CONTROLLED DIGITAL LENDING

A PANEL TO DISCUSS LEGAL AND PRACTICAL
CONSIDERATIONS INVOLVED IN THE IMPLEMENTATION OF
CDL BY PUBLIC AND POST-SECONDARY LIBRARIES IN
CANADA

ADRIAN SHEPPARD – UNIVERSITY OF ALBERTA
LILA BAILEY – INTERNET ARCHIVE
ARIEL KATZ – UNIVERSITY OF TORONTO
ANDREA MILLS – INTERNET ARCHIVE
GRAEME SLAGHT – UNIVERSITY OF TORONTO



INTERNET



Lila Bailey

POLICY COUNSEL INTERNET ARCHIVE

lila@archive.org

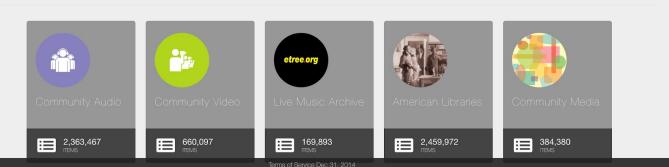


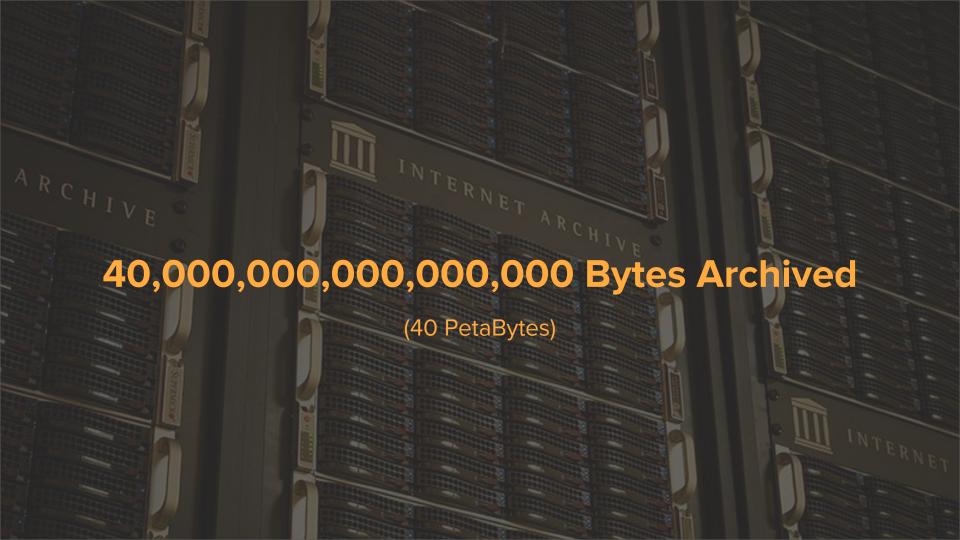
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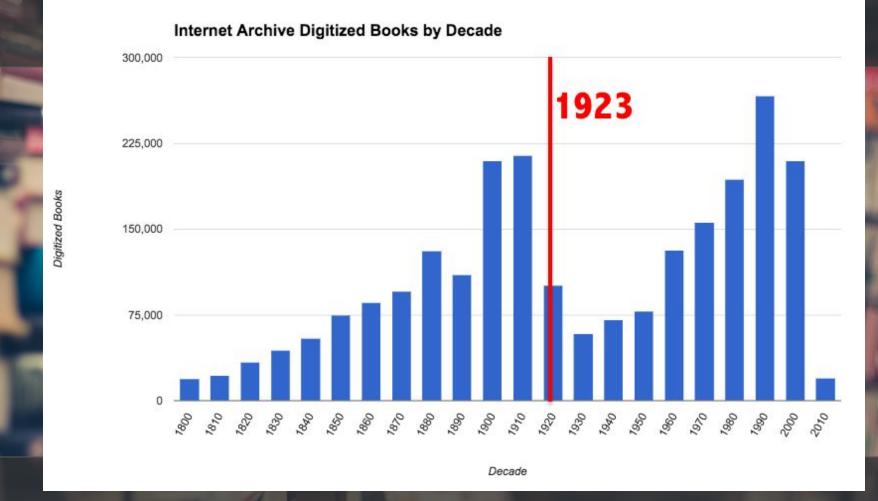
Software Titles Moving Images **Audio Recordings** Hours of Television eBooks Web Pages



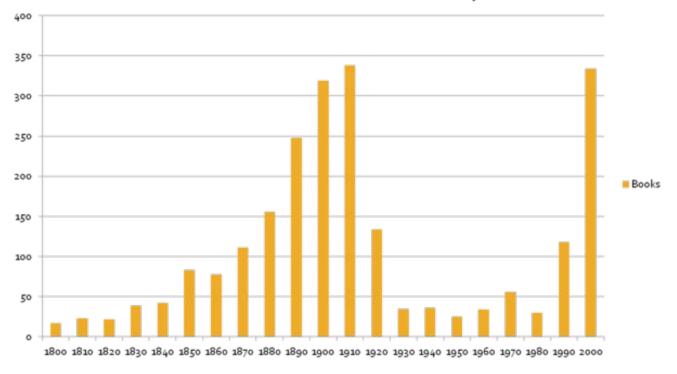
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MINTERNET ARCHIVE

