



Journal of Copyright in Education and Librarianship

ISSN 2473-8336 | jcel-pub.org

Volume 5, Issue 1 (2022)

You've Opened Your Doors: What's Next? Digital Lending During and After the Pandemic

Sara Benson, Carla S. Myers, and Timothy Vollmer

Benson, S., Myers, C. S. & Vollmer, T. (2022). You've opened your doors: What's next? Digital lending during and after the pandemic. *Journal of Copyright in Education and Librarianship*, 5(1), 1-6. <https://doi.org/10.17161/jcel.v5i1.16278>



© 2022 Sara Benson, Carla S. Myers, and Timothy Vollmer. This open access article is distributed under a [Creative Commons Attribution-4.0 International license](https://creativecommons.org/licenses/by/4.0/).

You've Opened Your Doors: What's Next? Digital Lending During and After the Pandemic

Sara Benson
University of Illinois Urbana-Champaign

Carla S. Myers
Miami University

Timothy Vollmer
University of California, Berkeley

Author Note: Correspondence regarding this article should be directed to Timothy Vollmer, tvollmer@berkeley.edu.

Abstract

During the heart of the COVID-19 pandemic, when nearly all lending of books and physical materials in the collections of college and research libraries was impossible due to campus closures, many HathiTrust member libraries participated in the Emergency Temporary Access Service (ETAS). This program permitted patrons of eligible libraries to access—in a limited fashion—a digitized HathiTrust book that corresponded to a physical book held in the collection of the member library. Although the ETAS was closed down after libraries reopened their doors, many libraries are exploring similar “controlled digital lending” services that leverage limitations and exceptions to copyright to support digital access options for patrons.

Keywords: Controlled Digital Lending, copyright exceptions, HathiTrust, digital access



You've Opened Your Doors: What's Next? Digital Lending During and After the Pandemic

Libraries are continually looking for ways to efficiently connect patrons with resources held in their collections. Over the years libraries have offered many services for physical copies of works such as books and film: consortial borrowing and lending, with items being couriered between libraries; delivery to various locations around a town or to patron's homes via a bookmobile; and mailing items to patrons' homes. Digital access to physical resources provided by vendors, such as electronic books (e-books) and streaming film, further expanded options for libraries seeking to connect patrons with materials; however, many items held in physical copies in library collections are not made available in a digital format, creating frustration for patrons looking to access them online. There are user rights found in U.S. copyright law, such as fair use (17 U.S.C. § 107), that libraries can consider to make digital copies of physical works held in their collections available to patrons, and technologies like Controlled Digital Lending (CDL) can help them do this in a way that strengthens applications of this exception. Building on the work of Michelle Wu (2011), Bailey et al. (2018) tell us that when "properly implemented, CDL enables a library to circulate a digitized title in place of a physical one" (p. 1), using technology to ensure that the library only loans the number of physical copies of the work it holds in its collection, that only one person can use each digital copy at a time, and that it puts technical protection measures in place to prevent users from retaining or distributing the copy of the work they are using.

Amplifying the Need for Digital Access

In March of 2020 college and research libraries across the U.S. closed their doors as a result of the coronavirus (COVID-19) pandemic. As a result, these libraries saw an unprecedented demand for remote access to works held in their collections to support classes that had shifted to online instruction. For physical resources, libraries began offering services such as distanced curbside pickup, electronic reserves, interlibrary loan, and even mailing books to patrons living off campus. However, these services did not meet all patron needs, so many libraries considered options for offering services based on CDL to connect scholars with access to books being used for teaching, research, and the creation of new scholarship. For example, beginning March 31, 2020, the HathiTrust Digital Library began offering an Emergency Temporary Access Service, or ETAS.¹ ETAS provides eligible college and research libraries with the ability to allow patrons to "check out"

¹ In-depth information about ETAS can be found online at: <https://www.hathitrust.org/ETAS-Description>

a HathiTrust digital book that corresponded to a physical book held in the collection of the member library. Check outs are controlled on a strict “owned-to-loaned” basis, meaning that if a member library collection contained a single copy of *The Fire Next Time*, only one reader at a time from that member library could access the HathiTrust digital version. Under ETAS, patrons were permitted to read online (although not download or print) the digital version of a physical book they might have normally checked out from their library.

Some institutions, like the University of Illinois Urbana-Champaign, had been contributing digital copies of their books to the HathiTrust Digital Library for years and, additionally, have many overlapping titles with the digital library from other contributing member institutions such as the University of Michigan. This means that even if a particular book held in the collection of the University of Illinois Library hadn't yet been scanned and contributed to HathiTrust, a user at Illinois could still view the digital version of that book under the terms of ETAS if the same book already had been deposited by the University of Michigan Library. As such, patrons at the University of Illinois were able to digitally access nearly 50% of the library's collection through ETAS (Murphy, 2020). It provided continuity of access for scholars shut off from the library stacks.

Alongside ETAS, academic and research libraries developed their own CDL systems to lend digital copies of physical works to their patrons during the pandemic. Examples include the Caltech Library Digital Borrowing System²; Stanford Libraries Project ReShare³; expanded electronic reserve systems developed by the University of Florida Libraries⁴ and the University of California Berkeley Libraries.⁵

Reopening our Doors

Over the course of 2020 and the spring of 2021, ETAS was approved for use by over 200 university and college libraries that are members of HathiTrust. But as more of the population was vaccinated, academic institutions began to shift back to in-person instruction and academic and research libraries began to allow patrons to access the library's physical spaces again. What then became of the access that was provided by ETAS and other CDL systems? The terms of service for ETAS make it clear that access will only be provided on a temporary basis to eligible libraries that experienced an “unexpected or involuntary disruption to normal operations, requiring it to be closed to the public, or otherwise restrict collection access services, so that users cannot gain access to items in the collection as they ordinarily

² <https://caltechlibrary.github.io/dibs/index.html>

³ <https://projectreshare.org/2020/07/02/news/>

⁴ <http://affordabletexts.ufl.edu/sustaining-access-responsibly-with-controlled-digital-lending/>

⁵ <https://news.lib.berkeley.edu/e-reserves>



would” (HathiTrust Digital Library, January 12, 2021). So, once a library reopens its doors and again grants patrons access to its physical collection, its ETAS access comes to an end. As of December, 2021, 193 institutions have deactivated their ETAS access (HathiTrust Digital Library, December 9, 2021), though HathiTrust has confirmed that they will continue to offer the service for member libraries that “demonstrate a need due to health and safety concerns arising from the global pandemic” (HathiTrust Digital Library, June 24, 2021).

