



TO: National Information Standards Organization (NISO) IS-CDL Working Group

FROM: Copyright Alliance

RE: Comment for NISO RP-44-202X, Controlled Digital Lending

DATE: April 19, 2024

The Copyright Alliance submits the following comments in response to the National Information Standards Organization (NISO) IS-CDL Working Group draft titled [Recommended Practice on Controlled Digital Lending](#).

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of copyrighted works for the public to enjoy.

The Copyright Alliance and its members have a strong interest in the proper application of copyright law. We are gravely concerned about the broad-reaching legal and practical consequences of the so-called practice of “Controlled Digital Lending” (CDL), which is already harming existing markets for books. If the practice expands to other copyrighted works, such as music, film, television, video games, and the visual arts, it would cause widespread harm to all creative professionals and undermine the very purpose of copyright. This is because CDL involves the unauthorized digitization of print materials and distribution those digital copies—often of copyright-protected works. Whenever a copyrighted work is digitized and distributed, the exclusive rights of the copyright owner under section 106 of the Copyright Act are implicated. Thus, absent an applicable exception in copyright law, authorization from the copyright owner is necessary.

The exceptions upon which CDL stakes its legal legitimacy are twofold: (1) fair use and (2) first sale. The fair use exception in the Copyright Act permits a party to use a copyright-protected work for certain purposes. Illustrative fair use cases include uses for criticism, comment, news

reporting, teaching, scholarship, or research, though these uses never automatically qualify as a fair use. Instead, courts analyze each use on a case-by-case basis, applying a four-factor balancing test. The second exception, the first sale exception, generally permits the lawful owner of a copy of a copyright-protected work to sell, lease, loan, gift, display or otherwise dispose of his or her copy of the work. It does not apply to licensed works and, most importantly, *it does not apply in the digital context*. In short, scanning and distributing large collections of digitized versions of copyrighted works to any user anywhere for free undermines existing licensing markets and strips creators and copyright owners of their statutory rights to commercialize and control their works. Congress, the U.S. Copyright Office, and courts have rejected the application of these two exceptions in the context of digitization and digital distributions of copyright-protected works.

The Copyright Act is the exclusive jurisdiction of our federal government institutions, including Congress, the federal court system, and the U.S. Copyright Office. Only Congress has the authority to change the copyright law, and only the courts and the Copyright Office have the legal authority to make binding interpretations and applications of the law. While NISO is recognized for its technical standard setting work, NISO is not a federal government institution and has no authority to create, change, or promulgate any standards or recommendations which are inconsistent with the law.

Nonetheless, NISO ignores this fact by pushing ahead with a draft proposal recommending CDL practices that clearly violate federal copyright law. The proposal represents only the views of some libraries and some within the library community while failing to acknowledge the harms to, or account for the interests of, those whose works are illicitly used through CDL. In so doing, NISO advances the interests of only one group of stakeholders, in a manner that will have a detrimental impact on many other stakeholders. Notably, when Congress was approached about expanding copyright law exceptions for digital transmissions and the digital environment, like first sale and fair use—the same theories that are being proffered to support CDL practices today—they unsurprisingly rejected the attempts to enshrine them into law.¹ Likewise, the U.S. Copyright Office rejected similar proposals to expand the first sale exception to digital copies and the Department of Commerce’s Internet Policy Task Force similarly cautioned Congress

¹ See H.R. 3048, Digital Era Copyright Enhancement Act, 105th Congress, 1st Session (Nov. 13, 1997). The bill *see also* Congressional Record, Vol. 144 No. 83, E1208-09 (June 23, 1998), <https://www.govinfo.gov/content/pkg/CREC-1998-06-23/pdf/CREC-1998-06-23.pdf>. Former Representative Howard Coble, then-Chairman of the House Judiciary Committee’s Subcommittee on Courts and Intellectual Property, objected to H.R. 3048’s proposed technology specific language for the fair use exception and a proposed expansion of the first sale doctrine to digital transmissions. On first sale, he noted: “In my opinion this extension of the first sale doctrine is antithetical to the policies the doctrine was intended to further . . . It is also likely that this provision would have a much greater impact on an owner’s primary market for new copies of a work. . . Congress has curtailed the first sale doctrine as it applies to the rental of sound recordings and software in the past, to prevent posing so great a burden on a copyright owner so as to undermine the incentive to create works which is the driving force behind the Copyright Act.”.

against the expansion of the first-sale doctrine to digital transmissions.² In practice, the NISO proposal acts as an end run around Congress, the U.S. Copyright Office, and relevant federal agencies.

