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Controlled Digital Lending Feasibility Report



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The contents of this report are based on the assessment of Naomi Korn Associates and are intended as an overview of the broad issues rather than legal advice. To all extent possible, Naomi Korn Associates believes the contents of this report are accurate at the date to which the report was written. However, if legal advice is required, the opinion of a suitably legally qualified professional should be sought.

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1. Executive Summary

Lending of digitised copies of library collections is controversial, with proponents and opponents disagreeing over whether digital lending is just an extension of a core library activity or whether it is different because it involves copying, with the potential for loss of control of use and income for rights holders. Controlled digital lending (CDL) is designed to address these rights holder concerns in the following ways.

1. The library must lawfully own a copy of the physical work that is digitised for lending purposes. It can destroy the physical copy as long as it keeps proof of ownership, but it must not re-sell or give away physical copies.
2. The library must not simultaneously lend more copies than it lawfully owns (it must maintain an "owned to loaned" ratio so the physical item must be made unavailable for loan).
3. The library must use technical protection measures (TPMs) to prevent unauthorised copying, sharing or manipulation of the digital copy. The loan must expire before it can be lent again and TPMs must be in place to prevent unauthorised use and use beyond the loan period.

Lending of copyright works is a restricted act under UK copyright law and in other legal jurisdictions. The legal bases for CDL in the UK are uncertain and current licensing schemes do not fully meet CDL needs. Although EU court case judgments indicate support for digital lending, further clarity is required. In the USA an ongoing court case against the Internet Archive may have a chilling effect on the rolling out of CDL. Therefore librarians need to make risk-based assessments considering factors such as copyright status or works and conditions of licence schemes and copyright exceptions. CDL software systems should facilitate legal and risk assessments and record decisions. They should store relevant documentation such as loan requester declarations and implement and enforce loan procedures that comply with CDL rules. There is growing demand internationally for the lending of digital copies of works to be treated in the same way as traditional library lending, but there is recognition that this will require further updating of current legal provisions to reflect current library user needs.

2. Introduction

Lending is a core activity in libraries and the scope of library lending has expanded as the types and formats of library materials have increased and changed over time. Libraries can provide licensed access to digital resources for their users. However, the market place currently does not fulfil user needs for digital access to all the materials they need. Not all materials are in digital form and not all users can travel to a library to borrow physical items. Lending of digitised copies of library collections is controversial, with proponents and opponents disagreeing over whether digital lending is just an extension of a core library activity or whether it is different because it involves copying, with the potential for loss of control of use and income for rights holders.

The core objection of opponents of CDL is that it involves what they see as the creation of an initial unauthorised digital copy of a physical work and then making further unauthorised digital copies in the process of loaning the item to each borrower. There are also concerns over security of loaned copies and that even when the loan expires and the digital copies are returned there will be unauthorised copies in Web caches which can still be used or further distributed.

Controlled digital lending (CDL) is designed to address these rights holder concerns in the following ways.

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The library catalogue record is usually amended to point the library user to the location of the digital copy. This approach has also been used in the case of preservation microform copies where physical copies are made inaccessible to library users.

The purpose of this report is to provide an overview of the legal position concerning CDL in the UK, including ILL. It will focus on whether the practice is lawful in the UK and if so, under which sections of the Copyright, Designs and Patents Act 1988, as amended (CDPA 1988). It also provides an overview of the difference between the legal positions in the UK and USA and comments on relevant legal developments in the EU. The report examines these legal provisions and comments on how they could be addressed in practice, including institutional risk management approaches and collective licensing schemes.

The key questions addressed in this report are

- Under what circumstances can a digital copy be lawfully "lent" by libraries?
- Under what circumstances can a digital copy be lawfully made or acquired for lending by libraries?

The report also considers which current or proposed digital lending practices are clearly legal and which are of uncertain legality but are low/moderate risk. The report makes recommendations for the possible functionality of a software system for digital lending with minimum risk of legal liability for UK library users or the software developer. The conclusion to this report considers future changes in the interpretation or the scope of current legal provisions to facilitate CDL.

3. Digital Library Lending and Copyright Law in the UK

Lending of copyright works is a restricted act under UK copyright law. The law provides an exception that allows educational establishments (CDPA 1988, s. 36A) to lend copies of works. This does not necessarily mean that lending digitised copies is lawful as the provision does not define what "copies" means or whether digitised copies of copyright works already in collections can be made and then loaned. Lending by public libraries is also provided for in copyright law (CDPA 1988, s. 40A) and is regulated by public lending right law (PLRA 1979, as amended by the Digital Economy Act 2017, s. 31). These provisions now include lending of e-books and e-audiobooks, but with the provisos that the works have been lawfully acquired and that lending complies with any purchasing or licensing terms that apply. The PLR scheme remunerates rights holders and only licensed digital works are covered by this scheme.

