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# United States Senate

WASHINGTON, DC 20510  
May 26, 2021

COMMITTEES  
ARMED SERVICES  
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## VIA ELECTRONIC TRANSMISSION

Ms. Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office  
101 Independence Ave, S.E.  
Washington, D.C. 20559

Dear Register Perlmutter,

I write you today in my capacity as Ranking Member of the Senate Judiciary Committee Subcommittee on Intellectual Property. Our nation's copyright system supports creators and industries that collectively add over \$1.5 trillion dollars to the American economy, employ 5.7 million hard-working Americans, and contribute more than \$200 billion in exports.<sup>1</sup> A key reason for the success of these incredible industries is our federal copyright system. Indeed, copyright law is one of Congress's enumerated powers in the U.S. Constitution, and my understanding is that current copyright law expressly preempts state laws in this area.<sup>2</sup>

However, I am concerned that despite this clear and longstanding framework, some states are encroaching upon the exclusive domain of federal copyright law. My understanding is that recently one state passed legislation that would require "a publisher who offers to license an electronic literary product to the public to also offer to license the electronic literary product to public libraries in the state on reasonable terms that enable public libraries to provide library users with access to the electronic literary product."<sup>3</sup> Similar bills have been introduced this year and in previous years.<sup>4</sup>

Among the most concerning issues these bills raise is that they require copyright owners to license their works to specific parties by government mandate. This compulsory license removes from the copyright owner the decision as to whether, in what format, and on what terms works will be made available. The decision to mandate licensing terms also appears to be an unprecedented government intrusion into the copyright marketplace for creative literary works, outside the province of a state's authority. Although Congress authorizes statutory and compulsory copyright licenses administered by the Copyright Office, such licenses arise only in select carefully considered circumstances.<sup>5</sup>

These state legislative efforts would appear to directly conflict with the Copyright Act's clear language preempting "all legal or equitable rights that are equivalent to any of the exclusive

<sup>1</sup> International Intellectual Property Alliance, Copyright Industries in the U.S. Economy, the 2020 Report (2020).

<sup>2</sup> H.R. 94-1476, at 129 (1976); 17 U.S.C. § 301(a).

<sup>3</sup> H.B. 518, 442<sup>nd</sup> Sess. (Md. 2021); S.B. 432, 442<sup>nd</sup> Sess. (Md. 2021).

<sup>4</sup> S.2890, 204<sup>th</sup> Leg. (NY 2021); A.5837, 204<sup>th</sup> Leg. (NY 2021); S.2773, 148<sup>th</sup> Sess. (RI 2020).

<sup>5</sup> See Circular 75, The Licensing Division of the Copyright Office, <https://www.copyright.gov/circs/circ75.pdf>.

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rights within the general scope of copyright . . .”<sup>6</sup> The proposed licensing requirement appears to encroach upon the Copyright Act’s exclusive rights of reproduction and distribution.<sup>7</sup>

Accordingly, I ask that your office examine these bills in light of what appear to be clear preemption rules that situate copyright law exclusively at the federal level. As the expert adviser to Congress on copyright matters, I ask that you use your valuable expertise to clarify if federal preemption applies to these legislative efforts. This in turn will provide helpful direction to states so they may avoid proposing or enacting legislation that is preempted by the Copyright Act. I appreciate your immediate attention to this matter.

Sincerely,



Thom Tillis  
Ranking Member  
Subcommittee on Intellectual Property

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<sup>6</sup> 17 U.S.C. § 301(a).

<sup>7</sup> 17 U.S.C. § 106(1) and (3).



The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

The Honorable Thom Tillis  
United States Senate  
113 Dirksen Senate Office Building  
Washington, DC 20510

August 30, 2021

Dear Senator Tillis:

I am pleased to provide this response to your letter dated May 26, 2021, requesting that the United States Copyright Office provide an analysis of potential federal copyright law preemption of certain legislation in Maryland and other states governing licensing requirements for electronic literary products. I appreciate that you are seeking the Office's input on these important issues after receiving inquiries from your constituents.

Our response begins with a brief summary of federal copyright preemption law generally, and then discusses how these doctrines may relate to an analysis of the subject legislation. We address only the technical question of the state legislation's potential federal preemption, and not the policy questions involved. As set out below, we conclude that under current precedent, the state laws at issue are likely to be found preempted.