As NISO is well aware, CDL has been held to be an unlawful copyright infringement by a federal district court in *Hachette Book Group, Inc. v. Internet Archive*.³ Moreover, in *Capitol Records v. ReDigi*,⁴ the Second Circuit Court of Appeals clearly ruled that creating digital copies of copyrighted works infringes a copyright owner's right to reproduce the work and thus, the first sale exception does not apply in the digital context. Of course, if NISO wants to proceed in contravention of the federal courts, it does so at its own peril and the peril of any organization or individual that chooses to follow the faulty and illegal CDL practices put forth as recommendations in this draft report, and threatens NISO's legitimacy as a neutral standard setting body.

Shockingly, the draft NISO report not only supposes CDL is legally achievable, but it also even goes so far as to *encourage* interested stakeholders to engage in such practices so long as it fits their appetite for legal risks. This approach is astonishingly irresponsible. CDL is an *illegal* practice. It blatantly runs afoul of the Copyright Act. Encouraging or promoting illegal acts not only exposes its adopters to near-certain liability for copyright infringement, but also makes NISO itself vulnerable to claims for secondary liability for illegal inducement as well as eroding long-held perceptions of trust and reliability in NISO's work in the information standard setting field.

While the draft report acknowledges the existence of the *Hachette v. Internet Archive* case, it fails to explain how and why the court *emphatically* rejected CDL practices. In its decision in the *Hachette* case, the federal district court for the Southern District of New York denounced Internet Archive's CDL theory as clear copyright infringement because it amounted to the unauthorized reproduction and distribution of copyrighted works in digital form. In reaching its decision, the court soundly rejected the argument that CDL qualified for the fair use exception. As stressed throughout the court's thorough and thoughtful analysis, the digital copying of physical books and their unauthorized distribution by Internet Archive through CDL did not

² The Copyright Office recommended against expanding the first-sale doctrine to digital transmissions in part because "[t]he risk that expansion of section 109[would] lead to increased digital infringement weigh[ed] heavily against such an expansion." U.S. Copyright Office, DMCA Section 104 Report 99 (2001), at 82-85, 96-101. <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>. In 2016, the Department of Commerce's Internet Policy Task Force likewise recommended against expansion of the first sale doctrine to digital transmissions. Dep't of Com. Internet Pol'y Task Force, White Paper on Remixes, First Sale, and Statutory Damages (2016) at 58, available at <https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf>.

³ 664 F. Supp. 3d 370 (S.D.N.Y. 2023).

⁴ *Capitol Recs., LLC v. ReDigi, Inc.*, 910 F.3d 649, 659–63 (2d Cir. 2018), cert. denied, 139 S. Ct. 2760 (2019).

qualify as a fair use under Section 107 of the Copyright Act, failing at *every* fair use factor.⁵ Furthermore, the court also unequivocally rejected the argument that CDL is excusable under guise of fair use because it furthered the policies of the first-sale doctrine enshrined in Section 109 of the Copyright Act.⁶

Given the illegal nature of CDL, we strongly urge that NISO retract this practice as a “Recommended Practice” and call on NISO members to reject the proposal and withdraw the entire project. There can be no normalization of standards, setting forth recommendations, or minimizing risks for CDL, because it is an illegal practice that clearly runs afoul of federal copyright law. The federal courts, Congress, U.S. Copyright Office, and U.S. government agencies have all in one form or another, rejected the arguments upon which proponents of CDL seek to legitimize the practice. Thusly, this draft report should be retracted and the project should be withdrawn.

Please let us know if we can provide additional information or answer any questions regarding the contents of this submission.

⁵ See *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 390–91 (S.D.N.Y. 2023).

⁶ The court reaffirmed the limitation of the first-sale doctrine to physical copies of copyrighted works, and made it crystal clear that under the Copyright Act and instructive case law, mainly *Capitol Records v. ReDigi Inc.* the doctrine does not permit a physical work to be digitized and distributed. *Hachette* at 386.