



ACP Statement on Controlled Digital Lending September 2022

The Association of Canadian Publishers (ACP) represents 115 independent English-language book publishing firms. Our members are Canadian-owned and operate in communities across Canada. Along with our francophone counterparts, we publish 80% of the new books published by Canadian writers each year. These books are published in a variety of genres and reach readers of all ages through bookstores, in classrooms, and libraries of all kinds, in print and an increasing number of digital formats.

Copyright is essential to the work that we do and is a key pillar of the creative economy. Copyright supports the continued creation and publication of written works in all genres and for a variety of markets.

ACP recognizes that Controlled Digital Lending (CDL)¹ is a developing practice among libraries. Discussion of CDL has grown in recent years, particularly in the context of the COVID-19 pandemic when access to print collections was temporarily restricted due to public health restrictions. ACP has observed that CDL is part of a broader trend within Canada and internationally among user groups who rely on copyright exceptions and limitations to justify the copying and distribution of published works, rather than dealing directly with copyright holders.

ACP stresses that **copying and making available are exclusive rights of copyright holders**. Users, including libraries, must seek permission from rightsholders for any acts of digitization and making available of published works. Without that permission, scanning and distribution of those digital copies is an act of copyright infringement. This was affirmed by the Supreme Court of Canada in its decision in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association* in July 2022.²

¹ A definition put forward by American proponents of CDL is as follows: “CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an ‘owned to loaned’ ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.” Source: Hansen, David R. and Kyle K. Courtney. “[A Whitepaper on Controlled Digital Lending of Library Books](#).” 24 September 2018.

² Supreme Court of Canada. [Society of Composers Authors and Music Publishers of Canada v. Entertainment Software Association](#). 15 July 2022.



When considering CDL in a Canadian context, ACP offers the following background to libraries considering the implementation of CDL projects:

- Copyright makes our work possible. It protects creators' and publishers' right to fair remuneration, and fuels investment in future works. It ensures that a diversity of voices and ideas can be amplified and heard. This is particularly important in a country like Canada, which has a relatively small population and a reading culture that is heavily influenced by the United States.
- Authors, illustrators and translators (after this called the creators) and publishers may legitimately reserve their right to determine when and how their content will be copied and distributed, regardless of format.
- Publishers' activities are defined by contracts with the creators they work with. We respect the rights assigned or licensed to us, and do not exploit rights we do not hold. When digital rights to a book remain with its creator, publishers cannot offer an ebook without violating the terms of our contract or the *Copyright Act*.
- Copyright law applies to works of all genres. Works of fiction and non-fiction both have value, require investment, and are deserving of remuneration for use.
- In an ever-changing marketplace, publishers continue to adapt their business models and employ new strategies. Publishers can choose to put commercial exclusions in place that limit sales to particular market segments, and may choose to refrain from producing books in particular formats.
- Publishers are investing heavily in a variety of digital formats, including accessible formats for readers with print and perceptual disabilities. These books meet high industry standards, and are of much higher quality than the scans offered via CDL in library collections, which offer an inferior reading experience and are inaccessible to those with print disabilities. In order for publishers to continue to invest in digital formats, including in the accessible formats that we have been asked by library partners to produce, a market must exist to make that investment possible and worthwhile.
- Most Canadian publishers are eager to sell to libraries and view them as important partners in building audiences and reaching readers. At the same time, we rightly and properly expect fair compensation for the copying of works in which we have invested our time, talents and resources. Further, we have a responsibility to the creators who we work with, to ensure creators are fairly compensated for the sale and use of their works.

CDL and the publishing marketplace

Arguments in favour of CDL often focus on books and collections that could reasonably be understood to present less risk of copyright infringement, for example, out-of-copyright works. However, the arguments put forward by the Canadian library community also lay the foundation for the application of CDL to certain in-copyright works.³ This raises concern among ACP and its members, particularly when the arguments are made within the context of libraries' current objections to ebook licensing models offered by multinational publishing companies.

Opening the door to the reproduction and distribution of in-copyright works would set a damaging precedent should it be applied more broadly. Though we understand Canadian independent publishers are not the primary target of libraries' calls for "fair" pricing for ebooks, copyright law applies equally to all creators and publishers, regardless of business model or country of origin. Independent publishers would likely suffer disproportionately from any market damage caused by CDL policies, given their smaller size and resource base.

Canadian libraries have also cited the unavailability of certain titles in digital formats as justification for the application of CDL to in-copyright work. For example, in its whitepaper on CDL, the Canadian Federation of Library Associations (CFLA) presents the fact that 9% of independent publishers have no plans to begin producing ebooks as justification for CDL.⁴ To ACP, this represents a significant achievement in the digital evolution of our industry; indeed, 91% of Canadian independent publishers *are* producing ebooks. Further, the paper notes that 10% of Canadian independent publishers have no plans to offer ebooks to libraries. (For the vast majority of that 10%, it can be assumed that they are not offering ebooks to anyone, based on the first statistic.) Publishers respond to market demand and if there are works within that 10% that libraries would like to acquire in digital formats but can't, direct communication with the publisher, rather than resorting to internal scanning, would help demonstrate to the publisher a need for those formats and could encourage investment. In order for publishers to continue to invest in digital formats, including in the accessible formats that we have been asked by library partners to produce, a market must exist to make that investment worthwhile.

CDL and the Copyright Act

There is no provision for CDL in the *Copyright Act*. The practice could only be found legal in Canada if libraries proved it to be supported by specific exceptions or limitations in the *Act*, or to be a fair dealing.