As it is not clear whether UK legal provisions for library lending extend to digitised copies of works in library collections, consideration must be given to whether and how digitised copies can be lawfully made or otherwise acquired for lending purposes. There are a number of options which carry greater or lesser degrees of legal risk for CDL. Focusing exclusively on out of copyright material is at the low end of the risk scale. Digitising hard copies of works that are also already commercially available in digital form is a high risk activity and not an acceptable method for CDL as it amounts to market substitution. Other options for addressing copyright issues in digital lending include licensing schemes and permissive open licences. In the UK, there are also a number of exceptions to copyright that allow copying for a limited range of specified purposes. The following sections of this report examine the usefulness of these options, associated risks and their implications for the development of a CDL software system.

Lawful Digitised Copies for Lending

Out of Copyright Works

Including only out of copyright works in CDL is a low risk activity as there will be no legal consequences, or at least no copyright-related consequences. Risk arises when it is not clear whether a work is out of copyright or not. A rule of thumb is that works published before the 20th century are out of copyright in the UK as copyright protection generally lasts for the life of the author(s) plus seventy years. Academic and research libraries, especially those in institutions with arts and humanities departments and/or with important special collections, may wish to lend copies of older works rather than relying on reference only access to their physical collections. Care would have to be taken with some unpublished works which will remain in copyright in the UK until the end of the year 2039.

However, it is likely that most libraries will have demand for digital access to 20th and 21st century works that do not exist in digital form. There may be no commercial interest from publishers and some 20th century works may be out-of-commerce altogether. This does not necessarily mean that rights holders will not object to CDL of these works as they might be planning to market some of these works commercially in the near future. Another issue with 20th century works is that increasingly complex forms of work developed with multiple rights owners. Libraries with users interested in audiovisual works, for example, will potentially be dealing with complex rights issues when assessing the copyright status of works they wish to lend digitally. Works published in the first half of the 20th century are more likely to be out of copyright so the risk of any legal actions arising from digital lending is low to medium. However, works published later in the 20th century present a higher risk. So libraries will have to balance user demand for late 20th century works with the complexity and potential expense involved in discovering the copyright status of work, and securing the necessary rights to digitise and lend these works.

Licensing Approaches

Identifying rights holders and negotiating bespoke licences for digital lending on other than a small scale is likely to be beyond the resources of most UK libraries. Licensing options are already available to libraries through reproduction rights organisations (RROs). The options cover the range of copyright works available in academic libraries, although different formats are licensed by different RROs. The question is whether existing licences address the requirements of controlled library lending either in their current forms and, if not, what modifications to such licences would be required.

In the UK, the RRO licensing schemes most relevant to libraries and controlled digital lending are the Copyright Licensing Agency (CLA) licences covering literary works for different library sectors, including higher education (HE). However, the scope of the HE licence would not allow the lending of digitised copies of whole works. It does allow scanning of extracts of works, for example a chapter of a book or an article from a periodical. A second extract from the same work can be copied through a separate pay-as-you-go CLA service. The scanned copies can be accessed and printed or downloaded by students or staff. Digital copies can be scanned in the higher education institutions (HEIs) or be lawfully acquired from the CLA's Digital Content store. The CLA Higher Education Licence is for on-campus and distance learning students. HEIs can also include students enrolled in overseas campuses through the CLA's Optional Coverage for Overseas Campus-Based Students scheme.

Another approach to licensing which is particularly relevant to academic and research libraries is open licensing. Open licensing is increasing used for academic and scholarly publications to make works available on terms that are more permissive than is generally the case in the publishing industry. In addition these works are made available in digital form. If the trend toward open licensing continues, the copyright issues with digitally lending recent publications are likely to diminish over time. Open licences, such as those provided by Creative Commons (CC), are not just applied to literary works; they are also used for other categories for copyright



works. CC licences are created in machine as well as human-readable form so it should be a relatively simple task to check a licence and identify whether CDL is permitted. In fact, most CC licensed works can be made available without all the controls required by CDL, as long as the creator of the work is acknowledged. Only the stricter Creative Commons (CC-BY ND and CC-BY NC ND)¹ licences would prevent further sharing or changing works by library users.

Since the UK left the European Union, the orphan works exception that was introduced through EU law no longer applies. The term orphan work means that the rights holder is not known or cannot be traced, so permission to copy cannot be obtained. The UK has a licensing scheme for orphan works for both commercial and non-commercial use. This scheme allows licencees to digitise and make available orphan works online and use them for educational purposes. Lending is not explicitly mentioned as a use under this licence. The licences are not available for mass digitisation and must be renewed after seven years. So, this licence is not appropriate for digital lending and libraries would need to rely on copyright exceptions for lending digitised orphan works.

