IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,	*	
Plaintiff,	*	
v.	*	**Case No.: DLB-21-3133**
BRIAN E. FROSH, in his official capacity as Attorney General of the State of Maryland,	*	
Defendant.	*	

MEMORANDUM OPINION

The Association of American Publishers, Inc. ("AAP") challenges the constitutionality of a recently enacted Maryland law ("Maryland Act" or "the Act") that requires publishers who offer to license "electronic literary products" to "the public" to offer to license the same products to Maryland public libraries on "reasonable terms." Md. Code Ann., Educ. § 23-701 – 23-702. AAP, the national trade association and principal public policy advocate for publishing houses in the United States, filed a complaint against Brian E. Frosh in his official capacity as the Maryland State Attorney General ("the State") in which it alleged, *inter alia*, that the Maryland Act is preempted by the Copyright Act, 17 U.S.C. § 101 *et seq.* ECF 1. AAP moved for a preliminary injunction enjoining enforcement of the Maryland Act, which took effect on January 1, 2022. ECF 4. The State opposed the motion and moved to dismiss the complaint. ECF 10. AAP replied and opposed, ECF 13, and the State replied, ECF 17. The Court held a virtual hearing on the preliminary injunction motion on February 7, 2022. For the reasons set forth in this Memorandum Opinion, plaintiff's motion for a preliminary injunction is granted.

I. Background

The Copyright Clause of the Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries . . . ." U.S. Const. art. I, § 8, cl. 8. Congress exercised this constitutional authority when it enacted the Copyright Act. The Copyright Act confers on the owner of a copyright certain "exclusive rights," including the right to "distribute copies or phonorecords of . . . copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3).

The exclusive rights protected by the Copyright Act are limited in duration. 17 U.S.C. §§ 302–05. Generally, copyright in a new work "endures for a term consisting of the life of the author and 70 years after the author's death." *Id.* § 302(a).

> [This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

There are exceptions to the exclusive rights enumerated in 17 U.S.C. § 106. For example, not considered copyright infringement is the "fair use" of protected material, which may include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. Also not considered copyright infringement is the reproduction of "damaged, deteriorating, lost, or stolen" copyrighted materials by libraries or archives—an exception that allows those institutions to preserve the public record for future generations. *Id.* § 108. A well-known exception is for the sale or disposition "of a particular copy or phonorecord" protected by the Copyright Act. *Id.* § 109. This exception, known as the

statutorily codified "first sale doctrine," prevents the far-reaching protections of copyright from interfering with the bundle of rights held by the owners of personal property. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 523, 538–39 (2013).[1]

It is clear from the text and history of the Copyright Act that the balance of rights and exceptions is decided by Congress alone. The Copyright Act contains an expansive 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 section 102 and 103, 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.

17 U.S.C. § 301(a). This preemption provision effectuated Congress's intent to "adopt[] a single system of Federal statutory copyright from creation." Pub. L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2572; H.R. Rep. 94-1476, 1976 WL 14045, at *129 (1976). Congress stated that "[t]he

[1] The "first sale doctrine" allows libraries to lend hardcopy books and other tangible copyrighted materials to patrons. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997). The federal government has studied the possibility of expanding the first sale doctrine to cover digital works on more than one occasion. In 2001, the Register of Copyrights and the Assistant Secretary for Communication and Information of the Department of Commerce prepared a report in compliance with § 104 of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860, 2876. The Copyright Office recommended against expanding the first sale doctrine to digital transmissions in part because "[t]he risk that expansion of section 109 [would] lead to increased digital infringement weigh[ed] heavily against such an expansion." U.S. Copyright Office, *DMCA Section 104 Report* 96–101 (2001). Then, in 2016, the Department of Commerce's Internet Policy Task Force prepared a "White Paper on Remixes, First Sale, and Statutory Damages." Dep't of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages* (2016). The Task Force likewise recommended against expansion of the first sale doctrine to digital transmissions. *Id.* at 58. The Task Force found that "the risks to copyright owners' primary markets as described by the Copyright Office in its 2001 Report d[id] not appear to have diminished, or to have been ameliorated by the deployment of effective new technologies." *Id.* To date, Congress has not expanded the first sale doctrine to digital transmissions. *See* 17 U.S.C. § 101 *et seq.*

intention of section 301 [was] to preempt and abolish any rights under the common law or statutes of a State that [were] equivalent to copyright and that extend[ed] to works coming within the scope of the Federal copyright law." H.R. Rep. 94-1476, 1976 WL 14045, at *130. Section 301's "declaration of [that] principle" was "intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection." *Id.*

