

Committee on Copyright and other Legal Matters (CLM)

BACKGROUND PAPER ON PUBLIC LENDING RIGHT

April 2005

Notes:

- This paper should be read in conjunction with the companion IFLA Position on Public Lending Right.
- In the context of this paper 'author' means the creator of a copyright work.

What is Public Lending Right?

Public Lending Right (PLR) does not exist in many countries, and varies in its application from country to country where it does exist. The term applies to two separate concepts.

1. In its strict legal sense, PLR may be a copyright - one of the limited, monopoly rights granted to the copyright owner of a protected work. It grants the owner the right to authorize or prohibit the public lending of a protected work in its tangible form* after the work has been distributed to the public. Authorisation of public lending can take place through licensing and through payment of royalties to authors through collecting societies.

2. A second concept sometimes described as PLR, is a "remuneration right," which is the right of an author (not necessarily the copyright owner) to receive monetary compensation for the public lending of his or her work. Where countries have chosen to establish a remuneration right, they have set their own criteria for eligibility and in some cases (but not all) this is to meet cultural objectives. In some countries, the remuneration right exists under law as an alternative to the PLR (in the legal sense described in (1) above), and is therefore seen as being associated with copyright. In other countries, the remuneration right is entirely outside of the context of copyright. In either case though, remuneration made to authors is not considered a payment of copyright royalties.

*(Public lending is not an act of extraction or reutilisation as from a database. It applies to works in *material* formats only.)

The origins of PLR

The demand for PLR originated in the 19th century from literary authors who believed that they were losing income from sales due to the availability of their books in the then burgeoning system of public lending libraries. In September 1883, a resolution claiming remuneration for the lending of books by 'lending bookshops' was passed at a meeting of the General German Writers Association in Darmstadt. In 1917, Thit Jensen, a major Danish author, publicly claimed remuneration for authors for public library lending of books in a speech at the first annual conference of the Danish Library Association. Libraries and publishers opposed this idea and the debate on whether the free library

loan disadvantaged or benefited authors continued until the introduction of Denmark's PLR system in 1946. The idea spread to authors elsewhere in Europe and elsewhere in the world leading to the introduction of PLR in other countries.

Existing PLR systems provide economic and social support to authors, and are seen as a means to encourage the growth and development of national culture. Authors are often passionately in favour of PLR, regarding it as a necessary and long overdue public recognition of their art and its contribution to the national culture. Many authors, even (with a few exceptions) famous ones, do not earn great riches from their work and their livelihood can be precarious. The 'social security' provisions of many national schemes are seen as a vital safety net and for many authors PLR remuneration is a significant source of income.

The relationship between authors and publicly accessible libraries

The primary motivation for an author to make a copyright work, particularly if it is his or her own intellectual creation, is because he or she has something to communicate to others. To this end, publicly accessible libraries do much to promote all classes of authors' works to users and maintain authors' profiles in the public domain long after the works have ceased to be sold commercially. Indeed the oft held assumption that primary sales of authors' works may be lost through library use is mistaken. Not only are such libraries themselves major purchasers of authors' works and the main purchasers of important and expensive reference works in analogue and digital formats, but library users often encounter an author's works for the first time in a publicly accessible library which can lead to further primary sales. Such libraries also enable people (including authors) to undertake learning and research, since they preserve older works from physical deterioration so that they remain available to the public.

Thus many authors benefit significantly from the availability of their works to users free of charge through publicly accessible libraries in ways other than the immediate collection of royalties from primary sales. Librarians and authors are natural allies seeking to promote creative works and the knowledge they contain and they often work together through activities such as reading groups, lectures, art exhibitions, film screenings, and performances of music and drama. UNESCO's annual World Book Day is just one example of the valuable work publicly accessible libraries achieve in cooperation with publishers and authors.

The international framework for 'lending right' and 'rental right'

Treaties and Conventions

Note: As far as existing legislation is concerned, 'lending' is an activity which is not conducted for profit, whereas 'rental' is a commercial activity conducted for profit, thus 'lending right' is distinct from 'rental right' and the two terms should not be confused.

