Written Only

JOSH GREEN, M.D.
GOVERNOR

KEITH T. HAYASHI
SUPERINTENDENT

STATE OF HAWAI`I
DEPARTMENT OF EDUCATION
KA ʻOIHANA HOʻONAʻAUAO
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HONOLULU, HAWAI`I 96804

Date: 04/05/2023
Time: 09:45 AM
Location: CR 016 & Videoconference
Committee: Senate Judiciary

Department: Education

Person Testifying: Keith T. Hayashi, Superintendent of Education

Title of Bill: HB 1412, HD1, SD1 RELATING TO LIBRARIES.

Purpose of Bill: Prohibits any contract or license agreement between a publisher and library in the State from precluding, limiting, or otherwise restricting the library from performing customary operational and lending functions; restricting the library from disclosing any terms of its license agreements to other libraries; and requiring, coercing, or enabling a library to violate rules regarding confidentially of a patron's library records. Deems contracts that contain prohibited provisions an unfair or deceptive act or practice and void and unenforceable. Prohibits libraries from copying or printing purchased electronic literary material. Exempts existing contracts that provide libraries with electronic literary products from vendors and aggregators. Effective 6/30/3000. (SD1)

Department's Position:
The Hawaii State Department of Education (Department) supports HB 1412, HD1, SD1.

As the digital resource landscape is rapidly changing and new licensing models are being developed and offered by publishers, the Department would like to ensure that school libraries continue to have the ability to enter into licensing agreements with aggregators and publishers provided the pricing and access are considered reasonable.

Thank you for the opportunity to provide testimony in support of this measure.

WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023

ON THE FOLLOWING MEASURE:
H.B. NO. 1412, H.D. 1, S.D. 1, RELATING TO LIBRARIES.

BEFORE THE:
SENATE COMMITTEE ON JUDICIARY

DATE: Wednesday, April 5, 2023 **TIME:** 9:45 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Benjamin M. Creps,
Deputy Attorney General, at (808) 586-1180)

Chair Rhodes and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments and two suggested amendments.

Opposition testimony asserts that this bill is entirely preempted by federal copyright law, relying on Ass'n of Am. Publishers, Inc. v. Frosh, 586 F. Supp. 3d 379 (D. Md. 2022). Frosh held that a Maryland law—which forced publishers to offer licenses to public libraries on certain terms if the publisher also offered the work to the public—was preempted because it conflicted with the right of distribution provided under 17 U.S.C. § 106(3). 17 U.S.C. § 106(3) provides copyright holders with certain "exclusive rights," including the right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." The Frosh court held that the right to distribute includes the right to not distribute copyrighted work and that the preempted law amounted to a compulsory license.

This bill, by contrast, applies only to publishers who choose to do business with libraries in Hawaii. It does not force publishers to do business with libraries in Hawaii or otherwise compel the grant of licenses, as in Frosh. This is an important distinction because Frosh and related case law hold that state laws may regulate the *manner* of distribution, but not the *election* to distribute. *See, e.g.* CDK Global LLC v. Brnovich, 16 F.4th 1266, 1275 (9th Cir. 2021) (states "retain the power to regulate market practices

even when those practices relate to copyrighted material"); Allied Artists Picture Corp. v. Rhodes, 679 F.2d 656, 662–63 (6th Cir. 1982) (state regulation affecting "distribution procedures and, indirectly, monetary returns from copyright property," was valid, both "explicitly and implicitly by the terms of the Copyright Act").

This bill on its face appears to regulate the manner of distribution in large part because it does not compel the grant of a license. It prohibits certain terms in contracts between publishers and libraries in the State and makes the offer of such terms an unfair and deceptive trade practice. Specifically, this bill prohibits any term that: (1) restricts the library from performing customary operational and lending functions; (2) restricts the library from disclosing any terms of its license agreements to other libraries; and (3) requires a library to violate rules regarding confidentially of a patron's library records. Analogous state regulations were upheld in Allied Artists, which upheld a state law that regulated certain license terms between film distributors and theaters.

If challenged, the question of preemption here will ultimately be a question of fact: whether prohibiting certain terms of a license agreement (e.g., the number of permissible loans, or ability of the licensee to disclose the license terms to third-parties) regulates (1) the election to distribute (not permissible) or (2) the manner of distribution or market practices (permissible).

Because the restrictions imposed by this bill are novel and largely unaddressed by courts, in an abundance of caution and to best insulate the bill from challenge, the Department offers the following amendments to section -2(a)(1)(C), at page 3, lines 18-19, and section -2(a)(2)(F), at page 5, lines 5-7:

> **§ -2 Contracts between publishers and libraries.** (a) No contract or license agreement entered into between any publisher and any library in the State shall:
>
> (1) Preclude, limit, or restrict the library from performing customary operational functions, including:
>
> . . . .
>
> (C) A library's right to make non-public preservation copies of electronic literary materials in accordance with federal law;
>
> . . . .
>
> (2) Preclude, limit, or restrict the library from performing customary lending functions, including any provision that:

. . . .

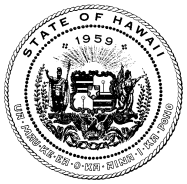
(F) Restricts the total number of times a library may loan any licensed electronic literary materials over the course of any license agreement, [~~or restricts the duration of any license agreement~~], and, if the publisher offers a license agreement to libraries for perpetual public usewithout such restrictions, it shall be at a price that is considered reasonable and equitable as agreed to by both parties;

The purpose of the amendment to section -2(a)(1)(C) is to ensure consistency with 17 U.S.C. section 108, which provides libraries certain rights to reproduce copyrighted works. The purpose of the amendment to section -2(a)(2)(F) is to clarify that this bill does not restrict publisher's right to choose whether or not to distribute. As noted, state laws may not compel a copyright holder to grant a license against its will.

Thank you for the opportunity to present this testimony.

JOSH B. GREEN, M.D.
GOVERNOR

STACEY A. ALDRICH
STATE LIBRARIAN



STATE OF HAWAIʻI
HAWAIʻI STATE PUBLIC LIBRARY SYSTEM
ʻOIHANA HALE WAIHONA PUKE AUPUNI O KA MOKUʻĀINA O HAWAIʻI
OFFICE OF THE STATE LIBRARIAN
44 MERCHANT STREET
HONOLULU, HAWAII 96813

SENATE COMMITTEE ON JUDICIARY
Wednesday, April 5, 2023
9:45 a.m.
Conference Room 016

By Stacey A. Aldrich
State Librarian

H.B. 1412 HD1 SD1 RELATING TO LIBRARIES

To: Sen. Karl Rhoads, Chair
Sen. Mike Gabbard, Vice Chair
Members of the Senate Committee on Judiciary

The Hawaii State Public Library System (HSPLS) **supports H.B. 1412 HD1 SD1,** which prohibits any contractor license agreement between a publisher and library in the State from precluding, limiting, or otherwise restricting customary operational and lending functions.

Digital books (i.e., e-books and digital audiobooks) are a vital part of library collections in the 21st Century. In fact, Hawaii's public libraries rely on digital books to create equity of access to titles when it may not be possible to place a physical copy in every library. In FY2022, HSPLS circulated 1,181,418 digital books.

This bill is important because it outlines expectations for future State library contracts, and it is necessary because publishers have created unreasonable pricing and access models that are unsustainable for ensuring that the public has access to digital books through public libraries.

Publishers charge libraries higher fees for e-books, presumably because they want more people to purchase them rather than check them out from the library. This dynamic exists with physical books, too, but for centuries, libraries have been valued precisely because they provide access to free information and resources creating equal opportunities to learn and grow. In return, public libraries introduce and promote authors and titles, and readers may purchase a book after checking it out of the library or becoming impatient when there's a long wait list for the latest bestseller.

In the past decade publishers have moved away from public libraries being allowed to own e-books and towards a licensing or leasing model. A small number of titles are available for perpetual access, but the vast majority of e-books are not."

For example, *No. 1 Ladies' Detective Agency* by Alexander McCall Smith, which is 20 years old, illustrates how costs for e-books have grown over time and perpetual access has vanished:

TITLE: *No. 1 Ladies' Detective Agency* – Alexander McCall Smith

YEAR	COST	ACCESS
2010	$14	Perpetual Access
2013	$44.85	Perpetual Access
2018	$44.85	2-year license (after 2 years libraries have to buy again)
2023	$27.50 or $55.00	12 months license 2-year license

In addition to high licensing costs, there are limits to the number of times a digital book title may be borrowed. For example, if HSPLS obtains a copy of an e-book for $65, once the check-out limit is met, we must pay another $65 to continue to provide access to that title. If a single title is popular and patrons are waiting to read it, HSPLS may need to renew that title several times. Renewing access three times at $65 is $195 for just one title. Continuing to pay over and over for access is not a sustainable model for our libraries. In the future, we may be able to license only a small selection of mainstream works, limiting the opportunities for our readers.

Based on the trends, libraries expect the big five publishers to move to a pay-per-use model in which libraries would have to pay each time a title was checked out. This model is unsustainable for public libraries to be able to manage and pay for titles on an ongoing basis forever. No public library has an unending supply of collection funding to keep ensuring access to a diverse collection to support the community.

