

Controlled Digital Lending: Viable E-book Alternative or Gross Copyright Infringement?

Libraries are constantly evolving to meet the needs of their communities. As technology progresses, patron expectations change as well. In 2024, digital media rules the information landscape. New movies, music, tv shows, and books are regularly and normally available in digital formats. Streaming of movies, tv shows, and music is increasingly expected, and consumers, for the most part, benefit from this access. Books, however, have been the slowest industry to become digital. The most common way for publishers to make their copyrighted works digitally available to libraries is through expensive, often restrictive licensing agreements. The recent growth of the e-book industry means that libraries need to find new ways to make information accessible, just as they did with movies, music, and tv shows. In order to provide access, libraries need to have access themselves. The theory of Controlled Digital Lending (CDL) has gained popularity among librarians as an alternative method to provide digital access to their patrons.

CDL in practice has neither been court tested for its legal standing, nor has its specific principles regarding digital materials been codified in US law, largely discouraging widespread adoption of CDL due to concerns of litigation (Wang & Lipinski, 2024). While the legal theory of CDL has support from copyright lawyers and librarians, as well as some author coalitions, publishing companies and other author coalitions have vehemently opposed the idea. This paper will review the literature related to CDL, provide an overview of the legal theory behind CDL as described by copyright lawyers and library scholars, as well as the positions of librarians, publishers, and authors on the legality and morality of

implementing CDL in libraries. Finally, the future of CDL will be discussed, including recent technological solutions that will help confirm libraries' right to lend books in any format.

Concern about the future of libraries in an increasingly digital world can be seen as early as 1995. Line (1995) and Kane (1997) both discuss the potential for information to be available largely via access models rather than ownership models in the future, and they also agree that both models will be necessary for libraries' survival. Moyo (2002) recognizes that the reality that Line and Kane theorized has arrived, but purports that "[e-books] are merely digital versions of printed books . . . Libraries will continue to collect and preserve printed material alongside electronic resources" (p. 52). Bartow (2001) was an early proponent of applying established ink-and-paper rights, such as the First Sale Doctrine, to digital documents, believing it would "promote certainty and stability" (p. 823). Literature from this time period concerning digital rights was largely speculative, reflecting the contemporary uncertainty of these rights. As Reese (2003) says, "Due to the uncertainty of what the details of that digital environment will look like . . . proposing concrete amendments to copyright law would be premature" (p. 644). Early literature acknowledges the changes that the newly established digital landscape will surely bring to libraries and copyright but is unable to provide any concrete solutions. As technology progressed further, and as more people embraced the internet, the possibilities for accessing information seemed endless.

The rapid changes in technology prompted librarians to investigate new ways to make their collection available to more people. Michelle Wu (2011), a prominent supporter of CDL, first introduced key CDL principles in discussing her theoretical law library

consortium, TALLO (Taking Academic Law Libraries Online), including that works that are scanned to be available digitally were legally acquired and are owned by the library, as well the requirement that no more copies may be lent than the library owns, maintaining an equal owned-to-lent ratio. Wu (2011) argues that the act of digitizing a legally acquired text should be considered format shifting, and that if the original copy is destroyed upon digitization there are no additional copies being created. The importance of legal acquisition of works for CDL cannot be understated. Chiarizio (2013) brings up again the reality that e-books are most often *licensed* to libraries, not sold, and so unless the library could be certain they *legally owned* the files for the e-book, they could not use the theory that Wu proposed and lend them out on a one-user-one-copy basis. Garofalo (2013) echoes Chiarizio's concerns about potential ownership of e-books vs the current common model of licensing, and further says that "publishers should not dictate access; libraries need to lead policy and access issues" (p. 51). Wu (2017) returns to argue in favor of using "digitize-and-lend" programs to preserve works and provide patron access to materials, while attempting to settle copyright law concerns by analyzing the specifics of two cases (Authors Guild v. HathiTrust and Authors Guild v. Google, Inc.) in the context of fair use. Discussion surrounding CDL is growing and will continue to grow.

Most recently, Wang and Lipinski (2024) conducted a study on current CDL modes in the US, Canada, and the UK. They found that four general modes of CDL are used: "general circulation service, course reserves, document delivery and interlibrary loan" (Wang & Lipinski, 2024, p. 1073). The authors conclude that the legal standing for CDL in the US is uncertain, owing to unclear laws surrounding digital materials and related

copyright. They end with several suggestions for copyright law revisions, including providing protections for libraries to lend digital works, to clarify the scope of the many types of libraries, and to clarify the types of works that are eligible for digital lending (Wang & Lipinski, 2024, p. 1083). This study demonstrates that CDL is a current topic worthy of further investigation and that it is necessary to set legal precedent to protect libraries in their mission.

Small scale implementation of CDL increased after Hansen and Courtney released their White Paper on Controlled Digital Lending of Library Books in 2018. This paper was accompanied by a statement on CDL that was initially signed by over 40 individuals and 24 institutions, and now has many more supporters (Enis, 2018; *Signatories*, 2023). Hansen and Courtney list six principles that are core to CDL:

- (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
- (Hansen & Courtney, 2018, p. 3).

