

States Cannot Force Publishers to License Public Libraries

Ass'n of Am. Publishers v. Frosh, No. DLB-21-3133 (D. Md. Jun. 13, 2022)

By: Jason Keener & Alexa Tipton | June 27, 2022

On June 13th, the District Court of Maryland protected publishers' rights to control the distribution of their literary works when it declared unconstitutional a Maryland statute that requires publishers to license their electronic literary products, such as e-books and audiobooks, to Maryland public libraries.

The statute states in part that, "a publisher who offers to license an electronic literary product to the public shall offer to license the electronic literary product to public libraries in the State on reasonable terms that would enable public libraries to provide library users with access to the electronic literary product." Md. Code Ann., Educ. § 23-702(a).

The Association of American Publishers (AAP) alleged that the Maryland statute is unconstitutional under the Supremacy Clause because it is expressly preempted by and conflicts with the Copyright Act, violates the Dormant Commerce Clause, and violates the Due Process Clauses of the Fifth and Fourteenth Amendments. AAP sought a declaration that the law is invalid and preempted by the Copyright Act, as well as a preliminary and permanent injunction enjoining the State from enforcing it. In February, the Court preliminarily enjoined the enforcement of the statute as it forced publishers to forgo their exclusive rights under the Copyright Act "to decide when, to whom, and on what terms to distribute their copyrighted works." In making this determination, the Court distinguished this law from an Ohio statute that was found not to be preempted by the Copyright Act because it regulated the distribution of literary works *after* the publishers initially chose to distribute. *Allied Artists Picture Corporation v. Rhodes*, 679 F.2d 656 (6th Cir. 1982). The Maryland statute forces publishers to license to libraries, whether they want to or not. Agreeing with AAP, the Court declared the law likely unconstitutional and granted a preliminary injunction, finding the statute is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In March, the Court issued a Show Cause Order asking the State why the preliminary injunction should not be made permanent. The State argued that it has not and will not enforce the Maryland statute and that the declaratory judgment is sufficient to provide AAP with its sought-after relief. Despite AAP satisfying the requirements for a permanent injunction, the Court determined that declaratory relief precludes the need for a permanent injunction. To bolster its decision, the Court concluded that the State has abandoned the challenged law, and therefore, the Court may reasonably assume that the State will abide by the declaration that the statute is unconstitutional. As the Court entered judgment on Conflict Preemption, it dismissed as moot the claim for Express Preemption, and the parties agreed to dismiss the Dormant Commerce Clause and Due Process Clause claims.

Although this statute was struck down because it required publishers to distribute to libraries, the question remains whether it would have been upheld if the statute merely controlled the terms of licensing after publishers initially chose to license to libraries.