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State Mandates for Digital Book Licenses to Libraries are Unconstitutional and Undermine the Free Market

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Introduction

Beginning in 2021, states across the country introduced or enacted legislation forcing publishers, authors, and other copyright owners to license to libraries certain copyrighted works—from e-books and other digital texts to audiobooks—for digital lending.[1] In addition to mandating licenses, these laws also: (1) require copyright owners to provide licenses that allow for digital library lending beginning the same day the works are first released, thus outlawing the longstanding distribution model of "windowing" with staggered release of works in different formats and in different outlets; (2) prohibit any limitations on the number of licenses offered to libraries by copyright owners; and (3) mandate that licenses be made on "reasonable terms"— an undefined term that effectively authorizes a state to impose price controls and other terms in licenses and to sue copyright owners for noncompliance with these mandates.

Proponents of these bills argue that legislation is needed to ensure "equitable access" to e-books, and they assert that this access is impeded by allegedly restrictive licensing terms and high prices.[2] They accuse publishers of engaging in "predatory pricing,"[3] "price gouging,"[4] and unfair dealing in their e-book licensing practices.[5] The siren call for more access to e-books through libraries gives these arguments populist appeal, and libraries understandably engender sympathies from policymakers. But these claims fall apart under closer scrutiny.

Distortion and rhetoric aside, these bills represent a fundamental attack on the U.S. copyright system. By imposing licensing mandates with price controls and the ability to dictate terms, these states would create a patchwork of what are known as "compulsory licenses" in copyright law. This proposed compulsory licensing by the states threatens the well-founded principle of a uniform federal copyright law established by the U.S. Constitution and its designation of Congress as the body responsible for securing to authors their exclusive rights.[6]

But the problem with these state bills creating compulsory licensing for e-books runs far deeper than the defect that they are "preempted" by the Constitution and federal copyright law. The proponents for these bills present a distorted view of the market for copyrighted works in order to rationalize unprecedented government intervention into the longstanding and fundamental rights of

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[1] Such legislation has been enacted in Maryland and took effect on January 1, 2022. In June of 2022, a federal court in Maryland struck down the law and issued a declaratory judgment finding that "the Maryland Act is unconstitutional and unenforceable" because it "conflicts with and is preempted by the Copyright Act." In New York, copycat legislation was vetoed by the Governor, who concluded that "[b]ecause the provisions of this bill are preempted by federal copyright law, I cannot support this bill." Similar legislation was introduced in 2022 in Connecticut, Illinois, Massachusetts, Missouri, Rhode Island, and Tennessee, and in 2023 in Connecticut, Hawaii, Kentucky, Massachusetts, and Rhode Island.

[2] Kathleen Dumais, bill sponsor, Testimony in support of Maryland House Bill 518 – Public Libraries – Electronic Book Licenses – Access, February 5, 2021; Library Futures, Letter supporting Rhode Island H. 6246, April 28, 2021; New York Library Association, letter supporting NY S.2890B/A5837B, 2021.

[3] Morgan Miller, Maryland Library Association, Testimony in support of HB518 – Public Libraries – Electronic Book Licenses – Access, House Ways and Means Committee, Friday, February 5, 2021

[4] Library Futures, Letter supporting Rhode Island H. 6246, April 28, 2021.

[5] Jonathan Band, American Library Association, Response to Statement of the Association of American Publishers Concerning Rhode Island House Bill 6426, May 17, 2021.

[6] *See* U.S. Const., art I, § 8, cl. 8 ("The Congress shall have 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;").

copyright owners to determine prices and other contractual terms in the marketplace. This endangers the promise of reliable and effective copyright protection for all creators and innovators working in the extremely successful creative industries in the U.S. Without the promise of the "exclusive right" in the fruits of their creative labors, the same promise made under law to all productive individuals, the economic incentives that copyright creates for authors to create books and for publishers to distribute these books to the public will be severely diminished. At the end of the day, these bills will undermine the very goal that their supporters seek—easy and affordable access to e-books.

