American Library Association Response to U.S. Copyright Office Analysis of Preemption Issues Relating to State Ebook Legislation

On August 30, 2021, Shira Perlmutter, the Register of Copyrights and Director of the U.S. Copyright Office, replied to a May 26, 2021, letter written by Senator Thom Tillis (R-N.C.) requesting the Office's analysis of potential federal copyright law preemption of state ebook legislation in Maryland, New York, and Rhode Island. The Office concluded that "under current precedent, the state laws at issue are likely to be found preempted." This memorandum identifies significant gaps in the Copyright Office's analysis.

1. The Office correctly recognized that there are two distinct forms of preemption: express preemption under section 301(a) of the Copyright Act; and conflict preemption where the state law interferes with the functioning of a regime created by the Copyright Act. In its advocacy against the state ebook legislation, the Association of American Publishers has focused on preemption under section 301(a). Likewise, Senator Tillis in his letter specifically cited section 301(a). The Office properly dismissed the section 301(a) argument. It observed that section 301(a) addresses only states' grants of legal or equitable rights equivalent to copyright. The state legislation, by contrast, "seeks to regulate the identity of licensees and the terms upon which licenses may granted, rather than granting rights." Accordingly, the Office found that section 301(a) does not preempt the state legislation.

2. Turning to conflict preemption, the Office correctly recognized that "courts have allowed state regulation of the terms of copyright licenses in some instances." The Office stated "this is especially true where the state has demonstrated a pattern of abuse of market power of suppression of competition." The Office further acknowledged that "the legislative history cites a pattern of practices by large publishers that negatively impact Maryland citizens." The Office noted that many popular book titles are not available for public libraries to license at the same time ebooks are made available to the public, and that libraries are charged significantly more to license ebooks than the general public.

3. Nonetheless, on the basis of a single Third Circuit decision, *Orson v. Miramax*, 189 F.3d 377 (3d Cir. 1999), the Copyright Office opined that a court considering the state legislation at issue would likely find it preempted. In *Orson*, a state law required a film distributer to expand its distribution after 42 days by licensing another commercial exhibitor in the same geographic area. The *Orson* court found preempted such a regulation that "appropriated a product protected by the copyright law for commercial exploitation against the copyright owner's wishes." But the Office itself recognized that *Orson* might be distinguishable. In footnote 21 on the bottom of page 8, the Office conceded that *Orson* dealt with

> forced *commercial* exploitation of copyrighted works; the state legislation at issue seeks to require licensing of works to libraries, which, while arguably a commercial transaction, ultimately serves a non-commercial goal of furthering the traditional mission of public libraries to provide free access to materials for their communities. It is unclear whether this would be a significant factor for a court considering the question of federal conflict preemption….

4. The Office further conceded on page 9 that:

> To date neither the Supreme Court nor any other circuit courts (including the Second and Fourth Circuits, which have jurisdiction over New York and Maryland) have had occasion to consider whether state regulations seeking to require licensing of copyrighted works could avoid conflict preemption either generally or under narrow circumstances, such as upon a showing of a state interest that is sufficiently compelling and distinct from the Copyright Act's purposes.

In other words, the Office admitted that there was no controlling precedent suggesting preemption in Maryland or New York, and the one precedent from another jurisdiction was readily distinguishable. Accordingly, the Office had no reasonable basis for concluding that a court considering the legislation "would likely find it preempted under a conflict preemption analysis."

5. The Office stated that it would address "only the technical question of the state legislation's potential federal preemption, and not the policy questions involved." But as the Office conceded, a critical issue in a conflict preemption analysis is whether the state had a sufficiently compelling interest for adopting the legislation. This is a policy question that the Copyright Office did not attempt to answer. Additionally, the Office did not consider whether the legislation in fact is consistent with the structure and objectives of the Copyright Act by preserving the privileged status of libraries in the Act.

6. Moreover, the question of conflict preemption (as opposed to express preemption under section 301(a)) turns less on copyright law than on constitutional law. The Copyright Office does not have any particular expertise in interpreting the Constitution's allocation of power between the states and the federal government.

7. Finally, it is worth considering why AAP has not raised conflict preemption in its lobbying against the state ebook laws. The likely explanation is that conflict preemption provides a basis for challenging enforcement of license terms that purport to limit fair use and other exceptions. Indeed, even *Orson* asserted that "a state regulation falling within the federally established exceptions to those rights, such as fair use, see 17 U.S.C. § 107, may obligate a copyright holder to change its practices to accommodate such uses…."

8. In sum, the American Library Association does not agree with Copyright Office's conclusion that a court likely would find the state legislation at issue preempted under a conflict preemption analysis. To the contrary, the Copyright Office letter further bolsters our view that the legislation is not preempted. Of course, resolution of this question lies with the courts.

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