Despite Congress's clear intention to preempt state copyright laws, in early 2021 the Maryland General Assembly introduced legislation with a two-part mission: (1) to require publishers to offer to license copyrighted electronic literary products, such as ebooks and digital audiobooks, to public libraries, and (2) to ensure the terms of such licenses would be fair. S.B. 432, 2021 Gen. Assembly, 442d Sess. (Md. 2021), 2021 Md. Laws Ch. 412; H.B. 518, 2021 Gen. Assembly, 442d Sess. (Md. 2021), 2021 Md. Laws Ch. 411. The legislation attracted much support—and opposition—from interested stakeholders with fundamentally divergent views on its costs, benefits, and legality. *Compare* ECF 7-1, *with* ECF 10-4 & 10-6. On the one hand, public libraries and their champions viewed the legislation as essential to ensuring public access to copyrighted materials that publishers previously withheld from libraries or offered on economically unfavorable terms. *See, e.g.*, ECF 10-8, at 2–3. The proposed law, according to its proponents, was reasonable and necessary to stop publishers from up-charging libraries for licenses shackled with stringent time and use limitations. *See, e.g.*, ECF 10-9, at 2–3. On the other hand, publishers and other copyright holders saw the legislation as an unconstitutional infringement on the rights conferred by the Copyright Act, most significantly the exclusive right to distribute. *See, e.g.*, Pallante Decl. ¶¶ 17–26, ECF 7, at 6–9. Opponents also maintained that,

by interfering with the profit-making of copyright holders, the legislation frustrated its own purpose. Curbing copyright holders' profits would prevent them from producing new content for the public to enjoy. *See, e.g.*, ECF 7-1, at 19–21.

The parties here dispute the scope of the problem the legislation purported to solve. The State paints a picture of an inflexible publishing industry that "increasingly offer[s] ebooks and digital audiobooks that [it] will not share with libraries." ECF 10-4, at 2. Maria Pallante, the Chief Executive Officer of AAP, controverts that depiction of the relationship between publishers and libraries. Pallante Decl., ¶¶ 1–26, ECF 7, at 1–9. In her December 16, 2021 declaration, she stated that "[l]ibrary and ebook and audiobook lending" was "thriving." *Id.* ¶ 14, ECF 7, at 5. She also reported that in 2020 "more than 100 public library systems exceed[ed] one million digital checkouts on the ebook lending platform of a library aggregator named OverDrive." *Id.* ¶ 15, ECF 7, at 6. Globally, "430 million ebooks were borrowed . . . in 2020." *Id.* "In 2021, 129 library systems [were] on track to . . . break[] [2020's] all-time [lending] record." *Id.* ¶ 16, ECF 7, at 6. The Authors Guild, which testified in opposition to the legislation, described the legislation as "responding to the practice by a dominant player of deliberately withholding its electronic books from libraries with a law that [swept] in thousands of small publishers and self-published authors who cannot manage distribution and licensing at scale." ECF 7-1, at 25. Motivating the legislation's proponents, according to the Authors Guild, was a negative response to "[t]he practices of one or two actors in the industry." *Id.*

Proponents of the legislation additionally decried the terms on which electronic literary products were offered to libraries. Licenses typically lasted only two years for products that may be lent a designated number of times to one individual at a time. Blackwell Decl. ¶¶ 5(a)–(c), ECF 10-3, at 3–4. The cost of the licenses also far exceeded the cost of personal use licenses offered to

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