



# LIBRARY OF VIRGINIA

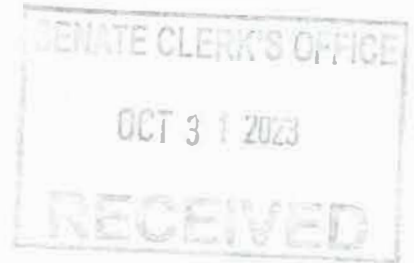
**Sandra Gioia Treadway**  
Librarian of Virginia

October 31, 2023

The Honorable Adam P. Ebbin, Chair  
Senate Committee on General Laws and Technology

The Honorable David W. Marsden  
Patron of Senate Bill 1528

Senate of Virginia  
P. O. Box 396  
Richmond, VA 23218



Dear Senators Ebbin and Marsden:

Enclosed please find a report on Senate Bill 1528, which the Senate Committee on General Laws and Technology referred to the Library of Virginia for study.

Please let me know if you have any questions or require any additional information.

Sincerely,

Sandra G. Treadway

Cc: Susan Clarke Schaar, Clerk of the Senate  
Amigo Wade, Director, Division of Legislative Services

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# **Report to the Senate Committee on General Laws and Technology on SB 1528**

October 27, 2023

Senate Bill 1528, introduced during the 2023 session of the Virginia General Assembly, proposes a remedy for a problem that libraries of all types – but especially public libraries – have experienced for more than a decade with the rise of electronic publishing and the public’s enthusiastic embrace of electronic books (ebooks).

As publishers adapted to meet the growing demand for ebooks, they realized that the pricing and distribution models they had traditionally used for print titles did not work in the electronic environment. In adjusting pricing models to ensure a sustainable return on investment in the ebook marketplace, they made significant changes in their long-standing relationship with libraries. Instead of selling electronic titles directly to libraries as they do printed works, publishers shifted to a licensing model through intermediary firms. Publishers now provide their ebook content to a handful of digital distribution partners (among them Overdrive, Axios 360, and Hoopla), and libraries must negotiate with these providers to obtain both the ebooks they wish to provide to their patrons and the technological infrastructure needed to lend these titles to library card holders. License agreements for ebooks contain a number of restrictions that publishers do not apply to print sales, and the price that libraries pay to license new titles is often substantially higher than what an individual consumer pays for an ebook. Library ebook licenses do not convey ownership but are for a limited duration – often two years or 26 check outs. Libraries must purchase titles again at the end of this period if they wish their patrons to have continued access. Libraries feel that the higher prices and the restrictions imposed by publishers are unfair and make it impossible for them to fulfill their mission by providing the same robust access to new books and information in digital format that their users have come to rely on in print. SB 1528 addresses these concerns by prohibiting publishers from including restrictions such as these in their contractual licensing agreements with libraries.

The publishing industry strongly opposes SB 1528 and any legislation that would prevent publishers from setting licensing terms that they believe are essential if they are to continue to make ebooks available to libraries. Publishers assert that their pricing model for the library market is necessary for them to provide economic incentives (such as advances and royalties) to

authors and thereby encourage new work. From the perspective of publishers, anything that reduces or inhibits these incentives infringes on authors' property rights and denies them fair market compensation for their work. Publishers assert that state regulation and intervention in the marketplace will decrease access to creative works as authors and publishers will not be able to invest in creating books or make market decisions that bring books to the public. Publishers see their current licensing practices as an effort to strike a balance between facilitating libraries' important work and ensuring the continued economic viability of the ebook market. If they were required to license ebooks on terms that would not adequately compensate authors for writing and publishers for disseminating their work, some publishers have indicated they might decline to license their digital collections to libraries at all.

Virginia is not the first state to attempt to level the playing field for libraries by proposing legislation regulating ebook licensing terms. In 2021 the state of Maryland passed a law very similar to SB 1528, which was quickly challenged by the Association of American Publishers. The Association of American Publishers, Inc, v Brian E. Frosh, Attorney General of the State of Maryland (case DLB-21-3133) was heard in the U. S. District Court for the District of Maryland last winter. In deciding the case, Judge Deborah Boardman found the Maryland statute to be in conflict with the U.S. Copyright Act and thus unconstitutional (*see* <https://cases.justia.com/federal/district-courts/maryland/mddce/1:2021cv03133/504378/19/0.pdf>). In concluding her opinion, Judge Boardman affirmed the important role that libraries play in our society and acknowledged the challenges they face in today's digital world:

Libraries serve many critical functions in our democracy. They serve as a repository of knowledge – both old and new – and ensure access to that knowledge does not depend on wealth or ability. They also play a special role in documenting society's evolution. Congress has underscored the significance of libraries and has accorded them a privileged status on at least one occasion, legislating an exception to the Copyright Act's regime of exclusive rights that permits libraries to reproduce copyrighted material so it may be preserved in the public record across generations. Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media. Striking the balance between the critical functions of libraries and the importance of preserving the exclusive rights of copyright holders, however, is squarely in the province of Congress and not this Court or a state legislature.

The State of New York passed ebook legislation requiring more reasonable licensing terms for libraries in 2021 as well. Aware of the situation in Maryland, New York Governor

Kathy Hochul vetoed the legislation before it took effect. Several other states have proposed or are considering legislation that would provide libraries with more leverage in the ebook marketplace, but to date none of these has been successful. Although the American Library Association and other national and state library advocacy groups do not agree that the Maryland statute violated copyright law, the decision in that case has caused proponents of ebook legislation across the country to consider other approaches. Whether one believes that the Maryland decision is the final word or not, it is clear that if SB 1528 were to be reintroduced as currently written, the bill would be challenged. The Association of American Publishers, the Authors Guild, the American Booksellers Association, and other groups have joined together to form the Protect the Creative Economy Coalition, whose primary purpose is to defeat future ebook legislation (*see* <https://protectthecreativeeconomy.org/>).

In an ideal world, representatives from the library and publishing communities would be able to find some common ground and identify areas for compromise. Given how high the stakes are for each side this seems unlikely to happen. Efforts to date have not been successful in bridging the gap between libraries and publishers. In the wake of the Maryland decision, a group of library workers, educators, lawyers, and others have established Library Futures, an organization committed to ensuring that libraries are able to acquire, lend, and preserve knowledge in digital format just as they do in print (*see* <https://www.libraryfutures.net>). Library Futures believes that legislation (federal as well as state) will be needed to accomplish this goal. The organization has put forward a template that state legislatures might consider that employs state procurement law to address licensing terms and thereby avoid conflict with the U.S. Copyright Act (*see* <https://www.libraryfutures.net/draft-ebook-legislation>). A state-by-state approach, of course, runs the risk of creating a patchwork of different laws across the country that might ultimately create more problems for libraries in their relationship with the publishing industry.

Library Futures has also proposed that policymakers consider an alternative solution to the ebook conundrum, that of digital ownership rather than licensing. Digital ownership would extend “the current paradigm for print works and allow libraries to both maintain the benefits of print collections and innovate even further . . . by creating new lending models, equitizing access for underserved communities, and contributing to a more democratic balance” (*see* <https://www.libraryfutures.net/digital-ownership-policy-paper>). Libraries would strongly support a digital ownership model, which Library Futures posits would benefit publishers as well. This

would be challenging to accomplish, but if an ownership model could be structured to allow libraries to fulfill their long-established mission while preserving the rights of copyright holders, it might be possible to move beyond the frustrating impasse that exists between libraries and publishers in the ebook market today.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sandra G. Treadway". The signature is written in black ink and is positioned above the typed name.

Sandra Gioia Treadway  
Librarian of Virginia