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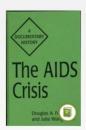
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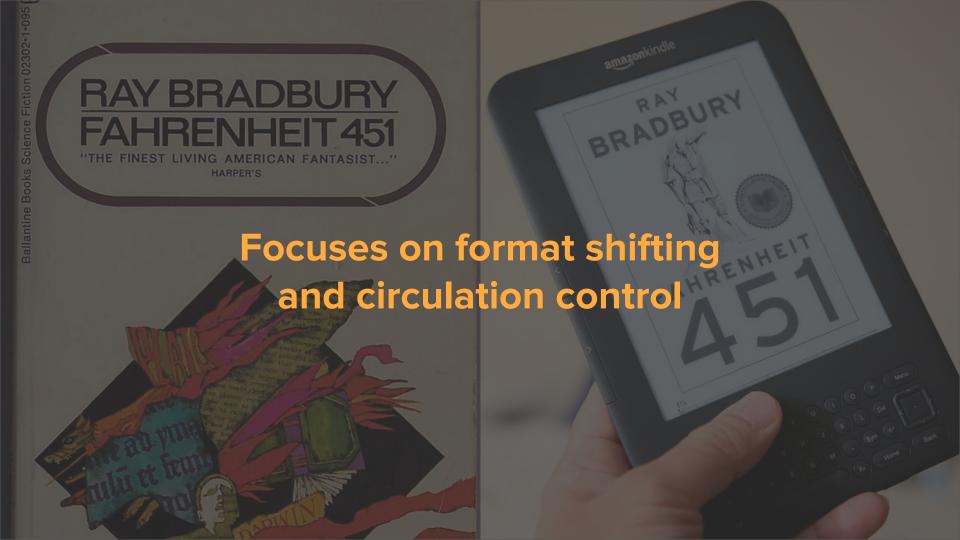




