

# eLending Legislation Position Paper

## Audience

This paper primarily targets school and public librarians who collect digital books and who may be interested in advocating for legislation to enable the same access to digital books that libraries have to print. Excerpts of the content may also be useful in educating legislative aides who have questions about proposed digital library book legislation. Finally, publishers, authors, and booksellers may wish to understand library advocates' rationale for pursuing legislative solutions.

## Executive summary

### Problem statement

Since at least 1908, schools and libraries have been able to buy any print book made available to the public at about the same price that the public pays. This is not true with digital books. Publishers specifically restrict school and library access to digital books in a number of ways which include:

- Refusing to allow schools and libraries to acquire some books, like *Charlotte's Web*.
- Charging prohibitively high prices. Most digital books are loaned like print books, one borrower at a time and expire after two years, but cost 2-5 times the print equivalent.
- Using licenses to excise important copyright limitations that serve readers and libraries, including Fair Use.

Pew Research found that 42% of adults surveyed in 2021 had read a digital book in the prior year. Digital books are now mainstream. Therefore, publisher restrictions on digital library books erode more than a century of public access to information and enrichment for hundreds of millions of school children and adults.

Most major publishers have resisted offering the same public access to digital books that the public has to print books, even though that access will not negatively impact their revenue. They have, in fact, shown a decade-long pattern of increasing restrictions rather than decreasing them.

### Proposed solution

Unfortunately, librarians have concluded that legislation is required in order to ensure that schools and libraries have the same access to digital formats that they have had to print for more than a century. To create continuity between print and digital book access the outcomes of legislation will be:

- Schools and libraries will be able to acquire any digital book made available to the public, as they can with print books.
- Digital books with print-like loan terms will cost schools and libraries about the price of the print equivalent.
- Licenses may not be used to rescind existing federal copyright limitations that serve readers or libraries.

Legislation may take place at the state level, federal level, or both. Because licenses are integral to the discussion, so too is contract law, which is a matter of state law. Copyright law, which is federal, may also require adjustment.

## Detailed discussion

### Why schools and libraries have access to print

In 1908, the Supreme Court recognized the [first sale doctrine](#) in copyright law, and it was codified by Congress in the Copyright Act of 1909. Under the first sale doctrine, copyright owners' right to distribute copies of their creative work is extinguished upon the first lawful sale of that copy. This allows people or organizations to resell, lend, or give away the copies of books they own without infringing the copyright owner's distribution right. And it means that the public controls public access to print books. If a community agrees to pool some money, it can build schools and libraries that can buy and loan any print book made available at retail, paying retail prices.

In other words, the first sale doctrine constrains to some extent the exclusive right that copyright owners have to distribute their work to some customers and not others. For example, let us posit that HarperCollins, the publisher of *Charlotte's Web*, prefers not to sell the book to libraries. Libraries can still buy the print version of *Charlotte's Web* from a wholesale or retail outlet, because HarperCollins' right to choose its customers is restricted to its first sale. Thereafter, the copy is the buyers' property to distribute as they wish. Usually, wholesalers like Ingram and Baker & Taylor are publishers' first customers and they choose to sell to libraries. That is why libraries can buy *Charlotte's Web* in print, regardless of the publisher's wishes. Even if the wholesaler decides to respect the publisher's request that it not sell to libraries, a library can still purchase the book from a bookstore, just like any other customer.

The first sale doctrine does not apply to most digital books because they are licensed, not sold, so the "purchasers" of digital books do not in fact own their copies. They cannot resell, loan, or give away digital books unless specifically permitted by their license. With digital books, publishers retain the distribution right throughout a copy's lifespan, which allows them to license to some customers and not others. They can and do refuse to license some books to schools and libraries. In fact, HarperCollins currently refuses to license *Charlotte's Web* to libraries in eBook format.

To summarize, with print books, the public controls public access. With digital books, publishers control public access. Any publisher can remove public access to any or all of their digital books at any time for any reason.

### Why print access is important to democracy and the economy

Every person reading this paper has read or referenced far more books than they could ever buy. Our preschools have classroom libraries of picture books or easy readers. Our elementary students are able to utilize textbooks that older students used the year before. Junior high and high school students borrow classroom copies of the books they study, such as *To Kill a Mockingbird* or *Fahrenheit 451*. College students reference library books and access databases of journals for research. Public libraries, the "lifelong learning" arm of the educational ecosystem, offer information and enrichment for millions of readers every year.

Print access is so pervasive a part of our lives that it feels like oxygen, a given, but it isn't. **It exists only because the first sale doctrine allows the public to buy and share books without restriction from publishers.**

Having that access by default for more than a century has been foundational to the United States' development as an innovative, free-thinking democracy, because productive democratic societies require a literate populace with access to informational resources, regardless of ability to pay. Robust modern economies also require a literate populace with access to inspiring resources and ideas in order to drive innovation. In this way, the publishing industry is uniquely important among other creative industries. To be a productive member of society, one does not need to be able to edit film, or read music, or write code. But one does need to be able to read and to think critically. For that reason, taxpayers invest heavily in literacy and education (and in the publishing industry by extension), as we will discuss in detail below.

To degrade public access to books through schools and libraries is to undercut our long-established political and economic systems. Creating new limits on access to books, as publishers are doing with digital books, is analogous to limiting oxygen; we cannot continue to thrive in this environment. If schools and libraries cannot offer a wide range of resources where readers are, in their cars and on their devices, then our schools and libraries cannot maintain 20<sup>th</sup> century levels of literacy and innovation into the future.

### Why digital book access is as important as print access

[Pew Research found in 2021](#) that 42% of Americans surveyed read a digital book in the prior year: 33% read a mix of print and digital books, while 9% read digital books exclusively. Digital books are a mainstream option for millions, which means that publisher restrictions on digital library books now have a widespread impact.

Public access to digital audiobooks is especially important for two reasons:

- Audiobooks on CD and MP3 will be obsolete within 5-7 years, which means that publishers, not the public, will entirely control public access to this popular format. If a publisher chooses to make popular audiobooks available exclusively to subscription services and not to libraries, then the public will have no access at all to those books.
- Audio is an important format for some vulnerable populations:
  - [7.6 million Americans \(2.4%\) have vision difficulties](#), per the 2020 census.
  - Audiobooks also allow people to read whose physical disabilities disallow them from holding books or devices.
  - Young people, especially reluctant readers, find audio a low-barrier way to engage with books and improve literacy. The National Literacy Trust in UK found that [25.4% of children](#) they surveyed listen to audiobooks.

Audiobooks are also an important format for millions of busy adults who have discovered that they can remain actively engaged with enriching, informative books while also commuting, working around the house, and doing other tasks. The [2020 Immersive Media and Books Study](#) by the Panorama Project and Portland State University found that 70% of audiobook readers are multitasking.

While print remains the preferred format for many, millions now also read digitally. Digital formats are important enough to require legislative protection. We need to restore the level of public access that created the literate populace on which our democracy and economy now depends.

### How publishers currently restrict digital books

First a primer on how digital books are licensed to libraries. Publishers license to libraries on terms that use print as a model:

- Libraries license “copies” of digital books, which can be loaned to one reader at a time.
- If there is high demand for a book, libraries license multiple copies to serve multiple readers at one time.
- After a period determined by the publisher, most digital library books expire, which is somewhat analogous to print books that have to be replaced due to condition or loss (although most licenses expire after 24 months, whereas print books at my library in the adult collections last an average of 7 years).

The use of print as a model for digital books gives publishers a predictable way to generate revenue and to ensure that unfettered public access to digital books does not negatively impact their sales. One can imagine that if public libraries offered unlimited instantaneous access to popular books, many eBook buyers would become eBook borrowers instead. Publishers originally implemented print-like licenses to balance digital book buyers and borrowers the way print buyers and borrowers are balanced.

However, publishers have increased both costs and license restrictions significantly and the system is no longer balanced like print.

### Restriction 1: Refusing to license certain titles to schools and libraries

The major publishers do currently make most of their catalogs available to libraries. But, as noted above, they may rescind access to any or all titles at any time if they decide that public access does not suit them. Macmillan did not make their [full catalog available](#) until 2014 and [Amazon Publishing and Audible](#) started to enable content in only 2021, and remain unavailable on the most commonly used digital lending platforms.

Additionally, the publishers’ claim to provide access to “all” titles is not accurate. Libraries manage hundreds of titles per year that publishers choose to rescind, even if the library has paid for a license. For example, OverDrive libraries recently lost access to all titles from popular author Jodi Taylor, although those titles are available from a Hachette Book Group imprint on the Kindle store. (OverDrive explained that there is a “known issue” with the availability of some titles from Hachette UK).

