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# LISTEN AND LEARN SESSIONS

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## Controlled Digital Lending

An E-book Solution When There Is No E-book?

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**ABSTRACT** Controlled digital lending is an intriguing model for libraries to make books available digitally. Building on fair use and the first sale doctrine, libraries digitize their print books, put the print books in dark storage, and lend one electronic copy for each print copy on a platform that prevents users from copying or redistributing electronic versions. The concept empowers libraries to digitize in-copyright books when there are no alternatives available in the e-book licensing market. AMBS Library experimented with a small pilot controlled digital lending collection using Internet Archive's established digitization and controlled digital lending services. This session reported on the results of that experiment.

### BACKGROUND

Anabaptist Mennonite Biblical Seminary is a small school based in Elkhart, Indiana with about 100 students. AMBS has both MA and MDiv programs with online and campus options. In addition to our print collection of about 100,000 volumes, the AMBS Library has a substantial electronic book and journal collection with both EBSCO and Proquest. Despite the richness of their electronic collections, AMBS librarians have problems supporting online education when the specific books students need are not available commercially

as e-books. This might be because the books come from a small publisher or are too old to be digitized commercially, but are still in copyright.

When AMBS librarians first heard of the controlled digital lending (CDL) model, most notably put in practice by Internet Archive through its Open Libraries project, they were intrigued. Internet Archive is a nonprofit library based in San Francisco; founded by entrepreneur Brewster Kahle, it has a grand mission of “providing universal access to all knowledge” (Internet Archive n.d.). Internet Archive offers libraries the ability to partner for digitization through its network of regional scanning centers. Prior to this controlled digital lending project, AMBS librarians had already partnered with them for a number of digitization projects of various sizes, so this established relationship made for an easy start to a controlled digital lending pilot project.

Controlled digital lending offers the ability to lend electronic versions of books similar to commercial e-books but, rather than relying on commercial e-book providers, it is based on print collections and the “first sale doctrine,” as well as an interpretation of fair use.

The idea is that libraries lend their print books on an electronic platform, maintaining a 1:1 relationship between owned print copies and online borrowers; the electronic platform must ensure that users can’t copy or redistribute the online version (hence the word “controlled”), and the print copy must not be available for patron access. For more on the legal justification for controlled digital lending, see the position statement at [controlleddigitallending.org](http://controlleddigitallending.org), co-authored by an A-team of legal experts in library copyright (Bailey et al. 2018). There is also a very helpful white paper by David Hansen and Kyle Courtney on the same site that goes into substantial detail about best practices for CDL (Hansen and Courtney 2018). The position statement reads in part that, “CDL techniques like those described in this Statement are designed to mirror traditional library practices permitted by copyright law” and goes on to say that “properly implemented, 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. . . Further, CDL systems generally employ appropriate technical measures to prevent users

from retaining a permanent copy or distributing additional copies” (Bailey et al. 2018).

The statement cites two principles in US copyright law supporting CDL. First is the common law “exhaustion principle” that is also known as “first sale doctrine” from Section 109 of the *Copyright Act*. This means rightsholders can only control the first sale of their works, and downstream outlets such as libraries and used bookstores are allowed to exist. The second doctrine that favors CDL is fair use—a basic part of US copyright law that includes a four-factor test of whether a particular use is fair (Bailey et al. 2018).

According to the statement, there are six things libraries should do to ensure that their CDL program is properly implemented:

- 1) Ensure that original works are acquired lawfully;
- 2) Apply CDL only to works that are owned and not licensed;
- 3) Limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an “owned to loaned” ratio);
- 4) Lend each digital version only to a single user at a time just as a physical copy would be loaned;
- 5) Limit the time period for each lend to one that is analogous to physical lending;
- 6) Use digital rights management to prevent copying and redistribution (Bailey et al. 2018).

The white paper on the controlled digital lending website further suggests focusing efforts on low-risk book candidates: “Book candidates with the lowest risk—and the strongest fair use argument, though those analyses are not necessarily tied together—are generally those with the lowest likelihood of market exploitation.” This means focusing on nonfiction, materials in the “out of print, off the market” category, and on older works. It also suggests a takedown policy and “mechanism for rightsholders to communicate about books they would prefer not be lent” (Hansen and Courtney 2018).

In terms of technical infrastructure, Internet Archive uses Adobe Digital Editions behind the scenes to manage its implementation of controlled digital lending. Internet Archive is itself a library; they have a public access mission and shipping containers filled with donated books, many of them surplus from used bookseller Better World Books. IA also partners with libraries who have their own

legitimately acquired collections to digitize. In addition to the legal basis for CDL, Internet Archive has a takedown policy. Basically, if rightsholders complain, IA takes things down.