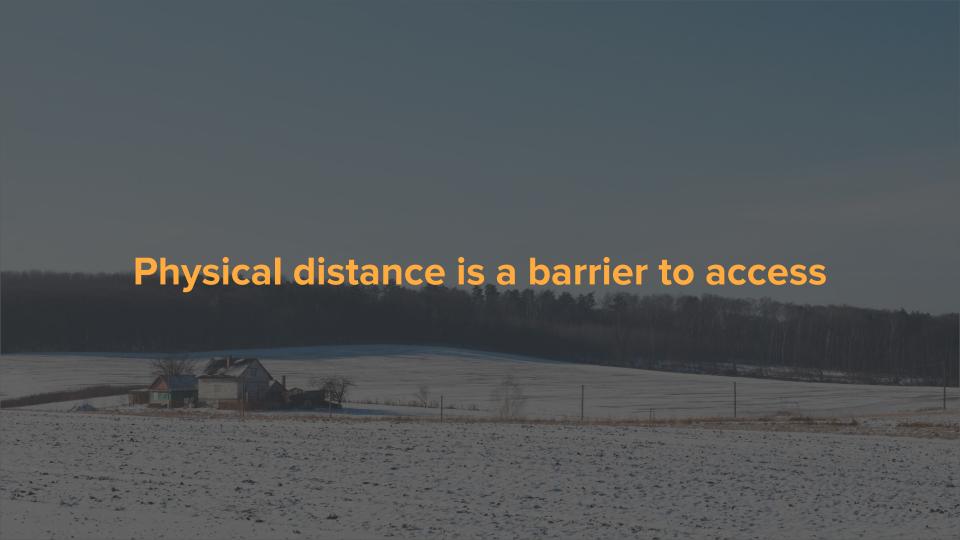


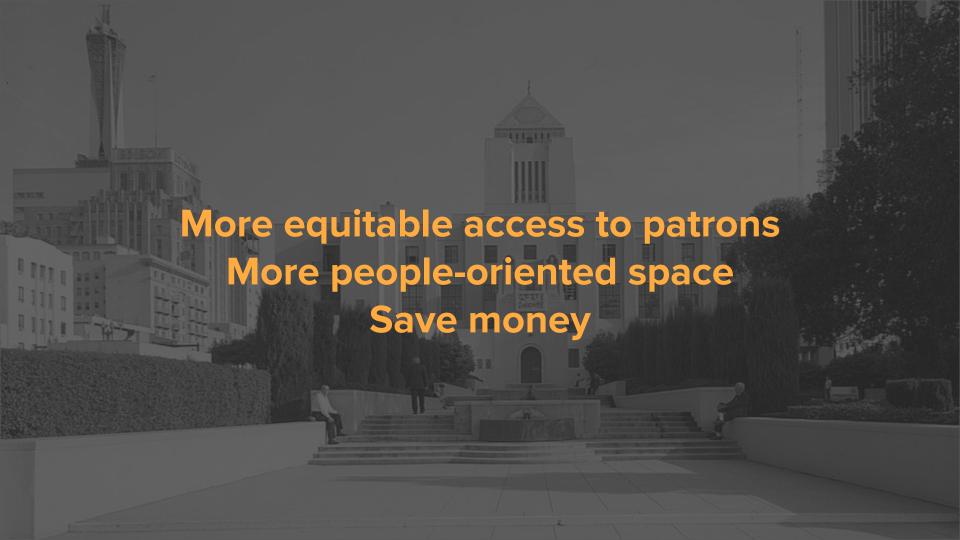






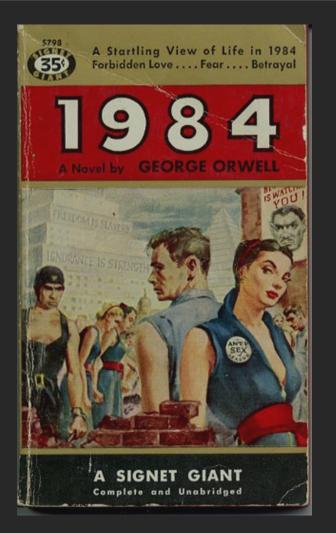


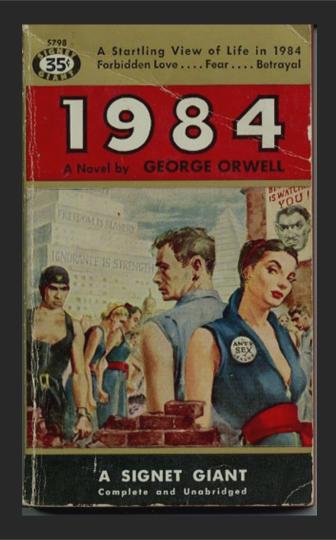












MINTERNET ARCHIVE

Sarah Peterson ▼

SUBJECTS

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AUTHORS ADD A BOOK

LISTS RECENTLY One web page for every book.

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7 editions of 1984 by George Orwell • Add edition? ← Previous | Next →

HELP

Last edited by <u>Lestevenon</u> September 11, 2013 | <u>History</u>

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Lists

Add to list



1984 a novel

by George Orwell

Published 1950 by New American Library of World Literature in New York, NY.

Written in English.



1st Americ. ed.: New York, NY: Harcourt, Brace, 1949. - Orig. publ. as: Nineteen eighty-four. - London : Secker & Warburg, 1949.

Signet book; 798 Series



The Physical Object

Format Paperback Pagination 237 p.

Dimensions 18 x x centimeters

ID Numbers

Open Library OL25430720M



Manage Covers

Calendar for Vegetable Garden

Sowing Seed and Planting Out Vegetables in Following Months

IANUARY AND FEBRUARY

SOW— Kale Peas
Beets Lettuce Radish
Carrots Onion Spinacl
Early Cabbage Parsnip Turnip
PLANT— Potatoes Cabbas

MARCH

In addition to list for January and February add

SOW— Late Cabbage Sweet Corn Egg Plant

Cucumber Musk Melon Squash

Tomatoes Watermelor Beans

APRIL

Sow seed and plant same as for March with following additions:

Pepper plants an

Egg Plant and Seed

MAY

Sow seed same as for foregoing months.

PLANT-Cabbage Egg Plant Pepper

Tomatoe Sweet Potatoe

JUNE

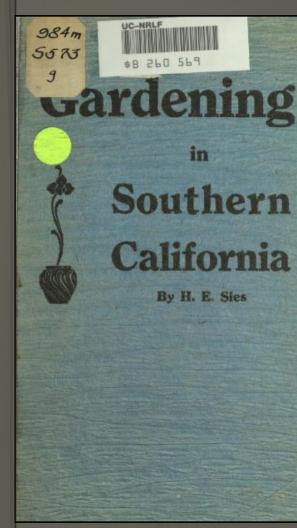
SOW— Beans Beets Cucumber Sweet Corn

Lettuce Musk Melon Onion Parsnip

Pepper Pumpkin Radish Squash Watermelo

PLANT-

Same as for May.



ULY

sow-

Beans Beets Lettuce Onion Pumpkin

Radish Summer Squasi

PLANT-

Cabbage

Cauliflower

AUGUST

sow-

Beans Beets Early Cabbage Cauliflower

Kale Lettuce Onion

Radish Tomatoes*

*For winter crop in frostless sections.

PLANT-

Potatoes

SEPTEMBER

SOW-Same as for August with addition of Parsnips.

PLANT-

Potatoes

CTOBER

Same as for August with exception of omitting Toma

NOVEMBER AND DECEMBER

Same as for October.

You can sow every month in the year:

Beets

Lettuce Radish

Turnips

Plant Onion sets all year round.

