

RSC22

WEB SERIES



Controlled Digital Lending for resource sharing: Law and policy developments

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What is Controlled Digital Lending?

Controlled Digital Lending

- CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner.

Controlled Digital Lending



Controlled Digital Lending by Libraries

[Position Statement](#) ▾

[White Paper](#) ▾

[ILL Statement](#) ▾

[FAQ](#)

[Further Reading](#)



Controlled Digital Lending (CDL) is an emerging method that allows libraries to loan print books to digital patrons in a “lend like print” fashion. Through CDL, libraries use technical controls to ensure a consistent “owned-to-loaned” ratio, meaning the library circulates the exact number of copies of a specific title it owns, regardless of format, putting controls in place to prevent users from redistributing or copying the digitized version. When CDL is appropriately tailored to reflect print book market conditions and controls are properly implemented, CDL may be permissible under existing copyright law. CDL is not intended to act as a substitute for existing electronic licensing services offered by publishers. Indeed, one significant advantage of CDL is addressing the “Twentieth Century Problem” of older books still under copyright but unlikely ever to be offered digitally by commercial services.

Libraries have a novel idea

THE WALL STREET JOURNAL.
Home World U.S. Politics Economy Business Tech Markets Opinion Books & Arts Real Estate Life & Work

Libraries Have a Novel Idea

Lenders Join Forces to Let Patrons Check Out Digital Scans of Shelved Book Collections

By Geoffrey A. Fowler
Updated June 29, 2010 12:01 am ET

 PRINT  TEXT

SAN FRANCISCO—Libraries are expanding e-book offerings with out-of-print editions, part of a broader effort to expand borrowing privileges in the Internet Age that could challenge traditional ideas about copyright.

Starting Tuesday, a group of libraries led by the Internet Archive, a nonprofit digital library, are joining forces to create a one-stop website for checking out e-books, including access to more than a million scanned public domain books and a catalog of thousands of contemporary e-book titles available at many public libraries.

Collaborative Digital Collections

Legal framework for CDL:

How do libraries legally
do what we do?

The legal framework for CDL

- Statutory exceptions
 - First sale basics
 - Fair use basics

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

Definition of rights

- Sec. 101. Definitions.
- 102. Subject matter of copyright: In general.
- 103. Subject matter of copyright: Compilations and derivative works.
- 104. Subject matter of copyright: National origin.
- 104A. Copyright in restored works.
- 105. Subject matter of copyright: United States Government works.
- 106. Exclusive rights in copyrighted works.
- 106A. Rights of certain authors to attribution and integrity.

Fair use!

- 107. Limitations on exclusive rights: Fair use.
- 108. Limitations on exclusive rights: Reproduction by libraries and archives.
- 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.
- 110. Limitations on exclusive rights: Exemption of certain performances and displays.
- 111. Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable.
- 112. Limitations on exclusive rights: Ephemeral recordings.
- 113. Scope of exclusive rights in pictorial, graphic, and sculptural works.
- 114. Scope of exclusive rights in sound recordings.
- 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.

Limitations & exceptions

- 116. Negotiated licenses for public performances by means of coin-operated phonorecord players.
- [116A. Renumbered.]
- 117. Limitations on exclusive rights: Computer programs.
- 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting.
- 119. Limitations on exclusive rights: Secondary transmissions of distant television programming by satellite.
- 120. Scope of exclusive rights in architectural works.
- 121. Limitations on exclusive rights: Reproduction for blind or other people with disabilities.
- 122. Limitations on exclusive rights: Secondary transmissions of local television programming by satellite.