- **'Rental right'** was introduced by the 1994 TRIPS Agreement -- www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm -- in relation to the commercial rental to the public of originals or copies of computer programs, cinematographic works and phonograms. TRIPS was followed by the World Intellectual Property Organisation (WIPO) Copyright Treaty 1996 (WCT Art.7 -- www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html) in respect of the commercial rental to the public (of originals or fixed copies that can be put into circulation as tangible objects) of computer programs, cinematographic works and works

embodied in phonograms, and by the WIPO Performances and Phonograms Treaty 1996 (WPPT Arts. 9 and 13 -- www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html) in respect of works and performances fixed in phonograms. 'Rental right' is not a provision of the Berne Convention, the Universal Copyright Convention or the Rome and Phonograms Conventions.

- **'Lending right'** of any class of copyright work is currently *not* provided for by TRIPS or any international copyright Treaty or Convention.

There is no international framework for 'lending right' apart from that which applies within the European Union (see below). However, it seems that WIPO did consider the question of national treatment and PLR in the mid 1990's and suggested a protocol to the Berne Convention. While the proposed protocol was not supported by a majority of delegations, neither was any final decision made as to whether or not public lending is a matter for international copyright conventions and treaties.

European Union Directive on Rental Right and Lending Right 1992 (92/100/EEC)

The first, and currently only, supranational legislation providing for 'lending right' is the European Union (EU) Directive 92/100/EEC -- http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31992L0100&model=guichett -- which established a copyright framework for the recognition of lending rights by Member States for authors and other rights holders.

- *Article 1* gives authors and performers, phonogram producers and film producers an exclusive right (subject to Article 5) to license or prohibit the lending of "originals and copies of copyright works, and other subject matter as set out in Article 2(1)."
- *Articles 1(2) and 1(3)* define 'rental' and 'lending' as follows:
"2. For the purposes of this Directive, 'rental' means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.
3. For the purposes of this Directive, 'lending' means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public."
The European Commission's subsequent view is that "Such establishments are in the first place public libraries. Depending in particular on the definition of the term "public" under national law, university libraries and those of educational establishments may also be covered."¹
- The Directive does not just apply to books. *Article 2(1)* provides that:
"The exclusive right to authorize or prohibit rental and lending shall belong:
- to the author in respect of the original and copies of his work,
- to the performer in respect of fixations of his performance,
- to the phonogram producer in respect of his phonograms, and
- to the producer of the first fixation of a film in respect of the original and copies of his film. For the purposes of this Directive, the term 'film' shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound."
- *Article 5* permits Member States to derogate from the exclusive lending right *provided that at least authors are remunerated*. Member States may define the amount of the remuneration, so long as it corresponds to the underlying objectives of the Directive and of copyright protection in general. Member States may also

exempt "certain categories of establishment" (unspecified) from payment of remuneration, and give priority to their own national cultural objectives when setting up PLR systems. The Commission subsequently maintains that "Member States may exempt certain, but not all, establishments from paying the remuneration."²

Where is PLR established?

At the time of writing, according to the PLR International Network -- www.plrinternational.com -- ³ 35 countries have PLR legislation which recognises 'lending right' at least for authors. ⁴ This includes all the EEA states⁵ (except Hungary which has legislation pending), Romania (a candidate country for the EU), and Australia, Canada, Israel, Mauritius and New Zealand. Of these, 20 schemes are actually established and a 21st expected soon.⁶ There is no PLR in the United States, Russia and the former Soviet Union states, countries in the Caribbean, Latin America, Asia and Africa.

Within the EU, although nearly all Member States have transposed Directive 92/100/EEC into their own legislation, some 13 years later a significant number of Member States had not established active PLR systems and have been subject to infringement proceedings by the European Commission. Belgium was successfully prosecuted before the European Court of Justice (ECJ)⁷ and proceedings were initiated against France, Ireland, Italy, Luxembourg, Portugal and Spain in January 2004.⁸ Belgium and France are now implementing PLR systems aimed at complying with the Commission's wishes. Ireland, Portugal, Spain, Italy and Luxembourg are to be prosecuted before the ECJ "because they simply exempt all public lending institutions" or, in the case of Italy and Luxembourg, fail to ensure that authors are remunerated for public lending. ⁹

The Commission's argument is that while categories exempted under Article 5 may include public libraries and the libraries of universities and educational establishments, if a Member State with well established public libraries was to exempt all public libraries from payment of the remuneration "it would exempt the majority of lending establishments from the application of the public lending right. As a result, the PLR as defined in Article 1(3) would be deprived of adequate effect. This situation would be contrary to the intention of the Community legislator in providing for a PLR."¹⁰

How do the PLR systems operate?