I. State Laws Dictating Prices and Terms for E-Book Licenses are Unconstitutional

Copyright law is the legal foundation that has enabled the rise of a professional class of authors and creators in the U.S. and created a flourishing creative industries sector that supports millions of jobs and contributes $1.5 trillion to the annual GDP.[7] Copyrighted works are one of the nation's strongest exports. In 2017, U.S. companies and individuals made over $190 billion in foreign sales of copyrighted works and products.[8] This was far more than many other well-known sectors of the U.S. economy that year; for example, it was more than the total foreign sales of electronic equipment ($174.2 billion), agricultural products ($138.2 billion), chemicals ($137.0 billion), aerospace products ($134.4 billion), or pharmaceutical products and medicines ($55.8 billion).[9] Copyright supplies the economic incentive for authors, artists, publishers, filmmakers, musicians, and countless others to invest creatively, intellectually, and financially in producing and providing access to creative works. It does so by securing marketable exclusive rights during the term of protection established by Congress.

The economic success of the creative industries is not an accident. The Framers recognized copyright's central importance to the growth of the new country by authorizing Congress in the Constitution to enact laws to protect the rights of authors through copyright. The Copyright and Patent Clause is the only place in the original Constitution—before the adoption of the Bill of Rights—in which one can find the word "right." The power granted by the Framers in the Constitution to secure to authors their justly earned "exclusive right" is equal among the other powers of Congress to create a navy and an army, to create federal courts to resolve disputes over citizens' rights, and to declare war, among other key functions of the government.

James Madison explained in *The Federalist No. 43*, that the "utility of this power [to secure copyrights and patents] will scarcely be questioned…. The public good fully coincides in both cases with the claims of individuals." Thus, it is unsurprising that the First Congress, which included James Madison and many of the other Framers of our Constitution, passed the Copyright Act of 1790 as one of its first legislative enactments. The rest, the saying goes, is history. As recognized by the U.S. Supreme Court, copyright law is grounded on "the conviction that encouragement of individual

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[7] Copyright Industries in the U.S. Economy, 2020 Report, available at: https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf

[8] *See* Stephen E. Siwek, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2018 REPORT, https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf (last visited Apr. 27, 2020).

[9] *Id.*

effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[10] In the early 21st century, the Supreme Court again observed the truism recognized in the U.S. since at least 1789 that "copyright law serves public ends by providing individuals with an incentive to pursue private ones."[11]

A key feature of the function and success of federal copyright law in promoting a vibrant creative industries sector is its national uniformity. Again, as James Madison explained in *Federalist No. 43*, "The States cannot separately make effectual provisions" to secure copyrights in creators who sell their creative works throughout the country.[12] Although the states continued to secure a limited form of copyright in unpublished works for much of the country's history, Congress ultimately perfected this national uniformity when it enacted the 1976 Copyright Act, discarding the dual system of state and federal copyright law in favor of a single federal copyright system.[13] The legislative history of the 1976 Copyright Act explained: "By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship."[14]

Consistent with its goal of creating a single, uniform federal copyright system, the 1976 Copyright Act expressly and implicitly prohibits states from enacting laws that interfere with federal copyright protections. In constitutional law, this is known as "preemption": federal law "preempts" state laws that may interfere with the federal law. These preempted state laws are unconstitutional. In § 301(a), the 1976 Copyright Act expressly states that all copyright protections are "governed exclusively" by federal law and that states are prohibited from either expanding or inhibiting the exclusive rights of copyright owners secured under federal law.[15]

The proposed state laws imposing price controls and dictating other licensing terms on copyright owners directly implicates this prohibition. By forcing copyright owners to offer licenses to libraries at prices and on other terms dictated by the state, these bills interfere directly with the legal framework created by Congress that secures to creators their "exclusive right" to determine how and under what terms they will license their copyrights. These proposed state laws make it impossible for copyright owners to exercise their federally protected right to decide whether and how to license—or refrain from licensing—and at the same time comply with a state's compulsory licensing scheme. Thus, these proposed compulsory licensing laws are squarely outside the authority of states to enact.

This is neither hyperbole nor a mere hypothetical prediction. The preemption problem with these compulsory licensing laws led to the swift demise of two such laws that succeeded in advancing out of state legislatures. Last year, a federal district court ruled that a Maryland compulsory licensing law

[10] Mazer v. Stein, 347 U.S. 201, 219 (1954).
[11] Eldred v. Ashcroft, 537 US 186, 212 n.18 (2003).
[12] Federalist Papers 43.
[13] With one exception: sound recordings fixed prior to February 15, 1972, were excluded from federal protection under the 1976 Copyright Act and continued to receive protection under state and common law. Congress brought these recordings within the federal system in 2018 through Title II of the Music Modernization Act.
[14] H.Rep. 94-1476 at 129 (1976).
[15] 17 U.S.C. § 301(a).