Designed to address the most common concerns with CDL, these principles have been reaffirmed by recent analyses (Board & Stutzman, 2020; Darlack et al., 2021). Hansen and Courtney say that CDL holds “significant promise” for books from the 20th century that are still protected by copyright but are not already digitally available from the rightsholders (Hansen & Courtney, 2018, p. 6). They base this argument on two copyright doctrines that libraries use already to fulfill their mission: first sale and fair use.

Copyright law is designed to promote learning for the public good while protecting the rights of authors. This requires a balance between the absolute rights of copyright holders, and the rights of the general public and scholars to access works and further progress. To this end, the first sale doctrine states that once a work has been sold, the new owner may sell, lend, or otherwise dispose of the work as they see fit, without interference from the rightsholders (17 U.S.C. § 109). This doctrine is essential to libraries, as they use this to legally lend out their physical collection. Using what’s known as the exhaustion principle, the first sale doctrine is based on the idea that once a rightsholder relinquishes control of an item by selling it, then they have “exhausted” their right to determine any future cost, use or owners of the item. The application of this doctrine to digital goods has not been decided by the US courts, but Hansen and Courtney (2018) argue that it has legal standing, and that when considered in tandem with fair use arguments CDL should be permitted (p. 8).

Fair use in copyright is another limitation on rightsholders in the interest of the public good. There are four factors that US courts use to help determine fair use:

- (1) Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
- (2) Nature of the copyrighted work;
- (3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (4) Effect of the use upon the potential market for or value of the copyrighted work (*U.S. Copyright Office Fair Use Index*, n.d., text box “About Fair Use”).

These four factors are meant to be weighed within the context of each specific copyright case to determine whether an infringement of copyright was fair use or not. Hansen and Courtney (2018) and Wu (2023) point out that not all of the fair use factors will be extremely relevant in every case, and so in alignment with their analyses this paper will discuss only the first and fourth factors as they are the most relevant. In the context of CDL, Hansen and Courtney (2018) with other scholars argue that CDL is protected under fair use for several reasons.

One core reason is that nonprofit library use is given special consideration, and have these special privileges codified in copyright law, when determining fair use because their purpose aligns with the original purpose of copyright law: to promote science learning and fine art creation (Board & Stutzman, 2020; Currier & Centivany, 2021; Hansen & Courtney, 2018; Wang & Lipinski, 2024). This is important for the first factor (purpose and character) as copyright court cases “have historically upheld libraries’ attempts to expand access for the public” (Courtney & Ziskina, 2023, p. 1). The fourth factor concerns the effect of the infringement on the market. As libraries are nonprofit organizations, the possibility of

commercial use is not a factor. Opponents of CDL in the publishing industry argue that the process of CDL “would create direct market substitutes for publishers’ extensive licensed offerings” (*Statement on Flawed Theory of “Controlled Digital Lending”*, 2019, para. 6).

Experts, proponents and legal scholars contend that there is no evidence that the lending of books through CDL that do not already have an e-book equivalent will have any more effect on the e-book market than the lending of physical books does (Currier & Centivany, 2021; Hansen & Courtney, 2018; Wu, 2017; Wang & Lipinski, 2024). In addition, publishers and authors have not released figures that support this assertion. On the contrary, recent studies and anecdotal evidence indicate that increased availability of books through the use of CDL may actually increase purchases of physical books (Adams et al., 2019; Nagaraj & Reimers, 2019). With these three reasons libraries have a relatively strong case for CDL, and more CDL programs have been implemented in libraries across the country.

Case studies for CDL programs began to be published more frequently after 2018, particularly after the national shutdown of many in-person services in 2020 necessitated quick development of programs in order to continue to serve their communities’ needs remotely. The Internet Archive consolidated 12 case studies of CDL use in North America based on interviews that describe “how libraries and publishers are addressing the challenges of providing digital access to materials in their print collections” (Adams et al., 2019, p. 2). CDL received overwhelming support from the interviewees, lauding its ability to allow access to materials from anywhere, anytime, including students who no longer have a school library, researchers from across the country seeking to more easily access local historical records, rural citizens who may be miles away from the library, and anyone who is

otherwise unable to visit their local library (Adams et al., 2019). In addition, it can bring attention to works that have been “marooned” due to perceived lack of relevance or interest or fragility of the pages, reviving their use and helping libraries make the most of their collection and their budgets (Adams et al., 2019). Librarians’ support of CDL is clear, even with its undefined legal standing.