Libraries are recognized as vital community resources. However, current licensing models for digital books are increasingly unsustainable for public libraries and threaten their ability to provide equitable access and serve their communities.

Thank you for the opportunity to provide testimony on this measure.

House of Representatives
State of Hawaii, 32nd Legislature 2023

April 3, 2023

Testimony in Opposition to HB 1412

The Authors Guild respectfully submits the following testimony in opposition to bill HB 1412. With over 13,000 members, the Authors Guild is the oldest and largest professional association of published writers of all genres including historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. Since its founding in 1912, the Guild has worked to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and fair contracts.

We oppose HB 1412 because it prejudices the exclusive rights guaranteed by federal copyright law to our members and all authors. It goes without saying that the Authors Guild and its member authors believe that libraries should have all the resources they need to distribute ebooks to patrons, but we strongly object to a legislative approach that interferes with authors' and publishers' fundamental rights under constitutionally-based copyright law to license their works on terms they chose. We want to emphasize that in December 2021 a similar bill in New York was vetoed by the governor, and a federal court in Maryland struck down a law that required publishers to license ebooks and other digital products to libraries as being pre-empted by the Copyright Act.

Copyright incentivizes authors to write books and publishers to publish them by creating economic value for books; without it, few books get written and published. Recognizing the importance of creating an economy for books throughout the nation, the Founders placed copyright law in the hands of Congress.[1] Section 301 of the current copyright law – the 1976 Copyright Act – is unambiguous on the principle of federal supremacy, stating 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 title."[2] Upholding the principle of federal preemption of copyright, and, in particular, the copyright owner's exclusive rights, courts across the federal

[1] Art. 1, Sec. 8, cl. 8
[2] 17 U.S.C. 103

circuits have struck down state laws that interfere with the copyright owner's right to control his or her work.[3]

HB 1412 encroaches upon Congress' exclusive authority under the U.S. Constitution to enact legislation within the scope of copyright, and is therefore pre-empted by the Copyright Act. By prohibiting and placing restrictions on copyright licensing terms, HB 1412 attempts to amend federal copyright law, and interferes with an author's or publisher's right to decide to whom, when and on what terms to license their works. As Authors Guild members rely on enforceable copyrights to protect their work and to maintain a robust publishing ecosystem that provides them with the financial ability to be able to continue to write for the public good, the Guild has a strong interest in protecting the exclusive rights provided for under the U.S. Constitution and federal copyright law.

We oppose HB 1412 for the reasons discussed above and respectfully request that it be withdrawn in light of the broader legal context, disruptions to the copyright system, and the possible serious repercussions for hard-working authors, and especially those who publish independently.

Respectfully submitted,

Mary Rasenberger
CEO, The Authors Guild

[3] See, e.g., Close v. Sotheby's, Inc., 894 F.3d 1061 (9th Cir. 2018) (finding requirement for re-sellers 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)); Authors 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"); Rodrigue v. Rodrigue, 218 F.3d 432, 436-42 (5th Cir. 2000) (finding that Louisiana's community property law could not interfere with the copyright author's right to control his or her work).

BILL: HB 1412, Relating to Libraries
COMMITTEE: Senate Committee on Judiciary
HEARING DATE: April 5, 2023
CONTACT: Keith Kupferschmid, keithk@copyrightalliance.org
POSITION: Oppose

The Copyright Alliance, on behalf of our membership, submits this statement of opposition for the record concerning the hearing on HB 1412 before the Hawaii Senate Committee on Judiciary. We urge the Committee to oppose this bill that attempts to legislate in areas that fall within the scope of federal copyright law and, therefore, are under the exclusive jurisdiction of Congress, and would harm authors, publishers, and other creators.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The Copyright Alliance represents the copyright interests of over 15,000 organizations in the United States, across the spectrum of copyright disciplines, and over 2 million individual creators, including photographers, authors, songwriters, coders, bloggers, artists and many more individual creators and small businesses that rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

The state of Hawaii is renowned for its creativity. Unsurprisingly, Hawaii's representatives in Congress have been long time supporters of copyright. In fact, Sen. Mazie Hirono was one of the original co-sponsors of the CASE Act, which created the copyright small claims court, and is co-chair of the Congressional Creative Rights Caucus (CRC).

For years, various organizations have unsuccessfully lobbied Congress to weaken federal copyright protections. Because Congress has not agreed that copyright should be weakened, these groups have now decided to circumvent Congress' authority by lobbying state legislatures to enact the very same legislation that Congress would not. This has resulted in a recent influx of state legislation like HB 1412 that would regulate licensing terms between publishers and libraries—imposing government-mandated terms and price caps and eviscerating the national, uniform copyright framework.

Since copyright is under the exclusive jurisdiction of Congress, legislation like this is inappropriate at the state level and runs the risk of being struck down. In fact, similar legislation has been struck down or vetoed in three other states already—Maryland, New York and Virginia. Earlier this year, legislation in Virginia (SB1528) nearly identical to HB 1412 was

rejected unanimously in committee. In December 2021, New York Governor Kathy Hochul vetoed legislation which similarly sought to regulate licensing terms between book publishers and libraries (A5837B), explaining that "[b]ecause the provisions of this bill are preempted by federal copyright law, I cannot support this bill;"[1] and in Maryland, after its bill was signed into law, the U.S. District Court for the District of Maryland held the bill to be unconstitutional. We believe these bills act as a cautionary tale for states like Hawaii that are considering similar legislation.

The individual creators and organizations that we represent—including the many creators who hail from the great state of Hawaii—rely on a strong federal copyright system to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy. The strength of our copyright system relies in large part on the uniformity of copyright laws across the United States, guaranteed by both the Supremacy Clause of the U.S. Constitution, and by the Copyright Act. HB 1412 undermines that important legal system and threatens the ability of authors and publishers to create and disseminate books to the public.

We respectfully ask that the Senate Committee on Judiciary reject HB 1412. Please let us know if we can provide additional information or answer any questions regarding our opposition to this bill.

Keith Kupferschmid
CEO
Copyright Alliance

[1] Letter vetoing New York State Assembly Bills Nos. 5565 and 5837-B from Governor Kathy Hochul, State of N.Y., to the N.Y. State Assembly (Dec. 29, 2021), available at https://authorsguild.org/app/uploads/2021/12/GovernorHochulVetoMessage.pdf.

MOTION PICTURE ASSOCIATION

TESTIMONY OF BEN SHEFFNER
SENIOR VICE PRESIDENT & ASSOCIATE GENERAL COUNSEL,
LAW & POLICY
IN OPPOSITION TO
H.B. 1412 HD1 SD1 (RELATING TO LIBRARIES)
HAWAIʻI SENATE
COMMITTEE ON JUDICIARY
APRIL 5, 2023

Chair Rhoads, Vice Chair Gabbard, and members of the Committee on Judiciary:

Thank you for the opportunity to submit testimony in opposition to H.B. 1412 HD1 SD1 (the "Bill"), which would unconstitutionally diminish rights under federal copyright law, the foundation of Hawai'i's and the nation's creative economy.

I am an attorney with the Motion Picture Association, Inc. ("MPA"), the trade association for the six major U.S. motion picture and television producers and distributors: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

As you are likely aware, Hawai'i is a very important state for our industry. Thanks in large measure to the Motion Picture, Digital Media, and Film Production Income Tax Credit, not to mention the state's stunning scenery, Hawai'i has become a major center for film and television production. Our industry is directly responsible for more than 3,000 jobs in Hawai'i, representing over $250 million in annual wages, and is responsible for supporting a total of approximately 7,830 jobs among vendors and other businesses that provide services to in-state

productions.[1] Films shot in Hawai‘i in recent years include *Jungle Cruise*, *Jumanji: The Next Level*, *Jurassic World: Fallen Kingdom*, and *Kong: Skull Island*; television series include *NCIS: Hawai‘i*, *Magnum PI*, *The White Lotus*, *Temptation Island*, *Doogie Kamealoha, M.D.*, and of course *Hawai‘i Five-0*.

Copyright is the foundation on which the entire motion picture and television industry is built. No recent invention, U.S. copyright law was enshrined in the original 1789 Constitution, which empowered Congress "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." U.S. Const., Art. I, § 8, Cl. 8. Congress swiftly used that authority to enact the Copyright Act of 1790, which it termed "An Act for the encouragement of learning."[2] More than two centuries later, copyright law continues to do just that: encourage authors, artists, filmmakers, composers, musicians, photographers, software developers, and others to invest their time and financial resources in their craft, for the benefit not just of these creators, but for society as a whole. As the Supreme Court has explained, "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

Importantly, copyright is a creature of federal—not state—law. The Copyright Act of 1976, which remains the law today, contains an express preemption provision, which makes crystal clear that copyright is an exclusively federal matter. *See* 17 U.S.C. § 301. In addition to the Copyright Act's express preemption provision, the doctrine of conflict preemption prevents states from "burden[ing] enforcement and thus threaten[ing] to marginalize copyright itself." *Am.*

[1] *See* https://www.motionpictures.org/what-we-do/driving-economic-growth/
[2] https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/1/STATUTE-1-Pg124.pdf

Soc. of Composers, Authors, & Publishers by Bergman v. Pataki, 930 F. Supp. 873, 878 (S.D.N.Y. 1996).