The Copyright Act Chapter 1

17 USC § 106

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- 1) to reproduce the copyrighted work in copies or phonorecords;
- 2) to prepare derivative works based upon the copyrighted work;
- 3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly

17 USC § 106 – "The Bundle"



Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- 1) **to reproduce** the copyrighted work in copies or phonorecords;
- 2) **to prepare derivative works** based upon the copyrighted work;
- 3) **to distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly**;
- 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, **to display the copyrighted work publicly**

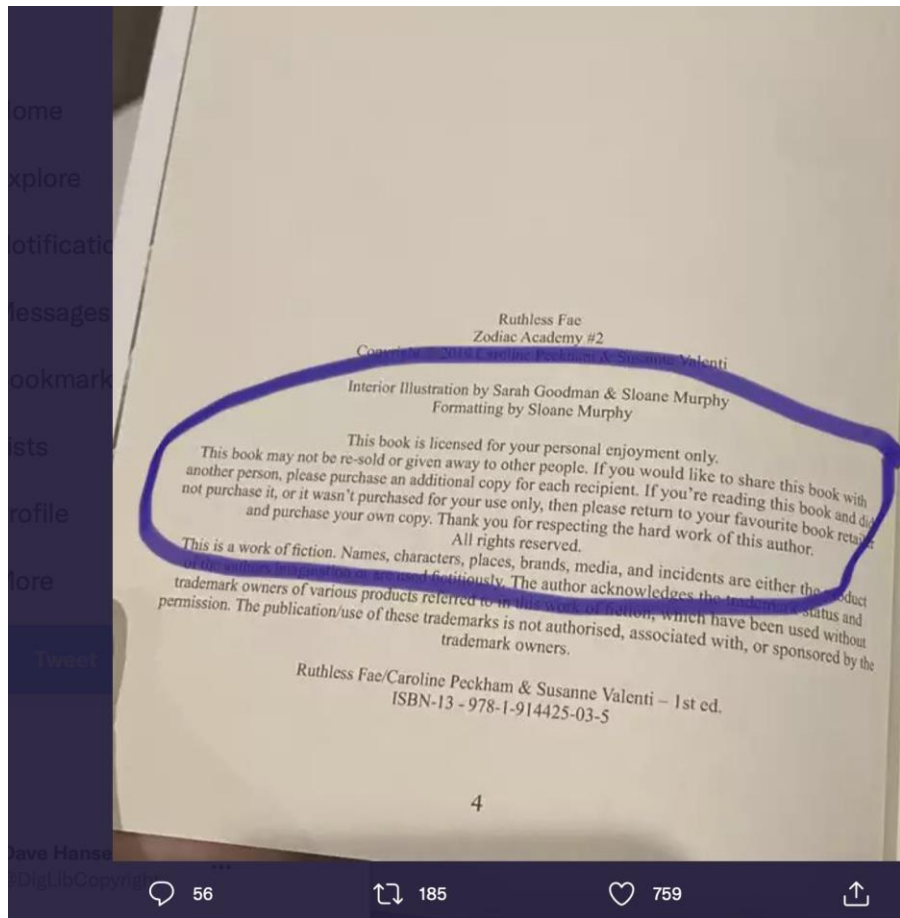
Reproduction and distribution

The owner of copyright has the exclusive rights:

(1) to reproduce the copyrighted work

(3) to distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease, or lending;





Caitlin Canahai 
@caitlincanahey

Can't get over this "copyright" notice that was included in a real book. Some poor Reddit user had to ask if it was a real thing.

1:02 PM · Apr 1, 2022 · Twitter for iPhone

96 Retweets 89 Quote Tweets 759 Likes



Tweet your reply

Reply



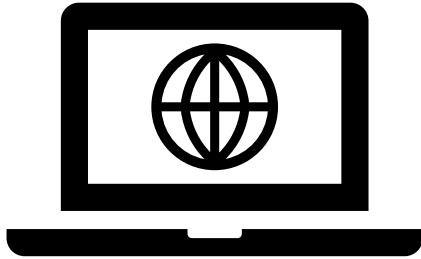
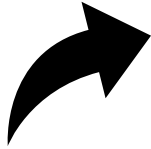
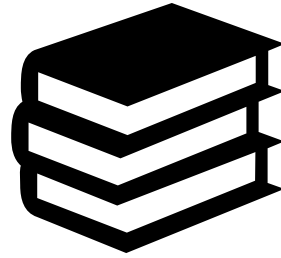
Phil Salva... @itsthesh... · Apr 1
Replying to @caitlincanahey and @tceles_B_hsup

I'm trying to understand the process through which a bookseller can be used to launder the enjoyment of the book. You can't sell it to a friend, but if you give it to a neutral party that does NOT enjoy books, they can re-license the enjoyment to somebody else