To get an idea of library availability levels, I looked at the 53 titles that won the Hugo award for best novel between 1953 and 2007 and found that, while individuals can acquire the digital books through the Kindle store, libraries have no access to 20% of the eBooks and 33% of the eAudiobooks.

	eBook	eAudiobook
Available to individuals	49	52
Available to libraries	39	35

% not available to libraries	20%	33%
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Note: 11 of the 17 eAudio titles that are unavailable to libraries are published by Audible Studios. It is possible that they may be included in the titles to be made available through the [Palace Project](#) in the future. It is unclear at this time how much of the Audible catalog will be provided.

Many of the publishers who have chosen not to make the Hugo award books available to libraries are small independent publishers who may not have the resources to enable the books for digital lending. But large publishers are represented too, including Blackstone Publishing, Recorded Books, and Macmillan. In other words, it is false for any of these publishers to state that they offer their entire catalogs to libraries.

A table listing all titles, their availability (as of May 2022) and their publishers is [here](#).

### Restriction 2: Charging prohibitively high prices for print-like licenses

Copyright law bestows upon content creators a temporary legal monopoly on their creative work. Aside from the publisher, no one can legally take the text of the latest bestseller and capitalize on its popularity by publishing and selling their own copies. The legal monopoly ensures that creators are remunerated for their work and that our country benefits from enabling viable career paths for many creative and innovative people. However, the legal monopoly, like all monopolies, is vulnerable to unfair pricing.

With print books, the first sale doctrine disallows publishers from price discrimination targeted specifically to schools and libraries. With digital books, major publishers do conduct price discrimination, offering print-like licenses that cost 2-5 times the cost of the print equivalent, even though digital books cost far less for publishers to produce. The bestselling eBooks from major publishers below are all licensed for sequential patron usage and expire after 24 months. In other words, this is an apples-to-apples price comparison between digital and print books.

Title	Author	Publisher	eBook price	Retail print price	eBook markup over print
The Lincoln Highway	Amor Towles	Penguin Random House	\$55.00	\$18.00	206%
Verity	Colleen Hoover	Hachette	\$65.00	\$11.26	477%
Cloud Cuckoo Land	Anthony Doerr	Simon & Schuster	\$59.99	\$18.23	229%
Beautiful World, Where Are You	Sally Rooney	Macmillan	\$60.00	\$16.80	257%
The Lightning Thief*	Rick Riordan	Disney	\$17.99	\$5.97	201%

\*expires after 26 loans

To information on more publishers, readers can consult the [Readers First Publisher Price Watch](#) tool.

High prices impact public access to books because library and school budgets are relatively fixed. Simply put, **if publishers offer digital books with print-like terms for three times the cost of print books, then schools and libraries can acquire a third the number of digital books.** If publishers increase their prices,

as they have done over the past ten years, then the number of digital books in schools and libraries will shrink even further.

High prices on the part of the major publishers are also impactful because they publish more books per year than smaller publishers. For the Washington Digital Library Consortium, serving 850,000 residents, the five publishers above represent 52% of the copies in our collection.

It is important to note too that a two-year expiration means that schools and libraries must constantly reacquire popular and important books. For example, all of the perennially popular titles below have to be relicensed every two years.

Title	Author	Publisher	Publication date	2-year license cost
The Pillars of the Earth	Ken Follett	Penguin Random House	1989	\$30.00
Hitchhiker's Guide to the Galaxy	Douglas Adams	Penguin Random House	1979	\$55.00
Tuesdays with Morrie	Mitch Albom	Penguin Random House	1997	\$55.00
Catch-22	Joseph Heller	Simon & Schuster	1961	\$51.99
Fahrenheit 451	Ray Bradbury	Simon & Schuster	1953	\$51.99

My library's print copy of *Fahrenheit 451* was purchased 12 years ago for about \$16. Enabling a digital copy for 12 years costs taxpayers \$311.94, a markup of 1850%.

Higher prices are acceptable when library license terms are more favorable than print. For example, some publishers offer digital books on perpetual use licenses, which do not expire. And it is reasonable to expect those licenses to cost more than the physical equivalent. Some licenses also permit multiple simultaneous users and have premium prices. However, the vast majority of digital library book licenses are print-like, loaned to one reader at a time, and therefore should not cost more than print. See the appendix section "How much publishers make from digital books" for more details.

### Restriction 3: Limiting library copies through embargoes

Imagine that a community transit system rents vans and busses from an automotive company like General Motors or Mercedes. And imagine that the corporation decides that it is too easy for the community to ride the bus and that the company might profit by making transit less convenient. It therefore limits the number of vehicles it rents, forcing the transit system to make its routes less accessible to all riders in the hope that some would-be riders will buy cars instead. This is what Macmillan did with library eBooks in 2019.

As noted above, library eBooks are loaned to one borrower at a time, exactly like print books. Therefore, when popular eBooks are released, library systems typically license many copies to serve the hundreds of patrons on wait lists for the books. For example, New York Public Library currently licenses 137 eBook copies of John Grisham's 2021 *The Judge's List*. In 2019, Macmillan decided that multiple library copies made borrowing too easy and that it could [increase its retail sales an estimated 8%](#) by making borrowing more difficult. It changed its license terms such that libraries, regardless of size, could license only one copy of any new eBook for eight weeks after its release, temporarily and artificially inflating the wait times for its books. By limiting the access that libraries typically offer and making it harder for everyone

to borrow, it hoped to drive the more affluent would-be borrowers to buy copies instead. Notably, librarians pointed out to then-CEO John Sargent in early 2020 that the embargo disadvantaged the less-affluent, including people of color and older adults, and [Sargent replied that he knew](#).

Embargoes are particularly egregious limitation, because they allow publishers to control the level of service a library offers its community. With print materials, schools and libraries can buy on the day of publication as many copies as they determine their students or community needs. That decision is in public hands. With digital books, public access, wait times, and library service quality are controlled not by the taxpayers funding the service, but by corporations.

#### Restriction 4: Using licenses and terms to create “shadow copyright”

Copyright law has several clauses that allow readers and libraries to use copyrighted work in limited ways without permission from copyright holders. These limitations and exceptions are an important component of copyright, protecting public access, especially in the service of education. However, publishers and their distributors have written license agreements and terms of use that require readers and libraries to waive those rights. As such digital book licenses and terms function as shadow copyright, excising copyright limitations that serve libraries and readers, including students, and functionally making copyright law meaningless for millions of readers.

The limitations and exceptions we will discuss here are:

- [Section 107](#), also known as Fair Use, which gives readers the right to quote and adapt copyrighted work, especially in the service of education.
- [Section 108](#) which gives libraries the right to make a copy of a work for archival purposes or for interlibrary loan
- [Section 121](#) which gives the right to make accessible copies for “blind or other people with disabilities,” a task that currently is sometimes undertaken by libraries on behalf of patrons, and is important in part because publishers are not required to make books accessible and have [historically resisted the cost](#).

#### Section 107: Fair Use

OverDrive is the digital library book platform used by almost all digital school and public libraries in the U.S. and Canada. It enables library patrons to read digital books online, using eReaders like Amazon Kindle or Kobo, and using its popular reading app Libby. The [OverDrive Terms and Conditions](#) state that users may not:

“...redistribute, repackage, transmit, assign, sell, broadcast, publicly display, rent, share, lend, modify, extract, reveal, adapt, edit, sub-license and/or otherwise transfer or misuse the Content...”

Several of these behaviors are widely considered acceptable under Fair Use. For example, a creator may wish to extract from, modify, or edit a work in order to criticize or satirize it. Likewise, a student creating a presentation about a book may wish to publicly display the cover, take extracts from the book, and share them with the class. In sum, students are not allowed to use OverDrive for book reports or research papers.

Another digital library book distributor [Axis360](#) specifically states, “Your use of eContent must also comply at all times with the Fair Use privilege under the U.S. copyright laws (see, e.g., 17 U.S.C. Section

107).” But then it goes on in the next section to state that users may not “make any of eContent available to any third party,” which, like OverDrive, makes it impossible for students to present book reports, use quotes, or display book covers. So, the apparent allowance for Fair Use is meaningless. Axis 360 demonstrates one of the perils of “shadow copyright.” Students and creators are denied a federal right, not because the distributor has a legitimate business reason, but because its lawyers were unable to draft an internally consistent set of terms.

Notably, the [Kindle Store terms of use](#) do not require individuals to waive Fair Use, nor do the terms and conditions for digital library book distributors [cloudLibrary](#) or the [Palace Project](#).

### **Sections 108 and 121: Archival and accessibility copies**

It is standard for digital library book platforms, including OverDrive, to disallow libraries from creating limited copies of digital books, as they can with print. The prohibition has not had serious implications in the past because digital books had analog counterparts that could be copied. However, audiobooks on CD and MP3 are likely to be obsolete soon. When that happens, libraries will be unable to make archival copies of digital audiobooks, a service that is crucial to the [dozens of libraries](#) in all 50 states dedicated to collecting on behalf of the visually impaired in their communities. According to the 2020 Census, there are 7.6 million Americans who report a disability related to their vision. [3.2 million](#) of them are over 65 and therefore also have a [lower median income](#), so they are disproportionately impacted by limits on public access to digital audiobooks.