#### **I. Federal Preemption of State Laws: Doctrine**

Under the Supremacy Clause of the U.S. Constitution, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," as well as all treaties made under the authority of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus Congress, when promulgating laws pursuant to its enumerated powers, may preempt conflicting state laws.<sup>1</sup>

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<sup>1</sup> The Copyright Clause explicitly grants to Congress the right to promulgate federal copyright laws. U.S. CONST. art. 1, § 8, cl. 8.

The Supreme Court has recognized two forms of federal preemption: express preemption and implied preemption, with implied preemption being further subdivided into field preemption and conflict preemption. *Ariz. v. U.S.*, 567 U.S. 387, 398–400 (2012). Express preemption will be found when Congress states its intention to preempt state laws “in express terms.” *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm’n*, 461 U.S. 190, 203 (1983). Field preemption applies when Congress has “legislated so comprehensively” in a given field that it “left no room for supplementary state legislation.” *R. J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 140 (1986). Finally, conflict preemption occurs when “under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (brackets and internal quotation marks omitted). In particular, the Supreme Court has found that conflict preemption will occur “[i]f federal law ‘imposes restrictions or confers rights on private actors’ and ‘a state law confers rights or imposes restrictions that conflict with the federal law.’” *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (citing *Murphy v. Nat’l Collegiate Athletic Assn.*, 584 U. S. —, —, 138 S. Ct. 1461, 1480 (2018)). The doctrines of express and conflict preemption are discussed in further detail below.<sup>2</sup>

#### **A. Express Preemption Under § 301(a)**

The Copyright Act contains an express preemption clause in § 301(a) that provides that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title,” but allows state legislation with respect to, among other things, “activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106.” 17 U.S.C. §§ 301(a), (b)(3). Federal courts have recognized that section 301(a) has a “broad preemptive scope,” in order “to insure that the enforcement of these rights remains solely within the federal domain.” *Tire Eng’g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 309 (4th Cir. 2012) (internal citations omitted). Courts apply a two-pronged test for the Copyright Act’s preemption of a state law claim: “First, we decide whether the subject matter of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102

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<sup>2</sup> As noted below, while the Copyright Act contains an express preemption provision, it also allows certain state regulations to survive preemption. Thus, it is unlikely that Congress would be found to have preempted the field entirely through the Copyright Act. See *Foad Consulting Grp., Inc. v. Musil Govan Azzalino*, 270 F.3d 821, 827 (9th Cir. 2001).

and 103. . . . Second, assuming it does, we determine whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106.” *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1069 (9th Cir. 2018) (internal citations omitted). As the Fourth Circuit has noted, the analysis under section 301(a) focuses not on the conduct or the facts pled, but on the elements of the state cause of action. *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 659 (4th Cir. 1993).

Where the subject matter of the state law claim is a work of original authorship that is fixed in a tangible medium of expression, it easily falls within the subject matter of copyright. *Close*, 894 F.3d at 1068 (finding that the subject of California’s Resale Royalties Act—works of fine art—were within the subject matter of copyright).<sup>3</sup> Whether a state law confers rights equivalent to the rights contained in section 106 is a more difficult question. Equivalency exists if the right defined by state law may be abridged by an act which in and of itself would infringe one of the exclusive rights. See *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001). Conversely, equivalency will not exist if violation of the state law requires “an extra element that changes the nature of the state law action so that it is qualitatively different from a copyright infringement claim.” *U.S. ex re. Berge v. Bd. of Trustees of the Univ. Al.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (quotation marks and citations omitted); see also *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 455 (6th Cir. 2001) (collecting cases).<sup>4</sup> But not all “extra elements” will be sufficient to protect a state law from preemption—as the Second Circuit has noted, “[t]he critical inquiry is whether such extra elements of the state law claim beyond what is required for copyright infringement ‘change[ ] the nature of the action so that it is qualitatively different from a copyright infringement claim.’” *In re Jackson*, 972 F.3d 25, 43–44 (2d Cir. 2020).

Importantly, section 301(a) addresses only states’ grants of “legal or equitable *rights* that are equivalent to any of the exclusive rights.” 17 U.S.C. § 301(a) (emphasis added). Given the clear language of the statute, while some courts have analyzed state-imposed *limitations* on the exclusive rights granted in section 106 as a question of express preemption, the better approach appears to be to analyze such limitations under the conflict preemption doctrine.