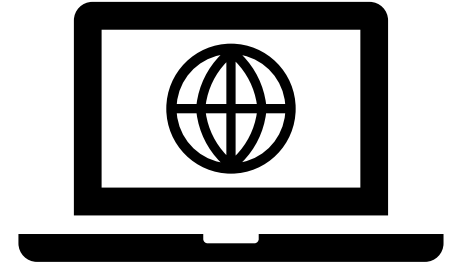


“Notwithstanding” section 106(3) “the owner of a particular copy or phonorecord lawfully made under this title is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”

First Sale, 17 U.S.C. §109



Reproduction + Distribution





- “Notwithstanding” **section 106** “the **fair use** of a copyrighted work, including such use by reproduction in copies...for purposes such as **criticism, comment, news reporting, teaching** (including multiple copies for classroom use), **scholarship**, or **research**, is not an infringement of copyright”

Fair Use, 17 U.S.C. §107

Fair Use Fundamentals

- Purpose and character of the use
- Nature of the work
- Amount and substantiality used
- Effect on the market

CDL statement guidance

At its core, CDL is about replicating with digital lending the legal and economically significant aspects of physical lending.

To do so, we libraries must truly exercise *control* in the process.

Exercising control

1. Ensure that original works are acquired lawfully;
2. Apply CDL only to works that are owned and not licensed;
3. Limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an “owned to loaned” ratio);
4. Lend each digital version only to a single user at a time just as a physical copy would be loaned;
5. Limit the time period for each lend to one that is analogous to physical lending; and
6. Use digital rights management to prevent wholesale copying and redistribution.

Explosion of interest in CDL from paper to practice

Controlled Digital Lending continues to be adopted....

- As of now **100+** (U.S. & Canada) libraries & publishers have harnessed a CDL system to loan digital copies
 - Boston Public Library
 - Allen County Public Library (genealogical collection)
 - Georgetown Law Library
 - MIT Libraries
 - MIT Press (selected back catalog)
 - Houghton Mifflin Harcourt (back catalog)
 - Brick House Cooperative (journalism)
 - And many more....

COVID closures

SC State College News

Schlow Library Extends Closure

Schlow Centre Region Library has extended its closure amid efforts to mitigate the spread of COVID-19. The library will now be closed through ...
2 days ago



AM Danville Advocate

Boyle County Public Library adds services during closure ...

In cooperation with state and local efforts to minimize the spread of COVID-19, the Boyle County Public Library is currently closed to the public.
2 days ago

(+) WJON News

Learn About Great River Library Services During Covid-19

...
Perhaps you had an item on hold before the library closure. On Hold items will be given an extended hold time until April 8th. You can also still ...
51 mins ago



Sp The SandPaper

County Library System Closing Now Indefinite

Originally looking to reopen at the end of March, the Ocean County Library System will remain closed until further notice. Kate Sanchez ...
23 mins ago

AW Arizona Daily Wildcat

Main Library announces closure due to coronavirus

The Arizona Health Sciences Library is closed to the public, but is still open to UAHS clients through their CatCard as of March 18. There is, ...
4 days ago



PD Portsmouth Daily Times

Portsmouth Public Library closing until April 6

The Portsmouth Public Library Board of Trustees met and decided to temporarily close the Library March 19 until at least April 6. The closure is ...
3 days ago

Stay up to date on results for **library closure**.

Create alert

CDL and COVID

- The problem illustrated:
 - Need to expand digital access, shut down collections
 - Physical access is not enough for lots of vulnerable populations
 - Need backup options

Libraries are already using:
Electronic document delivery,
digital interlibrary loan,
virtual reading rooms, and more....

And our users are
in the **Digital
Space**

Why are libraries
suddenly restricted
from that space?



CDL experimentation

- Increased willingness to explore alternative access options ("read and use the White Paper")
- Efforts such as HathiTrust ETAS, CDLI, CDL Reserves, and a variety of local implementations

EXAMPLE: HathiTrust's Emergency Temporary Access Service (ETAS)

- Owned to Loan & Friction Elimination
- Hathi member libraires (and their patrons) could check out a digital book for one hour.
 - Access would renew automatically at the end of that hour, unless another user requested the book after that hour was over.
- Users could click “Return Early” to make it available for another user.