Calendar for Ve

THIS BOOK IS DUE ON THE LAST DATE STAMPED BELOW

AN INITIAL FINE OF 25 CENTS

WILL BE ASSESSED FOR FAILURE TO RETURN THIS BOOK ON THE DATE DUE. THE PENALTY WILL INCREASE TO BO CENTS ON THE FOURTH DAY AND TO \$1.00 ON THE SEVENTH DAY OVERDUE.

APR 25 1939 2 1985 REC CIRC MAR 1 9 1985

illi

LD 21-95m-7.

VA ALTON GENERAL LIBRARY - U.C. BERKELEY



395100

UNIVERSITY OF CALIFORNIA LIBRARY

AUGUST

Tomatoes *

Calendar for Vege

Sowing Seed and P Vegetables in Follow

JANUARY AND FE

Beets Carrots Early Cabbage

Lettuce Onion Parsnip

LANT— 1

MARCH

In addition to list for January a

sow-

Late Cabbage Sweet Corn Egg Plant Cucumber Musk Melon Squash

Cabba

APRII

Sow seed and plant same as for l

Pepper plants and se

MAY

Sow seed same as for foregoing r

PLANT-Cabbage

Pepper

JUNE

Beans
Beets
Cucumber
Sweet Cor

Lettuce Musk Melon Onion Parsnip Peas

PLANT-

Same as for May.

Gardening.

Southern California

H. E. SIES
SAN DIEGO, CALIFORNIA



Price, 50 Cents

JULY

Onion Pumpkin Radish Summer Sour

Cabbage

Cauliflower

AUGUST

Kale Lettuce Onion Peas Radish Tomatoes*

in frostless sections.

Potatoes

SEPTEMBER

or August with addition of Parsnips.

CTOBER

ust with exception of omitting Tomat

EMBER AND DECEMBER

ctober.

ery month in the year:

Lettuce Radish Turnips

all year round.

Make Canadian Libraries Great Again

Is Controlled Digital Lending Legally Permissible?

Ariel Katz & Patrick Pang

Spoiler Alert!

Can libraries implement CDL legally?

Spoiler Alert!

Can libraries implement CDL legally?



Legal analysis

Legal Framework – Intellectual Property Law

- 1 Fair Dealing
- 2 Exhaustion
- 3 Specific exceptions (will only flag for now)

Background My research Legal analysis

The Mechanism of CDL

Just a reminder, there are two steps are involved:

Creation of the digital copy from physical books – Engages section 3(1) Reproduction Right

The lending of these digital copies in lieu of physical books

- Engages section 3(1) Reproduction Right (if downloaded)
- Communication to the public by telecommunication (if streamed)
- "Making available"?

Libraries are Unique

- Very important socially
- Encourage access to information
- Promotes and facilitates innovation
- Solves some "market failures"
 - Ariel Katz, Copyright, Exhaustion and the Role of Libraries in the Ecosystem of Knowledge
- But most importantly, libraries predate the Copyright Act
- Therefore, the Copyright Act must be interpreted in this context

Copyright in the Context of Libraries

- Unless there is a clear indication of legislative intent to the contrary, the ability of libraries to pursue their recognized mandate must be maintained
 Ariel Katz, Copyright, Exhaustion and the Role of Libraries in the Ecosystem of Knowledge
- What is this recognized mandate?
 Providing access to information and encourage innovation!

Legal Framework – Intellectual Property Law

- 1 Fair Dealing
- 2 Exhaustion
- 3 Specific exceptions (will only flag for now)

Test from CCH Canadian Ltd. v. Law Society of Upper Canada

- Part 1 that the dealing was for one of the enumerated purposes in the Act
- Part 2 that the dealing was fair

If fair dealing, no copyright infringement.

Part 1 – that the dealing was for one of the enumerated purposes in the Act

- Research, private study, education, parody, satire, criticism, review or news reporting
 - The categories may not be exhaustive *(see Ariel Katz, Fair Use 2.0: The Rebirth of Fair Dealing in Canada)*
- Given a large and liberal interpretation
 - (CCH at para 51, SOCAN v Bell, Alberta v Access Copyright)
- CDL is clearly for the purpose of research, private study, education and maybe even parody and satire

1. Fair Dealing

Part 2 – that the dealing was fair

- a) The **purpose** of the dealing
- b) The **character** of the dealing
- c) The **amount** of the dealing
- d) The alternatives to the dealing
- e) The **nature** of the work
- f) The **effect** of the dealing on the work
- Not necessarily a complete list
- Not every factor must be considered

1. Fair Dealing

Part 2 – that the dealing was fair

- a) The **purpose** of the dealing
- In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the Copyright Act – CCH
- Therefore, in favor of libraries.

 The purpose of library fits perfectly into the allowable purposes and is not done for commercial purpose.

Part 2 – that the dealing was fair

b) The **character** of the dealing

- Multiple copies widely distributed = less fair
- Single copy of work for a specific legitimate purpose = more fair
- Copy of the work is destroyed after it is used = more fair

Therefore, in favor of libraries.