Copyright Exceptions

UK copyright law (Copyright, Designs and Patents Act 1988, as amended) includes a number of exceptions to copyright for specific and limited purposes. The most relevant exceptions are the so-called library privilege exceptions. Fair dealing exceptions are less relevant to library lending but the exception for the making of temporary copies (CDPA 1988, s. 28A) is relevant to the process of making digital copies available to library users that rights holders care concerned about.

There is provision for copying and use of extracts of works by educational establishments (CDPA 1988, s. 36). This copying should be for the purpose of instruction for a non-commercial purpose only. This exception does not include broadcasts or stand-alone artistic works and it does not apply if a licensing scheme already exists. So, it would only cover works

¹ CC refers to Creative Commons, BY to the requirement to acknowledge the creator of a work, NC means no commercial use can be made of the work ND means no derivatives can be made of the work.



not included in, for example, the CLA licensing licensing schemes. This exception is more restrictive than the CLA copying allowances as it only allows up to 5% of a work to be copied across the institution in any one year. As the exception is only for the purposes of instruction, it would not be relevant to lending works for research purposes.

Libraries and educational establishments can make works available through dedicated terminals (CDPA 1988, s. 40B). The provisos include that the copies can only be made available for research and private study and in compliance with purchase and licence terms. In the case of a digitised copy, there are no purchase and licence terms but the copy itself must be lawfully acquired. It could be assumed that a digitised copy of a lawfully acquired physical work would comply with this proviso since the aim is to provide digital access, but this is not certain. In addition, the term “dedicated terminal” implies access within library premises although such terminals could conceivably be located elsewhere. Although this legal provision allows digital access, it seems more akin to "on the spot reference use", which is excluded from the definition of lending in copyright law (CDPA 1988, 18A). So this exception may be of some, but limited, use for CDL.

Other copyright exceptions allow copying by librarians for certain purposes. Librarians may make single copies of items to supply to other, non-profit, libraries (CDPA 1988, s. 41). Items can be copied in whole or in part in response to a request from another library without infringing copyright. There is a proviso in that the librarian making the copy should not know, or be able to reasonably find out, how to contact the rights holder to authorise making the copy. If the copy could be made in digital form the receiving library could potentially have a lawfully acquired copy. There is no explicit statement of what the receiving library can or cannot do with their copy, so this exception could potentially be used for lending by that library.

Librarians can make copies of works to replace damaged or lost copies in their own or other, non-profit, libraries. This provision only covers works that are not loaned to library users, that is reference only, not publicly available or only loaned to other institutions. The aim of this exception is preservation rather than increasing access. This suggests that the copy should



not be used for loan purposes in either institution as it would be inconsistent with the purpose of the exception (CDPA 1988, s. 42).

Librarians can make single copies of a reasonable part of published works for requesters (CDPA 1988, s. 42A). What is reasonable is not defined, however the law allows librarians to make a single copy of the whole of an unpublished work, unless this has been prohibited by the rights owner and the librarian knows or should have known this to be the case (CDPA 1988, s. 43). The requester must sign a declaration confirming that they are not aware of copies being made for anyone else at the time. This exception is not a good basis for lending because although only one copy can be made for one person at the same time, as is the case for loan items, the requester keeps the item. It is not a loan.

Copies of the whole or substantial parts of copyright works can be made for certain purposes under fair dealing exceptions to copyright. While all of the purposes are potentially relevant to library users, none of them are relevant to library lending. It is unlikely fair dealing exceptions would provide a basis for the requirements of CDL in the UK.

CDL and Inter-Library Lending

There is a difference between inter-library lending (ILL) and document supply. In the case of document supply, the requester keeps the supplied copy whereas loans are returned to the supplying library. It is made clear in UK copyright law that lending between libraries is not covered by the use of the term “lending” in this legislation (CDPA, s. 18A(2)(b)). So the inter-library loan system in the UK relies on the library privilege exceptions. There is a view that it is possible to lend works from digital collections because in UK copyright law exceptions to copyright cannot be over-ridden by contract (see, for example CDPA 1988, s. 41 (5)). The restrictions of the library privilege exceptions would still apply.



4. CDL in Other Jurisdictions

United States of America

Libraries in the USA have recently begun adopting CDL. Where digital copies already exist (by virtue of earlier digitisation efforts by, for example, the Internet Archive), CDL may involve repurposing existing scans for lending. However, US copyright law gives rights holders a number of exclusive rights, including the right to make and publicly distribute copies of their work. Section 108 of the US Copyright Act 1976, gives librarians the right to make a single copy of works in their possession, subject to certain limitations. While the law also grants some other exceptions for libraries (that enable them to, for example, lend materials to users and other libraries and make copies of deteriorating and damaged works under limited circumstances,) it is not clear that CDL falls within these exceptions.