### [Publisher pattern of increasing restrictions](#)

Schools and libraries are especially concerned about public access because publishers have shown a pattern of increasing prices and restrictions over the last decade. My [eLending position paper on Readers First](#) documents the following in detail.

Between 2011 and 2020:

- the average cost of a Big Five eBook license went from \$13.37 to \$39.96, a 300% increase. By contrast, the price of print materials increased by 11% in that time period.
- the average cost of an eAudiobook license (including Blackstone Audio and RBDigital) increased from \$35.37 to 60.31, an increase of 59%.
- [The New Republic reported in December 2020](#) that publishers were licensing *The Diary of Anne Frank* to schools for 12 months and charging \$27 per student. The paperback format costs \$6.29 on Amazon and can be used by multiple students.

Major publishers also switched from licenses that allow libraries “perpetual use” of digital books to licenses that expire after a brief period.

- All five major publishers adopted eBook licenses that expire after either 24 months or 26 checkouts, so schools and libraries must continually repurchase titles. Public libraries associated with the [Readers First Working Group](#) estimated in 2021 that ~25% of their annual budget is now dedicated to re-licenses. Many print books also have to be repurchased due to wear-and-tear, but print books at my library last an average of seven years.



- Hachette and Simon & Schuster switched eAudio from non-expiring licenses to licenses that expire after 24 months.

In sum, taxpayer dollars now buy far fewer copies of books than was possible a decade ago and nothing currently stops publishers from further increasing prices and restrictions. School and library budgets cannot increase proportionally, so fewer and fewer digital books will be publicly available if the pattern continues.

### Why digital library book access will not harm publishing revenue

To reiterate, schools and libraries seek for digital books the same access we have had to print since before 1908:

- Schools and libraries will be able to acquire any digital book made available to the public, as they can with print books
- Digital books with print-like loan terms will cost schools and libraries about the price of the print equivalent.

We use print access as a precedent specifically because it has proven for more than a century to be a level of public access that allows publishers to profit. The U.S. publishing market is the wealthiest in the world, generating [\\$15.4 billion in 2021](#). In 2015, the International Publishing Association reported that the U.S. market generated [2.5 times the revenue](#) generated by China's publishing market, the next largest, which is especially significant when we consider that China has over four times the U.S. population. If libraries pay print-like prices for print-like digital book licenses – not more and not less – then the industry will continue to prosper.

That said, it is worth addressing two specific questions:

### Will lowering digital book prices lower publisher revenue or author royalties?

Most libraries have relatively fixed budgets that they always spend out, and lowering prices will not change the amount we spend. For example, my digital book consortium spent approximately \$300,000 in 2021 on eBooks from the Big Five publishers at an average cost of \$40. Lowering the price to \$20 will not cause the library to spend \$150,000. It will cause the library to license twice as many digital books.

**The publishers make the same \$300,000 either way.**

Most authors will actually benefit from library legislation because the high prices on digital books skew digital collections heavily to a relatively few popular authors. In 2021, my consortium was able to license about 7,500 copies with \$300,000 at an average \$40 per copy. Approximately 6,000 of those copies were duplicates that we purchased due to popular demand. So, in 2021, we acquired titles from around 1,500 unique authors.

If the cost of an eBook was \$20, like its print equivalent, we could buy 15,000 copies. Assuming the same demand for popular titles, we would license 6,000 duplicate copies and be able to represent 9,000 unique authors in a year, six times as many authors as we are able to represent at current prices.

It is true that some popular authors will be financially disadvantaged if publishers trim their prices from \$40 to a print-like \$20. In our scenario, about 1,500 authors currently in the collection would see half

the income from library eBooks they receive now. But ~7,500 new authors would receive new income. If we count the value of free library promotion for 7,500 authors, who arguably need readership and buzz much more than popular authors do, then publishers and most authors should see net positive revenue from offering libraries print-like prices on digital books.

The Association of American of Publishers (AAP) has claimed that library legislation will negatively impact revenue and royalties. It stated in its [January 31, 2022](#) filing in its Maryland lawsuit, “That the Maryland Act is likely to negatively impact publishers’ revenues should not be minimized, let alone denigrated, given that these revenues drive publishers’ abilities to provide advances and royalties to authors.” The statement is unsubstantiated and false, demonstrating either purposeful disinformation or the AAP’s ignorance of how digital lending revenue actually works. In either case, both author income and public access to digital books are too important to allow such claims to stand without evidence.

### [Will legislation allowing states to define “reasonable terms” disadvantage publishers?](#)

The legislation in several states specifies that digital books be offered to libraries on “reasonable terms,” a phrase that has concerned some in the industry. The Independent Book Publishers Association (IBPA) [published a statement](#) in which they observed:

“...the State of Maryland could dictate a ‘standard’ eBook and audiobook license that pays \$1.00 per year for licensing unlimited copies to all libraries in the state. This would significantly impact the revenues from the sale of the book to the public and cause significant economic losses for small publishers and author-publishers...”

It is true that such a license would enable unprecedented levels of public access that would negatively impact publisher revenue, so libraries would not deem such a license “reasonable.” Fair remuneration for authors and publishers is critical to the long-term health and growth of the reading ecosystem, and libraries recognize that high levels of public access would harm that ecosystem. Again, print access offers a useful model. If libraries are offered digital books with print-like terms, they should expect to pay no more and no less than the cost of the print equivalent.

Although the Maryland law itself did not provide detail on what would constitute “reasonable terms,” Maryland librarians published a statement in July 2021 that recommended print as a model. They stated, “Library eBooks and eAudiobooks with print-equivalent license terms (loaned sequentially for a limited lifespan) should have print-equivalent prices. Based upon a centuries old model, updated to the digital realm, print-equivalent terms could be fair to publishers, authors, libraries, and users....”

In other words, libraries have no intention of offering a level of public access to books that would result in revenue levels worse than print. However, in future legislative efforts, it may be wise to embed limitations on both libraries and publishers into the law itself so that there is no question about how it may be implemented. Publishers and authors may be protected from prohibitively low prices, just as schools and libraries are to be protected from prohibitively high prices.

### [Special considerations for legislation](#)

Aside from the above, there are several more facts that argue for the legislation of public access to digital books.

- Most major publishers are owned by international companies.
- Schools and libraries can’t negotiate license terms, which are “take it or leave it.”

- The publishing industry is unique in the creative industries as a recipient of billions of American taxpayer dollars annually.

#### Several major publishers are owned by international companies

In considering the importance of American public access to digital books, funded by taxpayers, it is worth noting that three of the five major publishers are owned by international media corporations. The largest, Penguin Random House (PRH), is owned by [Bertelsmann](#) based in Germany. PRH has an estimated [24% of the U.S. book market in 2019](#) and may acquire Simon & Schuster (S&S), which has a market share of 9%. Hachette and Macmillan are owned by media companies based in France and Germany respectively.

So, when the Association of American Publishers argues that publishers should continue to control American public access to digital books, they are mostly defending control for international mega-corporations with interests in many non-American markets. Some of these markets will be overtly hostile to American intellectual property regulation in a way that differs from an American publishing company's position on regulation. For example, the American publisher Scholastic Corporation will certainly defend strong intellectual property laws because it depends on fair remuneration for itself and its authors. But it will also acknowledge that it benefits from some copyright limitations that serve education such as Fair Use. Scholastic needs teachers and literate, creative young people to buy its books, so American education is both a public and a corporate good for Scholastic. For international companies, the benefit of a literate, creative, competitive American populace is much more ambiguous. If our country is to retain 20<sup>th</sup> century levels of literacy, creativity, and competitiveness in international markets, we need legislation that clearly protects those values with the same public access to digital books that we have had to print since before 1908. And we must not be influenced by the representatives of corporations who do not have those interests at heart.

#### Schools and libraries are disadvantaged in negotiating better terms with publishers

My library spends approximately \$70,000 per year to license the database that we use to track our collections and our patrons. We contract with a library database company and renegotiate our contract with them periodically. And we have regulations in place that disallow taxpayer dollars to be misused as we work with such vendors.

By contrast, we spent \$175,000 in 2021 on digital books, an amount that we cannot negotiate, for a number of reasons.

- Publishers set the price ranges, but libraries contract with distributors like OverDrive, not publishers directly.
- My library is one of more than [9,000 public libraries](#) in the country, and there are [130,930 public and private K-12 schools](#). Almost no single school or public library has the clout to negotiate price.
- License agreements are “take-it-or-leave-it” but “leave it” is not a reasonable option for schools and libraries, which are chartered by their communities specifically to acquire a wide range of inspiring, educational books.

