

Can I Borrow Your E-Book?: A Brief Discussion of Controlled Digital Lending

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Perhaps lost in all of the commentary and handwringing over AI and what to do with the works it creates is how we care for copies of human-authored works. The concept of controlled digital lending (or CDL) raises significant questions for publishers, authors, and readers, particularly when it comes to the scope of the exclusive rights of reproduction and distribution granted to owners by the Copyright Act. CDL refers to digitizing a print book and lending the digital copy in place of the physical book.

Under Section 106 of the United States Copyright Act, a copyright owner has exclusive rights to reproduce and distribute its copyrighted works. By its nature, CDL implicates both rights – it requires scanning and creating a new digital file (i.e., reproducing the work) and then distributing that digital file. Without a statutory exception in the Copyright Act or a successful fair use defense, these acts constitute an infringement of the copyright owner's rights.

Section 108 of the Act contains one such exception, but only in narrow circumstances. It allows libraries to reproduce copyrighted works for archival purposes under a variety of strict restrictions. Of course, the Copyright Act was passed in 1976 in a print-centric world. The [Copyright Office](#) has held a “longstanding belief that section 108 needs to be updated so that libraries, archives, and museums have a robust, comprehensible, and balanced set of exceptions in order to fulfill their missions.” This disconnect between Section 108's analog-era limits and the digital realities of modern library practice is precisely where the debate over CDL now sits.

In 2024, the Second Circuit rejected CDL as fair use in *Hachette Book Group, Inc. v. Internet Archive*. The court answered “no” to the question presented: “[I]s it ‘fair use’ for a nonprofit organization to scan copyright-protected print books in their entirety and

distribute those digital copies online, in full, for free, subject to a one-to-one owned-to-loaned ratio between its print copies and the digital copies it makes available at any given time, all without authorization from the copyright-holding publishers or authors?” The Second Circuit held that all four fair use factors favored the publishers who brought the lawsuit.

The Second Circuit’s rejection of CDL as fair use removes perhaps the only legal theory that could allow libraries to provide controlled digital access to materials they already own. With fair use foreclosed, libraries cannot rely on Section 108 to fill the gap because that exception was not designed to authorize digital lending.

For publishers, CDL represents a threat to the e-book licensing market, because they see market harm to the model of licensing electronic versions of books and the control they exert over digital distribution. They believe that scanning a physical book into a digital file is an improper market substitution that allows a library to bypass the licensing mechanisms established by the publishers for electronic books.

Libraries, however, take a different view. Their goal is to provide their patrons with stable access to their collections. They are concerned that a licensing model introduces uncertainty, because licenses can be revoked or expire, they come with potential restrictions on use that do not exist with print copies, and the pricing can fluctuate. CDL, therefore, is a way for libraries to serve their mission in a digital environment without having to worry about fragile licensing arrangements.

The collision of CDL, the limitations of Section 108, the Second Circuit’s fair use ruling, and the new digital markets that did not exist when the Copyright Act was enacted mean that the existing framework is not working for either publishers or libraries. To resolve these issues, either Congress will need to step into the void or the various stakeholders will need to reach an agreement on their own terms.