Opposition to CDL unsurprisingly comes from authors, publishers, and associations and guilds that represent the interests of writers and distributors. They claim that it puts important revenue streams, such as royalties from book sales, at risk. Opponents also argue that CDL impacts book sales due to libraries no longer acquiring new copies to replace lost or damaged items. One final complaint against CDL is related to the ease through which users can discover and check out digitised items online. Taking into account the time and effort needed to borrow items, opponents of CDL claim that lending of digital copies via the Web is more likely to replace sales or licences of e-books than is availability of physical books in a library to replace sales of those books.

Proponents of CDL make two arguments for its legality under current US copyright law. Firstly, it is legal because it is like lending physical works under the concept of “first sale”, i.e., once you have sold something to a third party, you have no say on whether that third party can pass it on to someone else. Secondly, it is permitted under fair use, which is the main US copyright



exception that is relevant. Fair use enables members of the public to make certain kinds of uses of protected works without permission of rights holders (17 U.S.C. 107). Proponents of CDL argue that it is for not for profit educational purposes and does not cause market harm because no more digital copies are lent than the original number of physical copies purchased. All of this is explained in WWW.CONTROLLEDDIGITALENDING.ORG/STATEMENT, which argues that as long as access to the original physical copies is disabled any time the digital copy is checked out, and the library ensures TPMs are in place to restrict what users can do with the item, then the CDL is legal.

In the key case alleging copyright infringement by the Internet Archive, a group of publishers submitted a complaint to a US District Court in 2020. A portion of the complaint focused on CDL. According to the plaintiffs, CDL is no more than “a manufactured legal paradigm, conceived by the Internet Archive, to cast aside well-established copyright jurisprudence” (Complaint, para. 73). The complainants alleged that the Internet Archive was reproducing, distributing, displaying, and performing copyrighted materials, and they requested damages (up to \$150,000 per instance of willful infringement), an injunction, and the destruction of the digitised materials. As a result of the case, the Internet Archive suspended the activities complained of, but the case is still on-going. It should be noted that the Internet Archive does not enjoy the status of a library under section 108 of the Copyright Act; we should therefore not assume that traditional libraries will have the same decision made against them.

Some of the permitted fair uses include comment, criticism, quoting in a news report, research and other educational uses, and parody. US courts analyse cases brought to them using using a four-factor test that attempts to balance the purpose of the use, the nature of the original work, how substantial the use was, and the effect of the use on the market for the original. In the last couple of decades, virtually all fair use cases focus on whether or not the secondary use was “transformative”. A transformative use “does something more than repackage or republish the original copyrighted work. The inquiry is whether the work ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message ...’.” (Authors Guild v. HathiTrust), quoting *Campbell v. Acuff-Rose*. In the recent



case of *Authors Guild v. HathiTrust*, it was held that the mass digitisation of entire in-copyright works contained in libraries' holdings was a transformative fair use when the scans were used to facilitate search, enable text-mining, and provide access to visually-impaired persons. In an earlier decision in the 5th Circuit, that court held that creating copies of entire research articles for research purposes was not a fair use: the institutional, systematic, archival multiplication of copies is not transformative, particularly where a market for the original, in this case a licensing regime for individual articles, is available (*American Geophysical Union v. Texaco*). Taken together, these cases suggest that CDL may be a fair use when it is done to promote non-consumptive uses, but making copies for consumptive uses such as reading may not fall under the fair use exemption unless a compelling case can be made that the uses are transformative.

CDL was not anticipated by US lawmakers. The US Copyright Office is well aware that s. 108 relating to libraries is out of date, has stated it wishes to update it, and issued a discussion document on updating its law ([HTTPS://WWW.COPYRIGHT.GOV/POLICY/SECTION108/DISCUSSION-DOCUMENT.PDF](https://www.copyright.gov/policy/section108/discussion-document.pdf)) in 2017, but it seems no progress has been made since then. US libraries are currently permitted to make and distribute copies for library purposes such as replacement and preservation, and at the request of library users for private study, scholarship, and research. To qualify for the exemptions, libraries must be open to the public or accessible to researchers in a specialised field, the copying must not be motivated, directly or indirectly, by commercial advantage, and a notice must be given that the copied work is protected by copyright. Of particular note, libraries are restricted from distributing digital copies “outside the premises of the library” (17 U.S.C. 108(b)(2)) and “systematic reproduction or distribution” of copies made at the request of users for private study, scholarship, or research is expressly prohibited (17 U.S.C. 108 (g)(2)). While the emphasis against systemic reproduction and distribution arrangements, particularly those occurring “outside the premises of the library” would seem to be against CDL, this might be assuaged by the controlled nature of these activities. Nonetheless, CDL in the USA raise a legitimate risk of liability to participating libraries and consortia.