for e-books (Maryland House Bill 518) was preempted and therefore unconstitutional.[16] The court explained that 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 court further explained that it is "clear the Maryland Act likely stands as an obstacle to the accomplishment of the purposes and objectives of the Copyright Act" because the "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." The court ultimately ruled that the Maryland law "is unconstitutional and unenforceable" because it "conflicts with and is preempted by the Copyright Act."[17]

In December 2021, New York Governor Kathy Hochul vetoed a bill that had been passed by her state's legislature that was virtually identical to the Maryland law, explaining that "copyright protection provides the author of a work with the exclusive right to their works. As such, federal law would allow the author, and only the author, to determine to whom they wish to share their work and on what terms. Because the provisions of this bill are preempted by federal copyright law, I cannot support this bill."[18]

Unfortunately, despite the clear preemption issue with these state laws, copycat bills continue to be introduced in other states and advocates show no signs of giving up. Following the court's determination that the Maryland law was unconstitutional, the American Library Association urged Rhode Island lawmakers to ignore the Maryland court ruling because "it is not determinative in other district courts."[19] Others have proposed revisions to the proposed laws in an attempt to avoid preemption,[20] and as of January 27, 2023, lawmakers in three states have introduced bills which have dropped the licensing mandate but retained prohibitions on certain licensing terms and price caps.[21] Such new language in these bills cannot obfuscate the constitutional defect in these compulsory licensing laws. The uncontested and undeniable fact remains: any attempt by a state to limit the scope of the exclusive rights secured by federal copyright law is preempted by the Copyright Act.

II. State Laws Mandating E-Book Licenses are Bad Policy—They Harm the Public Interest by Interfering with Creators' Legal Rights and Economic Choices to Manage Risk in Delivering New Products and Services to Consumers

Setting aside the fatal preemption issue, efforts to impose compulsory licenses for library e-lending by dictating prices and license terms interfere with market-based decisions that serve the interests of the public and copyright owners alike. These bills embody the kind of government overreach and

[16] *Assoc. of Am. Publishers v. Frosh* 1:21-cv-03133-DLB (D. Md. Feb. 16, 2022).
[17] *Assoc. of Am. Publishers v. Frosh* 1:21-cv-03133-DLB (D. Md. June 13, 2022).
[18] "Hochul Vetoes New York's Library E-book Bill," Publishers Weekly (Dec. 30, 2021), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html.
[19] American Library Association Endorses Rhode Island S 2842 (April 26, 2022), https://alair.ala.org/bitstream/handle/11213/18006/RI-S2842-ALA-Final-Submitted.pdf?sequence=1&isAllowed=y.
[20] *See*, e.g., https://www.libraryfutures.net/library-futures-ebooks-policy-paper.
[21] Hawaii HB 1412, https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=HB&billnumber=1412; Massachusetts HD 3425, https://malegislature.gov/Bills/193/HD3425; Virginia SB 1528, https://lis.virginia.gov/cgi-bin/legp604.exe?231+sum+SB1528.

interference in the marketplace that is—among other things—contrary to property rights and our free enterprise system.

As everyone knows from well-publicized failures of blockbuster movies each year, the creative industries are replete with risks. Copyright owners must make decisions about whether and on what terms to invest in creative works, as well the timing, pricing, and formats for distributing those works. They must balance numerous competing business models in the marketplace; for example, in the publishing industry, book publishers must balance distribution decisions involving brick-and-mortar bookstores, online retailers, public lending libraries, school, academic, and special interest libraries, big-box stores, and other distributors. These marketplace-based decisions have a direct bearing on the success of a copyrighted work. Moreover, to keep pace with the various and sometimes competing demands of authors, artists, business partners, and customers, as well as changing technologies and market landscape, copyright owners must constantly innovate. They are always seeking ways to support the creation of new works, and to promote those works and disseminate them to people around the world. It is this environment that, as Madison noted, "[t]he public good fully coincides in both cases [i.e., copyrights and patents] with the claims of individuals [i.e., authors]."