One-to-one ratio distribution based on libraries' number of legitimately and legally owned physical books

The copy of the book is destroyed after the term of loan has expired

c) The **amount** of the dealing

- It is possible to deal with a whole work CCH
 - "Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service." para 6 of CCH
- The amount taken may also be more or less fair depending on the purpose.
 - For the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision CCH
 - Here, for obvious reasons, the entire book would need to be reproduced for this project involving CDL to work.
- Therefore, in favor of libraries.

- d) The alternatives to the dealing
- The availability of a license (i.e. for E-books) is not relevant to deciding whether a dealing has been fair. *CCH* at para 70.
- Here, the libraries' purpose can only be achieved if the entire books are reproduced/communicated to the public.
- Therefore, in favor of libraries.

- e) The **nature** of the work
- Wider public dissemination of the work is more fair
 - One of the goals of copyright law CCH
- Therefore, in favor of libraries.

Getting wider public dissemination of the work by removing the barriers to access to these books (i.e. transportation cost savings in time and money for someone living in more remote areas)

- f) The **effect of the dealing** of the work
- Compete with the market of the original work = less fair
- Neither the only factor nor the most important factor to consider
- Unlikely to take away the digital market share
 - Opportunity cost, libraries will not scan books that have e-books
 - Extremely restrictive process
 - Explore more in depth later on in the presentation

Therefore, neutral factor.

g) Technology neutrality

- Absent evidence of Parliamentary intent to the contrary, the Copyright Act is interpreted to avoid imposing an additional layer of fees based solely on the method of delivery of the work to the end user
 - Entertainment Software Association v. SOCAN
- Wish to avoid a gratuitous cost for the use of more efficient, Internet-based technologies
 - Entertainment Software Association v. SOCAN

Although not a factor, this principle will form part of the fair dealing analysis

On a balance, CDL is likely to be fair dealing

And we actually have a case about that

- 69 It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library.
- Twenty percent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source.
- Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library.
- If researchers could not request copies of the work or make copies of the works themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters.

Which case is it?

Legal Framework – Intellectual Property Law

- 1 Fair Dealing
- 2 Exhaustion
- 3 Specific exceptions (will only flag for now)

What is Exhaustion?

- "Exhaustion is the notion that an IP rights holder relinquishes some control over a product once it sells or gives that product to a new owner."
 - Aaron Perzanowski, Jason Schultz, The End of Ownership: Personal Property in the Digital Economy, pg 25.

Conventional Wisdom for Exhaustion in Copyright Law

- Preoccupation on a "copy" not to the work
- Limited to "tangible/physical goods" only
- Limited to distribution rights only

What is Ownership?

- "[T]he institution of property is not concerned with scarce resources themselves ('things'), but rather with the rights of persons with respect to such resources."
 - Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV. 730, 731–32 (1998).
- Ownership is not absolute dominion over a thing but a complex bundle of rights, privileges, powers, and immunities
 - Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays, (1917) Faculty Scholarship Series Paper 4378.

Let's Not Be Primitive

- For copyright, rights in a work are completely distinct from the right in the tangible medium that embodies the work
- Therefore, focus on
 - (a) which <u>right</u> we are getting
 - (b) with respect to the <u>underlying work</u>, not to a particular thing/medium

Exhaustion in the 21st Century

- If I buy one book, I am buying one "bundle of rights" with respect to the underlying work
 - It should not matter if its in a physical or digital form

Support for this position in academia:

- "In this future, copyright exhaustion would not be tied to a particular copy but would grant an identifiable subset of consumers' limited rights to use, modify, and alienate their interests in a work, regardless of its embodiment in any particular tangible form"
 - Aaron Perzanowski Jason Schultz, Reconciling Intellectual Property and Personal Property

Exhaustion Must BeInterpreted Broadly

- 1) Exhaustion is not limited only to distribution right
 - can include reproduction and public performance rights
- 2) Exhaustion must be interpreted in the context of libraries

Exhaustion is Not Limited to Distribution Rights

- *Théberge* relied on the logic of exhaustion in a case involving an allegation of unauthorized reproduction
- Re Sound relied on logic of exhaustion in a case involving public performance rights
- These SCC cases (e.g. *Robertson v. Thompson, Entertainment Software Association v. SOCAN*) illustrate how exhaustion constitutes a broader limiting principle in copyright.
 - Ariel Katz, Digital Exhaustion: North American Observations

Therefore, exhaustion can include reproduction rights and should with CDL and its additional reproduction.

"A workable digital exhaustion doctrine cannot be limited to the distribution right alone. It should also permit limited acts of reproduction, and even the creation of derivative works, to the extent necessary to enable transfers across competing technology platforms."

• Aaron Perzanowski Jason Schultz, "Reconciling Intellectual Property and Personal Property"

Exhaustion Must be Interpreted in Context of the Library

- Recall libraries predate Copyright Act and their special role in society
- This context cannot be ignored
- Ultimate goal of Copyright Act is to promote innovation and encourage creation of valuable works in society
 - Achieved by providing incentives and maintain this balance of author rights and user rights Théberge
- Libraries help achieve this goal!
 - Therefore, unless there is clear indication of legislative intent to the contrary, a broad construction of the scope of the rights exhausted should be adopted so libraries can pursue their public mandate in the 21st century!
 - There are no such indications from parliament.