European Union

There have been just a few significant EU court cases that are relevant to CDL and digital ILL. An important case was VOB and Stichting Leenrecht (Case C-174/15 Vereniging Openbare Bibliotheken v Stichting Leenrecht), decided by the ECJ in 2016. This revolved around the legal definition of “lending” and what libraries can do when lending items in their possession to their users. VOB (the Netherlands Association of Public Libraries) asked for a clarification of the law to see whether this permitted lending could also apply to the lending of e-books. The local courts decided the answer was “yes”. The Dutch Public Lending Right Office (Stichting Leenrecht) asked that this preliminary decision be referred to the Court of Justice of the European Union (CJEU). So this case was not one organisation suing another for alleged infringement, but rather both parties asking for clarification of the EU Rental and Lending Rights Directive (Directive 92/100/EC) from the CJEU. The CJEU concluded that the Directive did indeed permit the lending of e-books, subject to certain limitations. These limitations were: that authors are guaranteed some remuneration for such lending; and that the number of simultaneous acts of lending should be no more than the number of lawfully acquired e-books held by the library. It also concluded that the e-books acquired must have been under first sale doctrine or by some other lawful transfer of ownership. In other words, e-books can be treated by libraries as if they were physical books.

There are implications arising from this case. It concerned public libraries, but nothing in the decision prevents the ruling from being used a precedent for other types of libraries, such as HE libraries. A more speculative, but bigger implication, is that all actions that are lawful for a library to do with its physical copies also apply to digital copies. Thus this case provides an argument that CDL and digital ILL more generally might well be lawful in EU member states.

The CJEU ruled in 2015 (Case C-117/13 Technische Universität Darmstadt v Eugen Ulmer KG) that university libraries had the right to digitise in copyright books, make those digitised books available on dedicated terminals, and allow users to either print out the books or



download the digitised books (in both cases either extracts from the book, or the entire book). Ullmer is a scholarly publisher. The case went through various appeals before ending up at the CJEU, which ruled that member states are allowed to give publicly accessible libraries the right to digitise works contained in their collections, if such an act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments. However, that permission does not extend to acts such as the printing out of such digitised works on paper or their storage on a USB stick. However, such acts may, if appropriate, be authorised under national legislation provided that, in each individual case, the conditions laid down by the provisions in Articles 5(2)(a) or 5(2)(b) of the Information Society Directive (Directive 2001/29) are met.

Overall, then, there has been relatively little in ECJ cases that are helpful in providing clarity on the legality of CDL and digital ILL. This is further confirmed by a check of copyright legislation of the various Member States (see Appendix), where again there is little explicit permission for CDL. However, the rulings from the cases suggests support for digital lending by the CJEU.



5. Overview of Copyright Issues and Risk Analysis for Controlled Digital Lending in the UK

The tables below set out the considerations that should be addressed in the design of a CDL system. The broad headings of copyright status of works, licensing options and copyright exceptions are broadly applicable across the legal jurisdictions we have examined. The details of the risk analysis apply to the UK situation as outlined in the previous sections of this report. The risk levels for each line of the table briefly summarise the nature of the risk and, where appropriate, provide suggestions for risk mitigation.

Copyright Status of Works	Low Risk	Medium Risk	High Risk
Published Works with known authors	<p>Pre-19th century works</p> <ul style="list-style-type: none"> - out of copyright unless special arrangements (e.g. Peter Pan) 	<p>Pre-mid 20th century</p> <ul style="list-style-type: none"> - likely to be out of copyright - all rights owner death date checks recommended <p>If in copyright</p> <ul style="list-style-type: none"> -check for open licence -check for licensing scheme -check for applicable copyright exceptions 	<p>Mid 20th/21st century</p> <ul style="list-style-type: none"> -likely to be in copyright -all rights owner death date checks required -check for open licence -check for licensing scheme - check for applicable copyright exceptions
Published Works with Unknown or Untraceable Rights Holders (Orphan Works)	<p>Pre-19th century</p> <ul style="list-style-type: none"> - Out of copyright unless special arrangements 	<p>Pre-mid 20th century</p> <ul style="list-style-type: none"> - Likely to be out of copyright - Do due diligence search <p>If in copyright</p> <ul style="list-style-type: none"> - check for relevant copyright exceptions - consider orphan works licence 	<p>Unknown publication date and or mid 20th/21st century</p> <ul style="list-style-type: none"> - likely to be in copyright - do due diligence search - check relevant copyright exceptions - consider orphan works licence
Literary, Dramatic or Musical Works Unpublished before 1 August 1989 (2039 rule)	<p>Unknown author, reasonably assumed to have died more than 70 years previously</p> <ul style="list-style-type: none"> -likely to be out of copyright 	<p>Author unknown or known author died before 1969</p> <ul style="list-style-type: none"> -rights owners may or may not object -check with rights owners 	<p>Popular author died before 1969</p> <ul style="list-style-type: none"> -rights owners likely to object -check with rights owners -may need to negotiate licence