In other words, nothing currently protects taxpayers from exorbitant prices on digital books. Their option is either to pay or not to be able to read on their devices.

## [How American taxpayers invest in the publishing industry through schools and libraries](#)

Publishers sometimes assert that their business suffers due to school and library lending. In fact, the opposite is true. The publishing market would be a shadow of what it is today without schools and libraries providing the industry with billions of taxpayer dollars every year. The American public invests heavily in literacy because it is foundational to our democracy and our economy. Publishers benefit directly and indirectly from that investment in several ways.

### **Taxpayers spend about \$4 billion per year on books**

Public libraries: According to the annual survey by the Institute of Museum and Library Services (IMLS), public libraries spent approximately \$1.2 billion dollars on books in [2019](#). For context, the trade publication industry's 2019 annual sales totaled [\\$7.9 billion](#).

Schools: According to Statista, public elementary and secondary schools spent [\\$2.76 billion dollars](#) on textbooks alone in 2018. The revenue that year for the K-12 sector was \$3.46 billion dollars as [reported by the AAP](#).

### **Taxpayers invest hundreds of billions in youth literacy**

The American publishing industry would not be the wealthiest in the world if Americans couldn't read. The National Center for Educational Statistics estimates that total 2017-2018 expenditures for K-12 public schools totaled [\\$762 billion](#). If we estimate that one third of that spending is dedicated to language arts, then taxpayers invest \$254 billion dollars per year in future readers. Book distributor Ingram reports that [about half of these readers become book buyers](#).

### **Taxpayers support the marketing of books**

Passive book promotion:

There are 9,000 public libraries in the United States with 16,000 locations (more than either McDonalds or Starbucks). By contrast, there [6,000 bookstores](#). This means that when readers encounter new books, they very often do so at the library.

When readers see a book on the library shelf, that experience alone has value for publishers. Books that readers encounter on Amazon are chosen by algorithms and advertising code. When readers browse the library, the books they encounter are known to be chosen by seasoned book experts with graduate degrees, who have an ethical obligation to their communities to choose a wide range of quality materials. In other words, when a book appears on a library shelf (or in the online catalog), that is an expert endorsement of the book's value.

Notably, this value has become especially important to traditional publishers since the advent of digital books and the explosion of self-publishing. [Preserving the public's perception of the high value of their product](#) was behind several publishers' price-fixing effort, over which the Justice Department sued in 2012. According to a New Yorker article in 2014, "...publishers believed that the low retail price of e-books eroded the public's perception of what books are worth." John Sargent, then CEO of Macmillan, reiterated the concern in 2019, stating to authors, illustrators and agents, "Our new terms are designed to [protect the value of your books](#)."

### Active book promotion:

Libraries also actively promote books. Public library professionals help thousands readers discover new authors and books seven days a week, and it is well known that [library patrons are also book buyers](#) who use libraries to “test drive” new authors and ideas. Library Journal’s [2019 Generational Reading Survey](#) found “About one-third of all generations use the library for book discovery.”

Libraries also coordinate promotional events such as book groups and community reading programs that require marketing, which benefits authors and publishers. Cuyahoga County Library System, using a tool like the [Library Marketing Valuation Toolkit](#), calculated the marketing value of a single author event at over \$18,000.

Author event	Marketing
Website impressions	\$ 3,809.00
In-branch impressions	\$ 2,183.00
Email marketing	\$ 375.00
Paid radio and TV spots	\$ 12,000.00
	\$ 18,367.00

If we were to estimate that half the nation’s public libraries do one author event per year, then taxpayers bestow on the publishing industry tens of millions of dollars per year worth of free advertising from author events alone.

### **Taxpayers fund the publishing industry’s only effective defense against digital piracy**

It is a fact that popular digital books are available for free on [piracy sites](#). It is also a fact that most readers do not use those piracy sites and instead choose to buy or borrow digital books. Why? The barrier to the use of the piracy site is this: most people in our society know and respect the idea that creative work belongs to the creator and that using that work without remunerating the creator is theft.

In the U.S., we learn from an early age that we may not copy another person’s text and present it as our own. This idea feels ‘self-evident,’ but it isn’t. We learn it from teachers and librarians. Many literate societies, like China, exist without strong intellectual property laws, and piracy (as we define it) is rampant there. U.S. teachers and librarians avert that kind of piracy, inculcating respect in their students for others’ creative work, and teaching them how to use excerpts and cite sources. This is not an insignificant taxpayer investment: any seasoned reference librarian can report on the hours they spend every single week helping to ensure that a copyright owner’s intellectual property rights are respected as students do research.

Publishers have become very concerned about the cost of piracy because digital books are easier to copy and distribute than print. They have implemented technical solutions like Digital Rights Management software and legal solutions like the Digital Millennium Copyright Act, and some authors, publishers, and professional organizations have [pursued legal redress](#), but the real deterrent is not technical or legal. It is educational. And authors and publishers have taxpayers to thank.

Schools and libraries also avert piracy by offering readers a legal way to access digital books without incurring out-of-pocket cost. Digital library books enable publishers to monetize millions of people

whose incomes do not allow them to buy all the books they want to read. Without the library, these readers' alternatives are piracy, or not to read at all.

## Legislative solutions for digital library book access

### A brief history of state legislation

In February 2020, during the Macmillan embargo on digital library books, [the state of New York proposed legislation](#) which stated:

“Any publisher who offers to license electronic books to the public shall offer to license such books to libraries in the state on reasonable terms that would permit the libraries to provide their users with access to such electronic books.”

The legislation was tabled because of the urgent need for legislatures to address the COVID-19 crisis, but was reintroduced in 2021 and [passed both houses unanimously with the exception of one vote](#). However, the governor vetoed the law.

Also in 2021, [Maryland introduced similar legislation](#), which passed unanimously and went into law on January 1, 2022. The AAP sued Maryland and argued that the law is pre-empted by Copyright. In June 2022, the judge [ruled in agreement](#).

Six other states proposed similar legislation:

- Connecticut
- Illinois
- Massachusetts
- Missouri
- Rhode Island
- Tennessee

### Next steps

One of the lessons from the Maryland legislation is that achieving print-like access to digital books will not be as straightforward as we hoped. A combination of state and federal legislation may ultimately be required to enable these outcomes:

1. Schools and libraries will be able to acquire any digital book made available to the public, as they can with print books.
2. Digital books with print-like loan terms will cost schools and libraries about the price of the print equivalent.
3. Digital books will be available to schools and libraries on the same day as they are made available to the public.
4. Copyright holders offering print-like licenses will not limit the number of copies schools or libraries can license.
5. Licenses may not be used to waive federal copyright limitations and exceptions that serve readers or libraries.

## State legislation

States with laws like Maryland's may wish to pursue them, because the Maryland ruling does not apply to other federal district courts and so other federal judges in other states could rule differently given the identical circumstances. The [American Library Association and others do not agree](#) with the judge's rationale in the Maryland case.

Several states are also considering revised legislation that is unambiguously distinct from copyright law and that achieves much of the access the Maryland law sought to achieve. Library advocates who wish to discuss these revisions or legislative possibilities in general are welcome to email Carmi Parker ([carmi.parker@wcls.org](mailto:carmi.parker@wcls.org)) and Michael Blackwell ([mblackwell@stmalib.org](mailto:mblackwell@stmalib.org)). The ALA is also putting together resources during the summer of 2022 for libraries interested in advocating for improved access to digital books.

## Federal legislation

Federal legislation – perhaps an update to the U.S. Copyright Act itself -- will be difficult to achieve, but I believe it is both possible and crucial as the ultimate guarantee of continued public access to books.

In the achievement of this goal, libraries have on our side the precedent of the first sale doctrine, which has proven to benefit all of the stakeholders in the reading community for more than a century. We also have seen exceptional bipartisan support for the New York and Maryland laws, demonstrating that our public representatives on both sides of the aisle place a high value on public access to digital books for our schools and libraries.

Finally, it is important to remember the purpose of copyright law: to serve the public. When enacting copyright law, Congress determined that a temporary legal monopoly on intellectual property would encourage the creativity and innovation our country needs to grow. Remuneration for creators is crucial, but it is not the end goal of copyright law. It is a means to an end. The end goal of copyright is to serve the American public. And when corporations use license agreements to restrict historic public access, as they have done with digital books, it is necessary for us to correct our legislative course to ensure that the law continues to serve the public at least as effectively as it has done in the past.