Regrettably, H.B. 1412 HD1 SD1 would undermine rights of authors and publishers under the federal Copyright Act. By seeking to regulate the terms by which publishers (i.e., owners of rights under § 106 of the Copyright Act) may license those federally protected rights to libraries, the Bill would interfere with publishers' right "to control how, when and through which channels consumers can view their copyrighted works." *Disney Enterprises, Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 975 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017). And this interference would diminish the ability of publishers to recoup the large investments they must make to bring books to market, and to finance the creation and distribution of future books, harming the market for books as a whole, and ultimately depriving the public of the ability to enjoy and learn from books that never came into being because of the weakening of copyright law that the Bill would effect.

Were Hawai'i to enact this Bill, it would likely be struck down by a court under the preemption principles described above. That is exactly what happened when Maryland enacted a similar statute in 2021. *See Ass'n of Am. Publishers, Inc. v. Frosh*, 586 F. Supp. 3d 379, 393 (D. Md. 2022) (holding that the Maryland law "stands as an obstacle to the accomplishment of the objectives of the Copyright Act and … is likely preempted under the Supremacy Clause" of the U.S. Constitution). And it is why New York Gov. Kathy Hochul vetoed a similar bill passed by that state's legislature in 2021, stating in her veto message that "Because the provisions of this bill are preempted by federal copyright law, I cannot support this bill." Andrew Albanese, *Hochul Vetoes New York's Library E-book Bill*, Publishers Weekly, Dec. 30, 2021.[3] And the

[3] Available at https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html.

U.S. Copyright Office, the expert agency that administers the Copyright Act, is in accord. As Register of Copyrights Shira Perlmutter explained in 2021 letter analyzing Maryland's and other states' proposed e-book legislation, "a court considering the state legislation at issue would likely find it preempted under a conflict preemption analysis."[4]

While this particular bill is aimed at literary materials, not the movies and television programs produced and distributed by the MPA's members, the copyright and preemption principles raised by this legislation are of vital importance to our industry. Indeed, in striking down the Maryland statute that is similar to this bill, the court relied heavily on *Orson, Inc. v. Miramax Film Corporation*, 189 F.3d 377 (3d Cir. 1999) (en banc), which involved a Pennsylvania statute regulating the distribution films in movie theaters. In that case, the U.S. Court of Appeals for the Third Circuit held that certain portions of the Pennsylvania law were preempted by the Copyright Act because they "would impose on copyright holders, contrary to their exclusive rights under § 106 [of the Copyright Act], an obligation to distribute and make available other copies of the work following their initial decision to publish and distribute copies of the copyrighted item." *Id*. at 386.

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For these reasons, MPA stands with book publishers, authors, and other creators in firmly opposing H.B. 1412 HD1 SD1, and respectfully urges members of the Judiciary Committee to vote no on advancing this legislation. I am available to answer any questions you may have at Ben_Sheffner@motionpictures.org or (310) 713-8473. You may also contact the MPA's advocate in Hawai'i Bruce Coppa at brucopp@gmail.com or (808) 223-7971.

[4] Letter from Register of Copyrights Shira Perlmutter to Sen. Thom Tillis (Aug. 30, 2021), at 9, available at https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4768-1.pdf

April 4, 2023

Re: HB 1412
Position: Oppose
Contact: cmohr@siia.net

Statement of the Software & Information Industry Association in Opposition to HB 1412

To the Chair and Members of the Committee:

The Software & Information Industry Association (SIIA) respectfully submits the following statement in opposition to HB 1412.

SIIA is the principal U.S. trade association for the software and digital content industries. With over 600 member companies, SIIA is the largest association of software and content publishers in the country, and they publish works in a variety of fields including scientific, technical and medical journals, education, and business to business material. Our members range from start-up firms to some of the largest and most recognizable corporations in the world. Many of our members are located in or do business in Hawaii.

The legislation imposes price and use controls on licenses of copyrighted works to any educational institution or publicly accessible library in Hawaii, requiring out-of-state copyright owners to impose "reasonable" terms on the use of electronic works.

Enactment of this legislation is ill-advised for both legal and policy reasons. From a legal perspective, the law is unenforceable. The federal copyright laws give the copyright owner a series of *exclusive* rights—among them, the rights to make and distribute copies. *See* 17 U.S.C. 106. In enacting it, Congress expressly intended to create a uniform series of rules governing the licensing of copyrighted works. A recent federal case out of Maryland expressly rejected substantively identical legislation, and the state elected not to appeal it. *Ass'n of Am. Publishers, Inc. v. Frosh*, No. DLB-21-3133, 2022 U.S. Dist. LEXIS 105406 (D. Md. June 13, 2022). We note that electronic lending without permission is copyright infringement. *Hachette Book Group v. Internet Archive,* Case No. 20-cv-4160 (S.D.N.Y., Mar. 24, 2023).

These rulings are not surprising. For decades, courts have consistently invalidated state legislation that "prohibits the copyright holder from exercising rights protected by the Copyright Act." *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3d Cir. 1999). There, the Third Circuit invalidated a statute that limited the length of first-run exclusive licenses to theaters at 42 days.[1] Other examples abound.[2] Indeed, the Act specifically prohibits "action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright." State laws of the kind proposed in this bill are in clear conflict with express federal directives.

From a policy perspective, the legislation also will not work. Our members compete in a vibrant, competitive, and adaptive market for their intellectual property. During the pandemic, our members have bent over backwards to be sure that schools have had access to the instructional tools that they needed to keep their virtual and literal doors open. In other cases, these agreements can be handled via form contracts as the content is sold nationwide as a service. Rather than allow these agreements to form to particular needs, the legislation forces the inclusion of terms that neither the publisher nor the institution needs or wants. The result will be higher prices for Hawaiian consumers.

We respectfully urge you to reject it.

Respectfully submitted,
/s/
Christopher A. Mohr
President

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1 *See id.* at 386-87.

2 *See, e.g.*, *Close v. Sotheby's, Inc.,* 894 F.3d 1061 (9th Cir. 2018) (preempting California's state-mandated royalty on resale of certain kinds of art); *Rodrige v. Rodrigue*, 218 F.3d 432, 436-42 (5th Cir. 2000) (preempting Louisiana's community property law due to interference with the copyright owner's rights to license use of the work); *College Entrance Examination Board v. Pataki*, 889 F.Supp. 554 (N.D.N.Y.1995) (preempting state statute that interfered with rights of copyright owner in standardized tests);

3 April 2023

The Independent Book Publishers Association respectfully submits the following testimony in opposition to Hawaii House Bill 1412 (HB1412), which, if enacted, would violate our members' rights under federal copyright law and the United States Constitution by unconstitutionally regulating literary works by dictating licensing terms from copyright owners to libraries for eBook formats. The Independent Book Publishers Association is a national non-profit association of over 4,000 small and mid-sized publishers, as well as author-publishers, including members from the State of Hawaii. IBPA works to promote the rights and professional interests of our publisher members. Our membership would be directly impacted by HB1412.

While the Independent Book Publishers Association and its membership would like nothing more than for all books to be available to libraries in every format, we strongly oppose the legislative initiative taken by the drafters of HB1412 to achieve this otherwise laudable goal.

HB1412 would represent a fundamental, unprecedented intrusion into the free exercise of copyright by both authors and publishers by restricting certain licensing terms for digital materials under the guise of unfair and deceptive trade practices. When the State dictates licensing terms for copyrighted materials it violates the free exercise of Copyright under 17 U.S.C. §106. Only Congress, not the State, has the right to regulate copyright. In a lengthy written opinion analyzing the similar proposed legislation in other states, dated August 30, 2021, Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office, stated, "we conclude that under current precedent, the state laws at issue are likely to be found preempted." Meaning that the state laws interfere with the authority of Congress and thus violate the Supremacy Clause of the U.S. Constitution.

As the court recognized in the case AAP v. Frosh, concerning similar legislation passed by the Maryland legislature, "[i]t is clear from the text and history of the Copyright Act that the balance of rights and exceptions is decided by Congress alone" and "[s]triking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders... is squarely in the province of Congress and not this Court or a state legislature." States cannot avoid federal preemption by recasting restrictions on the exercise of copyrights as protections against unfair, deceptive, or unconscionable conduct, such as is the case with HB1412. Absent an evidentiary record that clearly establishes actual fraud or misrepresentation, bills

restricting price and licensing terms will be preempted where the supposed misconduct the state law aims to remedy is no more than the perception by the state that the licensor negotiated a favorable deal.