Even though most college and research libraries have fully reopened, does this mean they should stop lending digital versions of physical books they hold in their collections? Not necessarily. CDL was built on fair use, a crucial safety valve in U.S. copyright law that helps to balance the interests of rightsholders with the interests of researchers, educators, and other users. Fair use permits some uses of copyrighted works without permission from the rightsholder when doing so for purposes such as teaching, research, and scholarship. Fair use determinations are made by applying the four factors found in the statute to a particular situation to determine if a use would be considered fair or infringing. This includes examining:

1. “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work” (17 U.S.C. § 107).

The fair use evaluation is strengthened when considering access to books that are otherwise not available in the e-book marketplace. In other words, for works where electronic licenses are not available (and especially for older works or orphan works), there is little to no harm to the marketplace for college and research libraries to lend these books to their patrons electronically on a one-to-one basis, provided there are technical measures in place to ensure that the digital book cannot be downloaded, printed, or shared. In such cases, lending is likely a fair use. The International Federation of Library Associations and Institutions (2021) recently announced its support for digital fair use lending, stating that “there is a strong socio-economic case for enabling [such electronic lending] in libraries around the world, and that where a number of desirable and widely-recognized principles are respected (libraries’ ability to freely acquire and lend, the technological neutrality of law, the possibility to combine exceptions), its legal basis will in turn support the wider public interest.”

Continuing Applications of CDL

The ability to provide patrons with quick access to books in an electronic format was a lifesaver for many colleges and universities, where teaching, research, and the creation of new scholarship did not stop even though a pandemic had set in. Academic and research libraries should continue to pursue digital access services that exercise fair use—and other limitations and exceptions to copyright that support research, teaching, and learning—in a careful yet confident manner. Several institutions have already indicated their intent to do so. For example, after the release of a *Statement on Using Controlled Digital Lending as a Mechanism for Interlibrary Loan* (ILL) in the summer of 2021, (Barlow et al., 2021) the Boston Library Consortium (2021) announced it would be using CDL technology to expand the ILL services it provides to member institutions. Groups of library professions, such as the CDL Information and Recommendation Cooperative⁶ and Controlled Digital Lending Implementers,⁷ have developed to further explore technologies that can facilitate CDL and its applications to various library services. The potential for CDL to expand library services has even been recognized by organizations such as the Andrew W. Mellon Foundation, which awarded a grant of \$125,000 to National Information Standards Organization (NISO) “to support the development of a consensus framework for implementing controlled digital lending (CDL) of book content by libraries” (NISO, 2021). While the pandemic continues to make justifications for CDL more robust due to the inability of individuals to travel to campus while sick, the original justification for CDL remains: one-to-one controlled lending of older works with no available electronic licensing mechanisms continue to be justified under fair use.

⁶ <https://www.cdlproject.org/>

⁷ <https://sites.google.com/view/cdl-implementers>



References

- Bailey, L., Courtney, K. K., Hansen, D., Minow, M., Schultz, J., & Wu, M. (2018, September). *Position statement on Controlled Digital Lending*.
<https://controldigitalending.org/statement>
- Barlow, C., Courtney, K. K., Cramer, T., Hansen, D., Hurst-Wahl, J., Morris, J., O’Gara, G. *Statement on using Controlled Digital Lending as a mechanism for interlibrary loan*. Retrieved January 30, 2022.
<https://controldigitalending.org/illstatement>
- Boston Library Consortium. (2021, September). *Consortial CDL: Implementing Controlled Digital Lending as a mechanism for interlibrary loan*.
https://drive.google.com/uc?export=download&id=1bGExG_msf8PRx0L3o-zoyF8vwOiXd5XV
- HathiTrust Digital Library, (2021, January 12). *ETAS terms of service*.
<https://www.hathitrust.org/etas-terms-of-service>
- HathiTrust Digital Library. *ETAS: Approved libraries – Active & deactivated*. Retrieved December 9, 2021, from <https://www.hathitrust.org/etas-approved-libraries>
- HathiTrust Digital Library. *May 2021 Update*. Retrieved June 24, 2021, from <https://www.hathitrust.org/may-2021-update>
- International Federation of Library Associations and Institutions. (2021, June 22). *IFLA statement on Controlled Digital Lending*.
<https://www.ifla.org/publications/node/93954>
- Murphy, H. (2020, April 7). *University library expands electronic resources*. Illinois University Library. <https://www.library.illinois.edu/news/university-library-expands-electronic-resources/>
- National Information Standards Organization. (2021, September). *NISO awarded Mellon funding for Controlled Digital Lending project*.
<https://www.niso.org/press-releases/2021/09/niso-awarded-mellon-funding-controlled-digital-lending-project>
- Title 17, United States Code, Section 107
- Wu, M. (2011). Building a collaborative digital collection: A necessary evolution in libraries. *Law Library Journal*, 103, 527-551.
<https://scholarship.law.georgetown.edu/facpub/699>