All countries, except Canada, Israel and New Zealand have their PLR systems backed by legislation. The established systems operate under copyright legislation, as part of direct State support for culture, or as a separate remuneration right, or a combined approach of PLR system and copyright licensing may be taken. There are differing philosophies and modes of operation but two common features of the established schemes is that payments are at least made to authors for the lending of books and that PLR systems are seen as a means of support for cultural objectives.

When lending right is operated under copyright legislation as in Austria, Germany and the Netherlands, PLR is regarded as a related or neighbouring right.¹¹ Alternatively, PLR operates as a direct form of State support for culture, for example in the Scandinavian countries. The United Kingdom (UK) PLR system, which applies to public library lending

only, provides an example of PLR as a right to remuneration outside copyright.¹² This is a right to payment not an exclusive right, so authors may not prohibit or license the lending of their books. Similar systems operate in Australia and Canada. PLR administration in the UK is independent of but funded by the ministry of culture, whereas in Australia it forms part of the ministry responsible for the arts. In Canada and New Zealand it is within their arts councils. The UK is also an example of a combined approach to PLR as the public library lending of material forms of film and works embodied in phonograms, including audiobooks, comes under the copyright regime and requires licensing.¹³

Typical characteristics of PLR systems are:

- Generally the remuneration payments and cost of administration of PLR schemes are met by the State, centrally or locally.¹⁴ Each country calculates payments differently and the rates of payments are generally modest, sometimes with an overall maximum ceiling for annual remuneration. Although in most systems (i.e. within the EU) the remuneration is for the 'use' of the work, many systems actually make payments on a payment per loan basis according to how often an author's work is borrowed,¹⁵ or alternatively payments are made for the number of copies held in library stock,¹⁶ or the number of registered library users,¹⁷ or by direct grants.¹⁸
- Some PLR funds also provide pensions, health insurance, scholarships and emergency grants to authors, or other grants to support travel or other projects.¹⁹
- PLR schemes have their own eligibility criteria on who may qualify for payments. Usually authors need to register to receive PLR remuneration and need to be citizens of, or permanently domiciled in, the country concerned but EU Member States are prohibited from discriminating against Community rights holders on grounds of nationality.²⁰ The Australian, German and Flemish schemes and the forthcoming French scheme also remunerate publishers for book loans.
- Some PLR schemes restrict eligibility for PLR payments to support literature in their national languages, e.g. in Scandinavia. The aim is to encourage new literature in that language, as well as preventing the bulk of PLR payments going to foreign language (almost invariably English language) authors. However, the European Commission is doubtful about the legitimacy of the eligibility criteria for PLR applied in Denmark and Finland (only for works published in the national language) and Sweden (granted only for national or resident authors) and has formally requested that these Member States provide further information about possible indirect discrimination in relation to these restrictions and Finland's exemption of public lending institutions from paying remuneration to authors.²¹
- Some PLR schemes cover more than just the loan of books: e.g. the Dutch PLR system, which is entirely under the copyright regime, covers loans of recorded sound discs, audiovisual media and works of art. The Australian scheme (not a copyright scheme) is considering the inclusion of audiobooks.
- Where PLR systems have been established, public libraries are seen as the bedrock of the system. It varies whether or not other types of publicly accessible libraries are also included in the system.²²

Libraries and PLR: opportunities and threats

The administration of PLR differs widely from country to country but all existing schemes

have recognised the principle of a right of remuneration for the use of authors' works in libraries accessible to the public (although some of these might be excepted from the system) and the use of these funds to fortify cultural expression. As in most existing systems the State provides the funding for the rights holder remuneration, the financial burden is lifted from libraries and their lending and reference services remain free at the point of use. Author and other rights holders' organisations usually wish to work in partnership with libraries over PLR as they do on so many other projects and have generally supported librarians in seeking State or other non-library funding for PLR.

