

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

Submit a comment on the draft Controlled Digital Lending Recommended Practice to be considered by the NISO IS-CDL Working Group prior to finalization, approval and publication. Your comment will be publicly available with others.

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Comment Subject - provide a subject or short summary

Category - indicate whether this comment is editorial or substantive in nature

Substantive

Editorial

N/A or don't know

Summary - What is your specific comment?

STM respectfully objects to the premise and substance of NISO's Recommended Practice for Controlled Digital Lending.

STM values its relationships with libraries, and we would support a conversation that includes all stakeholders on this complex and legally fraught topic. As an overarching comment, STM and its publisher members do not agree with the Working Group having convened as a preliminary matter, because controlled digital lending (CDL) is not supported by the law; and we do not agree with the Recommended Practice. Contrary to assertions in the document (see p.6), the Working Group for this NISO project does not include publishers. The Foreword notes that publishers were involved in preliminary discussions, but they withdrew when it became clear that the working group would not address the inherent complex but imperative legal issues regarding the premise of CDL. For example, U.S. copyright law does not address digital lending; the reproduction and digital transmission of copyrighted content without permission is not supported by the First Sale Doctrine (17 U.S.C. § 109) or any other provision of Title 17.¹ Please see below for other specific concerns:

¹ STM further notes that 17 U.S.C. §§ 108(e) and (g) do prohibit systematic reproduction and redistribution of a copyrighted work. Subsection 108(e) permits reproduction of an entire work only if it is not available on the market at a fair price, such that a user cannot obtain a copy of an entire work from his or her library or through interlibrary loan if the work is available on the market. STM further notes that interlibrary loan was conceived to address the scarcity of print copies available among libraries; and that such scarcity does not exist online.

Page 7: While the Recommended Practice notes that the document “does not focus on legal issues,” its entire premise is a legal one in that, in claiming that CDL “encompasses practices and technologies that enable libraries to lend digital surrogates,” it is a practice grounded in legal activity. This contention is not supported by the law. No part of U.S. copyright law permits CDL. Courts are the arbiters of fair use and the recent *Hachette v. Internet Archive* case (2023 WL 2623787 (S.D.N.Y. 2023)) found that that the Internet Archive’s CDL program infringes publishers’ copyrights. On page 10, the Recommended Practice mentions that case but then suggests that “those now using or considering CDL (have) an unclear picture of how to proceed.” On the contrary, STM believes that the court decision is very clear. CDL that is in line with former Internet Archive practices must be discontinued.

The Recommended Practice does not accurately describe the legal implications of CDL. In that manner, although the document purports not to focus on legal issues, it conceals the very real legal problems that CDL raises. For example, by calling reproductions “digital surrogates,” the document obfuscates the fact that scanning a physical book and lending it online implicates a copyright owner’s exclusive rights under 17 U.S.C. §106.

NISO is a respected organization with the laudable objective of identifying, developing, maintaining, and publishing technical standards to manage information. This particular Recommended Practice does a disservice to NISO’s mission by putting forward guidance that could be followed by organizations around the world with a flawed legal basis. Copyright law is not something to be considered as a factor in risk management (see page 9, e.g., characterizing CDL implementation as risk assessment), it is a requirement. Suggesting otherwise to libraries is irresponsible. In describing the History and Evolution of CDL on pages 8-9, the Recommended Practice mentions academic works that favor the development and deployment of CDL, but it fails to mention that a 2023 district court has rejected the concept in whole.

On page 8, the document further encourages unlawful CDL activity by listing bulleted “rationales for CDL.” Licensing and permission are the sole legal rationales listed. The other points listed would require an intensive fact-specific inquiry, short of which it is incorrect to suggest that use cases involving lack of availability, rarity, or uniqueness comprise rationales for CDL. On page 10, the reference to libraries being under increased budgetary pressures is not balanced by the increased financial pressures faced by publishers, and in any case would not be a lawful justification for copyright infringement. In STM’s view, this is one example of many highlighting the lack of publisher input into this group’s proceedings and resultant document.

Similarly, on page 13, the Recommended Practice addresses potential positive impacts of CDL on authors and publishers, highlighting things like “greater access and discoverability” for authors, and “greater exposure of backlist content” for publishers. Third parties do not have the prerogative to make decisions about works’ communication and access that override rightholders’ exclusive rights. In addition, there are many countervailing harms of CDL that are not mentioned.

Overall, the Impact section fails to acknowledge that rightholders, under copyright law, are provided exclusive rights and it is up to the rightholder to decide whether, when, and how to make their works available in any format. These decisions must remain with the rightholder in order to ensure the health and viability of future publishing. High quality scholarship and research cannot be published, linked, curated, and otherwise maintained unless copyright law is respected.

Rightholders need to have the ability to control the terms and conditions that make the most sense for the distribution of their works. This ability is protected by copyright law. The Recommended Practice notes that a “core premise of CDL is to ensure the control of files. . . which safeguard(s) the intellectual property of publishers, authors, and rightholders.” However, making these decisions in the absence of the rightholder does not achieve that safeguard.

Lastly, STM would like to underscore the legal risks to libraries that the Recommended Practice introduces. By putting forward standards for CDL, NISO is at least facially condoning activity that one prominent U.S. court has found to be illegal. With the Hachette case on appeal in the Second Circuit, STM respectfully requests that NISO discontinue this work stream, or, at a minimum, pause it until there is further legal certainty. With respect to the General Recommendations on page 50 of the Recommended Practice, STM does not support any of these at this time. No Standing Committee, for example, should be stood up to undertake a study of CDL because CDL is not a legal activity.

At STM we support our members in their mission to advance trusted research worldwide. Our more than 140 members collectively publish 66% of all journal articles and tens of thousands of monographs and reference works. As academic and professional publishers, learned societies, university presses, start-ups and established players, we work together to serve society by developing standards and technology to ensure research is of high quality, trustworthy and easy to access. We promote the contribution that publishers make to innovation, openness and the sharing of knowledge and embrace change to support the growth and sustainability of the research ecosystem. As a common good, we provide data and analysis for all involved in the global activity of research.

The majority of our members are small businesses and not-for-profit organizations, who represent tens of thousands of publishing employees, editors, reviewers, researchers, authors, readers, and other professionals across the United States and world who regularly contribute to the advancement of science, learning, culture and innovation throughout the nation. They comprise the bulk of a \$25 billion publishing industry that contributes significantly to the U.S. economy and enhances the U.S. balance of trade.

Section / Page / Line - if applicable, please indicate the location where your comment applies

Proposed Solution - how should this comment be accommodated?

STM respectfully requests that NISO discontinue this workstream and not finalize this Recommended Practice, at least unless/until the *Hachette v. Internet Archive* case has come to a conclusion. The document is based on an incorrect premise that unfortunately discounts that the Internet Archive’s operation of CDL is illegal. Beyond that overriding problem, the Recommended Practice lacks the necessary input of the publishing community.