HathiTrust's ETAS (a familiar system?)

One acquired copy



Checked out to one person at a time

Limited time period, returned

Made available to next person

Repeat

[Without permission from, or more fees paid to, the © holder]

Open Library: IA's Version of CDL



Open Libraries

a project by the Internet Archive

National Emergency Library (NEL)

- NEL launched in March 2020
- In response to pandemic library closures
- NEL is not CDL
- Closed June 2020



National Emergency Library
[Archive.org/NEL](https://archive.org/NEL)

Hachette Book Group, Inc. v. Internet Archive, 1:20-cv-04160 (S.D.N.Y 2020)



Complaint from publishers

"First, while IA claims to serve an educational purpose, **education has long been a primary mission and market of publishers.**"

"In short, [IA] merely exploits the investments that publishers have made in their books, and it does so through **a business model that is designed to free-ride on the work of others....**"

Replace references to IA with “libraries”

It is authors and publishers who create the books of scholarship and literature for educators, students, and other readers; **[libraries]** create[] nothing. **[Libraries]** play[] no role in the hard work of researching, writing, or publishing the works or, for that matter, in creating or sustaining the overall publishing ecosystem and its distinct partnerships and markets.

Moreover, **[libraries’]** massive book **[lending]** business has no new purpose that is fundamentally different than that of the Publishers: both distribute entire books for reading.

Replace references to "IA" with “libraries”

In short, **[libraries]** merely exploit[] the investments that publishers have made in their books, and [they do] so through a business model that is designed to free-ride on the work of others. . . . **[Libraries]** undermine[] the balance and promise of copyright law by usurping the Publishers’ ability to license and sell the books that they have lawfully produced on behalf of authors and for the benefit of readers.

Every loan of a book is not a lost sale

Lawsuit Process

- Complaint ☒
- Answer ☒
- Discovery ☒
- Motion(s) ☐
- Trial ☐
- Appeal ☐

Is there support for Controlled Digital Lending?



everylibrary



Institute for the Study of
Knowledge Management
in Education



AUTHORS
ALLIANCE



/ ASSOCIATION
OF RESEARCH
LIBRARIES /



ASSOCIATION OF SOUTHEASTERN RESEARCH LIBRARIES



International
Federation of
Library
Associations and Institutions

SPARC*

Rakuten OverDrive[®]



Digify

OCCAM'S
READER

box

[aviary]
by avp



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Interoperable System of Controlled Digital Lending

Controlled Digital Lending (CDL) is a method that allows libraries to replicate the right to loan their legally acquired items in a digital format to patrons under controlled conditions, and that has grown in application in recent years. Through CDL, libraries use technical controls to ensure a consistent "owned to loaned" ratio, meaning the library circulates the exact number of copies of a specific title it owns, regardless of format, putting controls in place to prevent users from re-distributing or copying the digitized version.

As with any expansion of an existing service, there are new elements, features, and practices that need to be developed to adapt traditional circulation and ILL activities, policies, and infrastructure to the requirements of CDL. This proposal outlines a project to develop a consensus framework in support of controlled digital lending of book content by libraries, to be published as a NISO Recommended Practice. This framework will describe existing practice and define best practices for many aspects of this relatively new service model. Through a NISO consensus process, the outcomes will expand understanding of CDL as a natural extension of existing rights held and practices undertaken by libraries for content they legally hold.

The NISO IS-CDL Working Group began its work in January 2022. We will update this space periodically as the work progresses.

Low risk, reasonable
solution that
preserves **legal** and
fiscal value in
library collections

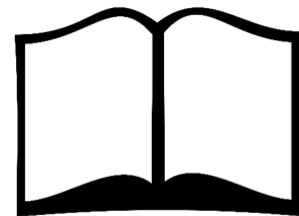
CDL for Resource Sharing

Interlibrary Loan: It's been around awhile....

