

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

October 2009

Introduction

Publishing in the UK is the largest media sector, and the biggest creative industry. The Publishers Association (the PA) is the leading trade body representing consumer trade, academic and educational publishers in the UK. The PA's members represent approximately £4bn (80%) of the £5bn turnover within these parts of the overall publishing sector. Collectively the creative industries – of which the copyright industries form the dominant part – contribute over 8% to the UK's GDP.

The PA is grateful for the opportunity to comment on the above proposal, but would regard any such extension of PLR with very considerable concern, and strongly urge the government to resist such an extension, for the reasons outlined below. Publishers recognise that PLR money could incentivise authors to participate in the digital market, and would like authors to continue to collect PLR money based on the model of one payment for one loan to one reader. Nevertheless the overriding concern with the government's proposal is that digital content may be sold or leased to libraries that have lending models that conflict in commercial terms with the publisher's business model. This concern is compounded by the lack of certainty around libraries' future lending models, and the likelihood of a gradual erosion of residency requirements. If in addition libraries developed commercial business models where they charged for access then publishers would want to consider these models and share in any revenue in an equitable way. It is for this reason essential that publishers retain the choice about whether or not to sell an audiobook or eBook to the library in the first instance in order for that burgeoning digital market to be sustainable.

Overview

The eBook and audiobook market

As ease and speed of access to content becomes increasingly important, innovation has established itself as a core principle of every publisher's business. The licences that users can enter into with rightsholders to access digital content are increasingly capable of meeting a vast range of needs, and both trade and academic publishers have taken huge steps in recent years to enable access to their content online. The digital market is still clearly a nascent one: the PA's first digital survey in 2008 showed total digital sales of books to be worth an estimated £75m-£85m across the whole industry. That market share is expanding rapidly: the PA estimates that digital sales rose by 27% between 2007 and 2008 across the constituency surveyed. The audiobook market is also experiencing growth in its digital markets: estimates from the Audiobook Publishers Association suggest that between 10% and 20% of the £75m audiobook market is accounted for by downloads. 90% of all journals are now available electronically, and major academic publishers are building both their frontlist and their active backlist in eBook format. The PA estimates that Taylor and Francis offers over 20,000 eBooks, Springer 27,000 and Elsevier 10,000. Trade publishers are investing to a similar degree, and for many, their future business models are dependent on a

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return on this investment: a recent Frankfurt Book Fair survey indicates that industry experts consider 2018 will be the year in which digital sales will overtake sales of traditional books.

Needless to say, a growing market at a time of rapidly developing technology needs careful nurturing. The consequences of an extension of PLR in the terms proposed could effectively result in free loans or free online access to authors' and publishers' content in an e-format which, unlike its physical counterpart, is highly conducive to unauthorised copying and onward exploitation

The alleged need for the proposed change

We are entirely unconvinced by the Consultation's description of the alleged need for this change. According to the Consultation's own figures (at paragraph 16) there were over 11 million loans of audiobooks in 2007/08 and increasing demand from library users for eBooks. This suggests a healthy picture for audiobook loans, and the beginnings of an equally healthy picture for eBook loans. However, the Consultation oddly states that "it is our understanding that regular formal licensing arrangements are not always achieved to the satisfaction of libraries or rights holders", which might suggest a need to encourage more licences, but most certainly not a need to sweep away rightsholders' exclusive rights completely in favour of an over-broad and dangerous new copyright exception. The claim that "It is government's view that the current system is not working as it is too complex, that rightsholders are not being adequately protected and that growth of non-print book lending may be being inhibited" misrepresents the underlying motivation, which seems to be that libraries are finding it inconvenient and time-consuming to obtain licences.

The potential dangers

The potential for loss of eBook sales is very significant, and could severely undermine publishers' investment in developing a nascent market. The Rights and Contracts Director of one of our major publishing groups commented "this could be as big a threat to trade publishers' business as Google". Although authors can opt not to register with the PLR scheme, the proposals offer no security for an author – and the publisher to whom he has probably granted exclusive rights – who was happy to see his physical books loaned, but who wished, not unreasonably, to prevent unprotected electronic access being offered unconditionally by public libraries which had purchased a single copy – especially for little or no remuneration. This would run a very real risk of destroying at birth any mass market for eBook content.

The Group Sales Director of another major publishing group observed: "whilst I understand that the aim is to ensure that libraries continue to be used and remain alive, this opens the possibility that any member of the UK population could access an eBook purchased by any public library. I have long feared that with library consortia we might end up with only one eBook sale where we had previously tens or hundreds of sales of the physical book."

Conflict with publishers' rights

There is another, more immediate, problem with the proposed extension of PLR, which is that most authors of most books (and certainly most eBooks) being lent through public libraries will have granted exclusive publishing rights to the publisher, so that the publisher can recoup the very considerable investment required, and in the vast majority of cases this will specifically include electronic publishing rights. The existing PLR system of loans of physical books does not threaten this contractual arrangement since physical book loans do not compete significantly with commercial sales, through bookshops or directly from the publisher. However, loans of eBooks, particularly if done in a way which failed to protect against further use or exploitation by the borrower, would certainly conflict with normal

exploitation of the book by the author's publisher (in which the author usually has a direct royalty share).

