



## **Library Futures Draft Legislation (Access to E-Books)**

### **Purpose**

To empower libraries to fulfill their mission of providing broad and equitable access to information for all Americans by ensuring that contractual agreements between libraries and publishers contain equitable licensing terms for the acquisition of electronic literary materials, and by ensuring that literary materials have at least the same utility in digital form as they have in analog form.

This act is adopted pursuant to the power inherent in the State of [X] to protect public policy and promote the life, education, public convenience, general prosperity, and well-being of society, and the welfare of the state's population and economy, that are dependent on libraries' abilities to continue, as technology advances, their traditional practice of providing nondiscriminatory access to literary materials.

Due to the unequal bargaining power of publishers and libraries and the pattern of abuse of market power by publishers, the State of [X] has a sufficiently compelling interest in adopting this legislation to protect the interests of [STATE's] citizens in accessing information through the use of libraries.

### **SECTION 1. Definitions**

(a) For purposes of this title, the following definitions apply:

- (1) "Digital audiobook" means a published work that is in the form of a voice recording (narrated) and is released as a digital audio file;
- (2) "Electronic book" means a published work that is in written form and is released as a digital text file;
- (3) "Electronic literary materials" means digital audiobooks and/or electronic books;
- (4) "Libraries" include:

- (A) public libraries;
  - (B) public elementary school or secondary school libraries;
  - (C) tribal libraries;
  - (D) academic libraries;
  - (E) research libraries; and
  - (F) archives;
- (5) "Publisher" means one whose business is the manufacture, promulgation, license, and/or sale of books, audiobooks, journals, magazines, newspapers, or other literary productions including those in the form of electronic literary materials;
  - (6) *"Aggregator" means one whose business is the licensing of access to electronic literary material collections that include electronic literary material from multiple publishers;*
  - (7) *"Literary monograph" means a literary work that is "published in one volume or a finite number of volumes."*<sup>1</sup>
  - (8) "Technological protection measures" means any technology that enhances the secure loaning and/or circulation by a library of electronic literary materials;
  - (9) "Borrower" means a person or organization, including another library, to whom the library loans media of any sort;
  - (10) "Virtually" means transmitted to receiving parties via the Internet in such a way that the transmission appears in front of the receiving parties on a computer, tablet, smart phone, or electronic device;
  - (11) "Loan" means create and transmit to a borrower a copy of electronic literary material and delete it at the end of the loan period;
  - (12) "Loan period" means the time between the transmission of electronic literary material to a borrower and the copies' deletion, as determined by any individual library.

## **SECTION 2. Contracts Between Libraries and Publishers**

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<sup>1</sup> 37 C.F.R. § 202.19(b)(5)

- (a) Any contract offered by a publisher to license electronic literary materials to the public in this state is governed by [STATE] law.
- (b) Contracts to purchase or license electronic literary materials that include prohibited provisions as enumerated in Section 3 of this chapter are unconscionable within the meaning of [CHAPTER X] of [STATE LAW] in violation of [STATE] public policy and are deemed unenforceable and void.<sup>2</sup> Any waiver of the provisions of this title is contrary to public policy and shall be deemed unenforceable and void.
- (c) *The prohibited provisions as enumerated in Section 3 of this chapter shall only apply to licensing agreements governing the use of literary monographs.*
- (d) *The prohibited provisions as enumerated in Section 3 of this chapter shall not apply to licensing agreements between libraries and aggregators.*

### **SECTION 3. Prohibited Provisions**

- (a) A contract shall contain no provision that:
  - (1) Precludes, limits, or restricts the library from performing their core missions, including any provision that:
    - (A) Precludes, limits, or restricts the library from licensing electronic literary materials;
    - (B) Bars the library from loaning electronic literary materials to borrowers;
    - (C) Restricts or limits the library's right to loan the electronic literary materials to borrowers using technological protection measures;
    - (D) Restricts or limits the use of technological protection measures for loaning the work to borrowers;
    - (E) Restricts or limits the library's right to make non-public preservation copies of the electronic literary materials;
    - (F) Restricts or limits the library's right to loan electronic literary materials via interlibrary loan systems; or

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<sup>2</sup> In states that have adopted the Uniform Commercial Code, [§ 2-302. Unconscionable Contract or Clause., Unif. Commercial Code § 2-302](#) codifies the courts' ability to deem contracts unconscionable. See, e.g. [N.J. Stat. Ann. § 12A:2-302](#). See [Lanigan v. City of Los Angeles, 199 Cal. App. 4th 1020, 132 Cal. Rptr. 3d 156 \(2011\)](#) for an example description of how many jurisdictions determine unconscionability using both "procedural" and "substantive" elements.

- (G) Restricts or limits the library's ability to virtually recite text and display artwork of any materials to library patrons such that the materials would not have the same educational utility as when recited or displayed at a library facility;
- (2) Restricts the number of licenses for electronic literary materials that the library may acquire after the same item is made available to the public;
- (3) Requires the library to acquire a license for any electronic literary material at a price greater than that charged to the public for the same item;
- (4) Restricts the library's right to determine loan periods for licensed electronic literary materials;
- (5) Restricts the total number of times the library may loan any licensed electronic literary materials over the course of any license agreement;<sup>3</sup>
- (6) Restricts the duration of any licensing agreements;<sup>4,5</sup>
- (7) Restricts the library from disclosing any terms of its license agreements to other libraries.
- (8) Requires the library to violate [STATE LIBRARY PRIVACY LAW].

#### **SECTION 4. Unfair and Deceptive Practices**

- (a) Contracts to purchase or license electronic literary materials that include a prohibited provision listed in Section 3 constitute unfair and deceptive acts within the meaning of [CHAPTER X] of this title and any remedy provided pursuant to [CHAPTER X] of this title shall be available for the enforcement of this chapter.<sup>6</sup>

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<sup>3</sup> A subdued version of (5) might read:

(5) Restricting the total number of times the library may loan any licensed electronic literary materials over the course of any license agreement to a number fewer than:

- a) 70 lends of electronic books; and
- b) 100 lends of digital audiobooks;

<sup>4</sup> A subdued version of (6) might read:

(6) Restricting the duration of any licensing agreements to a length fewer than five years;

<sup>5</sup> The subdued versions of provisions (5) and (6), above, may also be combined to read as follows:

*Restricting the total number of times the library may loan any licensed electronic literary materials to a number fewer than [X] lends, or restricting the length of any licensing agreements to a length fewer than [Y] years, whichever comes first;*

<sup>6</sup> An example of a Chapter that could be referred to here is the Cal. Bus. & Prof. Code § 17200

- (b) Any publisher may seek the opinion of the Attorney General for guidance on how to comply with the provisions of this title.
- (c) Actions for relief pursuant to this title may be brought by libraries, library officers, or borrowers or shall be prosecuted by the Attorney General.
- (d) Any publisher that violates this title shall be subject to an injunction and liable for a civil penalty of not more than two thousand five hundred dollars (\$2,500) for each violation or seven thousand five hundred dollars (\$7,500) for each intentional violation, which shall be imposed by the court.

#### **SECTION 5. Severability**

- (a) 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.