The Supremacy Clause is not the only constitutional concern raised by HB1412. As the sale of electronic literary products by definition represents interstate commerce, this legislation would also directly violate article 1, section 8, clause 3 of the Constitution, which gives Congress the right to regulate interstate commerce. Imposing terms on publishers from the several states in their commercial relationship with the Hawaii libraries, and ultimately the State of Hawaii itself, interferes with interstate commerce which is the exclusive purview of the Congress of the United States.

HB1412 would ultimately compel publishers to accept licenses they might otherwise choose not to or, tragically, to not offer their works to libraries at all. Under this proposed legislation, publishers would lose the ability to control to whom they license their works and on what terms, eviscerating their rights under 17 U.S.C. §106. The Supreme Court already decided this issue in its 1999 decision in Orson, Inc. v. Miramax expressly in which it ruled that states cannot infringe upon the rights of copyright holders: "The state may not mandate distribution and reproduction of a copyrighted work in the face of the exclusive rights to distribution granted under §106." The law at issue in that case, just as HB1412 would do, "direct[ed] a copyright holder to distribute and license against its will and interests."[1]

It is the contention of the Independent Book Publishers Association that HB1412 suffers from the same constitutional defects that led to the Federal court decision in the AAP v. Frosch case last year to swiftly strike down similar legislation enacted in Maryland, finding it "unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act." It held that the now-overturned Maryland law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[2] Maryland declined to appeal this well-reasoned decision.

While we are sympathetic to the motivations underlying this legislation, a law that sweeps in thousands of small publishers and self-published authors who cannot manage distribution and licensing at scale is not the right approach and is in fundamental violation of federal copyright law. We concur with United States District Judge Deborah Boardman, who, in the AAP v. Frosch case, stated: "Libraries serve many critical functions in our democracy. They serve as a repository of knowledge — both old and new — and ensure access to that knowledge does not depend on wealth or ability. They also play a special role in documenting society's evolution. Congress has underscored the significance of libraries and has accorded them a privileged status on at least one occasion, legislating an exception to the Copyright Act's regime of exclusive rights that permits libraries to reproduce copyrighted material so it may be preserved in the public record across generations. See 17 U.S.C. § 108. Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media. However, striking the balance between the critical functions of libraries and the

[1] *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999).
[2] Ass'n of Am. Publishers, Inc. v. Frosh, No. DLB-21-3133, 2022 U.S. Dist. LEXIS 105406 (D. Md. June 13, 2022).

importance of preserving the exclusive rights of copyright holders is squarely in the province of Congress and not this Court or a state legislature."[3]

We respectfully oppose HB1412 and ask that you reject it in light of the broader legal context and possible serious repercussions of this legislation for hardworking independent publishers and self-published authors already facing serious challenges in the current economic environment.

Respectfully submitted,

Andrea Fleck-Nisbet
CEO
Independent Book Publishers Association

Dr. Kurt Brackob
Advocacy Committee
Independent Book Publishers Association

[3] United States District Court for the State of Maryland, Case 1:21-cv-03133-DLB Document 19 Filed 02/16/22, p. 27.

AAP | ASSOCIATION OF AMERICAN PUBLISHERS

The Association of American Publishers (AAP) is the national trade association for book, journal, and education publishers in the United States, including large, small, and specialized publishing houses from across the country.

We respectfully submit this testimony in opposition to HB 1412. The bill is preempted by federal Copyright Law, would harm the livelihoods of authors, is a threat to both Hawaii's economy and national interests, and ignores a record-breaking number of "digital check-outs" from public libraries.

These "digital check outs" are made possible because publishers have long offered discounted access to public libraries, for them to make digital formats available to their patrons under controlled terms, as a supplement to physical books, which by far remain the most popular formats. Publishers have without question served public libraries and their communities very well in the digital age—to the point that today more patrons than ever before can access for free, at the push of a button, a plethora of award winning and best-selling literary works that they might otherwise have purchased from booksellers.

As there is no problem in the library market—but considerable concern about competitive businesses—AAP joins hundreds of thousands of creators in opposing HB 1412.

HB 1412 is clearly preempted by federal law and therefore unconstitutional.

The United States Copyright Act governs the distribution of literary works in all formats, including the transmission of eBook formats to library patrons pursuant to copyright licenses from publishers. The state of Hawaii may not enforce legislation that duplicates or frustrates the objectives of the Copyright Act.

As such, HB 1412 is clearly preempted and therefore unconstitutional. If enacted, the bill would subject Hawaii and its taxpayers to all of the liability, legal fees, and expenses that would attach, and which affected parties in the creative industries would have no choice but to pursue.

The Copyright Act is directly authorized by the "Copyright Clause" of the U.S. Constitution; it dates back to 1790 and has been carefully updated by the U.S. Congress in its discretion as needed, after comprehensive consideration. A lengthy but uniform federal law, the Copyright Act is the legal foundation of the publishing industry and all other creative industries. Moreover, the Copyright Act attaches to numerous copyright treaties and free trade agreements that the United States has led, adopted, and implemented, and which it is charged with fully enforcing.

The aim of Hawaii's legislation is not theoretical. Inexplicably, it would expose copyright owners to serious penalties and liabilities that it has no right to impose. To put a fine point on the unconstitutional conflict, HB 1412 seeks to punish copyright owners for exercising the very rights and remedies that federal law so clearly affords them!

We are aware that legislation like HB 1412 has been pushed to policymakers in other states, under outrageously false legal and business assertions. Thankfully, these bills have been rejected. In late 2021, Governor Hochul vetoed a similar New York bill stating that "because the provisions of this bill are preempted by federal copyright law, I cannot support this bill."

In 2022, a federal district court in Maryland found a similar bill "unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act" and because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Ass'n of American Publishers v. Frosh, 2022].

And, most recently, in 2023 in Virginia, a virtually identical bill was unanimously rejected in committee by the state legislature due to a plethora of legal and business concerns.

HB 1412 would harm the livelihoods of authors.

The Copyright Act is the basis of invaluable creativity and innovation in the marketplace, for which we owe American authors our gratitude and respect. The basic bargain of the Copyright Act is economic. It serves the public by encouraging authorship and publication, including through modern delivery models.

If enacted, HB 1412 would directly devalue the intellectual property of authors and therefore their right to seek market compensation. Under a scheme that would reduce the copyright interests of authors to an artificially capped system of government rates, authors could not sustain their crafts, to the great detriment of readers everywhere. Such a precedent would be frontally at odds with the Constitutional mandate of copyright law. In short, the kind of regime that HB 1412 envisions would threaten the entire creative economy that is so critical to the state of Hawaii and the Nation.

HB 1412 would threaten Hawaii's economy and national interests.

HB 1412 would undermine private sector investments that make literary works of all formats and genres possible, including poetry, novels, children's books, biographies and many other forms of entertainment and information that drive the creative economy.

In addition to these immediate impacts, HB 1412 would limit the downstream economic contributions of the publishing ecosystem which results in jobs and revenue for truckers, warehouses, manufacturers, and many other industries. In 2021, the copyright industry was responsible for an estimated $2.9 trillion dollars, or 12.52% of the U.S. economy. Simply put, HB 1412 would destabilize a significant sector of the U.S. economy – and U.S. employment – that rely on incentives and protections of federal law.

It is for this reason that **the groups who stand in opposition to HB 1412 represent hundreds of thousands of creators** including the Association of American Publishers, the Authors Guild, American Booksellers Association, Copyright Alliance, Independent Book Publishers Association, News Media Alliance, Motion Picture Association, Recording Industry Association of America, and Software & Information Industry Association, among others.

HB 1412 ignores a record-breaking number of digital checkouts in library markets.

American publishers are extremely proud of their role in championing public libraries, including their transitions to the digital age. As digital "check-outs" are booming, we note that HB 1412 is at best a solution in search of a problem, or at worst an effort to force businesses to subsidize public institutions at the expense of themselves and other stakeholders.

Today, the reading public has unprecedented library access to literary works in eBook as well as audiobook formats. This fact is true even while publishers compete rigorously and simultaneously to

serve readers in the commercial marketplace. Indeed, library e-lending has exploded to the point that commercial revenue for eBooks continues to decline as library check-outs increase. In 2022, readers borrowed more than half a billion eBooks, audiobooks, digital magazines, comics, and other digital content, ten percent more than the record-breaking numbers of 2021.

Moreover, libraries enjoy special licenses from publishers that permit them to do things that readers in the consumer markets may not do. Libraries make eBooks available over and over again to their patrons, at an aggregate cost that is nowhere close to the per-reader rates. This balance is critical. Authors, publishers, and bookstores would not survive if every consumer could instead immediately "borrow" a digital version of every book that they might otherwise decide to purchase. Indeed, no industry of any kind could function if forced to give unfettered free access while also trying to recoup investments.

CONCLUSION

In closing, American intellectual property is a point of pride for both local and global economies. Today's literary market is agile and offers consumers more choices than ever before, including digital formats that customers can enjoy in the comfort of their own homes. Especially now, in the face of challenging economic times, the success of authors depends on the success of publishing houses and the incredibly important commercial markets they support. HB 1412 seeks to unconstitutionally intervene in this market and disrupt the balance between art and commerce that it has so carefully struck.

