

JOSH GREEN, M.D.  
GOVERNOR



KEITH T. HAYASHI  
SUPERINTENDENT

STATE OF HAWAII  
DEPARTMENT OF EDUCATION  
KA 'OIHANA HO'ONA'AUAO  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

**Date:** 02/28/2023

**Time:** 01:30 PM

**Location:** 308 VIA VIDEOCONFERENCE

**Committee:** House Finance

**Department:** Education

**Person Testifying:** Keith T. Hayashi, Superintendent of Education

**Title of Bill:** HB 1412, HD1 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 confidentiality of a patron's library records. Deems contracts that contain prohibited provisions an unfair or deceptive act or practice and void and unenforceable. Effective 6/30/3000. (HD1)

**Department's Position:**

The Hawaii State Department of Education (Department) supports HB 1412, HD1.

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 HB 1412, HD1.



STATE OF HAWAII  
HAWAII STATE PUBLIC LIBRARY SYSTEM  
'OIHANA HALE WAIHONA PUKE AUPUNI O KA MOKU'ĀINA O HAWAII'  
OFFICE OF THE STATE LIBRARIAN  
44 MERCHANT STREET  
HONOLULU, HAWAII 96813

**HOUSE COMMITTEE ON FINANCE**

**Tuesday, February 28, 2023**

**1:30 p.m.**

**Conference Room 308**

**By Stacey A. Aldrich  
State Librarian**

**H.B. 1412 HD1 RELATING TO LIBRARIES**

To: Rep. Kyle T. Yamashita, Chair  
Rep. Lisa Kitagawa, Vice Chair  
Members of the House Committee on Finance

The Hawaii State Public Library System (HSPLS) **supports H.B. 1412 HD1** 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, and respectfully offers **proposed amendments**.

Digital books are a vital part of library collections in the 21st Century. In FY2022, the Hawaii State Public Library System circulated 1,181,418 digital books (i.e., ebooks and digital audiobooks).

This bill addresses longstanding challenges libraries have faced in accessing and pricing digital books. The models created by the publishers have been prohibitive and not sustainable for public libraries. For example, publishers put embargoes on the release date of high demand titles, so the public cannot access digital copies from the public library on the same date.

In addition, publishers charge libraries higher fees for digital books, even though digital editions are more affordable to produce. Furthermore, libraries don't own these digital books, they merely lease them, almost always at a cost that is four to five times the purchase price of the digital book. HSPLS pays between \$50-\$80 for a single digital book title, which has limits on how many times the title may be borrowed. For example, if HSPLS obtains a copy of an ebook 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 a 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.

Paying so much for access to popular titles also impacts the library's ability to build a diverse collection statewide, as the library has less funding for titles by other authors. Ultimately, this limits the ability to create diverse collections and restricts opportunities for personal and community growth.

We respectfully request an **amendment** to preserve existing contracts while we work with the publishers to transition to new agreements. This legislation will be one of the first in the nation, and as such, we will need flexibility in transitioning. To achieve this, we strongly recommend replacing the existing language in Section 3 with the following:

**SECTION 3. Severability**

The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**SECTION 4. Existing Contracts**

Nothing in this subsection affects existing contracts that are currently in force providing libraries with electronic literary products from vendors and aggregators.

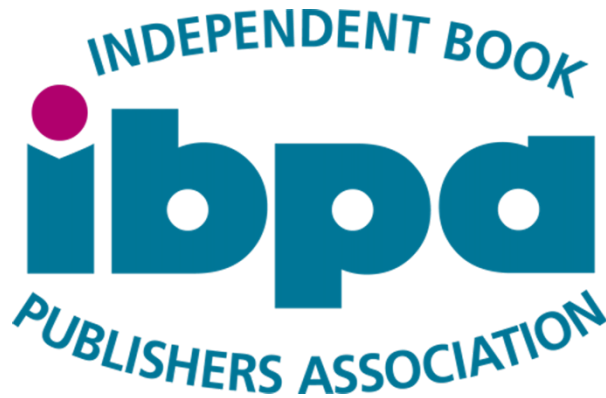
**SECTION 5. Effective Date**

This act shall take effect upon its enactment into law unless otherwise specified. The provisions of this act apply to transactions entered into and events occurring after such date.

We also recognize that academic, research, and special libraries may have other interests to balance and would understand if the legislation is limited to HSPLS libraries and school libraries.

As the only statewide public library system that is also geographically located on six islands, we have unique challenges in providing equal access to all of our communities. This legislation is important for helping to balance good stewardship of public funds and the ability to provide equitable access to digital books for the people of Hawaii.

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



8 February 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.”<sup>1</sup>

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.”<sup>2</sup> 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

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<sup>1</sup> *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999).

<sup>2</sup> *Ass'n of Am. Publishers, Inc. v. Frosch*, 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.”<sup>3</sup>

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

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



BILL: HB 1412, Relating to Libraries  
COMMITTEE: House Committee on Finance  
HEARING DATE: February 28, 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 House Committee on Finance. 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. Last week, 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;”<sup>1</sup> 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 House Committee on Finance 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

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<sup>1</sup> 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>.





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 audio-book 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 House Finance Committee to reject HB 1412.

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

Respectfully submitted,



Shelley H. Husband

Senior Vice President, Government Affairs  
Association of American Publishers