

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 */**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****TABLE OF CONTENTS**

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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**1. Introduction: Objectives of the Communication**

On 19 November 1992, the Council of Ministers adopted Directive 92/100/EEC, on the Rental and Lending Right and Certain Related Rights [1]. The Directive was to be implemented by 1 July 1994. Article 5(4) of the Directive provides that the Commission should draw up a report on public lending in the Community before 1 July 1997. Since some Member States implemented the Directive only recently, this deadline could not be met. The concept of public lending is deeply rooted in the national cultural traditions of the Member States. There are considerable differences among them in the way public lending operates. As a result, the provisions of the Directive on this issue only amounted to a limited harmonisation. Consequently, a report on the functioning of the public lending right was requested of the Commission and should be presented by the Commission to the European Parliament, the Council and the

Economic and Social Committee.

[1] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ No L 346 of 27 November 1992, p.61 ("The Directive")

The fact that the obligation to present a report was expressly included in Article 5 underlines the particular interest regarding developments in the field of the public lending right (PLR). In line with Article 5(4) of the Directive, the objective of this report is to assess the situation of public lending in the Community and to evaluate the implementation by Member States of the relevant provisions of this Directive, including the degree of harmonisation achieved and to draw conclusions for the treatment of PLR in the European Union.

2. Legal Situation concerning the Public Lending Right before adoption of the Directive

The origins of the PLR are to be found in the early twentieth century and are closely linked to the development of public libraries. The importance of private libraries, which were "lending" books against payment or membership fees, decreased as public libraries, accessible without any payment, appeared. After World War II, the number of private libraries reduced to insignificance. Due to the fact that the increase in the number and improvement of public libraries was strongly supported by the State, the number of lent items increased considerably. This led authors to ask for remuneration for this increased use of their works. Legislators did not, however, react to this immediately but introduced progressively the PLR in form of an exclusive right or a right of remuneration for authors.

The PLR was first introduced in the Scandinavian countries, (Denmark (1946) Sweden (1955), Finland (1961)), followed by the Netherlands (1971), Germany (1972) and the United Kingdom (1979/1982). Germany was the only country in which the PLR was integrated into copyright legislation whereas in the other Member States it was introduced in separate legislation. The provisions in these countries differed in several respects (rightholders, media and types of libraries concerned). In Belgium, the PLR was part of the distribution right. In Greece, France and Luxembourg, authors theoretically enjoyed an exclusive PLR based on the "droit de destination". In Spain, an exclusive distribution right existed, however the right was apparently not exercised in practice. In Portugal, the law could be interpreted in various ways: no PLR or an exclusive right forming part of a broad distribution right. In Ireland and Italy, there was neither an exclusive PLR nor a right to remuneration for public lending.

3. Provisions in Council Directive 92/100/EEC

3.1. The 1988 Green Paper on Copyright [2]

[2] Green Paper on "Copyright and the Challenge of Technology; Copyright Issues Requiring Immediate Action" COM (88) 172 final, 7 June 1988

The 1988 Green Paper on Copyright was the first Commission document to address the need for harmonisation in the area of copyright and neighbouring rights in a conceptual framework. It consisted of seven chapters describing and analysing the areas in which the Commission considered a need for action. Chapter 4 was devoted to the distribution right, exhaustion and the rental right, whereas Chapter 2 dealt with piracy. It is in these two chapters that the Directive has its origin. The Green Paper did not, however, address a possible need for action in the area of non-commercial lending.

3.2. The need for harmonising PLR

In the context of the follow-up to the 1988 Green Paper, the Commission organised several hearings of interested circles on the issues set out in this document. At one of those hearings, held in September 1989, and dedicated to the distribution right, exhaustion, and rental right, an overwhelming majority argued in favour of a harmonisation of both the rental and lending right. According to this majority, a Directive on the harmonisation of the rental right alone would have been incomplete if it did not also cover non-

commercial lending. Indeed, from an economic point of view, the public lending right complements the rental right. In some cases, public lending might even replace rental. Therefore, it was felt necessary to include a PLR in the draft Directive in order to ensure the proper functioning of the Internal Market in this field. On the basis of the Green Paper and in the light of the hearing mentioned above and other input received in the consultation, the Commission adopted the proposal for a Council Directive [3]. It proposed harmonisation for both the rental and public lending right. In its reasoning for the need for harmonising the public lending right, the Commission focused, amongst others, on the legal and economic link between the activities of rental and public lending. It was pointed out that, if rental and lending rights were not addressed together, the steady increase in public lending activities in the music and film sector might have a considerable negative effect on the rental business and thereby deprive the rental right of its meaning.