For all of the reasons outlined above and more, we therefore respectfully urge the Senate Judiciary Committee to reject HB 1412.

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

Respectfully submitted,

Shelley H. Husband

Shelley H. Husband
Senior Vice President, Government Affairs
Association of American Publishers

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April 4, 2023

SENATE COMMITTEE ON JUDICIARY
Sen. Karl Rhoads, Chair, Sen. Mike Gabbard, Vice Chair

HEARING DATE: Wednesday, April 5, 2023
TIME: 9:45 a.m.
PLACE: Conference Room 016

Re: TESTIMONY ON BEHALF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. OPPOSING HOUSE BILL NO. 1412 HD1

Dear Chair Rhoads, Vice Chair Gabbard and Committee Members:

We write on behalf of our client, Association of American Publishers, Inc. ("AAP")[1], in opposition to House Bill No. 1412, HD1 SD1 ("*HB 1412*"). We are concerned that this bill has significant flaws and will likely result in substantial legal challenges in the courts. As discussed more fully below, it is highly likely that the proposed bill would be in violation of existing federal law, including the United States Copyright Act, codified at 17 U.S.C. §§ 101 et seq. (hereinafter, the "Copyright Act"). As such, it would likely be preempted by the United States Constitution.

Specifically, HB 1412 would effectively preclude authors and their publishers from making the determination as to what contract terms apply, and in which markets and channels they direct their works, despite the fact that such control is guaranteed by the Copyright Act. The terms of HB 1412 essentially say that the copyright holder cannot restrict in any way the library's use of the copyrighted works. Any license agreements that have any restrictions on the number of

[1] AAP is a trade association that represents its members on matters of law and public policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions and that enables publishers to effectively enforce their intellectual property rights. Among AAP's most critical priorities is ensuring the viability of the United States' more than 200-year-old framework of federal copyright law that encourages publishers to invest in and distribute a great variety of books to the public.

licenses or the duration of such licenses are not permitted under the bill. Entering into a contract (assuming a library was to agree) or even making an offer for a contract that includes any kind of restriction on the scope, duration or cost of the license would expose the copyright holder to automatic liability and damages, including either treble damages or $1000 per occurrence, plus reasonable attorneys' fees.[2] Even if a library and the copyright holder were to reach an agreement, such contract provisions would be void under the bill, and the copyright holder could still face a lawsuit from other third parties like borrowers as this bill allows private rights of action.

It is difficult to see how any publisher would want to take such a risk to even negotiate with a library in Hawaii where the mere offering of terms could lead to the publisher being sued. This would likely have the converse effect of the bill's intent as it could substantially reduce the works made available to Hawaii's libraries and its borrowers. This is not a good thing for Hawaii's citizens.

As discussed more fully herein, not only is this bill bad policy, but it is likely to be deemed to be in violation of federal law. Similar legislation to HB 1412 has been introduced in other states and has been found to be preempted by federal law, including the Copyright Act. For these reasons, we would strongly urge that the Committee not pass this bill as it will result in substantial litigation and is likely to be deemed by the courts to be of no effect.

A. The United States Constitution and Federal Copyright Law Have Supremacy on Issues of Copyright.

The United States Constitution authorizes the U.S. Congress to prescribe to authors the exclusive rights to their writings for limited times, for the ultimate benefit of the public. Acting pursuant to this constitutional directive, Congress has enacted a comprehensive federal system of exclusive rights, remedies, exceptions, and limitations, embodied in the Copyright Act. The Copyright Act not only encourages authors to create a vast variety of literary works, it also incentivizes authors to disseminate these works to the public by transferring or licensing their exclusive rights to publishers for the promise of financial rewards. Publishers in the United States disseminate some of the most acclaimed fiction, nonfiction, children's books, education materials, and scholarly works in the world. Publishers invest considerable resources and make incalculable marketplace-based decisions to promote and sustain their literary catalogs, relying on the uniform and unambiguous authority of the Copyright Act.

The Copyright Clause of the U.S. Constitution provides that "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 . . . ."[3] Pursuant to

[2] HRS §480-13.

[3] U.S. Const. art. I, § 8, cl. 8.

that grant of authority, the United States Congress enacted the Copyright Act in 1976. The Copyright Act grants copyright owners certain exclusive rights. In particular, the Copyright Act provides that "the owner of copyright . . . has the exclusive rights to do and to authorize" others to reproduce and distribute works, prepare derivative works, and publicly display works, among other rights, subject to the Act's carefully prescribed limitations.[4] Pursuant to the Copyright Act, copyright owners have the authority to exercise these exclusive rights and to authorize others to do so. Importantly, copyright owners have the prerogative to refrain from exercising their rights or authorizing others to do so—for example, by declining to distribute their works.[5]

> "It is a familiar and well-established principle that the Supremacy Clause [of the United States Constitution] invalidates state laws that interfere with, or are contrary to, federal law." [6]

The Supremacy Clause provides that the "Constitution, and the laws of the United States which shall be made in pursuance thereof . . ., shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. The key issue in reviewing whether a state law is preempted is whether the operation of state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[7]

B. HB 1412 Violates Federal Law by Taking Away Control From Copyright Holders.

HB 1412 would limit the ability of copyright holders to limit the terms of any license in any agreement with any Library in the State. Specifically, HB 1412 would not allow a license agreement to limit the scope of any license, including: the number of loans, the duration of loans or the price of such licenses. Specifically, the relevant language in HB 1412 includes a number of instances where the law would restrict the ability of copyright holders to control the scope of their licenses, including:

> § -2 Contracts between publishers and libraries. (a) No contract or license agreement entered into between any publisher and any library in the State shall:

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[4] 17 U.S.C. § 106.

[5] *See, e.g., Stewart v. Abend*, 495 U.S. 207, 229 (1990) ("[T]his Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.").

[6] *Hillsborough Cty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 712 (1985) (citation and internal quotation marks omitted).

[7] *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479, 94 S.Ct. 1879, 1885, 40 L.Ed.2d 315 (1974) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).

(1) Preclude, limit, or restrict the library from performing customary operational functions, including:

. . .

(A) **Licensing electronic literary materials;**

…

(D) **A library's right to loan electronic literary materials via interlibrary loan systems**;

(2) Preclude, limit, or restrict the library from performing customary lending functions, including any provision that:

(A) **Precludes, limits, or restricts the library from loaning electronic literary materials to borrowers;**

(B) **Restricts the library's right to determine loan periods for licensed electronic literary materials;**

(C) **Requires the library to acquire a license for any electronic literary material at a price greater than that charged to the public for the same item;**

(D) **Restricts the number of licenses for electronic literary materials that the library may acquire after the same item is made available to the public;**

(E) **Requires the library to pay a cost per circulation fee to loan electronic literary materials, unless substantially lower in aggregate than the cost of purchasing the item outright;**

(F) **Restricts the total number of times a library may loan any licensed electronic literary materials over the course of any license agreement, or restricts the duration of any license agreement, unless the publisher offers a license agreement to libraries for perpetual public use without such restrictions, at a price that is considered reasonable and equitable as agreed to by both parties; and**

(G) Restricts or limits the library's ability to virtually recite text and display artwork of any materials to library patrons such that the materials would not have the same educational utility as when recited or displayed at a library;

(3) Restrict the library from disclosing any terms of its license agreements to other libraries; and

(4) Require, coerce, or enable the library to violate the law protecting the confidentially of a patron's library records as specified in section 8-200.5-3, Hawaii Administrative Rules.

HB 1412 (emphasis added).

As such, should a copyright holder enter into any agreement with a public library, the copyright holder would have no ability to restrict how the library may subsequently use the materials, including the scope and duration of such licenses. HB1412 would allow the library the unlimited freedom to loan the licensed work out to any person or even millions of persons or other libraries in the world for an unlimited duration of time, and would allow the library the freedom to make unlimited displays of the text and artwork of the copyrighted work. HB1412 would thus eviscerate the right of a copyright holder to control the licensing and distribution of the work, and would be directly contrary to the U.S. Constitution and the Copyright Act's provisions allowing the copyright holders such an exclusive prerogative. For this reason, HB 1412 would likely be in violation of federal law and preempted by the U.S. Constitution.

C. Other States Have Considered Similar Legislation, Which Has Been Deemed in Violation of Federal Law.

It is instructive to look at other jurisdictions where their legislatures have sought to pass similar legislation to HB 1412. While other States have sought to pass similar legislation, only two state legislatures have done so.

Perhaps most informative is the experience of the State of Maryland.[8] In May 2021, the Maryland state legislature passed the Maryland Act for the stated "purpose of requiring a publisher who offers to license an electronic literary product to the public to also 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."[9] Like HB 1412, the Maryland Act sought to limit the ability of copyright holders to control dissemination of their works in favor of allowing libraries to have such control. Further, like HB 1412, it required copyright holders to offer licenses at "reasonable" rates.

[8] The other state legislature to have passed similar legislation is New York. However, the legislation originally known as Bill 5837-B was subsequently vetoed by the governor on December 29, 2021 on the grounds that the bill's provisions "are preempted by federal copyright law."