Conflict with UK, EU and international law

This would not only directly breach the publisher's exclusive publishing rights, but would also conflict with the Berne Convention 3-step test for copyright exceptions (Article 9(2), included verbatim in Article 5.5 of the 2001 EU Copyright Directive, implemented in the UK in 2003), which makes it clear that copyright exceptions (such as the PLR exception) are only permitted in certain special cases which "do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightsholder". As explained above, the relevant rightsholder in the vast majority of cases is likely to be the publisher, not the author, and the risk of conflict with normal exploitation by them is very great indeed.

For all the above reasons, the PA would strongly oppose the proposed extension of the existing PLR copyright exception to audio and eBooks, and indeed to any electronic versions of copyright works published by its members.

Responses to specific 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.

No, because we strongly oppose the expansion of the scheme as proposed. From a production point of view, we can see how hard copy audiobooks or pre-loaded eBooks can be 'lent' in a meaningful sense of the word, provided that firm controls and Technical Protection Measures are in place to ensure 'return' to the library concerned, without copying, but further expansion of the scheme so that prior rightsholder consent would not be required would run the very real and immediate risk that valuable content could be further exploited and copied by third parties without any remuneration to the rightsholder other than that provided for under the PLR scheme, which would in no way be likely to compensate for the risk it presented.

Q2. Is the scope of [the definition at paragraph 17] sufficiently broad? Do you have any concerns about any of the formats currently listed? If so please provide details.

It is in our view far too broad, and goes far beyond the current definition of "lending" in section 18A of the Copyright, Designs and Patents Act 1988. We have significant concerns about all the formats listed in the current digital world of virtually cost-free and first-generation quality copying, but especially digital audio files, either provided to a user as a download, for short term access (licensed or not), or loaded onto appropriate hardware, and eBook digital files. We have particular concerns about the statement that "this is not an exclusive list", implying that with changing technology yet further formats may be added, all without any control or indeed participation by the rightsholder who invested in the content and the relevant format in the first place, and – at present rates – precious little remuneration. This is made explicit in paragraph 18 of the consultation document, which foresees a future "as sales of hard copy formats give further ground to soft copies". This can only be interpreted as implying that the existing, functioning, market will be undermined by one in which digital files are made widely and unconditionally available by libraries to users at major and irreparable cost to the industry.

Q3. Can you envisage any additional methods of ‘lending’ [to those in paragraph 19], or do you have concerns about those currently listed? If so please provide details.

No, not within the current meaning of the word, included in Article 5.3 of the 2001 Copyright Directive, and the definition of “public lending” in Article 5 of the Rental and Lending Directive. We certainly do have reservations about the proposed incorporation of all listed formats under the uncontrolled circumstances of an expanded copyright exception. We have particular concerns about loans of digital book files, temporary access to books in digital formats (eg MP3) which are downloaded for a short time but “not retained”. It is difficult to see what proposals the government is making to enforce this condition in the context of a digital future increasingly dominated by piracy, in particular illegal peer-to-peer file sharing. Equally, we would be very concerned by on- or off-site or remote access to a digital book to a library user, using the library’s own hardware.

Q4. Are the additional categories of rightsholders (ie performers and producers) in relation to non-print works an accurate description of rights holders in non-print works?

For the reasons set out in the main body of our response above, while performers and producers may indeed have relevant rights in audio and eBooks which include sound recordings or films, the consultation ignores completely the legitimate exclusive rights of publishers, which have almost invariably been purchased from the relevant creator (for publishers, normally authors or artists) as part of the publishing contract, in return for a reasonable remuneration as exploitation develops, normally at present via a royalty split. This has the benefit of flexibility in a fast-changing technological environment, but would be entirely put at risk by the government’s proposals.

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

We believe so.

Q6. Is it correct that lending rights are currently under-enforced and/or poorly protected in respect of audio and eBook loans through UK public libraries?

Not in our view. The licensing arrangements currently required with libraries for eBook loans are reasonably enforced and protected, but in the digital age we would very strongly oppose any expanded copyright exception for PLR which would have the effect of absolving libraries from any licensing requirement at all.

Q7. How effective are [such contractual arrangements] and do rights holders feel adequately protected/remunerated?

We have no reason to believe they are not effective. Publishers go to great – and expensive – lengths to protect the copyright of their authors worldwide, as they are contractually bound to do, despite the extensive risks of publishing in a digital environment. As to remuneration, we cannot speak for performers or producers, but remuneration for authors and artists under publishing contracts is for competition reasons a matter entirely for individual publishers and their authors, but is generally regarded as adequate. It is certainly considerably more than the 5.98 pence the proposal would offer in return for abandonment of effective digital control of the work concerned.

Q8. Would the inclusion of such rights holders in the Scheme produce the certainty of payment and protection of rights [described in paras 24-28]?

No, for the reasons set out.

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?

Emphatically not. Librarians may feel a temporary benefit in being relieved of the need to obtain licences for electronic use of copyright works in their collections, but this will be entirely at the expense of the authors and publishers whose rights are being circumvented by a dangerous and over-broad exception. The end result of such a proposal will be a decrease in the output of books in digital formats as digital publishing ceases to be a viable commercial proposition, at an obvious long-term cost to all libraries and all users, and society as a whole. The proposal will most certainly not benefit rightsholders in the publishing sector, and will only serve to impoverish and jeopardise the creative sector.

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