11. Exhaustion

Application to CDL

- Exhaustion should be interpreted broadly to include the additional reproduction made during this technological process to facilitate CDL
- Publisher rights should be exhausted with respect to both the lending and the additional reproduction

Specific Exceptions in the Copyright Act

Want to flag for now due to time constraint, will likely discuss in essay

- S.30.71 Temporary Reproductions
- S.30.1(1)(c) Library Exception for a Format that is Becoming Obsolete

Conclusion

Sliding Scale

- Traditional Libraries
- Uber for books (digital/physical)
- Where is the threshold?
 - CDL is below this threshold

Bottom-Line

- We can do anything we want with regards to works unless the Copyright Act says otherwise
- Until and unless parliament thinks it's a bad idea for CDL, there is nothing in the Act that prevents libraries from doing this
- Copyright owners always have the choice speak to Parliament, who will listen and make amendments as appropriate (as have been done in the past)
- Until then, CDL is permissible

Implications

- New and better library?
 - libraries will implement CDL or publishers can make e-books available to try and profit from this market
 - either way we may finally have a library that is befitting of the 21st century innovations

Controlled Digital Lending & Institutional Risk



Legal Argument

A solid legal argument is a great starting point, but...

Legal Argument (cont'd)

... this may be less about confidence that you would ultimately prevail in Court, and more about minimizing the likelihood of a lawsuit (while still meeting program objectives).

In the Balance

Relevant case law may carry more weight than sound legal reasoning that is untested by the Courts.

Whether the proposed activity is being done at other (comparable) Canadian institutions may also carry considerable weight.

CDL – Two Components

Digitization

8

Access

Digitization

Rationale underlying the digitization
 (e.g. preservation? Marrakesh? Fair dealing?)

 Choosing works to be digitized (scale and practicalities)

Digitization Spectrum

> Individual Works

>Small Collections

➤ Large Collections

Access

• What works will be made accessible?

What level of access is provided?

Access Spectrum - Works

- (Public Domain)
- + Permission
- + Out of print
- + In print before 19XX
- + In print before 19YY where no digital version available
- + In print where no digital version is available
- + Anything elsel

Access Spectrum - Level

Current community of users

+ [Consortium members]

+ [other CDN post-secondary institutions]

+ General Public!

Safeguards

- Digital copy reasonably available for purchase? Monitoring?
- Take down policy?
- Sequestration policy?
- Community of practice?

Internal Advocacy

Successful advocacy for a program involving the acceptance of institutional risk may cost political capital!

What else is in your advocacy pipeline? [Cost-Benefit Analysis; Timing]

Thank you!

adrian.sheppard@ualberta.ca
ualberta.ca/copvright

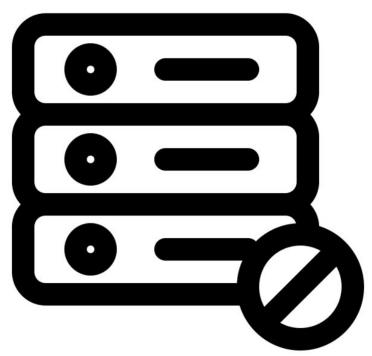


Thinking Strategically about Pitching CDL: Practical Considerations and Constraints

Graeme Slaght

Scholarly Communications & Copyright Outreach Librarian University of Toronto Libraries*

"Please don't infringe copyright!"



"Blocked Hosting" by Rockicon for Noun Project

"Not interested now, but would consider a proposal"

"We can't just do it just for the sake of doing it"

"The Dark History of HathiTrust" (Centivany)

"[The Google partnership] was a move that would force theories. Either people would be silent about it and they would be okay with it or it would force a fair use case that would be on favorable terms for us, assuming we did it right... [W]e either use fair use or we lose it. We were looking at the question prospectively rather than just reactively. Short of licensing something, there is no way to guarantee you won't become a test case for fair use. The only way that you can determine that your use was, in fact, definitively a fair use, is to have a judge tell you that."

senior University of Michigan administrator

"The Dark History of HathiTrust" (Centivany)

"Part of the challenge around copyright cases is, for the most part, publishers pick cases that they think they will win, and then use those decisions to narrow the scope of fair use. And the Google Library Project felt to me, at least intuitively, like ... Man, if we're going to have a discussion about fair use then this is the project to have a discussion of fair use around."

same senior University of Michigan administrator

2 Checklists

"Full-Throttle" CDL vs. "Diluted" CDL

Full-Throttle CDL

Short list!

- Do you agree that CDL is within the law?
- Is it worth digitizing? Do you have the \$?
- Is the means of access controlled?

Diluted CDL

Fair Dealing? Preservation (and then FD if necessary?)