[9] 2021 Md. Laws Ch. 411 (H.B. 518).

As part of a lawsuit brought in the Federal Court in the District of Maryland, the court enjoined the enactment of the Maryland legislation, finding that the Maryland legislation was likely preempted by Federal Law, stating that "It is clear the Maryland Act likely stands as an obstacle to the accomplishment of the purposes and objectives of the Copyright Act. The Maryland Act commands that, if a publisher offers to license an electronic literary product to the public at large, the publisher "shall offer to license" the same product to libraries "on reasonable terms that would enable public libraries to provide library users with access to the electronic literary product."[10] The court noted that the exclusive right to distribute also encompasses the right not to distribute. The Maryland Law necessarily infringed on that right as it proscribed terms and limited the control of copyright holders to control such distribution. The court concluded that the law "interferes with copyright owners' exclusive right to distribute by dictating whether, when, and to whom they must distribute their copyrighted works."[11] Further, the court found that substantial irreparable harm would result from the application of the Maryland Law. Accordingly, the court issued a preliminary injunction. Subsequently, the court issued a declaratory judgment and concluded that "the Maryland Act conflicts with and is preempted by the Copyright Act. The Act stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

In *Orson, Inc. v. Miramax Film Corporation*[13], cited in the *Frosh* court, the Third Circuit considered whether § 203-7 ("Pennsylvania law") of the Pennsylvania Feature Motion Picture Fair Business Practices Law conflicted with § 106 of the Copyright Act. 189 F.3d at 379. Plaintiff, a Philadelphia theater owner, sued Miramax Film Corporation under the Pennsylvania law, which provided:

> No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographical area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on subsequent run availability.[14]

Thus, the statute explicitly addressed the terms of the license that could be entered into by inserting the 42 day limitation on the exclusivity. The *Orson* court noted that:

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[10] *Ass'n of Am. Publishers, Inc. v. Frosh*, 586 F.Supp.3d 379, 389 (D. Md. 2022).

[11] *Id.* at 393.

[12] *Ass'n of Am. Publishers, Inc. v. Frosh*, 607 F.Supp.3d 614, 618 (D. Md. 2022).

[13] 189 F.3d 377 (3d Cir. 1999) (en banc).

[14] 73 Pa. Stat. § 203–7.

> The forty-two day exclusive first-run license limitation in section 203–7 of the Pennsylvania Act is a distinctly different regulation from those within the state's power over improper market practices. **If the state's ban on exclusivity after forty-two days directly regulates a right that is protected by federal copyright law, it must, of necessity, be preempted under conflict preemption principles**.[15]

The court continued by stating:

> [T]he section cannot stand because it prohibits the copyright holder from exercising rights protected by the Copyright Act. Among the "exclusive rights" granted under § 106 in the Copyright Act are the rights to "distribute" and to "perform the copyrighted work publicly." However, section 203–7 requires the distributor to expand its distribution after forty-two days by licensing another exhibitor in the same geographic area, even if such expansion is involuntary and uneconomic.[16]

The court held that this restriction on the ultimate control over the licensed work violated the right recognized by the United States Supreme Court that the copyright holder had "the capacity arbitrarily to refuse to license one who seeks to exploit the work."[17] As such, the Third Circuit held the state law was preempted.

It is important to note that, in Orson, as in HB 1412, film distributors still had the right to choose to negotiate or not negotiate, but the condition regarding the subsequent control of their work was merely a required feature of any license that they choose to enter. Similarly, HB 1412 includes express requirements that limit the control of the licensed work after an agreement to license is entered. As such, HB 1412 is seeking to enact the type of restrictions faced by the Orson court found to be preempted by the Copyright Act. That HB 1412 allows the library to have the control of subsequent licensing as opposed to compelling the copyright holder to perform the subsequent licensing is a distinction without a difference. Both statutes take control of the price, scope and duration away from the copyright holder. For these reasons, the terms of HB 1412 are likely in violation of the Copyright Act and thus preempted under federal law.

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[15] *Id.* at 385 (emphasis added).

[16] *Id.* at 385.

[17] *Stewart v. Abend*, 495 U.S. 207, 228–29, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990) (citing *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S.Ct. 546, 76 L.Ed. 1010 (1932))

D. The State Could Face Significant Litigation.

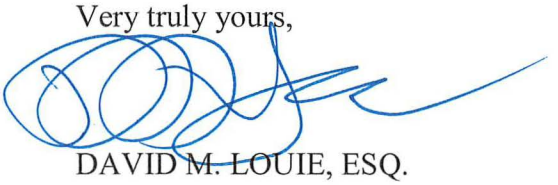
For the foregoing reasons, we are extremely concerned that passage of HB 1412 would result in significant litigation for the State. Further, the result of that litigation would almost certainly be to find that the law was in violation of federal law and of no effect.

It is axiomatic that the Hawai'i State Legislature has a duty to pass laws that are consistent with and effectuate the protections of the Hawai'i State Constitution.[18] Passage of this bill, which is substantively similar to other laws that courts have found to be preempted and in violation of the Copyright Act would not be consistent with the Legislature's obligations to make sound decisions consistent with constitutional principles.

E. Conclusion

For the reasons set forth herein, we have significant concerns about the proposed terms of HB 1412 and would strongly recommend that the Committee hold this bill.

Very truly yours,



DAVID M. LOUIE, ESQ.
for
KOBAYASHI SUGITA & GODA, LLP

[18] "[E]very enactment of the Legislature is presumptively constitutional." *Schwab v. Ariyoshi*, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977) (citing *State v. Kahalewai*, 56 Haw. 481, 541 P.2d 1020 (1975)); *cf. League of Women Voters of Honolulu v. State*, 150 Hawaii 182, 194, 499 P.3d 382, 394 (2021) ("[I]f the Legislature could alter the meaning of the Hawai'i Constitution through its own rules of procedure, theoretically, there would be no need to go through the formality of amending the Hawai'i Constitution. *See Mason's Manual* [*of Legislative Procedure* (2010 ed.)] § 12, ¶ 1 ('A legislative body cannot make a rule which evades or avoids the effect of a rule prescribed by the constitution governing it, and it cannot do by indirection what it cannot directly do.').").

April 4, 2023

Dear Chair Rhoads, Vice Chair Gabbard, and members of the Senate Judiciary Committee:

On behalf of the American Booksellers Association – the not-for-profit trade association of independent bookstores across the country, including Hawaii – we are writing today on behalf of Hawaii booksellers to express their opposition to HB 1412.

If signed into law, this legislation would harm individual authors and artists, damage creative industries, and drastically reduce the worth of creative works to the economy, and ultimately would dampen sales of books at local, independent bookstores. A federal court has already found this type of legislation represents an impermissible state intrusion into an exclusively federal body of law.

HB 1412 would unconstitutionally regulate literary works by dictating licensing terms from copyright owners to libraries for eBook and other formats. It would regulate how and when authors make their works available and it requires the sale of those works at below-market pricing. As such, the legislation would distort, if not cannibalize, the commercial markets that local, independent bookstores rely on, thereby threatening family-sustaining jobs that our member bookstores provide to their communities.

ABA and its members fully appreciate the value and importance of public libraries. Already, book publishers make their full digital catalogs available for library lending and as a result, lending is booming at unprecedented levels – there were a half billion checkouts last year, according to the Association of American Publishers. Despite arguments to the contrary, there is no market failure to justify HB 1412 – even if Hawaii was not federally preempted from enacting legislation of this nature. Materials and books of all kinds are more broadly accessible than they have been at any time in the nation's history.

We urge you and the committee to oppose this legislation, which would hurt small businesses, including independent bookstores, authors, and other creators.

Thank you for your consideration.

Best,

David Grogan, Director
ABFE, Advocacy & Public Policy
American Booksellers Association
333 Westchester Ave, S202
White Plains, NY 10604

March 21, 2023

The Honorable Karl Rhoads
Chair, Senate Judiciary Committee
Hawaii State Capitol, Room 228
415 South Beretania St.
Honolulu, HI 96813

The Honorable Mike Gabbard
Vice Chair, Senate Judiciary Committee
Hawaii State Capitol, Room 201
415 South Beretania St.
Honolulu, HI 96813

Dear Chair Rhoads, Vice Chair Gabbard, and Members of the Senate Judiciary Committee:

The undersigned organizations represent a broad cross-section of the creative industries, including authors, publishers, bookstores, motion pictures, music, newspapers, and software. We are writing to express our strong opposition to HB 1412, which would unconstitutionally regulate literary works by dictating licensing terms from copyright owners to libraries for ebook and other formats.

This legislation will harm individual authors and artists, undermine creative industries, drastically reduce the value of creative works to the economy, and—as a federal court has already found—represents an impermissible state intrusion into an exclusively federal body of law. In threatening both the integrity and efficacy of the U.S. Copyright Act, HB 1412 also threatens the creators and creative industries that depend on a uniform law. It is a poorly conceived bill designed to undercut the Nation's critically important protections of intellectual property. In short, it is of grave concern to all of us and the members we represent.

