

Comments of the  
Recording Industry Association of America,  
National Music Publishers' Association and  
News/Media Alliance  
Regarding  
A Recommended Practice of The National Information Standards Organization  
On  
Controlled Digital Lending

Delivered via email to [nlagace@niso.org](mailto:nlagace@niso.org)

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The Recording Industry Association of America, the National Music Publishers' Association and the News/Media Alliance (together, "Commenters") welcome this opportunity to provide comments to the National Information Standards Organization ("NISO") in response to its request for public comment on a Recommended Practice for Controlled Digital Lending ("CDL") prepared by NISO's IS-CDL Working Group.

The Recording Industry Association of America ("RIAA") is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. RIAA's membership – which includes several hundred companies, ranging from small-to-medium-sized enterprises to global business – creates, manufactures, and/or distributes sound recordings representing the majority of all legitimate recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

The National Music Publishers' Association ("NMPA") is the principal trade association representing the American music publishing and songwriting industry. NMPA's membership includes "major" music publishers affiliated with large entertainment companies as well as independently owned and operated music publishers of all sizes representing musical works of all genres. Taken together, compositions owned or controlled by NMPA's members account for the vast majority of musical compositions licensed for commercial use in the United States. NMPA's mission is to protect, promote, and advance the interests of creators by protecting its members' intellectual property rights in judicial, legislative, and regulatory arenas.

The News/Media Alliance ("N/MA") is a nonprofit organization representing the newspaper, magazine, and digital media industries. N/MA represents over 2,200 diverse publishers in the United States and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. In total, N/MA's membership accounts for nearly 90 percent of the daily newspaper circulation in the United States, over 500 individual magazine brands, and dozens of digital-only properties. Its members publish quality journalistic and

creative content that covers natural disasters, conflict zones, school boards, city halls, townhalls, entertainment and the arts, food, wellness, and other matters of public interest to local, national, and international communities.

Commenters and their members have a significant interest in this matter, because the Recommended Practice, if adopted, has the potential to reach far beyond books. If libraries and other lending institutions regard the Recommended Practice as a green light to engage in CDL – despite a clear finding by a federal court that CDL constitutes copyright infringement – it is highly likely that libraries and other lending institutions will eventually apply CDL not just to books and other print materials, but also to other types of copyrighted works including music and journalism.<sup>1</sup> Were that to happen, it would pose a serious risk to Commenters’ members, who depend on third-party compliance with copyright laws to protect their existing creative works and provide incentives for creating new original content. RIAA’s members generated 84% of their 2023 revenues from digital streaming services<sup>2</sup> and NMPA’s members are similarly dependent on digital streaming for a significant and increasing portion of their revenue. N/MA’s members rely on established distribution arrangements for the licensing (and sometimes digitization) of news content to licensees, including libraries and archives.

## Introduction

NISO is currently requesting comments to assist it in recommending how libraries and other institutions should implement a practice that violates copyright law. While the draft purports not to “focus on legal issues” and instead addresses “how to technologically approach CDL,”<sup>3</sup> that approach either inherently assumes that CDL comports with copyright law, or, worse, is indifferent to the fact that it does not. This approach has no foundation in law or policy, as explained further below.<sup>4</sup> Accordingly, Commenters dispute the premise of NISO’s request for public comment and oppose any effort to develop a “Recommended Practice” for unlawful conduct.

Although the document acknowledges that legal considerations are relevant to libraries’ decision-making<sup>5</sup> and recommends that institutions seek legal counsel when considering an implementation of CDL,<sup>6</sup> it concludes with the misleading statement that “institutions will have different views of their obligations and liabilities.”<sup>7</sup> In addition, the draft offers institutions a

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<sup>1</sup> Indeed, NISO’s Recommended Practice states that CDL has the potential to be “useful for a variety of in-copyright materials.” NISO, CONTROLLED DIGITAL LENDING, 8 (Mar. 2024), *available at* [https://groups.niso.org/higherlogic/ws/public/download/30355/NISO\\_RP-44-202X\\_Controlled\\_Digital\\_Lending\\_draft\\_for\\_public\\_comment.pdf](https://groups.niso.org/higherlogic/ws/public/download/30355/NISO_RP-44-202X_Controlled_Digital_Lending_draft_for_public_comment.pdf) (hereinafter “RP”).

