

Controlled Digital Lending

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ASSOCIATION
OF RESEARCH
LIBRARIES

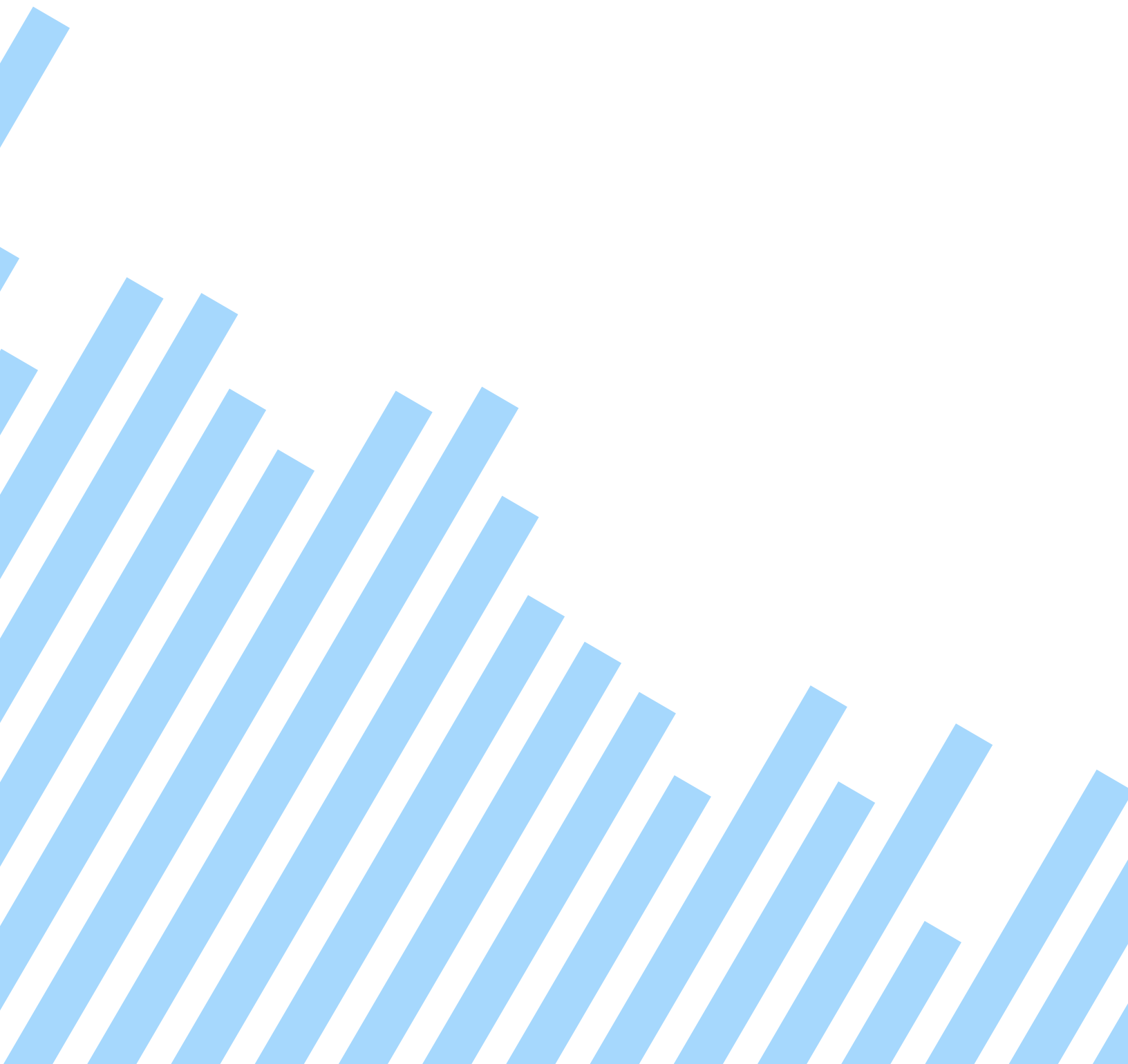


Table of Contents

ARL Position	3
Considerations for Research Libraries	4
Summary of ARL Discussion, October 2021	4
Understand Library Rights	
Start With What Is Possible Under Existing Rights	
Appendix	9
Endnotes	10

ARL Position

Libraries work individually and collectively to provide access to digital versions of materials in their collections—such as works that are older, out of print, or not available via license in e-book format—based on analysis of library rights and fair use.¹ Physical books that are still in copyright require a



particular fair-use analysis. According to a legal theory developed by Lila Bailey, Kyle Courtney, David Hansen, Mary Minow, Jason Schultz, and Michelle Wu,² an analysis of the first factor of fair use (Section 107 of the US Copyright Act)—the purpose and character of the use—would consider that circulating, or providing temporary access to, digital copies of print books may be consistent with the first-sale doctrine (Section 109). The theory holds that the fourth factor of a fair-use analysis—the effect of the use on the market—is strengthened when libraries remove a print copy from circulation while the digital copy is in use, maintaining a one-to-one ratio of “owned to loaned.” The Association of Research Libraries (ARL) endorsed this legal theory in 2020 when ARL signed the “[Position Statement on Controlled Digital Lending](#),”³ recognizing that research libraries need to provide research and academic continuity even while physical collections were inaccessible due to the COVID-19 pandemic.