HB 1412 Will Harm the Creative Industries and Hawaii's Economy

Copyright industries create high-paying jobs and employ millions of people, and the copyright economy consistently grows at a faster rate than the overall U.S. economy. Nearly six million people are directly

employed by core copyright industries—including books, motion pictures, music, software, newspapers, and magazines—and these industries add more than $1.5 trillion in annual value to U.S. GDP and create numerous jobs for distribution partners in Hawaii. That economic growth is the direct result of a uniform federal system of rights and responsibilities and the innovation it spurs.

This bill will harm both creativity and competition. By regulating both when and how authors make their works available *and* requiring the sale of those works at below-market prices, this legislation will artificially devalue competitive markets, not only undercutting the royalties that would otherwise be earned by authors, but also exacerbating an already difficult economic environment. In addition, this legislation would distort, if not cannibalize, the commercial markets that local bookstores rely on, thereby threatening family-sustaining jobs that these institutions provide in their communities. HB 1412 would threaten the very foundation that has governed the disposition of copyrighted works to great success, a foundation upon which both libraries and the economy depends.

We understand and appreciate the value and critical importance of our public libraries. Book publishers of all sizes already make their full digital catalogs available for library lending, and as a result, library ebook lending is booming at unprecedented levels, with a dizzying *half billion* checkouts last year. Indeed, despite arguments to the contrary, there is no market failure that would justify the systemic regulation that this bill would establish, even if Hawaii was not federally preempted from enacting legislation of this nature. Rather, literary works of all kinds, motion pictures, music and software are more broadly accessible than they have been at any time in our history.

We appreciate that public libraries will naturally aspire to serve as many patrons as possible with as many creative works as possible. However, this should not be done at the expense of creators whose very livelihoods depend on their ability to control and enforce the use and monetization of their works in accordance with the Copyright Act, including vigorously pursuing their respective marketplace opportunities. While there may be legitimate reasons to examine other ways to support and strengthen public libraries, HB 1412 is harmful and unnecessary, with the unprecedented number of digital check outs supporting the premise that there is no shortage of support for libraries from publishers.

HB 1412 is Unambiguously Unconstitutional

Both state governments and courts have rejected the bill's approach as an illegal and unwise attempt to regulate intellectual property. In December of 2021, Governor Kathy Hochul vetoed almost identical legislation in New York concluding 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**."[1]

The federal courts agreed. Last year, a federal district court swiftly struck down a virtually identical bill enacted in Maryland, finding it "**unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act**." It held that the now-overturned Maryland law "**stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress**."[2] Maryland declined to appeal from this well-reasoned decision.

[1] "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.

[2] Ass'n of Am. Publishers, Inc. v. Frosh, No. DLB-21-3133, 2022 U.S. Dist. LEXIS 105406 (D. Md. June 13, 2022).

HB 1412 Would Decrease Public Access to Books and Other Copyrighted Works

As organizations who represent authors, artists, creators, and other copyright holders, we are committed to ensuring broad access to copyrighted works by bringing those creative works to market, and it is the copyright law that makes that possible. Across the creative industries, robust federal copyright protection has been the bedrock upon which flexible business models have been built, giving consumers more choices than ever before about how, when and where they view the content they love. By regulating the license terms of copyrighted works, HB 1412 puts a chilling effect on these vital freedoms. The legislation encroaches upon these freedoms not only by regulating a certain manner of commercial dealing under penalty of law but by regulating when and how authors ought to make their works available.

In closing, we are happy to support public libraries in ways that do not violate federal law or undermine authors, publishers and other copyright holders. But we must vigorously oppose legislation that will hurt small businesses, including bookstores, authors, and other creators and that violates the federal copyright framework, endangering our ability to bring books and other copyrighted works to the public marketplace.

For all of these reasons, we respectfully urge you to reject HB 1412.

Association of American Publishers
American Booksellers Association
American Society of Composers, Authors & Publishers
Broadcast Music Inc
Digital Media Licensing Association
Independent Book Publishers Association
Motion Picture Association
National Press Photographers Association
Recording Industry Association of America
The Authors Guild
American Association of Independent Music
American Society of Media Photographers
Copyright Alliance
Entertainment Software Association
Independent Film & Television Alliance
National Music Publishers' Association
News Media Alliance
Software & Information Industry Association

BILL: HB 1412 – Relating to Libraries

COMMITTEE: Senate Judiciary Committee

HEARING DATE: April 5, 2023

CONTACT: Danielle Coffey, Executive Vice President & General Counsel, News/Media Alliance, danielle@newsmediaalliance.org

POSITION: Oppose

The News/Media Alliance ("N/MA" or the "Alliance") respectfully submits the following testimony in opposition to HB 1412, which we believe is ill-informed, unnecessary, preempted, and unconstitutional.

The News/Media Alliance is a nonprofit organization representing the news and magazine media industries and empowering members to succeed in today's fast-moving media environment. The Alliance's members represent nearly 2,000 diverse news and magazine publishers in the United States and internationally, ranging from the largest publishers to small, hyperlocal newspapers, and from digital-only and digital-first outlets to print papers and magazines. In total, the Alliance's membership accounts for nearly 90 percent of the daily newspaper circulation in the United States and includes nearly 100 magazine media companies with more than 500 individual magazine brands on topics including news, culture, sports, lifestyle, and virtually any other interest.

HB 1412 is a blunt instrument to a non-existent problem. While we share the legislatures sincere interest in the wellbeing of our public library system, there is no proof of an existing licensing market failure facilitated or initiated by publishers – book, news, magazines, or others. Libraries by and large have access to a wide range of written materials in a variety of formats, from physical books and magazines to electronic editions of newspapers. There are various ways for state legislatures to strengthen our public libraries and ensure communities' access to high-quality information and entertainment, but HB 1412 is not the answer. Instead, it would unacceptably encroach on publishers' ability to freely license their works and to invest in new, original content, thereby risking the very access to information our communities rely on.

Most disconcertingly, HB 1412 would undermine – and be in violation of – the federal copyright framework that is built on a careful balance between the interests of copyright owners and users. The Copyright Act protects creators' investments into the production of creative content, including by establishing clear exclusive rights that are reserved for copyright owners. These rights include the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

Section 301 of the Copyright Act establishes a strong federal preemption with regards to any state bills that aim to limit or regulate the exclusive rights reserved for copyright owners, stating that "*all legal or*

equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright… 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." By effectively dictating licensing terms for publishers – including book, newspaper and magazine publishers – when it comes to library licenses, HB 1412 clearly impinges on the exclusive rights created by the Copyright Act and is therefore preempted under it.

Similar bills in other states have failed for this same reason. In Maryland, a federal court found last year that the state's law "*likely conflicted with the Copyright Act because it forced publishers to forgo their exclusive rights to decide when, to whom, and on what terms to distribute their copyrighted works*," later declaring "*the Maryland Act unconstitutional and unenforceable because it conflicts with and is preempted by the Copyright Act*."[1] Meanwhile, in New York, Governor Kathy Hochul vetoed an analogous bill on the same grounds, stating that the federal Copyright Act reserves the right to decide to whom and on what terms to license copyrighted works solely to the author.

While HB 1412 raises other serious questions and concerns – many of which have been highlighted by other stakeholders – the abovementioned constitutional deficiencies make the bill disconcerting to the creative industries. It threatens the delicate balance of the federal copyright system and reduces publishers' incentives to invest in the creation of new works.

For the reasons noted above, the Alliance respectfully opposes HB 1412 and strongly urges the Committee to reject it.

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

Respectfully submitted,

Danielle Coffey
Executive Vice President & General Counsel
News/Media Alliance

[1] *Ass'n of Am. Publishers, Inc. v. Frosh*, 586 F. Supp. 3d 379 (D. Md. 2022); *Ass'n of Am. Publishers, Inc. v. Frosh*, No. DLB-21-3133, 2022 U.S. Dist. LEXIS 105406 (D. Md. June 13, 2022).

Pauline N. Sawai
162-A Rose Street
Wahiawa, HI 96786
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4 April 2023

I respectfully submit the following testimony in opposition to Hawaii House Bill 1412 (HB1412), which, if enacted, would violate creator rights under federal copyright law and the United States Constitution by unconstitutionally regulating literary works by dictating licensing terms from copyright owners to libraries for eBook formats. I understand that allowing tax paying citizens the ability to check out books for free is a privilege, but the rights of creators should not be trampled for this sake. Creators have the right to sell their skilled works to sustain themselves. Why should creative people always be sacrificed for the good of others? The Copyright Law exists for the protection of creators because in the digital age, it is so easy to take advantage of artists.

Perhaps it is time for the State of Hawai`i Library system to create a subscription service where citizens would pay a monthly fee or a fee for a limited amount of downloads for ebooks per year. This would then bring creators and citizens on an even playing field of paying our creators what they deserve.

Sincerely,

Pauline N. Sawai

Pauline N. Sawai

HB-1412-SD-1
Submitted on: 4/4/2023 3:57:41 PM
Testimony for JDC on 4/5/2023 9:45:00 AM

Submitted By	Organization	Testifier Position	Testify
Hela	Individual	Support	Written Testimony Only

Comments:

I support this bill, otherwise proposing would limit access to new materials, which is not the function of the library.