In a number of countries the operation of PLR works well for libraries because it is recognised that the role of librarians is crucial to its function. They supply the data on book loans, stock holdings or numbers of registered users to the PLR administrators or licensors to enable payments to be calculated and their cooperation is essential to creating and maintaining good and successful PLR systems. Where librarians have been positive about PLR and have taken the opportunity to forge successful partnerships with authors and the PLR administration to set up and then run the system smoothly, both they and authors reap the benefit. Not only are authors much more publicly supportive of libraries, but an unexpected outturn was that the statistics from PLR systems can attract wide national media coverage and draw public attention to libraries and to the most loaned authors, which helps to encourage more people to take up reading through libraries.²³

Regrettably however, despite the generally positive experience that librarians have had with most of the existing PLR systems, whenever proposals are made to establish a new PLR system, there is always the risk that publicly accessible libraries may be made responsible for funding it from their existing budgets, and it is often the case that the library and information community need to vigorously defend their services in the face of such demands.²⁴ Because PLR in effect acts like a tax on their core services, they simply can not afford to pay for it from their, often slender, library budgets without withdrawing the citizen's right to free access to libraries in the public sector and also diminishing the quality and variety of their services to the extent that their very purpose and existence could be undermined.

The altruistic 19th century social concept of free public libraries maintained by the State for the public good, which as the 'people's universities' have been a most significant part of civilized society for more than 150 years, could be seriously jeopardized by any attempt to make such libraries pay for PLR. This would be contrary to the very reason for having public library systems. The losers would be that country's citizens for generations to come, including those whom PLR is meant to benefit.

The future of PLR

Interest in PLR is growing around the world, and there is always the possibility that it might be considered again by WIPO, yet there is the question of whether there will be a role for PLR systems in an age of increasing digitisation. However, it is likely that books in material form (even if one day on electronic 'paper' rather than printed) will remain very user friendly and convenient formats for linear reading, and will continue to be available in publicly accessible libraries (as possibly may tangible multimedia formats for film and phonographic works), so PLR may continue for some time to come. If PLR evolves to take account of the digital world, librarians will need to campaign hard to ensure that account is taken of the fact that nearly all digital products, whether tangible

or online, are already subject to licensing and potential controls to access by rights owners through digital rights management systems and technological protection systems, and that rights holders are already well rewarded by those means.

A harbinger of future change is indicated by the European Commission's recognition that "Both the media market and the role of libraries are undergoing profound changes. Public libraries are constantly improving their services and are exploiting new territory in the public lending of all media products with the help of the new digital environment. These developments are closely observed by rightholders, publishers, the cultural community and policy makers... All developments in the exploitation of new technologies in libraries must be further monitored particularly with regard to any potential impact they may have on the functioning of the Internal Market and in light of their impact on rental and lending activities... At this point, it is difficult to assess if and if so to what extent, traditional public lending by libraries will be replaced by new forms of on-line distribution, which would not be covered by the present scope of this Directive. In this respect, the Commission will ensure the proper functioning of PLR rules enshrined in the Directive. In the same spirit, it will continue to examine the functioning of public lending and observe the new technological developments in lending institutions, with a view to assessing the possible need for further actions in this field."²⁵

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1. Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union COM/2002/0502 final. September 2002 -- http://europa.eu.int/comm/internal_market/copyright/public-lending-rights/public-lending-rights_en.htm
 2. Ibid.
 3. www.plrinternational.com -- The Network is coordinated by the UK PLR Registrar enquiries@plr.uk.com
 4. The Czech Republic, Poland and Slovenia only recognise the lending right principle for the lending of music.
 5. EEA comprises the 25 EU Member States (see http://europa.eu.int/abc/index_en.htm) plus Iceland, Liechtenstein, Norway and dependencies. EU candidate countries will also need to implement the Directive.
 6. Australia (1974), Austria (1977), Canada (1986), Denmark (1946), Estonia (2004), Faroe Islands (1988), Finland (1963), Germany (1972), Greenland (1993), Iceland (1968), Israel (1986), Latvia (2004), Lithuania (2002), The Netherlands (1971), New Zealand (1973), Norway (1947), Slovenia (2004), Sweden (1954) and United Kingdom (1979). Belgium: no national system as required by Directive 92/100/EEC, but Flemish speaking provinces have a cultural PLR grant scheme (2002-03) open to Flemish and Dutch authors. France (legislation 2003-04): a scheme is expected to launch very soon.
 7. Europa Rapid Press Release -- <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/989&format=HTML&aged=0&language=EN&guiLanguage=en> -- IP/02/989 03/07/2002; <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-433%2F02&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> -- ECJ Case C-433/02, October 2003