[Research libraries](#) may rely on fair use—as well as other rights reserved for and exercised by libraries in the Copyright Act—to provide their patrons with lawful access to digital versions of items in their collections.⁴ Research libraries’ analysis of fair use may take into account whether a work relies on the financial incentive of copyright protection for its creation; because scholars typically do not produce works like monographs for financial gain, such an analysis would likely

favor sharing academic materials. A fair-use argument may be strongest in cases when a library limits its lending to a narrow body of works that publishers do not make available in digital formats, such as research libraries lending older scholarly monographs. Research libraries are also typically lending to their own patrons or within established consortia and resource-sharing networks.

Considerations for Research Libraries

The following considerations may support research libraries in [crafting their use case](#)⁵ and preparing for a fair-use analysis.

- Are the works in the public domain or under copyright?
- What type of materials does the library wish to share?
- Who is the library making the works available to?
 - For how long?
- What year were the works published?
- Are the works out of print?
- Is there a market for this work, such as an e-book version available for license?
- Was the author likely incentivized by the financial incentives of copyright protection?

Summary of ARL Discussion, October 2021

The remainder of this paper reflects a discussion of digital-lending practices, concerns, and opportunities held by the ARL Advocacy and Public Policy Committee (APPC) and guests during the October 2021 Fall Association Meeting. This discussion, and subsequent conversations around an earlier version of this paper, informed ARL's position on digital lending.

Through this discussion, the group reached consensus that applications of what is often referred to as “controlled digital lending” present important opportunities for researchers, scholars, and other users to access digital works from a shared corpus at scale with little friction. At

the same time, libraries implementing these practices must do the work to understand these opportunities, and implement controlled lending without inadvertently constraining existing established practices and protected rights. Given how rapidly the practice and legal analysis are evolving in these areas, libraries should remember that commonly accepted interpretations often change over time; care should be taken to not over-interpret common practice as the outside limit of what may be legally permitted. In other words, these are best viewed as floors, rather than ceilings.

The questions that guided this conversation were:

- How is your library using controlled digital lending technology?
- What workflow decisions do you consider? (copyright status, age of materials, availability of the work in electronic format from the publisher, who has access, etc.?)
- What, if any, are your questions and concerns about controlled digital lending? How have these questions and concerns affected your library's practices?
- If we had the legal certainty and equitable technical ability to implement controlled digital lending, what could your library accomplish? (preservation, digital lending during planned closures/renovations, etc.)
- Is there an advantage to using controlled digital lending for ILL (lending digitized copies of materials)? What rights would this rely on? Would your library be comfortable lending to other institutions using these mechanisms, workflows, and legal theories?

Understand Library Rights

Understanding the rights environment is key to knowing whether other potential digital-lending use cases may already be lawful under the existing US copyright regime. This understanding begins, for example, with distinguishing copyrighted works from works in the public domain, which may be reproduced and distributed without any restrictions; discussions about controlled digital lending apply to in-copyright works only.

Libraries and educational institutions rely on several limitations and exceptions to the copyright holder's exclusive rights. Disambiguating these limitations and exceptions is important. For example, libraries rely in part on fair use to provide access to copyrighted works. Section 107 of the US Copyright Act reads: "The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 is flexible and is evaluated on a case-by-case basis according to a four-part test that considers the purpose and character of a copyrighted work, the nature of a work, the amount used, and potential impact on the market for the work.

The [HathiTrust Digital Library](#)⁶—a nonprofit collection of digitized works supplied by partner research libraries—offers authorized users a searchable database of in-copyright digitized texts, which the Second Circuit Court of Appeals upheld as a quintessential fair use long before the COVID-19 pandemic in [Authors Guild v. HathiTrust](#).⁷ The search results displayed to users **without** print disabilities were limited to a list of works containing the search term(s); no text was displayed. Later, in [Authors Guild v. Google](#),⁸ the Second Circuit affirmed that creating a search database consisting of millions of digitized copies of books that libraries submitted to the Google Books program is a transformative fair use; the Google Books search results reveal snippets of the work without providing full access. In the cases before the

Second Circuit, neither HathiTrust nor Google made in-copyright works fully viewable to general users. Critically, the HathiTrust decision clarified that [libraries can rely on fair use](#) **in addition to** the library exceptions enumerated in Section 108.⁹

Creating and lending accessible versions of copyrighted materials to people with print disabilities is an established lawful practice in the US under fair use, the Chafee Amendment, and the Marrakesh Treaty Implementation Act. In the HathiTrust decision mentioned above, the Second Circuit ruled that “the doctrine of fair use allows [HathiTrust] to provide full digital access to copyrighted works to their print-disabled patrons.” [Under Section 121 of the US Copyright Act](#), a library may distribute a copy of a copyrighted work to each person who requests one, and each person may keep their copy of the work. Relying on controlled digital lending would require libraries to control the number of accessible works that they circulate using the one-to-one ratio described above, and to limit the amount of time a user can access the work. Therefore, while controlled digital lending would be permissible under Section 121, it would be more restrictive than what the law permits and is unnecessary to lawfully provide access for people with print disabilities.