BILL: HB 1412 HD1 SD1 Contract and License Agreements for Electronic Books
COMMITTEE: Judiciary (JDC)
HEARING DATE: April 4, 2023
CONTACT: Kyle K. Courtney, Esq. (kylekcourtney@gmail.com)
Juliya M. Ziskina, Esq. (j.ziskina@gmail.com)
POSITION: Support

We respectfully submit this testimony in support of Hawaii House Bill 1412. We are the authors of the Library Futures ebook policy paper ("Mitigating the Library eBook Conundrum Through Legislative Action in the States"[1]), and write this testimony in our capacity as authors of the ebooks paper and as library, law, and policy experts.

The purpose of this bill is to support libraries as consumers in the ebook marketplace to fulfill their mission of providing broad and equitable access to information for all by ensuring that licensing and contractual agreements between libraries and publishers contain equitable terms. The bill represents a reasonable, productive, and viable alternative pathway for Hawaii to address the inequities and unequal bargaining power in the ebook marketplace and focuses on the state's traditional and well-accepted role in regulating how its own state contract law will apply, particularly in cases of unequal bargaining power.

Hawaii has a long history of supporting libraries and increasing access to ebooks to the benefit of the public. HD1 SD1 HB 1412's goals are no different. **HD1 SD1 HB 1412 does, however, differ from previous ebooks legislation attempts. This bill is firmly grounded in Hawaii state law**. HD1 SD1 HB 1412 does not include any language that requires publishers to grant a license. It merely harnesses existing state law to ensure ebook licenses and contracts are fair, equitable, and reflective of a library's mission.

The state of Hawaii has always had the ability to regulate markets. And, because libraries have a forward-facing mission in service of the public, the Hawaii state legislature is within its power to pass a law aiding that mission through the use of existing state consumer protection, state contract law, and contract preemption clauses. HD1 SD1 HB 1412 would put all libraries in a position to negotiate better terms, preempt restrictive terms, and control the untenable costs of providing access to ebooks for Hawaii communities.

This bill is proposed pursuant to the power inherent in the state of Hawaii to protect public policy and promote the life, education, public convenience, general prosperity, well-being of society, and the welfare of the state's population and economy, all of which are dependent on libraries' ability to continue, as technology advances, their traditional practice of providing open and nondiscriminatory access to literary materials.

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[1] Kyle K. Courtney and Juliya Ziskina, *Policy Paper: Mitigating the Library eBook Conundrum Through Legislative Action in the States* (June 2022), https://www.libraryfutures.net/library-futures-ebooks-policy-paper.

As themselves *consumers* in a market, libraries of all types have a long-standing practice of buying books and lending them to their patrons, whether done as individual actors or through library consortia or networks. Public and school libraries in particular play a vital role in delivering this access to a wide range of users, many of whom do not have the resources to purchase their own individual copies; this is also the case with special libraries, such as the talking book library, that serve particular populations. In some cases, having materials available through libraries frequently also acts as a product-marketing opportunity for authors and publishers, prompting those who can and desire to purchase their own copies.

Presently, ebooks are, in most cases, *rented* or *leased* to libraries or library consortia via restrictive and expensive licensing agreements. In other cases, ebooks are simply withheld from the library market. This system is unlike that for print books, where libraries only have to purchase once and may lend to their community continually according to established lending rules and practices. Under these licensing agreements, publishers set non-negotiable terms of library contracts with complicated clauses, conditions, and definitions that impede the library's ability to provide traditional access in service of their communities.

Libraries must continually replace items in their digital catalogs because of the restrictive nature of current licensing agreements, instead of focusing library collection budgets on procuring new material and providing educational services to the public.[2] For example, despite spending as much as $84 to license books that can normally be purchased for $14.99, most agreements offered to libraries limit item licenses to two years, at which point the exact same materials must be re-purchased.[3] Some libraries pay a cost per circulation fee on top of initial fees, entering into de facto rental agreements at unrestrained prices.[4] Publishers often charge libraries three to 10 times as much as the consumer price for the same ebook.[5] Further, some electronic materials are simply not available to libraries to license from some publishers and distributors. Or, worse, publishers have even attempted an outright embargo sale of ebooks to libraries, sometimes called "windowing," falsely claiming that "library lending was cannibalizing sales."[6]

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[2] Andrew Albanese, *Hachette Book Group Changes Library E-book Terms*, PUBLISHERS WEEKLY (Jun. 17, 2019), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/80486-hachette-book-group-changes-library-e-book-terms.html.

[3] *ALA 'concerned' over Hachette Book Group ebook and audio book lending model changes*, AMERICAN LIBRARY ASSOCIATION, (June 17, 2019) http://www.ala.org/news/press-releases/2019/06/ala-concerned-over-hachette-book-group-ebook-and-audio-book-lending-model.

[4] *A New Twist in Ebook Library Licensing Fees*, THE AUTHORS GUILD (Jun. 21, 2019), https://web.archive.org/web/20220303210514/https://www.authorsguild.org/industry-advocacy/a-new-twist-in-ebook-library-licensing-fees/

[5] Jennie Rothschild, Trashy Books Blog, *Hold On, ebooks Cost HOW Much? The Inconvenient Truth About Library eCollections*, Trashy Books Blog (Sept. 6, 2020); David Moore, *Publishing Giants Are Fighting Libraries on E-Books*, Sludge (Mar. 17, 2022), https://readsludge.com/2022/03/17/publishing-giants-are-fighting-libraries-on-e-books/.

[6] Lynn Neary, *You May Have To Wait To Borrow A New E-Book From The Library*, NPR All Things Considered (Nov. 1, 2019), https://www.npr.org/2019/11/01/775150979/you-may-have-to-wait-to-borrow-a-new-e-book-from-the-library/

Libraries have no choice but to enter into these agreements. As a result, many Hawaii libraries face financial and practical challenges in making ebooks available to their patrons, which jeopardizes their ability to fulfill their mission. The exorbitant costs and burdensome restrictions of these ebook contracts are thus draining resources from many Hawaii local libraries and/or the consortia to which they belong, forcing them to make difficult choices to attempt to provide a consistent level of service and put books—print or electronic—in the hands of their patrons.

Due to the unequal bargaining power between publishers/distributors and libraries, as well as the pattern of abuse of market power by publishers/distributors through use of these restrictive contracts, **the state of Hawaii has a sufficiently compelling interest in adopting legislation to protect the interests of Hawaii citizens in accessing information.** The contracts for libraries must be reflective of the special role libraries play in Hawaii, allowing reasonable terms regarding price, access, preservation, and loaning. HB 1412 advances the public good by making the contracts in which these ebooks collections are licensed more equitable and fair.

HB 1412 seeks to help libraries, publishers, and associated entities carry on their traditional roles to the benefit of all. *It is not intended to hinder publishers' innovation in the digital space but rather to allow libraries to participate in it fully and fairly as consumers*.

Again, HB 1412 differs from previous ebooks legislative solutions attempted in other states. The goal of the bill is to firmly ground these ebook contracts and licenses under Hawaii state law. It does not implicate the purview of the federal government. HB 1412 does not include any language that requires publishers to grant a license; the language proposes an approach that does not demand that publishers license to libraries, but instead merely utilizes existing state law to make sure ebook license and contract terms are fairly balanced and are an effective use of Hawaii taxpayer money.

Previous attempts at state ebooks legislation, such as the legislation at issue in *AAP v. Frosh*, contained language requiring that publishers "shall offer" licensed ebooks to Maryland public libraries "on reasonable terms." The court in *Frosh* stated that the "shall offer" language in the Maryland ebooks bill was preempted by federal law because "[t]he Act's 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."[7]

By contrast, HB 1412 does not contain the "shall offer" language and instead is rooted in the purview of the state (*i.e*. contract law), **clarifying that Hawaii is within its rights to *regulate* rather than *mandate* contracts.**

Without state intervention, Hawaii libraries will continue to struggle to afford electronic literary materials for their patrons. These institutions will be forced to devote increasing portions of their

[7] *Ass'n of Am. Publishers v. Frosh*, No. DLB-21-3133 (D. Md. Feb. 16, 2022).

budgets to license agreements or face losing their ability to provide digital information for the citizens of Hawaii altogether.

HB 1412 is based on the assertion that, *if publishers and aggregators want to continue to do business in the state of Hawaii, then contracts must be reflective of the library mission and feature equitable clauses, terms, and fair pricing.* HB 1412 accomplishes this by drawing on the rich history of existing Hawaii laws for consumer protection and contract preemption.

HB 1412 would assist in meeting the goals and protecting the interests of Hawaii libraries and their patrons. We respectfully ask the Senate Committee on Education to pass HB 1412.

Thank you for this opportunity to provide testimony. We would be happy to provide any additional information or answer any questions regarding our support for HB 1412.

Respectfully submitted,

Kyle K. Courtney
Juliya M. Ziskina