In the spring of 2020, the onset of the COVID-19 pandemic turned everything upside down, including controlled digital lending. In the context of the COVID-19 pandemic, Internet Archive decided to push the boundaries of its controlled digital lending operation by setting up the National Emergency Library, which suspended waitlists for controlled digital lending through June, effectively breaking the 1:1 relationship between print copies and users accessing them virtually. They made a case for this based on extending the boundaries of fair use in the context of the coronavirus national emergency. Keep in mind that, though the Internet Archive CDL collection is visible globally and the pandemic is also global, the ideas underlying CDL are based on US copyright law, hence the appeal to a “national” emergency. With the attention that IA got for the National Emergency Library, it was just a matter of time before publishers and authors’ groups lined up to condemn the library. On June 1, IA was sued by a group of four major publishers—Hachette, Penguin Random House, Wiley, and HarperCollins (Harris 2020). The lawsuit is still fresh, so the outcome is uncertain. Internet Archive closed the National Emergency Library on June 16, two weeks sooner than the planned June 30 date. The lawsuit, however, targets IA’s implementation of controlled digital lending directly, not just the national emergency library.

### **AMBS’ CDL EXPERIMENT**

When AMBS librarians learned about this initiative, they saw a potential solution to the problem mentioned earlier—namely, that sometimes an e-book is the best format for the library’s users, but not every title has an e-book version available. Could CDL be used to supplement existing electronic holdings and create a sort of on-demand e-book library?

In the fall of 2019, they decided to conduct an experiment with CDL. In order to determine which titles would be included in the experiment, they assessed the library’s course reserve lists, looking for books that met the following criteria:

- required reading for a course;

- not otherwise available as an e-book;
- from smaller publishers (who, it was assumed, wouldn't sue).

In the end, fifteen titles were selected to use as part of this pilot project. Because controlled digital lending relies on a 1:1 relationship between print books and digital copies, the first step to implementing it is to make sure that there is an extra copy of each book that is to be converted into the controlled digital format. For AMBS, this meant purchasing additional print copies of the fifteen titles in question.

Once the extra copies arrived, AMBS librarians worked with Internet Archive to provide these print copies to them for digitizing. A preexisting relationship with Internet Archive made this part relatively simple. Getting the books to them was just a matter of providing some basic information about the books and then packing and shipping the items to the nearest digitization center (in this case, in Fort Wayne, Indiana).

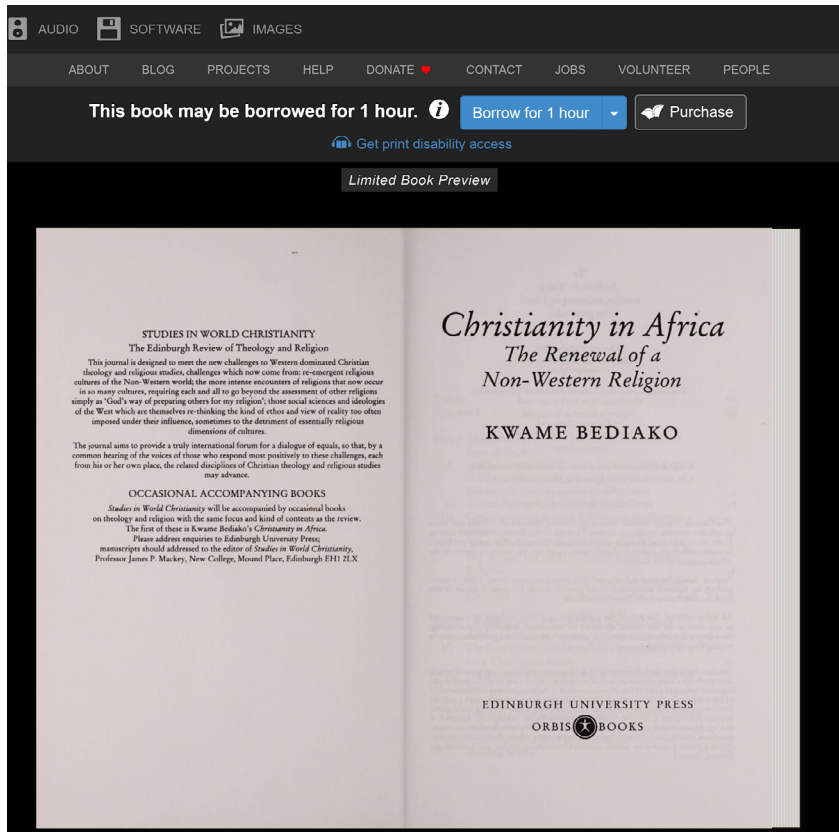
Once the staff at Internet Archive had finished their digitization work, they returned the print copies of the books. At this point, the ongoing responsibility of the AMBS Library is to ensure that these print books remain inaccessible—so they are stashed in the basement storage room. The idea here is that, by restricting digital access to one user at a time and preventing anyone from accessing the print copy, the books' formats have essentially converted—not reproduced or copied.

From start to finish, the total cost of this initiative was about \$800—which averages about \$55 per book. Included in that is the cost to purchase additional print copies of these books, as well as Internet Archive's digitization fees (\$3 per book, plus \$0.10 per page).