[3] Proposal for a Council Directive on rental right, lending right and on certain rights related to copyright OJ No C 53 of 28 February 1991, p35

Both the Council and the European Parliament concurred with this view and supported the principle of harmonisation of the PLR.

3.3. The concept of PLR in the Directive

The PLR is set out in the Directive as an exclusive right to prohibit or authorise public lending with or without payment.

The Directive states in its Article 1 (1) that Member States must provide "a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 2 (1)". According to Article 2, the lending right is granted to authors, performing artists, phonogram producers and film producers. The Directive does not cover rental and lending rights in relation to buildings and to works of applied art (Article 2(3)).

Article 1(3) defines lending as "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 that are accessible to the public". 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. Even if this is the case, however, these two latter categories of libraries will represent, at least in Member States having an established infrastructure of public libraries, a rather small proportion of all the lending establishments accessible to the public, in so far as they are only open to a rather limited and specific part of the general public.

However, while the Directive sets out the obligation to introduce or maintain an exclusive PLR, it also allows for certain derogations and limitations from this right as outlined in Article 5. Article 5 reflects the compromise found at the time between complying with the Internal Market needs on the one hand and taking account of the different traditions of Member States in this area on the other.

Scope of Article 5

Article 5 provides for a non-obligatory derogation from the exclusive lending right in respect of public lending. Under certain conditions, it allows Member States to replace the exclusive right by a remuneration right, or even not to provide for any remuneration at all. The Article moreover leaves Member States much discretion in the way they exercise the PLR.

Article 5(1)

According to Article 5(1), Member States may derogate from the exclusive lending right, as set out in Article 1(1) and (3), provided that at the very least, authors obtain a remuneration. The second sentence of Article 5(1) deals with the amount of the remuneration and enables the Member States to fix it in accordance with their respective "cultural promotion objectives". This sentence was inserted following a

proposal by a Member State, which intended to create a new library system as a means of cultural promotion. As it is explicitly provided here that Member States "are free to determine this remuneration" [4], the operational impact of this part of Article 5(1) could be considered limited.

[4] Cf. Article 5(1), second phrase

Article 5(2)

While Article 5(2) confirms that Member States may exclude phonograms, films and computer programs from the application of the exclusive lending right, it reiterates the notion already contained in Article 5(1), and indicates that, "when Member States do not apply the exclusive lending right provided in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration". Given that Article 5(2) is a derogation, the Commission is of the view that this provision has to be interpreted strictly: the exclusive lending right has to be taken as the rule, and wherever a Member State does not provide for an exclusive lending right, at least authors must be granted a remuneration right. Article 5(2) confirms that this principle, regarding the remuneration for authors, is of equal importance with regard to the category of works and other subject matter mentioned in this provision.

Article 5(3)

Article 5(3) allows a Member State to exempt "certain categories of establishments" from the payment of the remuneration. Such categories could include traditional public libraries, but also libraries of universities and educational establishments. However, the latter two categories will only be of marginal importance as compared with traditional public libraries, which are open to the general public, at least in Member States where public libraries are well established. Therefore, if such a Member State were to exempt under Article 5(3) all public libraries from the payment of the remuneration referred to in Articles 5(1) and 5(2), 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.

It should also be recalled that when introducing or maintaining a remuneration scheme for public lending, Member States have to comply with Article 12 (former 6) of the EC Treaty and not discriminate between Community rightholders on the basis of their nationality. This is confirmed by Recital 18 of the Directive.