- What is the underlying purpose of the lending?
- Risk analysis/extent of control (character, amount, effect of the dealing) i.e., is there a commercially available alternative (ebook)?
- Secondary consideration:
 Value Cost to digitize vs. cost to retrieve what are the organization circumstances around retrieval/delivery of books
- How clear is the "technological neutrality?"

Mass Digitization Digitization-on-Demand

Mass Digitization Digitization-on-Demand "Facilitated Digitization"

3 Kinds of Technological Neutrality

C. Craig "Technological Neutrality: (Pre)Serving the Purposes of Copyright Law" (2013) Restrictive

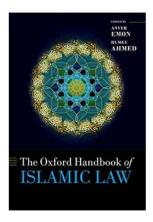
2. Functionally Equivalent

3. Purposive

Enhancing Faculty Bibliography/Research Profiles

What is the "real purpose or motive"

Featured Faculty Books



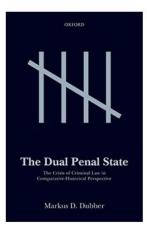
The Oxford Handbook of Islamic Law

Anver M. Emon and Rumee Ahmed, editors

Oxford University Press, 2018 ISBN: 9780199679010

This volume provides a comprehensive survey of the contemporary study of Islamic law and a critical analysis of its deficiencies. Written by outstanding senior and emerging scholars in their fields, it offers an innovative historiographical examination of the field of Islamic law and an ideal introduction to key personalities and concepts.

Publisher's web page



The Dual Penal State

Markus D. Dubber

Oxford University Press, 2018 ISBN: 9780198744290

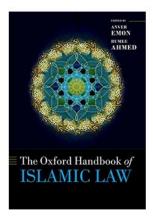
The Dual Penal State addresses one of today's most pressing social and political issues: the rampant, at best haphazard, and ever-expanding use of penal power by states ostensibly committed to the enlightenment-based legal-political project of Western liberal democracy.

Publisher's web page

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Featured Faculty Books



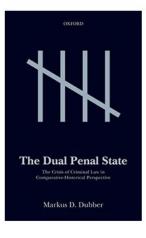
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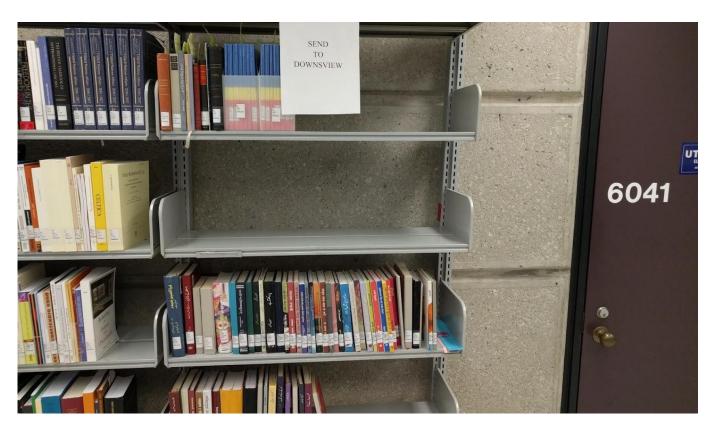
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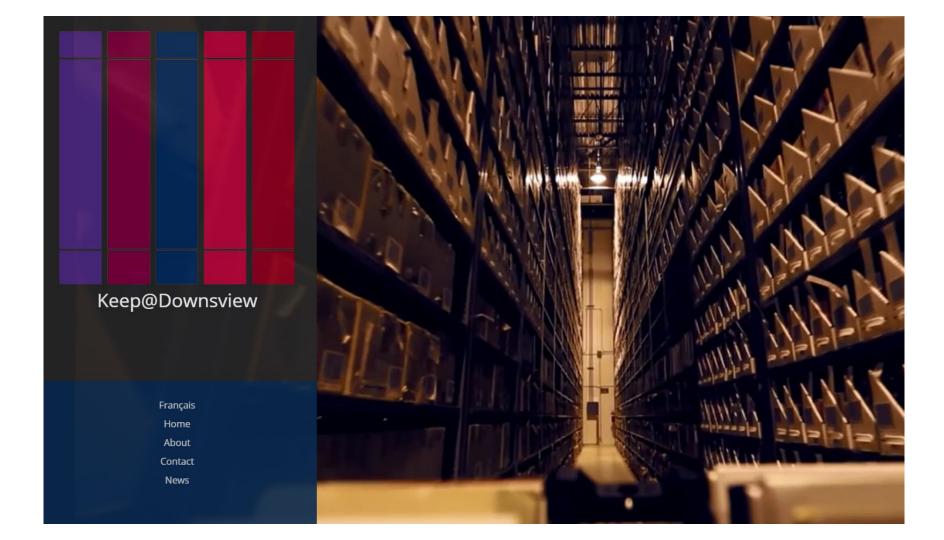
Publisher's web page

Enhancing Print Storage And Access



Enhancing Print Storage And Access





Thank you!

graeme.slaght@utoronto.ca



Andrea Mills

DIGITIZATION PROGRAM MANAGER
INTERNET ARCHIVE CANADA

andrea@archive.org

What to Digitize?