³ de Castell, Christina, Joshua Dickison, Trish Mau, Mark Swartz, Robert Tiessen, Amanda Wakaruk, and Christina Winter. "[Controlled Digital Lending of Library Books in Canada](#)." 9 February 2022.

⁴ *Ibid.*, p. 5.

As typically described by proponents of the practice, CDL necessarily involves libraries making unauthorized, new reproductions of copyright-protected works in their entirety. At the initiative of a library, one print copy of a copyright-protected book would be reproduced, resulting in two copies of the book in two separate material forms, print and digital. In the absence of the library proving a fair dealing defence, the library's reproduction of the print copy of the book would violate the copyright owner's sole intellectual property right under s.3 of the *Copyright Act* – that is, the sole right to decide whether the work is reproduced and in what material form. There is no support in the *Act* or Canadian case law for the idea that a copyright owner's right of reproduction is exhausted when the publisher sells a copy of a book to a library. A library cannot legally reproduce a digital copy of that book without the permission of the copyright owner or without proving a fair dealing defence.

Though the CDL model proposed in CFLA's whitepaper may involve restrictions on the circulation of unauthorized copies a library makes, this does not negate the fact that those copies were made in contravention of s.3 of the *Copyright Act*. Any "owned to loaned" regulation the library may establish would not, on its own, insulate libraries against claims of copyright infringement and secondary infringement under the *Act*.

CDL and fair dealing

CFLA's whitepaper examines potential CDL use cases through the lens of fair dealing, which is assessed using a two-step test:

- (1) The defendant must show that its dealing is for an allowable purpose prescribed by the *Copyright Act*, namely "research, private study, education, parody or satire" under s. 29; "criticism or review" under s. 29.1; or "news reporting" under s. 29.2.⁵

With respect to this first step, the paper asserts that "it can reasonably be expected that many or most uses of works made in the course of CDL will fall within these enumerated purposes," but does not provide any facts to support this statement.⁶ It is not clear to us how libraries could reasonably or efficiently know, at the time an unauthorized copy of any given work was made for the purpose of CDL, that their library patrons will use it for an allowable fair dealing purpose. To the contrary, depending on the nature of the book copied, it could just as easily be reasonably expected that a patron would use it for leisure reading or entertainment, and not an allowable purpose under the *Act*. Given the millions of patrons Canadian libraries serve each year, ACP believes that it is unreasonable to generalize their intentions so broadly.

⁵ Ibid., p. 12.

⁶ Ibid., p. 12.

The paper attempts to address this by distinguishing between works of fiction and non-fiction, and suggests that the latter are more likely to be accessed for purposes that would fall within the scope of fair dealing. ACP objects to the notion that non-fiction works are less worthy of copyright protection under the CDL model proposed, and also notes the popularity of this category among Canadian leisure readers. This is demonstrated in BookNet Canada's 2021 *Canadian Leisure and Reading* study, which documents how Canadian readers spend their leisure time and their reading preferences. The study found that 69% of print book readers, 63% of ebook readers, and 65% of audiobook readers read adult non-fiction.⁷ History and Biographies or Memoirs are identified as being the most popular subjects among non-fiction ebook readers, with 33% and 30% reporting, respectively, that they had read books in these genres in 2021.⁸

We recognize that CFLA is not advising libraries to digitize non-fiction collections on a wholesale basis, but caution that developing guidelines that are based around subject categories as broad as non-fiction, science, or un-illustrated cookbooks, is not a reasonable fair dealing defence and instead opens the door to infringement. Fact-based works, such as history, cannot be assumed to be accessed for purposes of research, private study, or education alone.

(2) The defendant must show that its dealing is “fair.”

Because of the fact-driven, contextual nature required of each fair dealing analysis, and because so many CDL parameters are unknown (e.g. the age, nature, and volume of works libraries would propose to copy without authorization), at this stage ACP believes that it is speculative and premature to try to forecast how and precisely what non-exhaustive fair dealing factors a Court would weigh in judging CDL for fairness.

With that said, ACP believes that libraries should use caution when relying on the idea that Canadian Courts would be disinclined to consider the market effect of CDL on the works copied without authorization (e.g. evidence of publishers' lost primary sales and/or licensing revenue resulting from the making available of full unauthorized reproductions of their works).

In short, reliance on fair dealing provisions to justify systemic reproduction and dissemination of in-copyright works puts libraries at considerable risk of litigation. Generally, a student or researcher scanning an excerpt from a work for the purpose of research, education, or private study is currently permitted by the *Copyright Act*; a library system digitizing a collection's works in their entirety for use by patrons regardless of purpose is a vastly different proposition.

⁷ BookNet Canada. [Canadian Leisure and Reading 2021](#). 10 May 2022, p. 29.

⁸ *Ibid.*, p. 31.



Conclusion

ACP recognizes that there may be legitimate use cases for the legal use of CDL. A model that supports the digitization of out-of-copyright works, for example, offers the potential for further joint exploration. However, we note that the role of CDL in library operations is far from settled internationally, with litigation pending in the United States.

We know that CDL projects are underway and will continue to be implemented by Canadian academic and public libraries. With this in mind, we underscore the importance of publishers and libraries working creatively and collaboratively to ensure that shared values are supported and legal rights are not abrogated.

It is important to the relationship between our sectors and to Canadian writers and readers that we proceed by consultation and negotiation, rather than by implementing policies that challenge the limits of existing law, and leave costly litigation as the only available remedy. ACP welcomes further discussion with the Canadian library community on the use cases where CDL would remove barriers to libraries and their patrons, while also ensuring a healthy writing, publishing, and lending ecosystem.

For more information:

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