## Countering opposition

The Association of American Publishers (AAP) perceives library legislation as an “attack” on copyright and has been vehement in its opposition, testifying in several hearings, sending protest letters to state legislators, and coordinating other letters from other professional organizations interested in copyright. The AAP unfortunately does not hesitate to use disinformation in the attempt to influence legislators, courts, and other stakeholders. Therefore, library advocates will wish to prepare material proactively for legislators and staff that debunk the AAP's most common charges. The Appendix includes two sections that may assist with this:

- Q&A, targeted to legislators or library stakeholders. It includes answers to several of the charges the AAP makes
- “On the AAP”: a detailed list of AAP charges, each debunked.

## Conclusion

### Stay up-to-date

In 2021-22, the library legislation landscape was constantly shifting, so librarians working with digital books or conducting advocacy may want to follow the Readers First [Twitter](#) feed or sign up for regular [email updates](#), using the form on the lower right. [Contact us](#) with any questions about the information above, or to let us know that you are interested in legislative advocacy. We can help!

### Thanks

I am indebted to a number of people for excellent, thoughtful feedback on this paper, including Jonathan Band, Michael Blackwell, Alan Inouye, and Mary Kinser. I also could not have invested so much time without the support of Lisa Gresham and Christine Perkins at Whatcom County Library System where I am very proud to work.

### About the author

Carmi Parker is a librarian and ILS Administrator for [Whatcom County Library System](#) headquartered in Bellingham, Washington. She serves on the Executive Advisory Committee for the [Washington Digital Library Consortium](#) (WDLC), an OverDrive consortium serving ~850,000 residents of Washington State. She also is a member of the [Readers First](#) Working Group, advocating for improved eBook experiences for libraries and patrons, and was a facilitator of the 2019-2020 [Macmillan boycott](#) in response to their eBook embargo. In 2021, she received a [Library Journal Mover & Shaker award](#) for that work. Before becoming a librarian, she worked at Microsoft as a technical program manager in the Online Services Division for 14 years. She lives in Everett, Washington with her family.



## Appendix

### Q&A on digital library book legislation

Advocates for digital library book legislation may want to use or adapt any or all of the Q&A content below in material that they prepare for their library stakeholders, state lobbyists, or legislators.

#### **Why are librarians proposing digital library book legislation?**

Since at least 1908, schools and libraries have been able to buy any print book made available to the public at about the same price that the public pays. This is not true with digital books. Publishers restrict school and library access in a number of ways, including:

- Refusing to allow schools and libraries to acquire some books, like *Charlotte's Web*.
- Charging prohibitively high prices. Most digital books are loaned like print books, one borrower at a time and expire after two years, but cost 2-5 times the print equivalent.
- Using licenses to excise important copyright limitations that serve readers and libraries, including Fair Use.

Pew Research found that 42% of adults surveyed in 2021 had read a digital book in the prior year. Digital books are now a mainstream option. Therefore, publisher restrictions on digital library books erode historic public access to information and enrichment for hundreds of millions of school children and adults.

Most major publishers have resisted offering the same public access to digital books that the public has to print books, even though that access will not negatively impact their revenue. They have, in fact, shown a pattern of increasing restrictions rather than decreasing them.

#### **What outcomes does the legislation propose to achieve?**

The legislation will ensure that schools and libraries have the same access to digital formats that they have had to print for more than a century. To create continuity between print and digital book access the specific outcomes of legislation will be:

- Schools and libraries will be able to acquire any digital book made available to the public, as they can with print books
- Digital books with print-like loan terms will cost schools and libraries about the price of the print equivalent.
- Licenses may not be used to waive existing federal copyright limitations that serve readers or libraries

#### **What are libraries currently paying for digital books?**

[Libraries may wish to customize this table for their own communities to personalize it for legislative staff]

The titles below come from large publishers who make up the majority of the collection. These prices are for licenses that can be loaned to one reader at a time, exactly like print.

Title	Author	Expires after:	Publisher	eBook price	Retail print price	eBook markup over print
The Lincoln Highway	Amor Towles	2 years	Penguin Random House	\$55.00	\$18.00	206%
Verity	Colleen Hoover	2 years	Hachette	\$65.00	\$11.26	477%
Cloud Cuckoo Land	Anthony Doerr	2 years	Simon & Schuster	\$59.99	\$18.23	229%
Beautiful World, Where Are You	Sally Rooney	2 years	Macmillan	\$60.00	\$16.80	257%
The Lightning Thief	Rick Riordan	26 loans	Disney	\$17.99	\$5.97	201%

Advocates may also consult the [Readers First Publisher Price Watch](#) tool, which compares the cost of eBook licenses across publishers.

**Is the state the right place for this legislation or should it be handled federally, perhaps by amending copyright law?**

Opponents of the legislation have argued that states have no jurisdiction over how digital books are licensed because digital books are protected by copyright. However, copyright does not bestow legal immunity on copyright holders from state property, contract, tax or other laws. Additionally, digital book publishers and distributors overtly use licenses as business contracts that are legally distinct from copyright law and therefore are subject to regulation and consumer protection like any other contract.

It is true that the digital library book legislation in Maryland was enjoined because the judge interpreted the law in a way that she considered in conflict with copyright. The American Library Association and its legal consultants disagree with the judge’s conclusion. If the same legislation is addressed in a different federal district court, the outcome may be different, and the Maryland ruling is not binding. However, states considering digital library book legislation may wish to draft their bills so as to minimize the misinterpretation that led to the Maryland outcome.

**Will legislation negatively impact publisher or author income?**

The legislation will not negatively impact publishers or authors. Both, in fact, may benefit financially. In brief, the legislation seeks to enable print-like prices for digital books that are offered to schools and libraries on print-like terms (loaned to one reader at a time). Librarians propose to use print as a model because it has proven for more than a century to benefit publishers, authors, and libraries. It has, indeed, enabled the high level of literacy we enjoy today along with the wealthiest publishing market in the world. Under legislation, publishers who offer print-like digital books will earn print-like revenue.

The Association of American Publishers (AAP), primary opponent to the legislation, has claimed several times that there will be a negative revenue impact, but have not substantiated the claim in any way. Since the AAP has a record of making false claims, this must be counted among them unless they provide evidence.

### **Will the legislation negatively impact other creative industries or independent booksellers?**

Digital library book legislation includes careful definitions of terms, which delineate exactly which parties are to be impacted by it. For example, the legislation in New York defined “publisher” as

“one whose business is the manufacture, promulgation, and sale of books, journals, magazines, newspapers, or other literary productions including those in digital form consisting of text, imagery or both.”

Legislation that carefully defines “publishers” cannot legally impact members of the film, music, photography, or software industries.

The AAP originated this claim, but has not substantiated it. It has also claimed that digital library book legislation threatens jobs at independent bookstores. Since bookstores are stakeholders in legislation that impacts book publishing, the AAP should be required to show evidence that increased digital library book availability causes decreased physical retail sales over time. Many independent bookstores believe that their community libraries aid their businesses by cultivating readers and offering low-barrier ways to test drive new authors. If those bookstores are correct, then print-like digital library book availability will help them, not hurt them.

### **Are libraries coordinating with Big Tech interests on legislation?**

Libraries are not working with Big Tech on digital library book legislation. The claim springs from concern that many in the creative industries share about Google and Facebook and other large tech corporations that depend on Fair Use. They are worried about the influence such corporations might have on the future interpretation of copyright law. However, the “Big Tech” issue is completely separate from the issues driving librarians to propose digital library book legislation. The AAP has claimed that the two issues are the same and that libraries are colluding with Big Tech on digital book legislation, but this is simply false.

### **Is it in the public interest to let the market determine digital library book prices and availability rather than trying to regulate it?**

Legislators that are generally opposed to the regulation of business in the interest of a free market economy may be concerned about digital library book legislation that will impact pricing. There are two economic considerations for these legislators:

First, copyright bestows on copyright holders a temporary legal monopoly. This monopoly is what allows creators and no one else to benefit financially from their creative work. If an author writes a book, no one except that author can take the book and monetize it. While this legal monopoly benefits both creators and society, it also means that competition does not have the same cost and price reduction impact that it has on a product that cannot be monopolized. If a library likes to purchase Brother printers and believes its current vendor’s prices are too high, it can choose a different vendor. If it

believes, alternatively that the digital book prices on James Patterson books are too high, there is no alternative. No one but James Patterson's publisher licenses James Patterson digital books.

Because of the legal monopoly, copyrighted works are vulnerable to unfair pricing, as in any monopoly. Librarians believe such unfair pricing has occurred with digital library books. The digital book, *Run Rose Run*, a 2022 release by James Patterson and Dolly Parton, costs libraries \$75.00 for two years of access to be loaned to one reader at a time, like print. The same book in print costs libraries \$18.00.

Second, legislators may also wish to consider taxpayer relief. Most schools and libraries are funded by their communities. When those communities must pay \$55.00 - \$75.00 each for digital books that last only two years and allow one reader at a time, the taxpayers are simply not getting their money's worth.