3.4. The resulting obligations of Member States

To sum up, Article 1 harmonises the exclusive right of public lending for authors with respect to their works and for performers, phonogram producers and film producers with respect to their protected subject matter. Whilst Article 5 gives Member States much flexibility in derogating from the exclusive lending right, a remuneration must at least be provided for authors. Member States may define the amount of the remuneration, but it must correspond to the underlying objectives of the Directive and of copyright protection in general. Member States may exempt certain, but not all, establishments within the meaning of Article 5(3) from paying the remuneration.

4. Situation in the Member States

The following description is based on the information available and on cooperation with Member States, as set out in Article 5(4) of the Directive.

Under Article 15 of the Directive, Member States were required to transpose the Directive into national law by 1 July 1994. Many of them complied with this obligation after that date. In substance, the implementation of the PLR by the Member States has resulted in continued existence of important differences in the public lending right, as set out at national level.

4.1. PLR as set out at national level by the Member States

An exclusive lending right for all kinds of works exists in some Member States. Others have provided for a remuneration right instead. The derogation to the PLR under Article 5(3) for the benefit of certain categories of establishments is used widely. Greece [5], France [6], Ireland [7], Italy [8], Portugal [9], Spain [10] and the United Kingdom [11] grant an exclusive lending right, at least to certain categories of rightholders.

[5] The implementation was included in the entirely new Copyright Act No 2121/1993 of 4 March 1993 (Official Journal A, No 25)

[6] Act No. 92-597 of 1 July 1992, Journal Officiel 153 du 3 juillet 1992

[7] S.I.44 Copyright and Related Rights Act, 2000 of 1 January 2001

[8] Act No 685 of 16 November 1994 (Gazetta Ufficiale, Serie Generale, No 293 of 16 December 1994) amending Act No 633 of 22 April 1941 on the protection of authors' rights and neighbouring rights

[9] Act No 332/97 of 27 November 1997 (Diario da Republica, I Serie A No 275 of 27 November 1997, p. 6393), amending the Copyright Act No 63 of 14 March 1985

[10] Act No 43 of 30 December 1994 (BOE No.313 of 31 December 1994), which has later been incorporated in the Spanish Law on Intellectual Property

[11] Copyright and Related Rights Regulations of 26 November 1996, amending the Copyright, Designs and Patents Act. At the same time, the Public Lending Right Act of 1979 applies

In Greece, the Copyright Act (CA) grants an exclusive PLR to authors, performing artists, phonogram and film producers, as well as to posthumous editors.

In France, the harmonised PLR has not been implemented specifically. It is claimed that the existing French law already grants authors, performers, producers of phonograms and videograms an exclusive lending right. The Ministry for Culture announced recently its intention to present a draft law for the implementation of the Directive in the near future. This draft shall apparently propose the granting of a remuneration for authors of books and publishers for the lending of protected works.

In Italy, where there was no PLR prior to the Directive, an exclusive lending right (as part of the distribution right, but without exhaustion after the first sale) has been introduced for authors and performers. With respect to phonograms, films and videograms, the exclusive right exhausts 18 months after the first distribution.

Ireland has implemented the Directive only recently, by the Copyright and Related Rights Act 2000. The law grants an exclusive distribution right. This right includes the public lending of copies of a work and of other protected matter.

The Portuguese Copyright Act contains an exclusive distribution right for authors, performers and producers of phonograms and videograms expressly covering the PLR. The PLR continues to apply after the distribution.

In Spain, an exclusive public lending right is granted to authors, performers, producers of phonograms and film producers.

Under the British PLR scheme, the United Kingdom provides for an exclusive PLR for authors, film and phonogram producers and for performers. Authors are entitled to a remuneration when their books are lent by public libraries. Copyright is not infringed by the lending of copies of a work by educational establishments or by the lending of a book by a public library if the book is within the PLR scheme.

Instead of an exclusive right, or after its exhaustion, a remuneration right for the public lending of

protected works has been granted in Austria [12], Denmark [13], Finland [14], Germany [15], Luxembourg [16], the Netherlands [17] and Sweden [18].

