The Libraries and Archives Copyright Alliance

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Consultation on the Extension of Public Lending Right to Rights Holders of Books in Non-print Formats

Response by LACA: the Libraries and Archives Copyright Alliance

About LACA

LACA: the Libraries and Archives Copyright Alliance, brings together the UK's major professional organisations and experts representing librarians and archivists to advocate a fair and balanced copyright regime. LACA lobbies in the UK and Europe about the copyright and related rights issues affecting the ability of library, archive and information services to deliver access to knowledge in the digital age.

Consultation Questions

Q1: Do you agree that, on expansion of the PLR Scheme, the inclusion of non-print books is appropriate in terms of lending and creative production trends? Please give details of your position on this issue.

Removing the complications of licensing public lending should help encourage the provision of more audio-books and e-books in public libraries. In particular such expansion of non-print book provision will be especially helpful to reading disabled people, whose numbers will certainly increase as the number of older people in society is increasing, provided that

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the technological protection measures attached to e-books do not interfere with text-to-speech and similar access software used by print-disabled people.

As e-book readers develop and improve and as envisaged by the *Digital Britain* report more households will have a computer at home with broadband access, remote downloading of e-books from public libraries is likely to increase. However, it will be necessary to allow users to move the downloaded copy to other devices running the appropriate software for convenience. Eventually as portable hardware converges and becomes yet more sophisticated, the e-book downloaded to the mobile phone will be normal but it may simply be a transmission vehicle and be too small a device on which to actually read the book.

Given that in the UK the lending right of the rightholders in film, sound recordings and other non-print works, including audio-books and e-books, already exists under the copyright regime and thus public libraries require licensing to lend these materials, we therefore generally favour the transfer of the administration of lending right in non-print books from copyright licensing to the existing PLR scheme. It has proven itself to be an efficient partner in the administration of PLR for both libraries and the beneficiaries of the lending right.

Q2: We have made an assessment of the current and potential formats for non-print publications which could be made eligible under the PLR Scheme (paragraph 17) – is the scope of this definition sufficiently broad? Do you have any concerns about any of the formats currently listed? If so please provide details.

It is right to not tie legislation to specific formats since they are soon superseded. The concepts expressed in Para 17 seem in the main to be suitably broad. However, the wording used to express these concepts in the proposed Bill will need careful scrutiny.

Q3: We have made an assessment of the methods of 'lending' of non-print books which are currently used by public libraries, or may be adopted in the future (paragraph 19) – can you envisage any additional methods of 'lending' which should be included, or do you have any concerns about those currently listed? If so please provide details.

Para 19 (Bullet 4): "The granting of temporary permission to a library user of access to a digital book, either remotely or through the library's own loaned or on-site hardware."

We do not believe that this concept falls within the legal definition of lending within the CDPA, which is in line with the definition given in the **Rental and Lending Directive 2006/115/EC** (which replaced Directive 92/100/EC)**,** and therefore it does not qualify for lending right. The Bullet 4 concept is that of 'on-the-spot' reference access in the virtual environment as though it were to books sitting on a shelf in the physical. There is no "lending" as the work is not downloaded (as envisaged by Bullet 3) to the user's device for later use for a temporary period (similar to the BBC iPlayer download service), but merely streamed to display temporarily on screen while online, which is making available or, if on the web, also a communication to the public. Access to such on-screen display is covered by the product licence. The legislation for non-print books should mirror analogue lending and only cover handheld items or downloads which the user keeps on his or her own device and may access only for a specific period of time.

Directive 2006/115/EC Article 2(1)(b) defines "lending" as meaning '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;' In line with the Directive, **CDPA 1988 s.18A(2)(b)** defines "lending" to mean 'making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment which is accessible to the public'. There is nothing to imply that these concepts do not apply equally in the virtual environment as in the physical.

Directive 2006/115/EC Recital 10 excludes 'on the spot reference use' from the definition of lending. Likewise **CDPA s.18A(3)** says that (a) "lending" does not include 'making available for the purpose of ….communication to the public' and (c) the 'making available for on-the-spot reference use.'[1] Again, there is nothing constraining 'on the spot reference use' to the physical environment, so it can cover any reference use where the work remains in situ whether physically or digitally.

Q4: Are the additional categories of rights holder (i.e. performers and producers) in relation to non-print books an accurate description of rights holders in non-print works?

Our answer here refers to both Paras 20 and 22.

The consultation document indicates that extension of PLR to other rightholders is being considered. PLR in the UK is a derogation from the lending right permitted by **Directive 2006/115/EC Article 6(1)**.[2] The Directive provides that where there is a derogated scheme at the very least authors should be remunerated but that remuneration to other classes of rightholders is not compulsory. Producers and publishers (and in theory other rightholders) in non-print books can already be remunerated for public lending if they wish through contracts and licensing. However, in practice only publishers and producers are in a position to distribute the works and conclude licences with libraries etc. It should be assumed that if authors and performers assign their lending right to publishers and producers, it is a private contract matter and that they receive adequate remuneration in return.