### **Conclusion**

Libraries seek continuity between public access to print and digital books. Now that digital books are a mainstream option, the measurably limited access libraries have to digital library books impacts millions of people, including school children. The restoration of print-like access will insure that libraries can continue to serve our communities as effectively in the future as they have in the past.

### How much publishers make from digital library books

Schools and libraries believe that the price discrimination they experience with digital books is excessive in part because major publishers are charging far more than print on a format that costs them far less to produce. We have researched how this works below.

#### **Hardback: what publishers, authors, and distributors earn and what libraries pay**

When a publisher releases a print book, it assigns a list price. This is the price that usually appears somewhere on the book jacket, and it can be found online as the price that distributors discount. An example from Amazon is highlighted below.

**Beautiful World, Where Are You: A Novel**  
 by Sally Rooney | Sep 7, 2021  
 ★★★★★ - 8,975

**Hardcover**  
 \$16.80 ~~\$28.00~~  
 ✓prime FREE Delivery Sat, Apr 9  
 More Buying Choices  
 \$8.40 (121 used & new offers)

**Audible Audiobook**  
 \$0.00 ~~\$25.54~~  
 Free with Audible trial  
 Available instantly

**Kindle**  
 \$14.99 ~~\$28.00~~  
 Available instantly

Other formats: Paperback, Audio CD

*"You're renting this place on your own? he said. I know, she said. It's much too big, obviously."*  
 Highlighted by 943 Kindle readers

The list price is an estimate that publishers make as to the value of the book, but buyers almost never pay it, because distributors buy books from publishers at wholesale prices and then mark up from wholesale.

Usually the wholesale price on a print book is 50% of the list price. So, in the example above, Macmillan makes \$14.00 in revenue from *Beautiful World, Where Are You* by Sally Rooney, which has a list price of \$28.00.

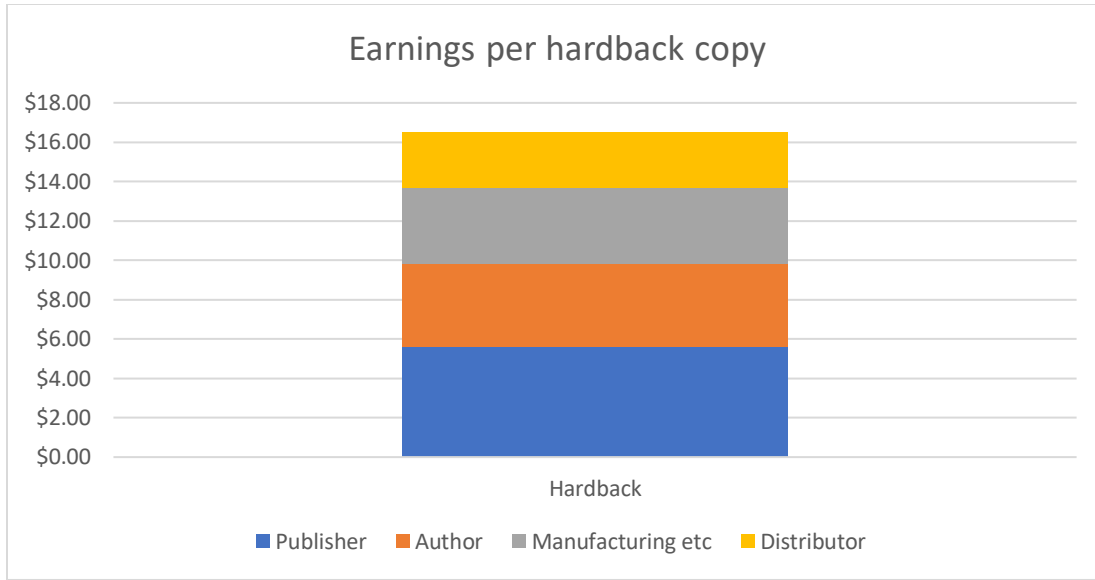
The author portion of the publisher revenue for a hardback is usually 15% of the list price, so the author makes \$4.20.

According to a [blog post by author Hugh Howey](#), the publisher margin on a print book is 41% so after paying the author and covering the cost of manufacturing and shipping, the publisher earns \$5.63.

Libraries buy tens of thousands of print books annually and usually have business agreements with one of the major book distributors that allows them a discounted rate. For example, my library works with Ingram and our discount is approximately 40% off the list price. Therefore, if Ingram buys *Beautiful World, Where Are You* from Macmillan for \$14.00 and sells it to my library for \$16.80, it earns \$2.80.

	Hardback
List price	\$28.00
Publisher %	50%
Publisher revenue	\$14.00
Author % of list	15%
Author revenue	\$4.20
Manufacturing, shipping, returns	\$3.85
Publisher net	\$5.95
Publisher net %	43%
Distributor %	10%
Distributor revenue	\$2.80

Here is a breakdown of who earn what amount from the sale of a hardback book to a library:



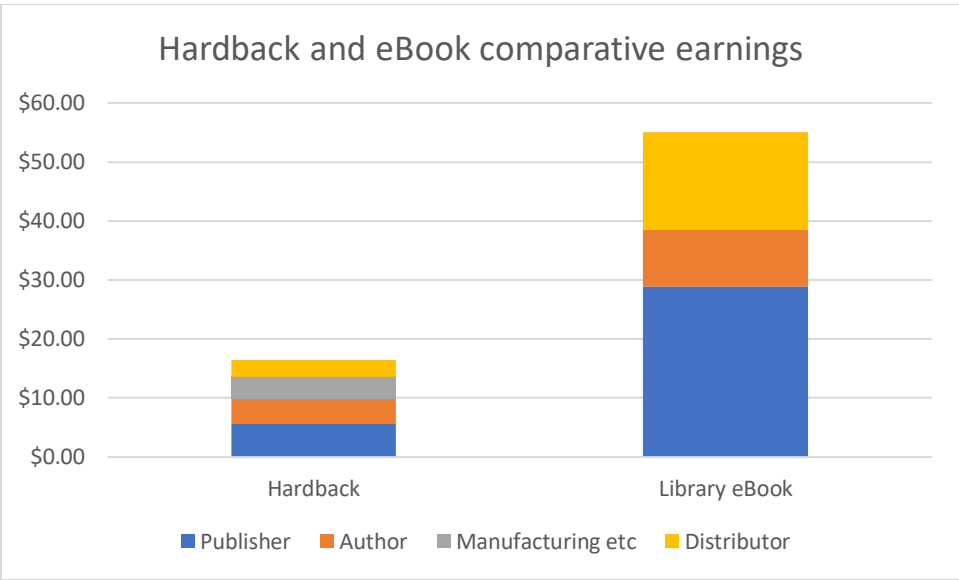
**eBook: what publishers, authors, and distributors earn and what libraries pay**

When a publisher releases a book in eBook format, it uses a different revenue model with distributors than the 50/50 wholesale model used for print. Instead, it uses what is called an “agency model” under which publishers set the price of an item and then give distributors a percentage. eBook distributors like Amazon receive 30% of the price of an eBook and we believe that also is the percentage that digital library book distributors receive from the major publishers (although this is not confirmed).

The cost of a 24-month license for *Beautiful World, Where Are You* is \$60.00 for libraries, which results in the following revenue for publishers, authors, and distributors.

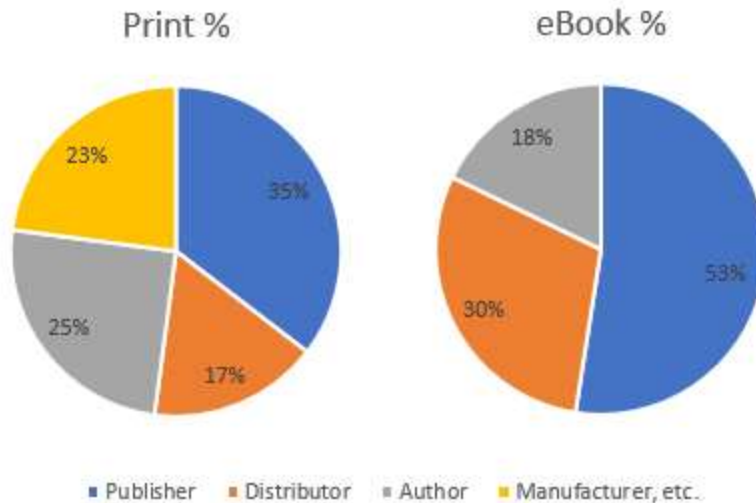
It is important to note that a digital book with a 24-month license can only be loaned to one reader at a time, exactly like a print book, so the price comparison below is apples-to-apples.