<sup>2</sup> Matthew Bass, *Year-End 2023 RIAA Revenue Statistics* (2023), *available at* <https://www.riaa.com/wp-content/uploads/2024/03/2023-Year-End-Revenue-Statistics.pdf>.

<sup>3</sup> RP at 7.

<sup>4</sup> The only exception is in the narrow (and, as far as we are aware, exceedingly rare) circumstance where a copyright owner has expressly authorized a library or other lending institution to engage in CDL in connection with one or more specifically identified works that it owns.

<sup>5</sup> It even includes a section on “Legal Considerations.” RP at 9-10, Section 1.4.1.

<sup>6</sup> It is unlikely that all institutions with an interest in CDL have either in-house legal counsel or a budget to pay outside counsel for advice. Rather, institutions that are unable to afford legal counsel are likely to rely on the promulgation of the Recommended Practice as an indication that CDL is legal.

<sup>7</sup> RP at 10.

number of potential rationales to rely on when implementing CDL, including a “fair use/first sale analysis by a library.”<sup>8</sup> It also suggests two other *permission-less* rationales – “[l]ack of availability of an e-book license at the time of digitization” and “[r]arity/uniqueness of specialized material, its market availability limitations for replacement, or other concerns related to circulation of the physical object.”<sup>9</sup> None of these purported rationales justifies the Recommended Practice.

## Comments

The draft as currently written is extremely misleading and likely to cause significant harm to: 1) libraries and other lending institutions that rely on it to their detriment; 2) copyright owners whose works are infringed as a result of it; and 3) NISO’s credibility. In particular, the draft gives the false impression that reasonable minds can differ as to the legality of CDL when, in fact, the court in *Hachette Book Group, Inc. v. Internet Archive* (hereinafter “*Hachette*”) found unequivocally and without hesitation that Internet Archive’s fair use defense of CDL “fails as a matter of law.”<sup>10</sup> Indeed, after evaluating each of the statutory fair use factors, the court concluded that:

Each enumerated fair use factor favors the Publishers, and although these factors are not exclusive, IA [Internet Archive] has identified no additional relevant considerations. At bottom, IA’s fair use defense rests on the notion that lawfully acquiring a copyrighted print book entitles the recipient to make an unauthorized copy and distribute it in place of the print book, so long as it does not simultaneously lend the print book. But no case or legal principle supports that notion. Every authority points the other direction.<sup>11</sup>

The Court of Appeals for the Second Circuit (the same court that is now considering IA’s appeal of the *Hachette* decision) reached the identical conclusion in *Capitol Records, LLC v. ReDigi Inc.* (hereinafter “*ReDigi*”).<sup>12</sup> That case involved an online music-resale platform that allowed users to copy “lawfully purchased digital music files” (e.g., from iTunes) onto ReDigi’s servers in a series of “packets” while simultaneously deleting those packets from their own computers.<sup>13</sup> ReDigi argued that it simply facilitated the “*transfer* of its users’ lawfully made phonorecords, rather than the *creation* of new phonorecords,”<sup>14</sup> because “the entire file never exist[ed] in two places at once.”<sup>15</sup> The Court disagreed, reasoning that “even if ReDigi effectively compensated”

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<sup>8</sup> RP at 8.

<sup>9</sup> *Id.* The draft also mentions two permission-based rationales – “[p]ermission secured by a library from a rightsholder to do CDL” and “[a]greement with a vendor/publisher to allow CDL of its undigitized backfile.” *Id.* Not only are those circumstances exceedingly rare (particularly in the case of music) but to the extent that they may exist, they would be governed by specific, negotiated terms in the agreements granting any such permissions, making a generic “Recommended Practice” both unnecessary and inappropriate. It is also noteworthy that the draft fails to mention Section 108(c) of the Copyright Act, *see* 17 U.S.C. § 108 (c), despite the fact that it offers permissible ways to address some of the rationales mentioned in the draft.

<sup>10</sup> *Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 391 (S.D.N.Y. 2023).

<sup>11</sup> *Id.* at 390-91.

<sup>12</sup> 910 F.3d 649 (2d Cir. 2018).

<sup>13</sup> *Id.* at 652-53.

<sup>14</sup> *Id.* at 657 (emphasis added).