Start With What Is Possible Under Existing Rights

During the discussion, the community noted that controlled digital lending should be thought of as an enhancement to existing practices that libraries can use to expand access to the fullest extent legally permissible. Expanding access can mean allowing patrons to borrow digital copies of scholarly monographs that the publishers do not make available in a digital format, rather than requiring them to travel to the library and borrow a physical copy, for instance.

For years, research libraries have made [strong and compelling arguments](#) that faculty should be able to digitize full chapters or whole articles and distribute those copies to students without worrying about multiple simultaneous users. Libraries have [lawfully and successfully](#)

relied on fair use to make scholarly materials available via e-reserves. Using controlled digital lending as the sole method of providing course reserves could be seen as a step back, if faculty had to restrict multiple simultaneous users from accessing the work, for instance. However, using controlled digital lending to lend digital versions of full titles is an example of how the practice can expand the existing electronic reserves service to increase access to content.

Another example is by expanding the universe of books that library patrons can access. Relying on Section 108(e), libraries may copy entire works that are not available for sale at a fair price, and those copies become the user's property. By using controlled digital lending, a library may be able to make digital copies of works available even if they are available in the secondary market; while the library could only make one copy available at a time under the own-to-loan requirement of controlled digital lending, the use of the practice in this instance could expand access to a larger universe of books.

Appendix: External Readings & Resources

“Accessible Text Request Service.” HathiTrust Digital Library. Accessed June 2, 2022. <https://www.hathitrust.org/accessible-texts>.

“Apply for NLS Service.” National Library Service for the Blind and Print Disabled, Library of Congress. Accessed June 2, 2022. <https://www.loc.gov/nls/enrollment-equipment/apply-for-nls-service/>.

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“Controlled Digital Lending.” VIVA: Virginia’s Academic Library Consortium. Accessed June 2, 2022. <https://vivalib.org/va/cdl>.

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“Eligibility.” National Library Service for the Blind and Print Disabled, Library of Congress. Accessed June 2, 2022. <https://www.loc.gov/nls/about/eligibility-for-nls-services/>.

Hansen, David R., and Kyle K. Courtney. “A White Paper on Controlled Digital Lending of Library Books.” September 2018. <https://doi.org/10.31228/osf.io/7fdyr>.

Endnotes

1. Some institutions and consortia are rebranding their physical resource sharing services to reflect this digital borrowing.
2. Lila Bailey et al., “Position Statement on Controlled Digital Lending,” last updated September 2018, <https://controldigitalending.org/statement>.
3. Lila Bailey et al., “Position Statement.”
4. Ryan Clough, “Digitization in an Emergency: Fair Use/Fair Dealing and How Libraries Are Adapting to the Pandemic,” *ARL Views* blog, April 1, 2020, <https://www.arl.org/blog/digitization-in-an-emergency-fair-use-fair-dealing-and-how-libraries-are-adapting-to-the-pandemic/>.
5. Clough, “Digitization in an Emergency.”
6. HathiTrust Digital Library, accessed June 2, 2022, <https://www.hathitrust.org/>.
7. Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014), <https://www.govinfo.gov/content/pkg/USCOURTS-ca2-12-04547/pdf/USCOURTS-ca2-12-04547-0.pdf>.
8. Authors Guild v. Google, 721 F.3d 132 (2d Cir. 2015), <https://www.govinfo.gov/content/pkg/USCOURTS-ca2-13-04829/pdf/USCOURTS-ca2-13-04829-0.pdf>.
9. Authors Guild v. HathiTrust.
10. Copyright Act of 1976, 17 U.S.C. § 121 (2010), <https://www.govinfo.gov/app/details/USCODE-2010-title17/USCODE-2010-title17-chap1-sec121>.
11. Brief of amici curiae American Library Association, Association of College and Research Libraries, and Association of Research Libraries, Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), <https://www.librarycopyrightalliance.org/documents/united-states-documents/amicus-briefs/lca-supports-georgia-state-university-in-amicus-brief/>.
12. Cambridge Univ. Press v. Becker, 446 F.Supp.3d 1145 (N.D. Ga. 2020), <https://casetext.com/case/cambridge-univ-press-v-becker-2>.

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