



**Comments of the Authors Guild on
NISO Draft Recommended Practice RP-44-202X, Controlled Digital Lending**

April 19, 2024

The Authors Guild thanks the National Information Standards Organization (NISO) for the opportunity to provide comments on Recommended Practice NISO RP-44-202X, Controlled Digital Lending. The Authors Guild is a national non-profit association of over 14,000 professional, published writers of all genres. Its members include leading historians, biographers, academicians, journalists, and other writers of nonfiction and fiction whose works have appeared in the most influential and well-respected publications in every field. The Guild has a fundamental interest in ensuring that works of authorship and the rights of authors are protected, and that the hard work and talents of our nation's authors are rewarded so that they can keep writing, as intended by the framers of our Constitution. The Guild believes that it is crucial for our culture and the future of democracy to ensure that our literature and arts remain vibrant and diverse.

The Authors Guild is deeply dismayed that NISO would seek to lend legitimacy to the discredited legal theory of controlled digital lending (CDL). It is crucial to understand that CDL is a theory invented by academic critics of copyright law to allow libraries to create and provide access to ebooks without paying for them, contrary to the law. But it is also susceptible to use by ebook piracy sites and indeed has become the primary tool with which piracy websites masquerading as libraries seek to justify copying vast numbers of copyrighted books and distributing them online without permission from, or payment to, authors and publishers. This effort has been properly repudiated in court. Just last year, the U.S. District Court for the Southern District of New York held that the Internet Archive's CDL practices constitute copyright infringement, squarely rejecting the Archive's assertions of fair use. *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370 (S.D.N.Y. 2023). The case is currently on appeal to the Second Circuit.

The draft Recommended Practice acknowledges the *Hachette* decision but oddly suggests it has limited precedential value. See Recommended Practice § 1.4.1, at 10 (stating that “the judgment related only to a specific set of works in a specific jurisdiction” and that “this and other court cases are likely to continue to shape the ways in which libraries approach CDL”). But the court nowhere suggested that the outcome would be different in a case involving different works. To the contrary, the court made clear that CDL represents a fundamental misunderstanding of copyright law:

The crux of [the Internet Archive’s] first factor argument is that an organization has the right under fair use to make whatever copies of its print books are necessary to facilitate digital lending of that book, so long as only one patron at a time can borrow the book for each copy that has been bought and paid for. **But there is no such right, which risks eviscerating the rights of authors and publishers to profit from the creation and dissemination of derivatives of their protected works.**

664 F. Supp. 3d at 386 (emphasis added, citation omitted).

Nor has a court in any other jurisdiction suggested that the CDL theory remains available to be “shape[d].” While the Internet Archive has appealed the district court’s decision, it is misleading at best for NISO to suggest that the legality of CDL is somehow unsettled.

Particularly troubling to the Authors Guild is that NISO’s effort to “normalize” CDL practices (Recommended Practice § 1.4.1, at 10) has the potential to greatly harm authors and threatens their ability to continue in the writing profession. The Recommended Practice suggests that continued use of CDL by libraries is to be encouraged because it “has the potential to more equitably connect library users with otherwise not readily available materials.” Recommended Practice § 1.4.1, at 10. But it lacks any thought of equity or fairness to the authors whose books are being taken without pay or any consideration to how the practice will affect their ability to sell their older books, where the markets might be small, and can be easily displaced, but are very meaningful to the authors, some of whom rely on their “backlist” as their main source of income. The proposed standard appears oblivious to the devastating effect on authors’ livelihoods that would result if CDL practices were to become widespread. For a detailed description of these harms, we urge NISO to read the *amicus curiae* brief filed by the Guild and fifteen other creator organizations in the *Hachette* appeal. See <https://authorsguild.org/app/uploads/2024/03/23-1260-As-Filed-Amici-Brief-3.22.24.pdf>.

Infringers like the Internet Archive commonly argue that these effects are outweighed by a purported public interest in disseminating books. But there are already plenty of legal ways to access ebooks and legal, licensed ways to create digitized versions of older books. Moreover, as the district court in *Hachette* recognized, the notion that infringement can be justified by a supposed interest in “access” is legally incorrect, for “[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work.” 664 F. Supp. 3d at 390 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985)).

In view of these serious concerns, the Guild concludes that the overall project of promulgating best practices for CDL is fundamentally flawed and should be abandoned. We therefore urge NISO to withdraw the Recommended Practice.

Respectfully submitted,

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