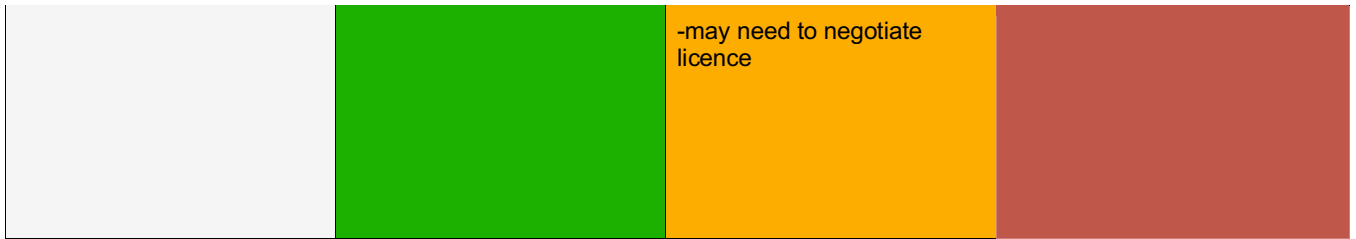


Table 1 Risk Analysis and Mitigation of Digitisation of Works by Copyright Status

The only risk-free approach to CDL is to only include works that are out of copyright. However, the needs of libraries are increasingly to be able to provide digital, remote access to more recent works in their collections. So a risk-managed approach is required and this will involve determining the copyright status of works and deciding the degree of risk the library is willing to take. The decision will be influenced by factors such as whether the library is focusing on lending to support teaching and learning or for research purposes. It may well also depend on subject and research fields. Teaching needs are likely to be more focused on more recent, in copyright, works and research needs will range across older works and orphan works.

Licensing Options for Acquisition of Lawful Digital Copy	Low Risk	Medium Risk	High Risk
Open Licences	<p>e.g. CC0 or CC-BY lawfully applied to print or digital copy</p> <p>-acknowledge author if reasonably possible</p>	<p>CC-BY ND CC-BY NC ND</p> <p>-ensure CDL security standards applied</p>	<p>Open licence unlawfully applied</p> <p>-e.g. plagiarism or moral rights otherwise infringed (except for CC0 licences)</p> <p>-check rights holder identity (e.g. CLA register)</p>
Collective Licence from CLA	<p>Digital copies lawful</p> <ul style="list-style-type: none"> - extracts only of books allowed - requires scans of works owned by library to comply with CDL rules 	<p>Copyright permission paid copies</p> <p>- do not comply with CDL rules (works not owned by library)</p>	<p>Lending may breach licence</p> <p>-only lend to on campus and distance learners</p> <p>- need separate licences for second extracts and users in overseas campuses</p>

Orphan Works Licence	Digital copies lawful -can make available online -can use for educational purposes		Not clear if lending to other libraries is covered by licence
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Table 2 Risk Analysis and Mitigation of Digitisation of Works by Licensing Option

If a library decides to include copyright material in their digital lending, the best licensing option is to identify works that are published under an open licence. These works are likely to already be in digital form and publicly available. The library should check whether the licence has been legitimately applied to the work, i.e., whether the work has been correctly attributed and whoever applied the licence has the right to do so. Lending digitised copies of whole works is not currently possible under the CLA licences, so this option is really only suitable for teaching and learning purposes and for individual researchers rather than a general loan collection. Orphan works licences are an expensive option and would be most appropriate for rare or historical material with a high value to the institutional and wider community.

When considering UK copyright exceptions, factors to take into account include: what proportion of a work can be copied; what uses can be made of the copy; is there a licensing scheme available that would prevent relying on the exception; and whether the terms of any contract associated with the work that would over-ride the exception are unenforceable. Reliance on an exception should take into account any conditions and exclusions in terms of what works are covered or excluded from the exception, whether any due diligence is required (for example searching for the contact details of a rights owner or checking whether replacement copies of list of damaged items can be purchased).

These considerations should be part of the risk analysis for sourcing and lending digital copies since the scope of the lending exception needs to be clarified, and current licence schemes and library privilege exceptions were not designed for controlled digital lending. Libraries should collect and retain details of the exception relied upon for each work, legal analysis and due diligence carried out as well as copies of request forms submitted by library users.