Given these marketplace complexities and the importance of reliable and effective property rights—in this case copyright—to promote investments in new works and efficiencies in commercializing these works, active government intervention, such as compulsory licensing, has long been strongly disfavored in copyright law. As highlighted by the Court of Appeals for the 2nd Circuit, "Congress noted that 'in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the Government's intrusion on the broader market in which the affected property rights and industries operate.' S. Rep. No. 106-42, at 10 (1999)"[22]

The Department of Commerce's Internet Policy Task Force, in considering recent proposals for the establishment of a new compulsory license for remixes or "mash-ups," framed the adoption of a compulsory license as a decision "to abandon fundamental market principles for the more drastic approach of a statutorily imposed license," and noted that there exist only "a handful of compulsory licenses in the Copyright Act," which "have been enacted sparingly as exceptions to the normal structure of exclusive rights."[23] The former Register of Copyrights similarly stated that "Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored."[24] In the rare instance where such a license is adopted, it is done by Congress, not a patchwork of states that lack authority to legislate in the area of copyright.

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[22] WPIX, Inc., v. IVI, Inc., 691 F.3d 275, 281-282 (2d Cir. 2012).

[23] U.S. Dep't of Commerce Internet Policy Task Force, White Paper on Remixes, First Sale, and Statutory Damages, at 25 (Jan. 28, 2016), available at https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf.

[24] *Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the Comm. On the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights), *available at* https://www.copyright.gov/docs/regstat091009.html.

In the context of library e-lending, there is no evidence of any market failure that would justify the unprecedented regulatory overreach of compulsory licensing through price controls and state-imposed license terms on authors and publishers.

At the core of the arguments offered to justify these bills is the claim that copyright licensing terms for library e-lending are simply unfair. Specifically, proponents for compulsory licensing point to the distinction between (1) the *sale* of physical books and the *licensing* of e-books, and (2) the disparity between the consumer price for an e-book licensed for *personal* use and the price charged to a library for a digital lending license *for distribution to dozens of patrons* They argue that these differences exemplify, in their words, examples of predatory pricing or price-gouging that result in inequitable access to e-books. These arguments misconstrue both the law and the market.

To understand why, one must first understand the distinction in copyright law between ownership of the copyright in a work, which consists of the exclusive rights set forth in the Copyright Act,[25] and ownership in the physical object embodying that work. The Copyright Act expressly recognizes this distinction: The copyright may be sold or licensed by its owner, but the sale of a physical embodiment of this copyright, such as a particular book, does not convey this copyright absent an express agreement by the copyright owner.[26]

A further element of this key distinction in copyright law between ownership of the copyright and ownership of physical embodiments of this copyright is found in a feature of the copyright law known as the "first sale doctrine."[27] Under the first sale doctrine, once a copyright owner distributes a particular physical copy of a work, the exclusive right to distribute *that particular physical copy* is exhausted—that is, the owner of the physical copy can resell or (as is the case with public libraries) lend that copy to others as he or she sees fit. But the first sale doctrine does not affect the other exclusive rights of a copyright owner, so ownership of a particular copy of a work does not permit, for example, the public performance of that work or the creation of additional copies. Because the online transmission of a work in digital format necessarily entails the creation of additional copies, the first sale doctrine does not permit further digital transmissions of that work.[28]

For more than three decades, federal officials in the U.S. Copyright Office and in other agencies have repeatedly considered whether to broaden the first sale doctrine to permit further digital

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[25] *See* 17 U.S.C. § 106.

[26] *See* 17 U.S.C. § 202 ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.").

[27] *See* 17 U.S.C. § 109.

[28] Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 656 (2d Cir. 2018); Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 92 (1995) ("the first sale doctrine does not allow the transmission of a copy of a work (through a computer network, for instance), because, under current technology the transmitter retains the original copy of the work while the recipient of the transmission obtains a reproduction of the original copy (i.e., a new copy), rather than the copy owned by the transmitter. The language of the Copyright Act, the legislative history and case law make clear that the doctrine is applicable only to those situations where the owner of a particular copy disposes of physical possession of that particular copy."). First sale also only applies to copies that are sold, not licensed.

dissemination without the authorization of the copyright owner.[29] They have consistently declined to do so. They have recognized that applying the first sale doctrine in the digital sphere would severely undermine electronic commerce for copyrighted works given critical differences between physical and digital works, such as the ease of retransmitting perpetually perfect digital copies as compared to the resale of the veritable "used book" that degrades over time.

These and other critical differences between physical and digital copies necessitate different approaches by copyright owners in commercializing their copyrighted works in the marketplace. Generally, copyright owners rely on the *sale* of physical copies, while access to works online is accomplished through *licensing*. A sales model works in the physical world because of the nature of physical objects. For example, the inherent difficulties involved in accessing and copying tangible copies of books, such as having to take trips to bookstores or the library, which may or may not have what you are looking for at the time, and the time and effort required to duplicate a physical copy, renders resale and lending less disruptive to the mainstream market for the sale of new books. There is also the well-known distinction between new and used books, as captured perfectly between a clean, bright Barnes & Noble and the musty, cramped, and sometimes dimly lit local used bookstore.