	Hardback	Library eBook	% increase
List price	\$28.00	\$60.00	214%
Publisher %	50%	70%	
Publisher revenue	\$14.00	\$42.00	300%
Author percentage	15%	25%	
Author revenue	\$4.20	\$10.50	250%
Manufacturing, shipping, returns	\$3.85	\$0.00	0%
Publisher net	\$5.95	\$31.50	529%
Publisher net %	43%	75%	
Distributor %	10%	30%	
Distributor earns	\$2.80	\$18.00	643%



It is interesting to note that authors are comparatively disadvantaged by the way that revenue is apportioned with digital books compared to print.

Revenue	Print amount	Print %	eBook amount	eBook %
Publisher	\$5.95	35%	\$31.50	53%
Distributor	\$2.80	17%	\$18.00	30%
Author	\$4.20	23%	\$10.50	18%
Manufacturer, etc.	\$3.85	25%	0	0%
Total	\$16.80		\$60.00	



### On independent publishers and author-publishers

The Independent Book Publishers Association (IBPA) published a statement about digital book legislation and I followed up with them to ask some questions about their concerns. They pointed out the following, which legislative advocates may wish to consider as they design legislation.

- State legislation is costly to all publishers because there is a potential incremental cost to compliance with each new state. Therefore, consistency in legislation across states would be helpful to publishers.
- The vague definition of "reasonable" puts publishers at risk, because a state could theoretically decide that a "reasonable cost" is, per the statement, "an eBook and audiobook license that pays \$1.00 per year for licensing unlimited copies to all libraries in the state." As noted above, legislation related to print-like licenses should stipulate that libraries pay no more *and no less* than a print-like price so as to protect publishers from a level of public access that would harm them.
- Any cost forced upon publishers by legislation will disproportionately impact indie publishers, which have higher costs and smaller margins than large publishers. With print books, there is no cost to the publisher in enabling access. They simply provide books to distributors. With digital books, retail and library distributors are different, and so there is overhead for a publisher if legislation requires them to distribute to libraries. The IBPA suggested that, if laws are passed, they might exclude author-publishers and smaller independent organizations as measured by annual revenue. The issue merits further thought, because such exclusions would exclude some important books, including at least four of the Hugo-award winning books described above. The barrier presented by digital lending infrastructure to enabling library access may be something that libraries and independent publishers can work on together with eLending distributors to minimize (separate from legislative efforts). It seems likely that libraries don't have access to some titles, not because the author-publishers want to restrict libraries, but because enabling access is too costly for them.



## On the AAP

Library advocates interested in digital library book legislation need to be aware of the role of the [Association of American Publishers](#) (AAP), the legislation's most visible antagonist. The AAP has submitted letters or testified against legislation in several states and it sued Maryland over its digital book law and succeeded in blocking it.

The AAP's CEO is Maria A. Pallante, an attorney and former copyright register, but its board includes leaders from all of the major publishers. The AAP claims to have [several policy priorities](#), but their news feed and other activities demonstrate that they are more interested in gaining or retaining ground on their copyright position than on other stated values such as opposing censorship. For example, it bestowed its [2022 Award for Distinguished Public Service](#) on Senator Thom Tillis, despite the fact that he supports book bans and is a co-sponsor of a [bill to defund \*The 1619 Project\*](#). The AAP seeks to make Tillis an ally because he is the ranking Republican on the Senate Intellectual Property subcommittee, which oversees copyright.

Library advocates encountering the AAP for the first time may be surprised by one of their tactics: disinformation. Fortunately, it is a tactic that librarians are uniquely qualified to counter. Below are some of the false claims the AAP has made and may use again.

### **AAP claim: Library legislation is actually backed by Big Tech and "lobbying groups"**

The AAP first made this claim in [June 2021](#), stating that "Challenges to copyright protection are also happening at the state level, Pallante warned, where library lobbyists and 'tech-funded' special interest groups are working to 'divert copyright protection away from Congress to state assemblies'"

Pallante reiterated the charge in [December 2021](#), stating that New York's library legislation "was rushed through the state legislature in response to a coordinated, misinformation campaign supported by Big Tech interests and lobbying groups that are notorious for wanting to weaken copyright protections for their own gain."

The charge is false. The librarians working in eight states to advocate for digital library book legislation are not working with Big Tech or lobbying groups that seek to weaken copyright. Indeed, the legislation challenges one Big Tech corporation, Amazon, because it has two publishing arms, Amazon Publishing and Audible.

The AAP is wise to watch Big Tech's agenda for copyright carefully insofar as powerful businesses like Google and Facebook depend on Fair Use. But the agenda behind library legislation is quite different, and the AAP conflates the two merely to stoke fear and garner sympathy from creative industry allies. "Big Tech" is a much better villain than a bunch of librarians.

### **AAP claim: Library legislation will harm publisher revenue and author royalties**

The AAP has used this claim in protest of legislation in New York and Rhode Island and in the [January 31, 2022 filing](#) in the Maryland lawsuit, and they have failed to substantiate it in all cases.

In the Maryland filing, they state, "That the Maryland Act is likely to negatively impact publishers' revenues should not be minimized, let alone denigrated, given that these revenues drive publishers' abilities to provide advances and royalties to authors"

They also state that the revenue impact is “impossible to quantify,” which begs the question of how they can legitimately claim a financial impact that they cannot even provide an estimate.

Libraries can supply data and models that demonstrate that digital library book legislation will not negatively impact publisher revenue or author royalties. The states with legislation specifically chose print-like access as a model for digital book access because print has proven for more than a century to balance publisher revenue, author royalties, and public access. Print-like access to digital books will create print-like revenue for publishers and authors offering digital books. Libraries will not decrease spending if better license terms become available. Revenue may be distributed differently, with new and less popular authors making more while best seller titles—those needing the least boost in sales—earn proportionately less. If anything, libraries may increase spending, helping promote diversity and discovery of titles.

If the AAP makes this claim in the future, especially in testimony before legislators or in court, it must be asked either to substantiate the claim or retract it. Public access to books is too important simply to accept convenient and unsubstantiated assertions.

#### **AAP claim: Library legislation will impact the other creative industries**

In protest letters against library legislation in New York and Rhode Island, the AAP collected signatures from a range of organizations including:

- Motion Picture Alliance
- Music Workers Alliance
- Software & Information Industry Association

It claimed in its New York letter:

“Assembly Bill 5837 would have a significant negative impact on the economy and jobs in New York. As the state aims to rebound from the devastating impact of COVID-19, publishing houses and other New York-based creative industries that are critical to the state’s economic recovery would be substantially harmed by this legislation...The bill may also have an adverse effect on royalties paid to authors in addition to increasing risks especially for independent bookstores, thereby threatening jobs relying on these local institutions.”

It thereby ignores the [text of New York bill](#), which states:

“Any publisher who offers to license electronic books to the public shall offer to license such books to libraries in the state on reasonable terms that would permit the libraries to provide their users with access to such electronic books.”

And it defines “publisher” as “one whose business is the manufacture, promulgation, and sale of books, journals, magazines, newspapers, or other literary productions including those in digital form consisting of text, imagery or both.”

In other words, the New York bill impacts the publishers of texts, not the publishers of film, music, or software. It is false to state that such industries would be impacted in any way by legislation specific to texts. As with the charge that legislation will harm publishers and authors, the AAP must produce data

to show exactly how digital library book availability can measurably negatively impact the film, music, or software industries.

The AAP claims that library legislation will also threaten jobs at independent bookstores and should again be asked to supply data demonstrating that increased digital library book availability causes decreased physical retail sales over time. Many independent bookstores believe that their community libraries aid their businesses by cultivating readers and offering low-barrier ways to “test drive” new authors. If those bookstores are correct, then print-like digital library book availability will help them, not hurt them. Libraries, likewise, are fans of the independent bookstores in their communities, often partnering with them on community reading events, which support book sales.

**AAP claim: Increased digital lending correlates with a downward trend in overall digital book revenue**

The AAP suggests this claim in their January 31, 2022 filing in the Maryland suit and reiterates it in its Rhode Island protest letter. It is a damaging assertion, and so we will disprove it here in detail. And if the AAP cites it again in court, library advocates may wish to supply their attorneys with the data to debunk it.

Per the Maryland filing:

"('In Fiscal Year 2020, Maryland libraries held 4,733,755 e-books and saw a 31% increase in customer access to digital materials.') ... this explosive growth in library digital lending has coincided with a multi-year, downward trend in ebook purchases by consumers."

In a footnote, it goes on: “E-book revenues have been declining for several years. Indeed, according to AAP December 2021 StatShot, ebook revenues were down 4.7% in 2021 as compared to calendar year 2020. See <https://publishers.org/news/%ef%bf%bcaap-december-2021-statshot-report-publishing-industryup-2-8-for-month-and-12-2-calendar-2021/>.