Copyright Exceptions Copyright, Designs and Patents Act 1988	What is allowed	Risk Factors
36A. Lending of copies by educational establishments	Copyright in a work is not infringed by the lending of copies of the work by an educational establishment.	The meaning of “copies” of the work is not defined. It is unclear whether this encompasses lending of digitised copies.
36. Copying and use of extracts of works by educational establishments	Not more than 5% of a work may be copied in any period of 12 months by an organisation For the purposes of instruction for a non-commercial purpose Can be communicated by or on behalf of the educational establishment to its pupils or staff	Cannot be used if a licence is available Does not apply to broadcasts or artistic works not incorporated into other works Copy cannot be communicated for any other purposes, will be treated as infringing copy Hard to track usage
41. Copying by librarians: supply of single copies to other libraries	Can make a single copy of the whole or part of a published work and supply it to another, non-commercial, library Contract terms cannot override this exception	The librarian must not know, or not be able reasonably find out the contact details of the person authorised to permit the copying
42. Copying by librarians etc : replacement copies of works	Can make a copy of an item in an institution’s permanent collection to preserve or replace that item in that collection. Can make a copy to replace an item of another library that has been lost, destroyed or damaged Contract terms cannot override this exception	Can only use this exception if it is not reasonably practicable to purchase a copy of the item to achieve either of the purposes Cannot copy items from the lending collection, only applies to reference collections available to the public
42A. Copying by librarians: single copies of published works	Can make and supply a single copy of one article in any one issue of a periodical, or a reasonable proportion of any other published work Copy can only be used for research for a non-commercial purpose or private study Must be in response to a request accompanied by a declaration signed by requester - the requester has not already had a copy - the requester is not aware of anyone else who has/will made a similar request Contract terms cannot override this exception	Librarian must not be aware that the declaration is false If the declaration is false the copy is infringing The requester is responsible for any false declaration

Copyright Exceptions Copyright, Designs and Patents Act 1988	What is allowed	Risk Factors
43. Copying by librarians or archivists: single copies of unpublished works	<p>A librarian may make and supply a single copy of the whole or part of an unpublished work Copy can only be used for research for a non-commercial purpose or private study Must be in response to a request accompanied by a declaration signed by requester</p> <ul style="list-style-type: none"> - the requester has not already had a copy - the requester will not supply the copy to anyone else <p>Contract terms cannot override this exception</p>	<p>Librarian must not be aware that the requester declaration is false If the declaration is false the copy is infringing. The copy is infringing if the work was published or communicated to the public before it came into the library's collection The rights holder has prohibited copying</p>

Table 3 Overview and Risk Analysis of UK Copyright Exceptions



6. Requirements for a CDL System

CDL requires the following activities:

- Making, or otherwise acquiring, a digital copy of a physical work in a library collection;
- Putting the physical copy of the work digitised out of use and directing library users to digital loan copy;
- Applying loan conditions to the physical copy;
- Enforcing loan conditions through the application of TPMs.

Depending on legal requirements in different jurisdictions, other activities include:

- Ascertaining and recording the copyright status of each work;
- Carrying out and recording results of research to identify rights holders where appropriate;
- Identifying and recording relevant legal bases for making lawful digital copies of works to be lent where appropriate;
- Recording and applying conditions of the legal bases relied upon for copying. This includes categories of works and proportion of works that can be copied or how the use meets fair use purposes, for example;
- Capture and storage of requester declarations, licence agreements or other required documentation to comply with requirements of legal bases relied on;
- Recording loans made for rights holder remuneration or other required purposes;
- Carrying out and documenting risk analysis and decision making.

A CDL software system should include, or interface with other systems, to facilitate CDL and library risk analysis and mitigation activities. Furthermore, librarians should maintain a watching brief on changes to the law and court judgments that may affect risk assessments. A CDL system should allow assessments to be updated to reflect the impact of changes to levels of risk, (selecting and effectively ingesting the risk factors as outlined in this report) for example when a work goes out of copyright or if a legally uncertain legal basis for action becomes certain.



Risk management is vitally important for libraries to avoid legal and reputational difficulties resulting from the implementation of CDL. The term vicarious liability refers to the liability of a person (natural or legal) for the acts or omissions of another person. Libraries as legal persons and employers are responsible for negligent acts (or omissions) carried out by employees in the course of employment. A lot depends on whether the employer has control over the activities, authorises them or directs them. Knowledge of unlawful activities is also a factor. In implementing CDL, libraries are potentially liable for any infringement of the law so should be doing so in based on a careful analysis of risk. System security is also important to prevent unauthorised use of CDL systems. Libraries already deal with security issues with their digital collections access systems and this should be extended to digitised copies of works included in a CDL system, so that lending conditions are strictly enforced.

Software vendors and hosts can reduce their liability for unlawful use of CDL software in various ways. One potential source of liability for software providers is secondary copyright infringement. Secondary infringement occurs if those involved knowingly undertake or facilitate infringement. As an example, under UK law (Copyright, Designs and Patents Act 1998 (ss. 22-26)), providing the means for making infringing copies is a form of secondary infringement. If CDL software does not include any functionality relating to the making of digitised copies of works then this is unlikely to apply. Even if it did, liability would depend on whether the software could have other, legal uses, and whether the software provider encouraged unlawful use in some way. CDL software can be used for lawful purposes: if a jurisdiction's law allow this type of lending, if digitised works are out of copyright or if suitable licence arrangement are in place. In addition, software vendors can make clear statements that their software is intended for lawful user only and that they do not accept responsibility for unlawful actions by software users.