- 8.** Europa Rapid Press Releases <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/60&format=HTML&aged=0&language=EN&guiLanguage=en> -- IP/04/60 16/01/2004 and <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/891&format=HTML&aged=0&language=EN&guiLanguage=en> -- IP/04/891 13/07/2004
- 9.** Europa Rapid Press Release <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/1519&format=HTML&aged=0&language=EN&guiLanguage=en> -- IP/04/1519 21/12/2004 and <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/347&format=HTML&aged=0&language=EN&guiLanguage=en> -- IP/05/347 21/03/05
- 10.** See (1) above and Europa Rapid Press Release <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/1303&format=HTML&aged=1&language=EN&guiLanguage=en> -- IP/02/1303
- 11.** Authors have the right to license library lending so licensing and fees distribution are organised by collecting societies, which negotiate with federal and provincial governments (Austria and Germany), or directly with libraries (Netherlands).
- 12.** Qualifying authors who register have a legal right to receive payment (up to a maximum annual ceiling) from the government in respect of the number of occasions on which printed and bound books (excluding musical scores) are lent out by public libraries only.
- 13.** UK public library lending of recorded music is by a free national licence from the major recording industry producers. Many independent record producers also freely licence public library lending. A licence is proposed to remunerate authors and performers for the loan of audiobooks. Currently no licensing scheme exists for public library lending of videos and DVDs: public libraries must purchase rental copies (often at a reduced price), which come with a licence to lend.
- 14.** However, in the Netherlands since 1993 the cost has been funded entirely by libraries, which negotiate licensing direct with collecting societies.
- 15.** E.g. Estonia, Germany, Iceland, Israel, Latvia, Lithuania, the Netherlands, Slovenia, Sweden and UK. Sweden also remunerates for reference use of books within library premises and there are proposals for this to happen in the UK.
- 16.** E.g. Australia, Canada, Denmark, and New Zealand.
- 17.** E.g. the forthcoming French system.
- 18.** Norway: government fund negotiated with author organisations, which then distribute it as grants to members. Finland: authors apply for government grant from fund equating to percentage of government expenditure on library books. Iceland: government PLR funding available through grants and other means including payment for book loans.
- 19.** E.g. Austria: 50% of PLR fund for the 'social needs' of authors. Germany: 55% of fund for health and insurance schemes and emergency funds for authors. Slovenia: 50% of fund for scholarships. Sweden: 66% of fund for pensions, long-term grants and emergency funds for writers. France: part of fund to finance supplementary pensions for writers and translators.

20. E.g. UK: system is open to authors of any nationality resident in any EEA country, whose books are lent out by UK public libraries. Austria, Germany and the Netherlands: have copyright based systems which must follow national treatment rules and make cross border payments to nationals of all countries which offer reciprocal schemes. Canada: so that PLR supports Canadian authors and due to libraries' fear of being made responsible for funding if PLR was under copyright, all stakeholders united to avoid PLR being under a copyright regime, since the majority of books held in Canadian libraries are of foreign authorship.

21. See (9) above.

22. E.g. Australia: educational libraries are included in PLR (in separate scheme). France: educational libraries will be included. UK: not-for-profit publicly accessible libraries (other than public libraries) and educational establishments are excluded from lending right and are not in the PLR system. They may lend any class of work without a licence.

23. E.g. UK: <http://www.plr.uk.com/enhancedindex.htm> -- Click on Trends.

24. Spain (one of the countries being prosecuted by the European Commission): reports suggest that the public library system may be forced to pay for PLR from existing budgets without the funding to do so.

25. See (1)

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