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<sup>3</sup> Even if a claim does not concern copyrightable expression, it may still be within the subject matter of the Copyright Act if it is the kind of claim the Copyright Act was intended to exclude. See *U.S. ex re. Berge v. Bd. of Trustees of the Univ. Al.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (“But scope and protection are not synonyms. Moreover, the shadow actually cast by the Act’s preemption is notably broader than the wing of its protection.”).

<sup>4</sup> For example, the Copyright Act does not preempt conversion or trespass claims against a defendant who steals and retains a copyrighted book insofar as the claims relate to the tangible property (i.e., the physical book).

## B. Conflict Preemption Under the Copyright Act

Conflict preemption under the Copyright Act is broader than express preemption under section 301(a) and will be found when it is either impossible for a party to comply with both state and federal law or when the state law interferes with the objectives of the federal law. See *ASCAP v. Pataki*, 930 F. Supp. 873, 878 (S.D.N.Y. 1996). The Second Circuit has described the second of these circumstances as including situations where the state law “interfere[s] with or frustrate[s] the functioning of the regime created by the Copyright Act.” *In re Jackson*, 972 F.3d at 33. Similarly, state laws have been found to be preempted when they have the effect of “burden[ing] enforcement and thus threaten[ing] to marginalize copyright itself.” *Am. Soc. of Composers, Authors, & Publishers by Bergman v. Pataki*, 930 F. Supp. 873, 878 (S.D.N.Y. 1996). It is not enough, however, that the state law merely affect or seek to regulate copyrightable subject matter or the exclusive rights provided by the Copyright Act. See *Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808, 815 (3d Cir. 1982) (citing with approval a district court’s holding that “[t]he authority of the states to regulate market practices dealing with copyrighted subject matter is well-established”); cf. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (noting that “[s]tate law is not displaced merely because the contract relates to intellectual property”).

State laws that “restrict (and in some cases prohibit) the publication and dissemination of works of authorship governed by the Act” may survive preemption when they further an important state objective, such as protecting against false advertising or invasions of privacy, that is distinct from the Copyright Act’s objectives. *In re Jackson*, 972 F.3d at 34–37. Thus, “when a person undertakes to exert control over a work within the subject matter of the Copyright Act under a mechanism different from the one instituted by the law of copyright (*i.e.*, a state law claim), implied preemption may bar the claim unless the state-created right vindicates a substantial state law interest, *i.e.* an ‘interest[ ] outside the sphere of congressional concern in the [copyright] laws.’” *Id.* (quotation marks and citation omitted). However, when the state law invokes less substantial rights or “amounts to little more than camouflage for an attempt to exercise control over the exploitation of a copyright,” such claims will be preempted. *Id.* at 38.

As the Supreme Court has noted, while one goal of the Copyright Act is to promote the dissemination of creative works, the purpose and intended effects of the Act are broader; “the Act creates a balance between the artist’s right to control the work during the term of the copyright protection and the public’s need for access to creative works.” *Stewart v. Abend*, 495 U.S. 207, 228 (1990); see also *College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 564

(N.D.N.Y. 1995) (evaluation of “the balance struck by Congress between copyright owners found in § 106 of the Copyright Act and the exceptions to those exclusive rights found in §§ 107–118 of the same Act” leads to a finding that the state law is preempted). This balance includes giving the author the right “arbitrarily to refuse to license one who seeks to exploit the work.” *Stewart*, 495 U.S. at 229; see also *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981) (vesting “the liberty not to license rights in his work”); *Lawlor v. Nat’l Screen Serv. Corp.*, 270 F.2d 146, 154 (3d Cir. 1959) (recognizing the right to exclude others as a corollary to the licensing right).

Courts looking at potential conflicts between state regulatory schemes and federal copyright law have tended to allow “regulations that are designed to assure a fair market and honest business dealings,” while finding that copyright law preempts those “that direct a copyright holder to distribute and license against its will or interests.” *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 386 (3d Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000). Thus, courts have allowed states to regulate movie distribution by adopting anti-blind bidding statutes<sup>5</sup> or regulating the bidding and negotiation process,<sup>6</sup> but have rejected state laws that require a copyright owner to file test questions with the state for public distribution,<sup>7</sup> a cable programming provider to license programs to all city-franchised cable operators,<sup>8</sup> software providers to allow third party interoperability when doing so necessarily involves the creation of copies and derivative works,<sup>9</sup> or film distributors to license their films to second-run theaters after 42 days.<sup>10</sup> Other state laws that have been found to be preempted by federal copyright law include a requirement that cable operators remove advertisements for alcohol from the

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<sup>5</sup> *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105, 109 (D. Utah 1981), *appeal dismissed and case remanded*, 782 F.2d 136 (10th Cir. 1985).