Software hosts can include suitable clauses in contracts to address the issue of liability for actions carried out by their customers using the software. For example:

The [Client] shall indemnify, and hold [Hosting Service] harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable legal fees, which arise



from any claim by any third party of an alleged infringement of any copyright or any other proprietary right arising out of the use of the [Licensed Materials] by the [Client] or any [User], whether authorised or not. No limitation of liability is applicable to this indemnification.

To the extent permitted by law, the [Hosting Service] is not liable to the [Client] for any loss resulting from a cause over which the [Hosting Service] does not have direct control, including but not limited to, failure of electronic or mechanical equipment or communication lines, telephone or other interconnect problems, unauthorised access, theft, operator errors, or for any actions taken by the [Client] or any [User], whether authorised or not, that are deemed to be illegal by a Court.

Conceivably, the The Electronic Commerce (EC Directive) Regulations 2002 could apply in The European Union if CDL software system if CDL software hosts qualify as information society services. Information Society Services are defined as ‘any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service’ (s. 2). CDL software systems may not involve processing or storage of digitised works, this may be done by the libraries or by other hosting services. In any case, the Regulations provide some defences against liability for service providers. They may have a defence if they are acting as a ‘mere conduit’, or transmitting data, or cache information temporarily. The service provider should not actively interact with the data, and in the case of caching, delete or prevent access to the cache in some circumstances (s. 18(b)(v)). The service provider may not be liable for hosting customer content if unaware of any illegality and if it has no control over what the subscriber does (s. 19). However, the Regulations state that once in possession of knowledge of illegal material, the service provider ‘acts expeditiously to remove or disable access to the information’ (Regulations ss. 18(b)(v) and 19(a)(ii)).



7.The Future of CDL

Wicht (2011) and Muller (2012) wrote early and far-sighted papers discussing ILL of e-books. Having analysed the laws of Germany, Canada and the USA, Muller concluded that the law was currently ambiguous and that libraries should lobby their national legislatures to create new legal instruments that will enable libraries to provide legally clear e-book access, including ILL. Wicht examined both the current (as then) ILL environment for e-books, and then possible future business models, i.e., short-term purchase (also known as short term lending, short term circulation or simply e-book loans), purchase on demand, print on demand, and consortial purchasing. She noted that each of these models have pros and cons and that a decision needed to be made on the basis of a library's particular situation. She strongly recommended that ILL, acquisitions and collection departments in each library work closely together to decide on the best solution for their library.

There is an interesting article by Matulionyte (2017) on EU rulings and laws on lending e-books by libraries. It does not cover CDL explicitly, but implicitly. In particular, she looked at whether PLR, as harmonised in the EU under the EU Rental and Lending Directive (Directive 2006/115) applies to e-books as well as print books. The CJEU confirmed this is the case in the VOB case, but she argued that PLR may not be the best way to undertake e-book lending. She thinks that using PLR would not address all the issues librarians face, nor would it provide appropriate remuneration to authors, so she recommended other possible solutions should be explored. These include compulsory collective licences or a remunerated digital lending exception.

Despite the convictions of the proponents of CDL in the USA, overall the legality of CDL in the USA is unclear. The Internet Archive case, if it gets a final court decision, is not necessarily relevant to libraries, as noted earlier, but would have a chilling effect on CDL if it goes in favour of publishers. Investing time and money into a process currently the subject of a major court case is likely to inhibit many libraries. It depends how risk-averse the library is. However, library management systems vendors are developing CDL systems. This implies they are

confident CDL is legal in other countries and/or the US situation will get resolved with a reasonable compromise and/or US law will be updated to allow for CDL.

The issue of digital lending has become more prominent and arguably urgent due to the COVID 19 pandemic. Hudson and Wragg (2020) have explored whether the impact of COVID-19 on UK educational institutions and their students necessitates changes to copyright law. As far as CDL is concerned, Hudson and Wragg conclude that, without government intervention, a large-scale UK CDL system is unlikely. They suggest that CDL could be considered fair dealing, drawing on the confidence of US supporters of CDL that the activity constitutes fair use. They also point out that the UK copyright exception for lending by educational institutions (CDPA 1988, s. 36A) cannot be limited to physical lending for CDL to be lawful.

An international “statement of solidarity” (Library Futures 2021) that is relevant to CDL was released in late 2021. It covers the impact of technology on librarians’ rights. Its demands include: copyright exceptions and limitations must be made for librarians to best serve the public; CDL and other innovative lending practices should be legally protected; and we must achieve universal access to knowledge for all users. It will be interesting to see just how influential this statement becomes.



8. References

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