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[1] Directive 2006/115/EC Recital 10
(10) It is desirable, with a view to clarity, to exclude from rental and lending within the meaning of this Directive certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use. Lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.

CDPA s.18A(3)
(3) The expressions "rental" and "lending" do not include -
(a) making available for the purpose of public performance, playing or showing in public or communication to the public;
(b) making available for the purpose of exhibition in public; or
(c) making available for on-the-spot reference use.

[2] Directive 2006/115/EC Article 6
Derogation from the exclusive public lending right
1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

With regard to 'soft-copy' or 'e-books', licences are an unavoidable prerequisite for gaining access to paid-for online materials, so it might not actually prove possible to remove lending right from copyright and therefore from licences, and substitute with the derogated PLR scheme. Unless the lending right is *wholly* transferred from copyright to the derogated PLR scheme, introducing PLR for these additional formats of books actually complicates matters for libraries as publishers and producers, and those authors and performers who have assigned their lending right to them, would continue to be remunerated through licensing. Other authors and performers would rely on the PLR scheme. Therefore we agree with DCMS (Para 21) that all rightholders should be covered by the PLR scheme.

The cost of these licences, which in the case of e-books already include lending where required, is unlikely to reduce in any meaningful way to reflect such partial change. The Government needs to ensure that under no circumstances should anyone be paid twice for the same use. It is all money from the public purse.

Library licences will take time to renegotiate and may run on a multi-year cycle before renegotiation is due. There are also potentially significant software development costs involved for both publisher/producer, the PLR Registrar, and for libraries, to be able to monitor the "lending" of relevant non-print books. A suitable transition period should be introduced to allow these changes to be made.

Q5: Do such rights holders licence/assign their lending rights in practice? If so, do such rights holders enforce their unwaivable right to equitable remuneration in practice?

We provide no answer to this question as it appears to be addressed to rightholders.

Q6: It is our understanding that lending rights are currently under-enforced and/or poorly protected in respect of audio and e-books loans through UK public libraries – is this correct?

As far as we are aware public libraries seek to obtain licensing for lending non-print books. The licensing for e-books is likely to include lending where required, but for hand-held items bought as one-off purchases, this has proved more difficult unless the licence already includes lending. This is often not the case as the producers selling mainly to retail markets did not envisage library lending. Public libraries have had to spend time and money trying to obtain lending licences ending with a patchwork of provision.

Q7: Where such contractual arrangements exist, how effective are these arrangements and do rights holders feel adequately protected/remunerated?

We provide no answer to this question as it appears to be addressed to rightholders.

Q8: Would the inclusion of such rights holders in the Scheme produce the certainty of payment and protection of rights described above (paragraphs 24-28)? Please give details.

The PLR scheme in the UK is an efficient scheme regulated by Government and administered by an impartial non-departmental body. It is trusted by both libraries and authors and should therefore continue to provide certainty to the other classes of rightholders in non-print books.

Q9: Do you agree that the expansion of the PLR scheme, as opposed to maintaining the current contractual lending market, will benefit rights holders, libraries and the creative sector?

In principle, expanding PLR to non-print books will benefit both rightholders and libraries. The central government funded PLR scheme in the UK has proved itself an efficient system for collecting data as painlessly as possible and for remunerating authors for public library lending of analogue books and should do so with regard to non-print materials as well. As indicated in answer to Q1 the PLR scheme should actually help to promote the distribution and availability of audio-books and e-books in public libraries.

Obtaining suitable licensing for the public lending of hand-held sound recordings and film DVDs, has proved to be a fragmented process resulting in a patchwork of provision which, in many cases, has restricted the range of materials that can be offered for lending by public libraries with the consequent knock-on to their purchasing decisions.

Since primary legislation is anyway needed to transfer lending right in non-print books from copyright to the derogated PLR scheme, we would suggest that the Government should also take this opportunity to approach the whole issue comprehensively and do the same with recorded music and other sound recordings and film, in which there is lending right. In other words, wholly remove lending right from the copyright regime (and therefore from licensing) altogether and bring it all into PLR, funded by central Government. This would make the whole issue of public lending much more efficient and give legal certainty for public libraries. It would also be a more certain method of direct remuneration to authors (including composers and lyricists) and performers. LACA would be happy to assist DCMS in further exploring this proposal.

It is **crucial** to the continuance of public lending in the UK that the central Government continues to pay the remuneration to rightholders and the costs of the PLR Scheme as now. The Government should be able to contain the costs of extending PLR comprehensively to include public library lending of music recordings and film since **Directive 2006/115/EC Article 6(1)** provides that 'Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.'

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