

# ALA American Library Association

## Testimony of Alan Inouye in Support of S 0498 May 29, 2023

I am the Interim Associate Executive Director for Public Policy and Advocacy for the American Library Association (ALA). The ALA is the largest library association in the world and represents the 123,000 libraries in the United States. On behalf ALA, I urge the Rhode Island Legislature to adopt S 0498, which would require publishers to license digital books to libraries and schools in Rhode Island on reasonable terms.

### **The Need for Legislation**

The legislation is intended to enable libraries to continue in the digital age to fulfill their mission of providing equitable access to information to all. Libraries increasingly are providing Rhode Island residents with access to digital books, such as e-books and digital audio books. Digital books are particularly useful for older Americans, people with disabilities, and others who may find it more accessible and manageable than paper books. Furthermore, during the height of the pandemic, when the physical premises of most libraries in the State were closed, libraries were able to continue lending digital books, thereby allowing Rhode Island residents to continue their access to books.

Libraries can purchase physical books from any outlet at the same price as any other customer, and then lend them to users. In contrast, the lending of digital books requires their licensing from the publishers' partners who provide the technical infrastructure for the lending by libraries. As the digital book licensing market has evolved, libraries have encountered four distinct problems.

**First**, some publishers have released some titles only as digital books, and they have refused to license these titles to libraries—at any price. Because these titles are not available in physical copies, libraries have simply not been able to provide these titles to their users in any form. This discriminates against Rhode Island residents who cannot afford to purchase the titles themselves. For several years, Amazon Publishing has followed this practice of publishing certain titles only as e-books but refusing to license them to libraries. Amazon recently has agreed to license some titles to the Digital Public Library of America, but it could revert to its previous practice at any time. Furthermore, most audio-books released by Audible, an Amazon subsidiary, are not available to be licensed to libraries. Audio-books have grown in popularity with the public, and Audible is a popular source.

**Second**, some publishers have imposed embargoes on the licensing of e-books to libraries. For example, a publisher might allow a library to purchase only one license (copy) for a title for the first eight weeks the title is on the market. Such embargoes undermine the democratic and

educational function of library systems. Many library patrons are lower-income or face barriers to other means of information access. These new licensing restrictions mean patrons will be forced to wait much longer to borrow books, as only one copy is made available per library system. Additionally, these restrictions will financially burden library systems that will have to purchase more copies to keep up with demand following the two-month embargo. During the pandemic, publishers such as Macmillan Publishers suspended their embargoes, but nothing prevents them from resuming this practice.

**Third**, the largest publishers impose a significantly higher price on library digital book licenses than on consumer licenses: for example, for best seller e-books, the multiple is often between three to five times as much. At the same time, the library license often lasts only for two years or 26 circulations. Either the higher price or the limited duration might be justified as replicating the physical market, where a book often becomes unusable after several dozen circulations. However, forcing libraries to pay a higher price for a license of limited duration is excessive, enabled by the publishers' market power over digital book licensing—a market power that does not exist with physical books.

**Fourth**, the e-book licenses typically prohibit libraries from making the copies permitted under exceptions in the Copyright Act, for purposes such as preservation or accessibility for people with print disabilities. In effect, the publishers use license terms to override rights given by the U.S. Congress—and the First Amendment—to libraries.

The legislation addresses these four problems. It requires digital books to be licensed to Rhode Island libraries if they are licensed to Rhode Island consumers; it prohibits the embargoes of digital book licenses to libraries; it requires that digital books be licensed to libraries on reasonable terms; and it renders unenforceable license terms that limit library fair use rights. The legislation will simply require publishers to behave more fairly, as they did in the past and continue to do for print books. This legislation will help restore the equilibrium that digital technology has disrupted.

### **AAP to Challenge to the Maryland e-Book Legislation**

Legislation similar in several respects to S 0498 was enacted in Maryland in June 2021. The Association of American Publishers (AAP) sued the Attorney General of Maryland in December 2021, seeking to block enforcement of the Maryland digital book law on preemption grounds. In February 2022, the federal district court in Maryland in *AAP v. Frosh* found that this legislation was unconstitutional because it conflicted with the federal Copyright Act.

Conflict preemption is a complicated matter, and the *Frosh* court acknowledged that there was little precedent directly on point. We respectfully disagree with the *Frosh* decision. *Frosh* held that the Maryland digital book law conflicted with the objectives of the Copyright Act, but never identified those objectives or responded to the Maryland Attorney General's argument that the Maryland digital book law furthered those objectives by increasing public access to information. Moreover, *Frosh* failed to recognize that libraries, which predate the copyright law, have always had a privileged status under the copyright law.

The *Frosh* decision is not binding on federal courts in Rhode Island. Thus, with any challenge to an enacted version of S 0498 in federal court in Rhode Island, the court may disagree with *Frosh* and find the elements of S 0498 similar to the Maryland law to be constitutional.

Furthermore, S 0498 is different from the Maryland law in a critical respect: section 6-59-4(b) declares unenforceable any license term that limits the rights of a school or library under the Copyright Act. The Maryland law had no counterpart to this “fair use preservation” provision. This provision unquestionably does not conflict with the Copyright Act because it explicitly seeks to preserve the rights established by the Copyright Act. Because S 0498 contains a severability clause, section 6-59-4(c), the fair use preservation provision would survive even if a court found the parts of the statute addressing e-book pricing and embargos to be preempted.

Accordingly, ALA supports enactment of S 0498. We would be pleased to provide further information as needed.

Respectfully submitted,



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