Publishers and authors have issued their own opinions on CDL. The Association of American Publishers (AAP) released a statement in response to Hansen and Courtney’s White Paper in 2019. They criticize the document on several fronts, saying it confuses the terms “work” and “copy,” as well as ignoring the difference in markets between e-books and physical books (*Statement on Flawed Theory of “Controlled Digital Lending”*, 2019). They claim that any public benefit of CDL would be outweighed by “the harm to publishers’ actual and potential markets” (*Statement on Flawed Theory of “Controlled Digital Lending”*, 2019, para. 6). The National Writers Union (NWU) released “An appeal to readers and librarians from the victims of CDL” in 2019, where they say CDL “violates the economic and moral rights of authors” and that it limits authors’ ability to make a living off their writing (*Appeal from the Victims of Controlled Digital Lending (CDL)*, 2019, para. 3). They also claim that CDL interferes with their methods of income as related to out-of-print books but do not go into detail (*Appeal from the Victims of Controlled Digital Lending (CDL)*, 2019). The Authors Guild has similar concerns about potential market loss, and also purport that e-book licenses for libraries “are more expensive than consumer editions for good reason” but do not elaborate on these reasons (“Open Library,” n.d., para. 2). On the other hand, the Authors Alliance supports CDL, saying it is “a reasonable application of fair use” that

increases access and availability, and also extends authors' reach (Author's Alliance, 2019, para. 5). The difference in motivation is evidently monetary in nature.

When examining opposing views, it is important to keep motivation behind those views in mind. As stated before, and reflected in many scholarly publications, the library's mission is to progress learning and to serve their communities. The motivations behind support for CDL is not to purposefully infringe on copyright, but to provide materials to researchers and users in a fast and efficient way that reflects current technological capabilities. As authors and publishers have adjusted to provide materials digitally, libraries must defend the right to lend digital materials independently of rightsholders, just as they can with print books. This right aligns with the original purpose and intent of copyright law.

The purpose of copyright law is not to provide financial stability for creators. Wu (2023) describes the historical motivations behind early copyright laws in the late 18th century. Authors were concerned about their works being pirated by printers, a common occurrence at the time, so the Continental Congress were convinced that in order for their works to be read, authors needed protection (Wu, 2023). They recommended states secure copyrights for authors or publishers "for a certain time" (Wu, 2023, p. 142). Most reserved this right only for authors, and the vast majority cited public benefit as the reason for creation of copyright laws (Wu, 2023). Wu states, "the rights granted to the author to control their work were based in equity . . . the opportunity to make money was a side effect but not the justification for the control" (2023, p. 143). While authors certainly

deserve to be reimbursed for their work, it is not the intent behind copyright law. This context must be remembered when discussing CDL and copyright in libraries.

There are several initiatives to support CDL in libraries and promote alternative e-book practices. Project ReShare is one such initiative. Conceived in 2018 to support the growing need for consortial resource sharing, Project ReShare has grown in support, compatibility, and capability in the years since its release in 2020 (*The History of ReShare*, 2024). In 2023, the Boston Library Consortium began financially supporting Project ReShare and in February 2024 the first Minimum Viable Product for CDL was released (*ReShare Controlled Digital Lending*, 2024). Another initiative is spearheaded by the Brick House Cooperative, a journalist owned publishing platform, called BRIET (*BRIET*, 2024). This program allows independent publishers and authors to sell, not license, digital books directly to libraries (*BRIET*, 2024). Brick House calls for small publishers to join them in protecting libraries' right to own books and not be forced to license them (*About*, 2024). This movement toward ownership of e-books is supported by a set of principles released by Library Futures, a library research and advocacy program, that supports the ownership of e-books by libraries (2023). With the longest running CDL initiative, The Internet Archive launched the Open Library in 2006 with the express goal "to make all the published works of humankind available to everyone in the world" (Chitipothu, 2024; Turnbull, 2007). They have since faced litigation from multiple publishers in *Hachette Book Group, Inc. v. Internet Archive* once they launched the National Open library in June 2020, after national shutdowns caused patrons to lose access to their local library. Multiple legal and library scholars have expressed disappointment and dissatisfaction in the courts assessment of

the case (Barlow, 2024; Courtney, 2024; Hansen & Lewis, 2024; Stella, 2024; Wu, 2023). following a loss in court, then in appeal, the Internet Archive announced that they would not be seeking Supreme Court review (Freeland, 2024). Despite this setback the Open Library continues to operate, though with 500,000 titles less than were available before the lawsuit (“Why Are so Many Books Listed as ‘Borrow Unavailable’ at the Internet Archive,” n.d.). Clearly, librarians and legal scholars believe that CDL in the library context has a strong enough legal rationale that the Internet Archive’s loss is not discouraging enough to give up.

The legality of Controlled Digital Lending in the US is still under scrutiny. Although supported by legal and library scholars, the threat of litigation looms. The context of original copyright law and the motivations of each opposing viewpoint are important to keep in mind when considering this issue. Recent technological innovations have made implementing CDL easier for libraries, but library patrons’ demand for digital access necessitates more options. In order for libraries to provide the access patrons need and deserve, libraries must have full access themselves. Libraries, authors, publishers, and the US courts must work together to this end, for the good of the American people.

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