<sup>6</sup> See, e.g., *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 376 (3d Cir. 1986); *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982).

<sup>7</sup> *Assoc. of Am. Medical Colleges v. Cuomo*, 928 F.3d 519, 521–23 (2d Cir. 1991); *accord College Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 564 (N.D.N.Y. 1995). *But see Newport-Mesa Unified Sch. Dist. v. State of Cal. Dep’t of Educ.*, 371 F. Supp. 2d 1170, 1179 (C.D. Cal. 2005) (state law that required copies of test protocols to be provided to parents by school district as part of student’s records constituted fair use).

<sup>8</sup> *Storer Cable Commc’ns v. City of Montgomery*, 806 F. Supp. 1518, 1534 (M.D. Ala. 1992).

<sup>9</sup> *CDK Glob. LLC v. Brnovich*, 461 F. Supp. 3d 906, 917 (D. Ariz. 2020).

<sup>10</sup> *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 386 (3d Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000).

copyrighted signals they retransmit<sup>11</sup> and a state resale royalty that granted artists a remuneration right for sales of their works subsequent to the first sale.<sup>12</sup>

## II. State Legislation Regarding Licensing of Electronic Literary Products

### A. Background

On April 1, 2021, the Maryland General Assembly passed legislation providing that any publisher “who offers to license an electronic literary product to the public shall offer to license the electronic literary product to public libraries in the State on reasonable terms that would enable public libraries to provide library users with access to the electronic literary product.”<sup>13</sup> The legislation defines electronic literary products as “[a] text document that has been converted into or published in a digital format that is read on a computer, tablet, smart phone, or other electronic device” or “[a]n audio recording of a text document, read out loud in a format that is listened to on a computer, tablet, smart phone, or other electronic device.”<sup>14</sup> Failure to comply constitutes an “unfair, abusive, or deceptive trade practice” under Maryland law, which is subject to enforcement via an action for injunctive relief, damages, and attorneys’ fees.<sup>15</sup> Similar legislation has passed both houses of the New York State Assembly but has not yet been submitted to the governor for signature,<sup>16</sup> while legislation in Rhode Island has been referred to committee.<sup>17</sup>

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<sup>11</sup> *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710–11 (1984)

<sup>12</sup> *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1070–71 (9th Cir. 2018).

<sup>13</sup> Public Libraries – Electronic Literary Product Licenses – Access, 2021 Md. Laws ch. 411, MD. CODE ANN., EDUC. § 23-702 (2021), <http://mgaleg.maryland.gov/mgaweb/legislation/details/SB0432?ys=2021RS>. Under the Maryland Constitution, the bill became law without the governor’s signature when he failed to veto it within 30 days after its presentment. MD. CONST. art. II, § 17(c).

<sup>14</sup> 2021 Md. Laws ch. 411, MD. CODE ANN., EDUC. § 23-701(B) (2021), <http://mgaleg.maryland.gov/mgaweb/legislation/details/SB0432?ys=2021RS>.

<sup>15</sup> MD. CODE ANN., COM. LAW § 13-401 *et seq.* (2021).

<sup>16</sup> N.Y. ASS. BILL A5837B (2021), <https://www.nysenate.gov/legislation/bills/2021/A5837>.

<sup>17</sup> R.I. HOUSE BILL 6246 (2021), <https://legiscan.com/RI/bill/H6246/2021>; R.I. SENATE BILL 2773 (2021), <https://legiscan.com/RI/bill/S2773/2020>.

## B. Copyright Act Preemption Analysis<sup>18</sup>

As noted above, section 301(a) by its terms addresses only states' *grants* of "legal or equitable rights that are equivalent to any of the exclusive rights." 17 U.S.C. § 301(a).<sup>19</sup> Because the legislation at issue seeks to regulate the identity of licensees and the terms upon which licenses may be granted, rather than granting rights, the more appropriate analysis is based on conflict preemption. Whether the Copyright Act implicitly preempts such laws will turn on whether the laws make it impossible for a party to comply with both the state licensing law and the Copyright Act, or otherwise interfere with the objectives of the Copyright Act. *See ASCAP*, 930 F. Supp. at 878. In addition, under *In re Jackson*, courts will likely look to the state purpose behind the legislation. The Fiscal Summary that accompanies the Maryland legislation cites to the Maryland State Library Association in stating that "many popular book titles are not available for public libraries to license at the same time the electronic books are made available to the public due to restrictions placed on sales by large publishers" and that "public libraries are charged significantly higher amounts to license the same electronic books," and notes that one anticipated effect of the bill is that "[l]ocal libraries may realize cost savings on digital publications, thereby *allowing funds to be used to purchase more digital publications* or for other purposes."<sup>20</sup>