<sup>15</sup> *Id.* at 653-54.

by making “offsetting deletions” of the music files, the process “nonetheless ... involve[d] the making of unauthorized reproductions.”<sup>16</sup> The Court concluded that ReDigi’s copying was *not fair use*, as the platform “ma[de] no change in the copyrighted work” and instead simply created a resale market that “compete[d] with sales of the same recorded music by the rights holder.”<sup>17</sup>

Nor can proponents of CDL rely on the first sale doctrine (the other legal rationale suggested in the draft proposal) to shield the practice from liability. *Hachette* is equally unequivocal in rejecting that argument:

Section 109(a) [of the Copyright Act] does not excuse IA’s unauthorized reproduction of the Works in Suit. The first sale doctrine limits a copyright owner’s distribution right under § 106(3), but Section 109(a) “says nothing about the rights holder’s control under § 106(1) over reproduction of a copy or phonorecord.” . . . Although Section 109 entitles IA and its Partner Libraries to resell or lend their lawfully acquired print copies of the Works in Suit, “unauthorized reproduction,” which is at the heart of IA’s online library, “is not protected” by § 109(a).<sup>18</sup>

Notwithstanding the plain-as-day pronouncements from the *Hachette* and *ReDigi* courts, as well as from the U.S. Copyright Office,<sup>19</sup> the draft proposal would have libraries and other lending institutions believe that those authorities only “called the lawfulness of CDL into question” and “left those now using or considering CDL with an unclear picture of how to proceed.”<sup>20</sup> To the contrary, the *Hachette* court made it abundantly clear that those “now using or considering CDL” can no longer do so without subjecting themselves to liability for copyright infringement.

To the extent that the draft implies that the Second Circuit is likely to overturn *Hachette* on appeal, the draft fares no better. Judge Koeltl’s district court decision was thorough, well-reasoned, and consistent with Second Circuit copyright authorities. IA’s arguments on appeal largely reiterate its unpersuasive arguments before Judge Koeltl. Moreover, Judge Koeltl’s analysis is supported on appeal by 70 prominent individuals and organizations who joined together to submit six friend of the court (i.e., amicus) briefs.<sup>21</sup>

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<sup>16</sup> *Id.* at 658; *see id.* (explaining that courts “are not free to disregard the terms of” the Copyright Act even if “the entity performing an unauthorized reproduction makes efforts to nullify its consequences by” taking “counterbalancing” measures).

<sup>17</sup> *Id.* at 661; *see also id.* at 663-64.

<sup>18</sup> *Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 385 (S.D.N.Y. 2023) (citations omitted). *Accord* United States Copyright Office, DMCA SECTION 104 REPORT, 80 (2001), *available at* <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> (“Section 109 provides no defense to infringements of the reproduction right. Therefore, when the owner of a lawful copy of a copyrighted work digitally transmits that work in a way that exercises the reproduction right without authorization, section 109 does not provide a defense to infringement. . . . We therefore conclude that section 109 does not apply to digital transmission of works.”).

<sup>19</sup> *See* footnote 18, *supra*.

<sup>20</sup> RP at 10.

<sup>21</sup> Those joining the friend of the court briefs include professors and scholars of copyright and intellectual property law, former judges and former government officials, international and regional trade bodies, organizations representing the interests of writers and other creators, and organizations representing copyright owners.

There is simply no reason to think the Second Circuit will approach this issue any differently than Judge Koeltl did, particularly given the *stare decisis* doctrine and the Second Circuit's ruling in *ReDigi*. Accordingly, it is irresponsible, at best, for the draft to reassure libraries and other lending institutions that, "[i]n spite of current legal challenges, CDL is still being utilized by the library community and has the potential to more equitably connect library users with otherwise not readily available materials."<sup>22</sup>

## **Recommendation**

Given the clear legal authority prohibiting CDL,<sup>23</sup> we urge NISO and its IS-CDL Working Group to withdraw the draft Recommended Practice. Failure to do so will likely lead astray libraries and other lending institutions that will infer from its publication that CDL has some legal foundation, which it demonstrably does not.

If NISO has questions about our recommendation, we would be happy to respond to those questions in writing or in person.

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<sup>22</sup> RP at 10.

<sup>23</sup> See footnote 4, *supra*.