

BILL: SB432, Public Libraries - Electronic Book Licenses - Access

COMMITTEE: House Ways and Means

HEARING DATE: March 24, 2021

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POSITION: Oppose

The Association of American Publishers (AAP) respectfully submits the following testimony in opposition to Senate Bill 432 (SB432), which violates and is preempted by federal copyright law and, in any event, is unconstitutional.<sup>1</sup>

AAP is the national trade association for book, journal, and education publishers in the United States. AAP's members include major commercial book publishers of fiction and nonfiction; education publishers; small, specialized, and independent publishers; and nonprofit publishers such as university presses and scholarly research societies. Among AAP's most critical priorities is ensuring the viability of our nearly 230-year-old legal framework that encourages publishers to invest in and distribute a great variety of books to the public. It is not an overstatement to say that the free operation of the publishing industry cannot be separated from the free exercise of democracy in this country.

SB432 would undermine the long-established and unambiguous federal legal framework enacted by Congress to govern the distribution of copyrighted works by forcing publishers to license digital works to all Maryland public libraries under undefined "reasonable terms" if the digital works in question have been otherwise made available to the public.

Federal copyright law prohibits this type of regulation of copyrights by state governments. Moreover, SB432 raises significant Commerce Clause and Due Process Clause concerns and would likely be found to violate the U.S. Constitution. We therefore urge lawmakers to revisit the intent and expression of this draft bill and to engage broader stakeholder input into its intended and unintended impacts. To the extent that the bill aims to address the licensing decisions of a particular dominant online company doing business in the state, we ask the Committee to handle those concerns as a matter of antitrust law arising from their dominance in order to avoid the troubling implications noted below.

The legislation is vulnerable to challenge on the following grounds:

First, federal copyright law preempts it. Copyright law is exclusively federal, and section 301 of the Copyright Act states that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . [that] come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this

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<sup>1</sup> The concerns raised in this statement also apply to the House companion bill, HB518.

title.”<sup>2</sup> Among the exclusive rights of copyright owners is the exclusive right to distribute a work by sale or other transfer of ownership.<sup>3</sup> SB432 conflicts with this exclusive right to distribute by mandating the sale or licensing of copyrighted works—eBooks and audiobooks—to specific customers under specific terms.<sup>4</sup>

Second, the mandatory license created by SB432 would force an involuntary transfer of ownership that is prohibited under section 201(e) of the Copyright Act. The bill, in mandating publishers to license works, amounts to an exercise of a right of ownership with respect to a publisher’s copyright, which is precluded by that section.<sup>5</sup>

Third, the bill would impermissibly regulate both interstate and out-of-state commerce by specifying conditions on which out-of-state publishers do business. Because the Commerce Clause protects against state regulations that erect unjustified barriers against interstate trade,<sup>6</sup> Maryland would need to meet the difficult burden of showing that a constitutionally sufficient state interest justifies the erection of such barriers.

Finally, the proposed legislation raises fundamental due process concerns, as it does not define what “reasonable terms” are or provide any means for publishers to know whether the terms they offer violate the law and expose them to penalties. Laws that proscribe conduct

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<sup>2</sup> 17 U.S.C. § 301(a).

<sup>3</sup> 17 U.S.C. § 106(3).

<sup>4</sup> See, e.g., *Close v. Sotheby’s, Inc.*, 894 F.3d 1061 (9<sup>th</sup> Cir. 2018) (finding requirement for resellers of fine art to pay artist a 5% royalty on sales within California violated section 301 of Copyright Act because it conflicted with exclusive distribution right under section 106(3)); *Author’s Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 681 (S.D.N.Y. 2011) (noting that “[a] copyright owner’s right to exclude others from using his property is fundamental and beyond dispute” and “[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”); *Rodrige v. Rodrigue*, 218 F.3d 432, 436-42 (5<sup>th</sup> Cir. 2000) (finding that Louisiana’s community property law could not interfere with the copyright author’s right to control his or her work).

<sup>5</sup> See, e.g., *Assoc. Am. Med. Colleges v. Carey*, 728 F. Supp. 873 (N.D.N.Y. 1990) (holding that the unambiguous language of section 201(e) prohibits a state from mandating disclosure of copyrighted testing materials because it would abrogate a copyright owner’s federally protected rights).

<sup>6</sup> See, e.g., *Lewis v. BT Inv. Managers, Inc.*, 447 US 27, 35 (1980); *American Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2<sup>d</sup> Cir. 2003).

except on undefined “reasonable terms” have been held to be unconstitutionally vague in other circumstances.<sup>7</sup>

AAP is unaware of any demonstrated, pervasive market failure or other basis involving the hundreds of publishers we represent that would justify the systemic market regulation of copyrights that SB432 would establish, even if Maryland were not federally preempted from enacting legislation of this nature. To the contrary, it is copyright law that operates as the legal foundation that brings about the creation of such a wide variety of published works that libraries’ customers value so highly: it supplies the economic incentive for authors and publishers to invest creatively, intellectually, and financially in the dissemination of literary works, and it does so by according them exclusive rights over the disposition of their works for the term of protection established by Congress.

AAP appreciates that SB432 aims to affirm the importance of public libraries as a marketplace for eBooks and audiobooks. We wholeheartedly agree, as AAP’s member companies vigorously compete with one another to market and license their immeasurably important novels, biographies, poetry, children’s books, and scholarly works to their library customers through a wide variety of constantly evolving formats and innovative business models. Libraries have become and are expected to remain an important market for AAP’s members’ eBooks, with millions of digital titles currently available to libraries.

For the reasons noted above, AAP respectfully but strongly opposes SB432 and urges the Committee to reconsider its intended objective with the benefit of broader stakeholder input.

We appreciate the opportunity to present these views to the Committee.

Respectfully submitted,



Terrence Hart  
General Counsel

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<sup>7</sup> See, e.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86-88 (1921); *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221-22 (1914); *United States v. Reliant Energy Services, Inc.*, 420 F. Supp. 2d 1043 (N.D. Cal. 2006).