One of the objectives of the Copyright Act is to promote the dissemination of creative works, which the Act does by, among other things, creating "a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works." *Stewart*, 495 U.S. at 228. Courts have found that the copyright law ordinarily does not preempt enforcement of the terms of a contract, on the grounds that "[a] copyright is a right against the world," while "[c]ontracts . . . generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights.'" *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); *see also Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324–25 (Fed. Cir. 2003) (collecting cases). Similarly, courts have allowed state regulation of the terms of copyright licenses in some instances. *See, e.g., Associated Film Dist.*, 683 F.2d at 815

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<sup>18</sup> While the Takings Clause (U.S. CONST. amend. V) and the Dormant Commerce Clause (U.S. CONST. art. 1, § 8, cl. 3) may also limit states' ability to require publishers to license works to public libraries, this analysis is confined to federal preemption under the Copyright Act.

<sup>19</sup> The electronic literary products at issue are clearly within the subject matter of copyright, as they constitute copyrightable subject matter fixed in a tangible medium of expression. 17 U.S.C. § 102(a).

<sup>20</sup> DEPARTMENT OF LEGISLATIVE SERVICES, MARYLAND GENERAL ASSEMBLY, FISCAL AND POLICY NOTE: SB 432 (2021) (emphasis added), [http://mgaleg.maryland.gov/2021RS/fnotes/bil\\_0002/sb0432.pdf](http://mgaleg.maryland.gov/2021RS/fnotes/bil_0002/sb0432.pdf).

("The Supreme Court has rejected claims that the exclusive right granted by Congress to distribute copyrighted material included the exclusive right to distribute it in the manner deemed most desirable by the copyright holder."). This is especially true where the state has demonstrated a pattern of abuse of market power or suppression of competition. See *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408, 447 (S.D. Ohio 1980), *aff'd in part, remanded in part sub nom. Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982) (collecting cases).

Here, while the legislative history cites a pattern of practices by large publishers that negatively impact Maryland citizens, the state legislation does not purport to regulate the terms of an existing contract (the license offered to the public), but instead requires publishers to grant licenses to a certain class of customers (public libraries) on certain terms ("reasonable" terms) any time they "offer[] to license [the work] to the public." Because the Maryland and New York legislation require publishers to grant a license, rather than regulating the terms of a license that has already been granted, the legislation is closer in kind to the state law found to be preempted in *Orson*, which "require[d] the distributor to expand its distribution after forty-two days by licensing to another exhibitor in the same geographic area." 189 F.3d 386. Both the Third Circuit and the District of Utah have explicitly excluded from permissible state regulations those that "appropriate[] a product protected by the copyright law for commercial exploitation against the copyright owner's wishes."<sup>21</sup> 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

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<sup>21</sup> *Orson*, 189 F.3d at 386; *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105, 108 (D. Utah 1981), *appeal dismissed and case remanded*, 782 F.2d 136 (10th Cir. 1985). *Wilkinson* cites for this proposition 17 U.S.C. § 201(e), which states:

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

*Cf. Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 680–81 (S.D.N.Y. 2011) (noting Copyright Act concerns with proposed settlement agreement because copyright owners that fail to affirmatively opt out of the license would "lose their rights" due to forced licensing of their works). It is worth noting that both *Orson* and *Wilkinson* discussed forced *commercial* exploitations 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 under *In re Jackson* (972 F.3d 25).

narrow circumstances, such as upon a showing of a state interest that is sufficiently compelling and distinct from the Copyright Act's purposes. Nonetheless, we believe the *Orson* court's reasoning is sufficiently sound that a court considering the state legislation at issue would likely find it preempted under a conflict preemption analysis.

We hope that the foregoing analysis is helpful in answering the questions regarding the state legislation noted in your letter. Please do not hesitate to contact me if you need any additional information.

Respectfully submitted,

A handwritten signature in black ink that reads "Shira Perlmutter". The signature is written in a cursive, flowing style.

Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office