BECOME PART OF LIBRARY LIFE

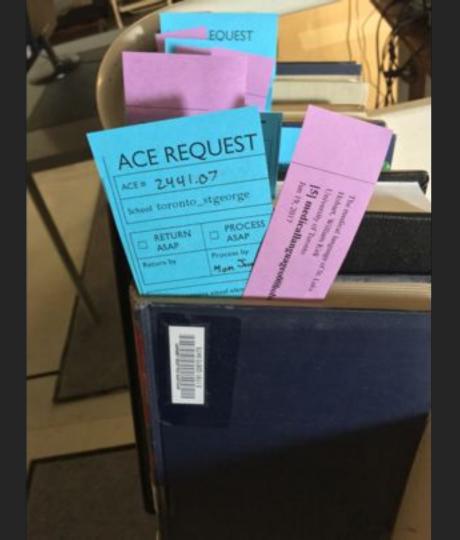
Leverage Existing Systems



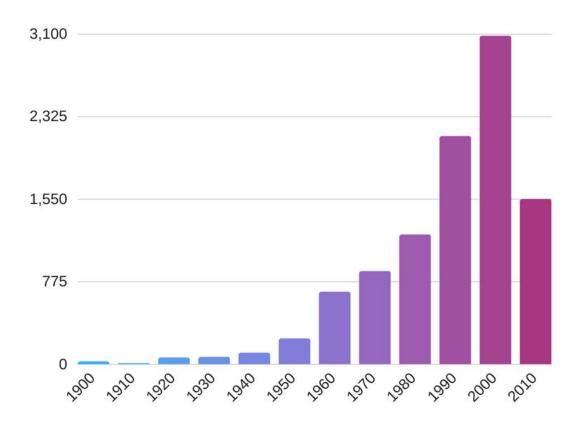
Controlled Digital Lending AT LEAST → **Open Access Where Possible**

Accessible Content E-Portal

On-demand Service of OCUL/ Scholars Portal



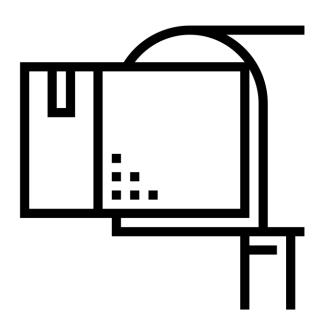
Accessible Texts Digitized On Demand



* Student Requests from 2013-2018

Inter-Library Loan: Select Digitization

Physical Material Loan



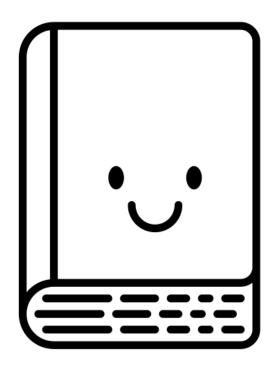
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Digitize + Lend OR Send



Created by Matt Saling from Noun Project

Last Copy Projects



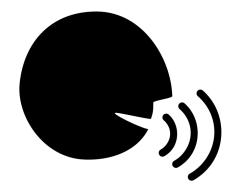
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Low Vision Pilot Project

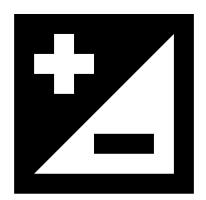


Privileged access to **1.6M ebooks** for users that might make use of screen readers, read aloud functions, large print or contrast enhancement









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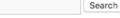
- ← Benefit Concert for Internet Archive featuring Moonalice
- June 30, 2018

The ACCESS to Recordings Act is the Right Way to Fix ${\rm Music\ Copyright} \rightarrow$

Internet Archive awarded grant from Arcadia Fund to digitize university press collections

Posted on May 21, 2018 by chrisfreeland

Internet Archive has received a \$1 million dollar grant from <u>Arcadia</u> – a charitable fund of Lisbet Rausing and Peter Baldwin – to digitize titles from university press collections to make them available via controlled digital lending. The project, *Unlocking University Press Books*, will bring more than 15,000 titles online from university presses. This project extends the successful <u>pilot with MIT Press</u>, which has already made <u>more than 400 books available</u> for digital learners around the world.



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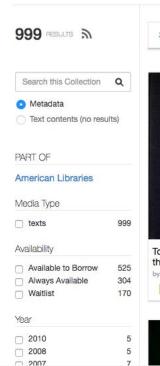
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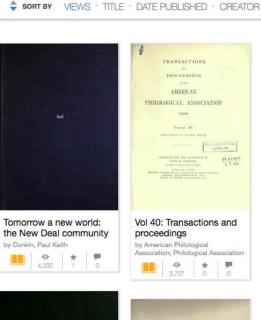


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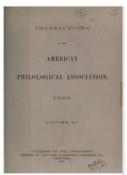
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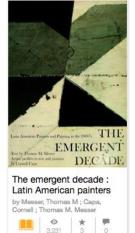














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Thank you!

Please see our blog for details about Low Vision Pilot project and general IA News:

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