Licensing has emerged as the primary business model to distribute works in digital format in part because there is no comparable "friction" in the online marketplace for books—e-books can be accessed instantly anywhere from any connected computer or mobile device, and easily shared. There is also no concept of "used" because each digital copy is perfectly identical to the original digital work. At the same time, licensing offers a host of new options and benefits for consumers that are not possible with the sale of physical copies. Digital license terms for copyrighted works provide different permissions (at different price points) than physical sales given these fundamental differences. For example, given the virtually effortless ability to copy digital works and the loss of revenue when this occurs, copyright owners generally charge more for a license to a digital work than for the sale of a single physical book. A license that will lead to multiple uses of a digital work, such as a library license, will cost more than a license for a single, personal use of the same digital work. These and other differences in the business models in commercializing copyrighted works to consumers is an inherent feature of the modern copyright system in which copyright owners seek remuneration for their investments in creating works and in distributing these works to the public. For this reason, such differences in licenses and business models have been ubiquitous across the creative industries for several decades.

Yet, advocates for the state bills imposing compulsory licensing on library e-books argue that it is unreasonable for library e-lending licenses to cost more than consumer licenses. This argument is flawed because they metaphorically compare apples to oranges and fail to account for critical differences in these respective licenses. Consumer licenses are generally for personal use only. Library e-lending licenses, on the other hand, permit access by dozens of patrons, and more convenient access to a copyright work that will not degrade over time in the same way that a physical copy will, that is repeatedly loaned out to patrons. Given the significant difference in the number of

[29] Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 95 (1995); U.S. Copyright Office, DMCA Section 104 Report 96–101 (2001). Dep't of Commerce Internet Policy Task Force, White Paper on Remixes, First Sale, and Statutory Damages 58 (2016).

people that will be accessing the copyrighted work and the long-term viability of digital works as compared to physical works, it is not at all surprising to see different prices. This is not evidence of unfair or discriminatory practices or price-gouging, and merely identifying the fact of differences in prices does not prove that it is.

In fact, if you calculate the costs of these licenses on a per-user basis, libraries pay *far less* than consumers do when they purchase a license of an e-book for personal use. For example, one common complaint voiced by the bills' supporters is that while consumers often pay around $15 to license an e-book for personal reading, libraries must pay more than triple that amount, often $50, for a two-year license allowing unlimited electronic checkouts. At first blush, it may seem that $50 is outrageous compared to $15, which is why advocates for the bills highlight this difference, but this superficial comparison of prices ignores crucial facts. If the average patron checks out an e-book for two weeks, then the library can check the e-book out to 52 different readers during the two-year license. This results in a cost per reader of less than $1. This is far below the $15 cost per reader under the consumer license.

By way of analogy, imagine a streaming video service that wants to license a film from a movie studio to make the film available to its thousands of subscribers. It would be economically absurd for a lawyer for the streaming service to say to the studio, "I can download your film from Amazon for $20 for my own personal viewing, and therefore it's reasonable for the streaming service to pay you the same $20 for a license to stream the film to its thousands of subscribers." These are two completely different types of markets with significant differences in the use of the copyrighted work. Thus, it is entirely reasonable that a license to distribute a copyrighted work to a large audience, such as a streaming service's license of a film or a library e-lending license, will cost more than a single consumer license for personal access.

III. The Arguments for State Mandates for E-Book Licenses are Economically Unsupported

Aside from constitutional preemption and the failure of advocates for the bills to prove that library e-book licenses impose exorbitant prices on libraries, advocates raise a third and final argument. They argue that digital licenses are actively harming libraries by straining their budgets and thus unfairly limiting their ability to provide lending services to their patrons by being able to stock their digital shelves, so to speak, with the e-books that people want to read.

For example, in addressing licensing pricing and terms in a submission to the House Judiciary Antitrust Subcommittee, the American Library Association said, "unfair behavior by digital market actors – and the outdated public policies that have enabled them – is doing concrete harm to libraries as consumers in digital markets." In moving to dismiss the litigation challenging Maryland's e-lending statute, attorneys for the state of Maryland said, "The historical balance between publishers' commercial motives and public libraries' role in providing fair access to literature and information to benefit all members of the public has been lost." And Library Futures, a newly-formed astroturf advocacy group that has been heavily involved in pushing these bills, allege e-book prices are "unsustainably high" and "out-of-control."[30]

[30] Library Futures eBooks Policy Paper: Mitigating the Library eBook Conundrum Through Legislative Action in the States (June 2022), https://www.libraryfutures.net/library-futures-ebooks-policy-paper.