Most obviously, “explosive growth” in 2020 is attributable to the pandemic when library locations were closed and the only books libraries could offer the public were digital. It is true that libraries saw increased digital lending, but not because book buyers were becoming borrowers. It was because print borrowers were becoming digital book borrowers. In other words, 2020 statistics cannot correlate with a “multi-year, downward trend.”

Also, the numbers cited above are apples-to-oranges-to-bananas. They compare data for different formats in different years as if they are the same set of formats in the same year. First, the AAP compares library circulation, which includes eBooks and eAudiobooks, to eBook-only revenue, excluding eAudio revenue. It also attempts to compare 2020 library circulation with 2021 eBook revenue. An apples-to-apples comparison is Maryland 2020 circulation compared to 2020 eBook and eAudiobook revenue, which was [up 11.7% for eBooks and 13.9% for eAudio](#) according to the AAP itself. In other words, library circulation was up and industry revenue was up, which disproves the inverse correlation that the AAP is attempting to make.

Those interested in understanding better the complex reasons behind digital book revenue may want to review this analysis by [Constance Grady](#) on Vox.

**AAP claim: Legislation is not necessary because digital library book market is healthy**

The AAP makes this claim in its Maryland filings and in its letter protesting Rhode Island's bill. In the latter document, it states:

"There is simply no crisis in access to books. In fact, the exact opposite is happening. Library lending of eBooks is thriving and 2021 was a record year for ebook circulation, with over half a billion checkouts reported by OverDrive."

The claim that the market is healthy is relatively easy to counter, and legislators and judges have appeared receptive to rebuttal. Most obviously, if the digital library book market were healthy, librarians would not be investing hundreds of hours in legislative solutions nor requesting busy legislators' attention.

Second, actual data on what taxpayers pay for print-like digital library books seems to resonate. The ALA statement in defense of Rhode Island legislation states:

"For popular trade ebooks, libraries often pay \$55 for one copy that expires after 2 years (or \$550 for one copy for 20 years). Meanwhile, a consumer will pay about \$15 for perpetual use. By comparison, libraries can purchase hardcover books for around \$18-20."

Future advocates may wish to use data directly from their own libraries to help legislators and other stakeholders to understand the positive impact on their own communities of passing legislation. (If library staff have questions about how to pull such data, contact [carmi.parker@wcls.org](mailto:carmi.parker@wcls.org).) Advocates may also consult the [Readers First Publisher Price Watch](#) tool.

We can also counter the AAP's claim that the market is healthy because OverDrive circulation is growing. Circulation growth is not a meaningful indicator of health in this case. It answers the question, "Did OverDrive libraries circulate more this year than last year?" The meaningful numbers to compare when considering library legislation are OverDrive's circulation numbers in a given year and what those circulation numbers would be under library legislation.

To put it another way, the AAP uses circulation growth as a way to say that libraries must be okay with current prices because they keep licensing more and more digital books, and therefore the market is fine and no regulation is necessary. But if prices were print-like, then libraries would license far more titles than they do and circulation would increase. OverDrive's half a billion circulations in 2021 may actually be poor compared to what is possible with print-like prices for print-like licenses.

#### **AAP claim: Library legislation derails how copyright has "always" worked**

In the New York protest letter, the AAP states:

"...even though publishers are committed to widespread access to books and take library resources into account when setting these terms, the bill's vague requirement that publishers offer licenses to libraries 'on reasonable terms' would interfere with these decisions, which are solely the copyright owner's prerogative and how copyright markets have always functioned."

This is false. In fact, markets have historically limited the copyright owner's prerogative to set the terms of book transactions. Since before 1908, they have been able to set terms only for the first sale of a book, and therefore have not historically been able or allowed to take "library resources into account"

when setting terms. They also do not control “widespread access” in any way. Public access to print books is in public hands, thanks to copyright law, not publisher hands.

With digital books, public access to is in publisher hands, and the AAP would like for its audience to believe that this relatively unlimited power is normative. In fact, it is not how copyright has “always functioned”; it is only as old as the licensing model.

**AAP claim: The “market” should determine public access to digital books, not “government fiat”**

As part of the Maryland lawsuit, the AAP publicly posted the [following](#):

“The state has also badly misunderstood the premise and operation of the copyright framework and its constitutional origins, in which public access to original works of authorship is not achieved by government fiat or manipulation of terms, but rather through a system of economic incentives that foster investment, rewards, and continuous market innovations during a statutory term of protection.”

As with the claim above, the AAP here describes the copyright framework it would like to exist, not the copyright framework that does exist. In fact, public access is achieved by government fiat. As discussed extensively above, the first sale doctrine enables public access to print materials. On top of that, several copyright limitations and exceptions also serve libraries. Section 107, which describes the Fair Use doctrine, is often used by libraries and the people who use them. Section 108 overtly serves libraries as having a special role to play in the balance between rewarding creative work and ensuring that the public has access to it.

It is also worth noting here that copyright itself is government fiat. A truly free, unregulated market is one in which copyright does not exist and any creative work can be monetized by anyone. So, to suggest that library legislation is too regulatory to be in the public interest is absurd. Copyright is regulatory, as are all of the other laws that touch intellectual property, including but not limited to, property law, contract law, and tax law. The AAP can reasonably claim that regulating digital books is unwelcome to them. They cannot reasonably claim that a market should be unregulated when their industry and market exist at all without regulation.

**Conclusion**

The AAP is fulfilling its mission by fighting to protect and extend book publisher and other content creator advantages under copyright. We can respect opposition, even as we disagree with the AAP stand on state ebook laws. Librarians must, however, be aware that the AAP’s position is undercut by its use of disinformation—disinformation that we should and can be ready to reveal as misleading and false.

[Who is impacted by digital library book legislation](#)

- Students
  - Pre-K-12: Of the ~330 million people in the United States, approximately [49.4 million](#) attended public school in 2020, while about 4.7 million attended private school.

- College: Approximately [19.4 million](#) students attended college in 2020 (a year of low enrollment due to the pandemic)
- Readers
  - According to Pew Research, [77% of U.S. adults](#) surveyed in 2021 had read at least one book in the prior year.
  - In 2019, public libraries in the United States recorded [1.24 billion visits](#), an average of 4 visits per capita.
  - [173.3 million](#) people have library cards, 53% of the population.
- Libraries
  - School and classroom libraries
  - Public libraries
  - Academic libraries
  - Special libraries and archives
- Taxpayers
  - In 2019, taxpayers filed [148.3 million](#) federal tax returns. Taxpayers primarily pay for schools, colleges, and public libraries. Their investment in literate, free-thinking, innovative communities provides the publishing industry with billions of dollars annually.
- Publishers
  - The “Big Five”: five publishing companies control most of traditional publishing. According to [Publishers Weekly](#), they commanded 91% of the hardcover best seller slots in 2021 and 77.4% of the paperback slots.
    - Penguin Random House, owned by German corporation Bertelsmann. If PRH succeeds in acquiring Simon & Schuster, it will have an estimated [30% market share](#) in the U.S. industry.
    - HarperCollins, owned by News Corp.
    - Simon & Schuster, owned by Paramount Global, but will be acquired by PRH unless the Justice Department blocks the acquisition.
    - Hachette Book Group, owned by French corporation Lagardère Group.
    - Macmillan Publishing, owned by German corporation Holtzbrinck.
  - [Amazon Publishing](#) and [Audible](#): Amazon and Audible are book distributors, but also publishers in their own right. For many years, they refused to license their books to libraries, but are now working with the Palace Project to make them available.
  - Independent publishers: the U.S. book industry supports thousands of independent publishers ranging from large corporations like Scholastic to tiny niche publishers. Independent publishers are concerned that legislation targeting the Big Five might disproportionately impact them.
  - Author-publishers: authors who own their own rights to their books are considered author-publishers. These includes self-published authors who use services like Kindle Direct Publishing, but also traditionally published authors who retain digital publishing rights.
- Distributors
  - [OverDrive](#): most school and public libraries license digital books through OverDrive

- Smaller for-profit distributors: other digital library book distributors include [Bibliotheca](#), Baker & Taylor's [Axis 360](#), and [Hoopla](#).
- [Palace Project](#): a non-profit distributor coordinated by [DPLA](#) and [Lyrisis](#). Palace is working with Amazon Publishing and Audible to enable eLending.
- Professional organizations
  - [Association of American Publishers](#): a professional organization representing the larger publishers. CEO is former copyright register Maria A. Pallante. AAP sued the state of Maryland over its digital library book law in 2021.
  - [American Library Association](#). It supports legislative efforts to enable public access to digital books.
  - [Independent Book Publishers Association](#): a professional organization representing smaller publishers. It opposed the Maryland digital library book legislation.
  - [Authors Guild](#): a professional organization of authors. It opposed the Maryland digital library book legislation.