[12] Act of 28 June 1993 (BGB1 No 1993/93), amending the Copyright Act (BGB1. No 1936/111)

[13] Act No 706 of 29 September 1998; PLR Act No 21 of 11 January 2000 and Executive Order on PLR Remuneration of 29 March 2000

[14] Act No 446/1995 amending the Copyright Act (No 404 of 8 July 1961), and by Act of 31 October 1997 (No 967/1997)

[15] Act of 23 June 1995 (BGB1. I S. 842) amending the Copyright Act of 9 September 1965 (BGB1.I S. 1273)

[16] Act of 18 April 2001 (Mémorial A No 50 of 30 April 2001, page 1042)

[17] Act of 21 December 1995 (Stb. 1995, 653), amending the Act on authors' rights of 1912 and amending the Act on neighbouring rights.

[18] Act 1997:309 of 13 June 1997

In Austria, the PLR is part of the distribution right. Authors, performers, producers of phonograms, film producers and broadcasting organisations are granted a right to equitable remuneration for public lending after the exhaustion of the distribution right (exhausted after the first authorised distribution).

In Denmark, the PLR is part of the exclusive distribution right of authors, performers, producers of phonograms and film producers. The exclusive PLR is exhausted after the first authorised distribution of the respective object. This does not apply to cinematographic works and computer programs in digitised form. Authors, translators, illustrators, and performers enjoy a remuneration right when their works or other subject matter are lent by public libraries.

In Finland, a PLR scheme exists which is based on the 1961 Act on grants and subsidies for authors and translators. The PLR is covered by the exclusive distribution right and is subject to exhaustion except for public lending of cinematographic works or computer programs. Thus, only authors of cinematographic works and computer programs are granted an exclusive PLR once distribution has taken place. Authors of other works have in principle a right to remuneration for public lending.

In Germany, the exclusive PLR is also exhausted after the first act of authorised distribution and authors enjoy a remuneration right for specific acts of lending. The lending institutions concerned include public libraries, public collections of audio-visual or audio recordings or other original works or copies.

The legislation in Luxembourg had granted an exclusive PLR for authors, performers and phonogram and film producers, subject to exhaustion after the first act of authorised distribution to the public. New legislation adopted in 2001 grants a remuneration right only for authors and performers. A decree will have to be introduced to complete the transposition of the Directive. This decree will set out both the actual amount of remuneration and a list of establishments exempted from any PLR.

In Netherlands, the exclusive PLR is exhausted after the first authorised distribution of the respective object; the Dutch law provides for a remuneration right for authors, performers, and producers of phonograms and films.

In Sweden, a new PLR scheme started in 1999. A remuneration is granted for public lending of books, phonograms and printed music in public and school libraries. Half of the amount paid for the lending of phonograms is paid to authors and half to performers.

In Belgium [19], a combined solution has been chosen: the PLR of the Copyright Act which existed

previously continues to apply for authors and performing artists, as well as for producers of phonograms and of films. These rightholders enjoy a remuneration right for public lending of the copies of their works. Belgian Law allows the public lending of audiovisual works and sound recordings only 6 months following the first publication of the objects concerned against remuneration. Certain categories of establishments are exempted from paying any remuneration for their lending activities. A Royal Decree, not yet enacted, is supposed to lay down the details of the remuneration and any exemptions thereto.

[19] "Loi relative au droit d'auteur et aux droits voisins" of 30 June 1994, No SC 9586, Moniteur du 27 juillet 1994 p. 19297; concerning computer programs, the implementation is contained in the law implementing the software Directive (Moniteur belge of 27 July 1994, No 19315)

4.2. Functioning of the PLR

Payment

According to the information at the disposal of the Commission, the PLR does not seem to be applied properly. It appears that in certain Member States no remuneration at all is paid to the rightholders concerned. This is reported to be the situation in Belgium, France, Greece and Luxembourg but it may not be limited to these countries. In other countries, certain elements are present which give rise to concerns as to whether direct or indirect discrimination may exist.: the remuneration is granted only for national authors or authors living in a specific territory (Sweden). Certain other Member States grant a remuneration right only for books published in their national language (Denmark, Finland).