Similar to the broadfaced allegations about high prices, this argument that library e-book licenses are precipitating a broader crisis in e-book access for libraries does not withstand scrutiny. Readers have never had access to more e-books through libraries than they do today—the leading library e-book aggregator Overdrive has reported that library users borrowed over half a billion digital materials in 2021[31] and even more in 2022.[32] Statistics collected by the Institute of Museum and Library Services, the federal agency charged with supporting public libraries, tell a similar story. They reveal that as a percentage of total library budgets, the amount of money spent by libraries on all collection materials—physical books, e-books, DVDs, electronic databases, and other materials—has been steadily declining for decades. In 1992, public libraries spent 15.2% of their total expenditures on collections.[33] In 2020, that number had dropped to less than 11%.[34] By itself, this number seems concerning given the primary purpose of public libraries in providing access to materials. But the decline is even more incredible given that it continued unabated through the digital revolution. Public libraries, in other words, have been expected to build new digital collections on top of their existing physical collections without any additional money.

Within these severe budgetary constraints, though, libraries have been able to *grow* their digital collections. The total number of e-books available in U.S. libraries more than doubled between 2016 and 2020, from 392.5 million to 804 million. This growth was made possible in part because the cost of electronic collection materials continues to fall every year—Overdrive reported in 2021 that "libraries achieved all-time records for circulation while lowering the average cost-per-title borrowed."[35] These are not the trends in collections or costs that would exist in the presence of price-gouging or unfair trade practices.

IV. Conclusion

Ultimately, the state bills imposing compulsory licensing on library e-books are based on arguments that do not withstand legal, commercial, or economic scrutiny. Instead, advocates for these state bills simply recast customary licensing practices and ordinary business decisions that companies in the creative industries all engage in as inherently unfair and discriminatory practices. They then abruptly conclude that library e-book lending licenses must be regulated by the government with unprecedented, intrusive price controls and mandates of other license terms. But merely asserting

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[31] Public Libraries and Schools Surpass Half a Billion Digital Book Loans in 2021, (Jan. 5, 2022), Overdrive, https://company.overdrive.com/2022/01/05/public-libraries-and-schools-surpass-half-a-billion-digital-book-loans-in-2021/.

[32] Overdrive Releases 2022 Digital Book Circulation Data and Highlights (Jan. 6, 2022), Overdrive, https://company.overdrive.com/2023/01/06/overdrive-releases-2022-digital-book-circulation-data-and-highlights/.

[33] Public Libraries in the United States: 1992, National Center for Education Statistics (Aug. 1994), https://www.imls.gov/sites/default/files/publications/documents/pls1992.pdf.

[34] Public Libraries Survey, Institute of Museum and Library Services, https://www.imls.gov/research-evaluation/data-collection/public-libraries-survey. Although overall budgets for libraries grew during that time period, nearly all that growth went toward additional spending on administration and staffing. See http://concurrentmedia.com/2022/04/14/how-to-support-your-local-library/. When adjusted for inflation, collection expenditures have essentially been flat for decades. https://www.amacad.org/humanities-indicators/public-life/public-library-revenue-expenditures-and-funding-sources.

[35] Public Libraries and Schools Surpass Half a Billion Digital Book Loans in 2021, (Jan. 5, 2022), Overdrive, https://company.overdrive.com/2022/01/05/public-libraries-and-schools-surpass-half-a-billion-digital-book-loans-in-2021/.

that there is a problem, and using heavy-handed rhetoric that demonizes copyright owners, does not in fact prove there is a market failure that requires government intervention.

It is revealing that, when the arguments for compulsory licensing of library e-books were tested in court with the only bill that was enacted into law (in Maryland), the federal judge quickly found these arguments to be severely wanting in both factual and legal support. Aside from the obvious constitutional difficulty with preemption by federal copyright law, these state bills are simply bad policy. They represent a drastic and unwarranted intrusion into the marketplace by state regulators. This would ultimately harm authors, publishers, and copyright owners of all types, diminishing their ability to create new works and to commercialize these works to the audiences they serve. At the end of the day, these state bills would thus harm the very people they claim to be trying to help.