- The purpose of ILL as expressed by the 1917 A.L.A. Code for Interlibrary Loans was:
 - (a) to aid research calculated to advance the boundaries of knowledge by the loan of unusual books not readily accessible elsewhere
 - (b) to augment the supply of the average book for the average reader



www.shutterstock.com - 516178492



§108 is the engine
behind document
delivery, preservation,
and interlibrary loan

The dream of shared access

- Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 Law Libr. J. 527 (2011)
- Exploration of how we can leverage CDL together, for improved access
- CDL Co-Operative Group formation

Primary legal issues

- How does CDL interact with Section 108?
 - Document delivery (108, licenses) vs. "returnables"
- Licensed eBooks vs. Digitized copies of print collections
- Risk associated with lending beyond a library's main user group

Digital access/loans do not negatively affect the market any differently than the *legal uses already permitted by libraries when providing access to works physically.*

Statement on Using Controlled Digital Lending as a Mechanism for Interlibrary Loan

Authored with community feedback by the CDL Co-Op:

Charlie Barlow
Kyle K. Courtney
Tom Cramer
Dave Hansen
Jill Hurst-Wahl
Jill Morris
Genya O'Gara

Goals & Context

The authors of this statement aim to:

1. Increase awareness of CDL controlled digital lending in this context,
2. Affirm libraries' rights to use CDL, and
3. to improve services provided by the library resource sharing community by ensuring libraries and consortia are operating with the same set of assumptions and principles.

Statement 1

Interlibrary loan (ILL) is a foundational, Congressionally protected library practice, long empowered by copyright law, in which libraries lend materials to one another for a variety of purposes.

Statement 2

Libraries support the copyright ecology and the rights of copyright holders by acquiring copyrighted works. Interlibrary loan is one way libraries provision materials for their patrons and is a key consideration as libraries develop their collections in concert with each other.

Statement 3

Interlibrary loan of library materials (both digitized and born-digital) is directly in keeping with the core purpose of libraries, and builds upon existing infrastructure and best practices for temporarily lending materials.

Statement 4

Controlled Digital Lending is a modern method of lending that replicates a library's right to loan legally acquired physical materials in a digital format under controlled conditions.

Statement 5

Controlled Digital Lending directly supports the ALA core values of librarianship by providing the “highest level of service to all library users” and equitable access to library materials “regardless of technology, format, or methods of delivery” using sustainable and efficient “practices that are environmentally sound, economically feasible and socially equitable.”

Statement 6

Controlled Digital Lending also directly supports the ALA Interlibrary Loan Code for the United States, specifically:

5.8 Ship material by the fastest method reasonably available to the location specified by the requesting library.

5.11 Deliver copies electronically whenever possible.

Statement 7

Interlibrary loan is lending among libraries; libraries are trusted institutions that balance the rights of the creators with the rights of the public to access.

Statement 8

Interlibrary lending—physically or digitally—is a legally protected activity within the marketplace; using Controlled Digital Lending as a mechanism for ILL has the same effect on the marketplace as other methods of ILL.

Statement 9

Librarians and library staff are experts, well-versed in digitization for lending, review of materials for copyright concerns, and technology used on controlled resource sharing platforms.

Statement 10

Determining parameters for Controlled Digital Lending for interlibrary loan is within the rights, powers, obligations, and judgments which librarians make every day.

Legislative and policy efforts

- Physical and Virtual *Hill Walks* in 2019-2021
- "CDL: The Bill"
 - Amending Copyright Act?
 - Narrow focus
 - Careful of legislative process



CDL resources

- Position statement on CDL (September 2018): <https://controleddigitallending.org/statement>
- CDL White Paper: <https://dash.harvard.edu/handle/1/42664235>
- Building a Collaborative Digital Collection: A Necessary Evolution in Libraries:
<https://scholarship.law.georgetown.edu/facpub/699/>
- Statement on Using Controlled Digital Lending as a Mechanism for Interlibrary Loan:
<https://controleddigitallending.org/ill/download>
- IFLA's statement on international CDL: <https://www.ifla.org/news/ifla-releases-a-statement-on-controlled-digital-lending/>
- Controlled Digital Lending Implementers home page: <https://sites.google.com/view/cdl-implementers>
- Canadian paper on CDL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031054

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thank you

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