Beneficiaries of the PLR vary from one Member State to another. Certain Member States grant an exclusive right at least for authors. In countries where a remuneration right operates in practice, it is mostly the State, as owner of the libraries, that is responsible for payment (Denmark, Sweden, and United Kingdom). In Austria and Germany, the Federal government and the Länder have taken on the public libraries obligation to pay. In the Netherlands, on the other hand, libraries are obliged to pay the remuneration themselves. In those countries that provide for an exclusive lending right, it is also the libraries - as users of copyright - who have to pay the remuneration required on the basis of contracts.

Lending institutions exempted from the PLR

Most countries make use of the possibility to exempt certain lending institutions from being subject to the PLR.

Ireland, Italy and the Netherlands dispose of an exemption for certain libraries. The exclusive PLR is not infringed by the lending of items without any remuneration by educational establishments and establishments to which members of the public have access in Ireland. Libraries and record libraries belonging to the State are exempted in Italy. The Netherlands exempts libraries from any remuneration for lending to the visually impaired and exempts educational and research institutes as such from the remuneration. Italy exempts from any PLR the libraries belonging to the State and which lend books, CDs and records.

The United Kingdom also exempts certain public libraries and educational establishments from the PLR.

A broad exemption exists in Spain and Portugal for museums, archives, libraries, newspaper libraries, record and film libraries, which belong to public interest bodies of cultural, scientific or educational character without commercial purpose and for teaching establishments incorporated in the Spanish educational system; this list covers, in fact, most lending institutions open to the public. Finland exempts all public libraries and those who serve research or teaching purposes.

Belgium and Luxembourg are still to enact further decrees, which are expected to provide an exemption for certain categories of establishments.

Lending objects

The optional derogations from the lending right, under Article 5 of the Directive, have been used to varying degrees by Member States. A number of countries, when applying PLR, do not distinguish between the various objects of lending, such as books, videograms or phonograms (France, Germany, Austria), whereas some countries have provided an exclusive lending right for specific objects (with or without exempting libraries from payment). In some countries, the lending of cinematographic items is covered by an exclusive lending right (notably in Denmark, Finland and Sweden). In Italy, the exclusive lending right is granted for the lending of phonograms and videograms only for a period of 18 months after the first distribution. In Sweden and Denmark, an exclusive lending right is granted for the lending of CDROMs and films but only a remuneration right for books and in Sweden for tapes .

5. CONCLUSION

5.1. PLR and Internal Market aspects

Since the public lending right was one of the most debated issues during the negotiations on Directive 92/100/EEC, the degree of harmonisation agreed upon, at that time, represented an important step forward, but not necessarily the ultimate solution.

The ways in which most Member States have transposed the Directive represent an improvement compared to the protection afforded to public lending activities prior to the Directive. However, it is evident that only partial harmonisation has been achieved and the legislative measures applied by Member States still vary to a large extent. Not all Member States have changed their law and some have only made minor changes as these Member States claim that their existing rules comply with the obligations of the Directive. It is therefore far from obvious that all Member States have complied with their minimum obligations under Article 5, notably to provide at least authors with remuneration for the lending of their works by certain public establishments.

As regards the relatively low degree of harmonisation of the PLR by the Directive, the Commission has no clear indications, at least as for now, that this has had a significantly negative impact either on the economic interests of rightholders or the proper functioning of the Internal Market.

The Commission has, however, recently received some elements of information about possible problems of implementation at national level and about certain obstacles to the functioning of the Internal Market which may stem from the relatively low degree of harmonisation. It is examining these concerns closely, also taking due account of the recent amendments to the respective laws prepared at national level, at least in some Member States. The fairly limited number of concerns raised at the present stage should not be taken as a sign of complacency. In compliance with its role as guardian of the Treaties, the Commission is committed to ensure that 7 years after the transposition deadline, the PLR should be fully effective in all Member States.

5.2. Perspectives

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.

The use of new technologies in public libraries is still in an experimental phase. 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