) “loan” means to create and transmit to a library user a copy of an electronic book or digital audiobook and to delete such copy upon the expiration the loan period;
 - (4) “portable electronic device” means any self-contained electronic device for personal use for communicating, reading, viewing, listening, playing video games, or computing, including a mobile telephone, tablet computer, electronic book reader, and other similar devices;
 - (5) “publisher” means any person in the business of the manufacture, promulgation or sale of books, journals or other literary productions, including those in digital form, consisting of text, imagery or both, and digital audiobooks. 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) “reasonable terms” means purchase or licensing specifications listed in Sections [x], [y], and [z] below that consider a publisher’s business model as well as a library’s need to continue its mission to provide access to materials and the efficient use of funds in providing library services.
- Any contract offered by a publisher to license electronic literary materials to the public in this state is governed by [State] law.

- Clauses or provisions included in contracts to purchase or license electronic literary materials, as enumerated below, are **unconscionable** within the meaning of [Chapter X] of [State Law] in violation of [State] 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.¹¹

- A contract provision is unenforceable if it:
 - Precludes, limits, or restricts the library from performing their core missions, including any provision enumerated in this section, such as restricting or limiting the library’s right to make non-public preservation copies of the electronic literary materials, the library’s right to loan electronic literary materials via interlibrary loan systems, among others;
 - Restricts the number of times any library may loan any electronic book or digital audiobook over the course of any license agreement while also restricting any library’s loan periods for electronic books or digital audiobooks;
 - Limits the number of electronic book licenses any library may purchase on the same date such electronic book is made available for purchase by the public;
 - Restricts the number of licenses for electronic literary materials that the library may acquire after the same e-material is made available on public markets;
 - Charges the library more for the use of one e-copy in excess of the list price for the public for one copy of same item;
 - Restricts the library’s right to determine loan periods for licensed electronic literary materials;
 - Restricts the total number of times the library may loan any licensed electronic literary materials over the course of any license agreement;
 - 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;
 - Restricts the library from disclosing any terms of its license agreements to other libraries; and
 - Collects library-user information that would be prohibited with print equivalents under state library privacy law in [Chapter X] of [State Law].

- Contracts to purchase or license electronic literary materials that include a prohibited provision listed above constitute **unfair and deceptive acts** within the meaning of

¹¹ In states that have adopted the Uniform Commercial Code, § 2-302. Unconscionable Contract or Clause., Unif.Commercial Code § 2-302 codifies the courts’ ability to deem contracts unconscionable. *See, e.g.* N.J. Stat. Ann. § 12A:2-302. *See* [Lanigan v. City of Los Angeles, 199 Cal. App. 4th 1020, 132 Cal. Rptr. 3d 156 \(2011\)](#) for an example description of how many jurisdictions determine unconscionability using both “procedural” and “substantive” elements.

[Chapter X] of this title and any remedy provided pursuant to [Chapter X] of this title shall be available for the enforcement of this chapter.

- Contracts to license electronic literary materials must comply with the full state procurement process as required by [Chapter X] of [State Law].
- 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.

The full Library Futures model bill text can be [found here](#).

What Can You Do?

We encourage every librarian and community member interested in working on these topics to take the following steps:

- [Connect with state library organizations and legislation committees.](#)
- Contact state reps interested in proposing state bills in the next legislative session. [Click here](#) to find your state legislators.
- [Join the Library Futures community](#), which will be launching more resources this summer and fall.