Once Internet Archive has finished uploading the materials to their Open Library platform, the books are available for anyone to borrow. The screenshot on the next page shows an example e-book within Internet Archive's platform. Note the blue "Borrow for 1 hour" option, which has now become the default loan period for items within the Open Library collection.

## **RESULTS & ISSUES**

So how did this go? In general, AMBS librarians feel that there is room for improvement. In principle, there is great potential for controlled digital lending and its potential usefulness for libraries



SOURCE – [archive.org/details/christianityinaf00bedi\\_0/page/n3/mode/2up](https://archive.org/details/christianityinaf00bedi_0/page/n3/mode/2up)

in the future but, based on this experience, there are some serious questions about how useful or practical this particular method of implementation can actually be—especially on a larger scale.

Some of the key issues that arise on a critical evaluation of the program are:

- Usage statistics: Internet Archive offers stats only on a title's previews—meaning, how many times did someone land on the title's listing? As of early June 2020, the title with the highest number of previews had 83, while the lowest had 10. One could reasonably assume that at least some of those previews ended up with the book being borrowed, but there really is no way of knowing how many. This makes it difficult to justify the cost involved, as there is no way to determine the return on investment.

- **Unavailable titles:** In the few months between the digitization and this presentation, several of the digitized titles had been removed, likely as a result of a publisher's takedown request. To this point, Internet Archive has not informed AMBS librarians of why the titles are gone, nor have they offered a refund for the digitization charges incurred.
- **Questions about future legality:** Internet Archive's implementation of its "National Emergency Library" (where they removed usage restrictions to accommodate the rapid changes libraries experienced because of COVID-19) has raised questions about the future of controlled digital lending. Specifically, it seems to have drawn the attention of unhappy and litigious publishers, who have now made it a priority to eliminate the program. So the question is, now that Internet Archive has shut down their National Emergency Library (two weeks early, even), will the publishers be satisfied to allow CDL to continue with its normal usage restrictions, or do they want to destroy it entirely?
- **Platform limitations:** There are some significant limitations for end users that make these CDL e-books less useful than traditional e-books. For example, users are restricted to either reading online or downloading the entire book—there's no way to download a single chapter or a certain page range. Users are unable to highlight, annotate, etc., even in their downloaded copy of a title. The single-user limitation creates issues in an academic setting, as well. A professor could not rely on one of these titles for course readings, as the first student to get to the site would lock out his/her classmates until the title was returned (although the recent change to 1-hour only checkouts makes this more akin to physical course reserves). Additionally, the single-user limitation does not just apply to users from AMBS. Anyone anywhere in the world is able to check out one of the titles that we've digitized—effectively locking AMBS Library patrons out until the title has been returned.

## **NEXT STEPS**

So, what now? AMBS librarians have contemplated next steps after their experiment with controlled digital lending. They could keep going with digitizing reserve books, but a challenge is anticipating

them far enough in advance in order to get them scanned in time for use during the semester.

AMBS Library is also part of a collaborative project to put French and Portuguese Anabaptist theological books online. Traditionally, they have done this using an open access model. However, they have discussed negotiating with publishers for more recent titles to go online via controlled digital lending rather than fully open access. Perhaps these publishers would be more willing to allow this.

There are also a fair number of books in the AMBS Library stacks that have multiple copies. Some of these were used heavily in the past but have seen their usage decline in recent years. Instead of a weeding project to get rid of unused second (or third!) copies, could these titles be moved to dark storage and put into controlled digital lending?

It may also be possible to bring controlled digital lending in-house and remove Internet Archive from the equation altogether. The copyright rationale would be the same, but it would allow the AMBS Library to provide access only to its patrons—instead of to everyone in the world. The hurdles here are finding the staff time to digitize entire books, as well as finding (or developing) a platform that would restrict concurrent access.

Ultimately, though, the best approach may be to wait and see what happens with the lawsuit. Investing significant time and money in digitizing in-copyright books might not be the best long-term strategy if the publishers are successful in shutting down IA's CDL operation. We are optimistic that IA has a good fair use case for what they are doing and there is strong support in the library community. This is really a test of our fair use rights as libraries.

## WORKS CITED

- Bailey, Lila, Kyle K. Courtney, David Hansen, Mary Minow, Jason Schultz, and Michelle Wu. 2018. "Position Statement on Controlled Digital Lending by Libraries." [controlledigitallending.org/statement](https://controlleddigitallending.org/statement).
- Hansen, David R. and Kyle K. Courtney. 2018. "A White Paper on Controlled Digital Lending of Library Books." Preprint. LawArXiv. [doi.org/10.31228/osf.io/7fdyr](https://doi.org/10.31228/osf.io/7fdyr).



Harris, Elizabeth A. 2020. "Publishers Sue Internet Archive Over Free E-Books." *New York Times*, June 1, 2020. [www.nytimes.com/2020/06/01/books/internet-archive-emergency-library-coronavirus.html](https://www.nytimes.com/2020/06/01/books/internet-archive-emergency-library-coronavirus.html).

Internet Archive. n.d. "Internet Archive: About IA." Accessed July 13, 2020. [archive.org/about](https://archive.org/about).