

**Re: Consultation on the Extension of Public Lending Right to Rights Holders of Books in Non-print Formats
Response from British Equity Collecting Society Limited**

September 2009

Introduction

BECS represents the interests of its members (over 23,000 actors and other performers) in the negotiation and administration of performers' remuneration.

BECS works for the benefit of "Performers"¹. In this context the mandates given to BECS apply to performances given by members whether they are fixed in audio or audiovisual recordings. Such recordings would therefore include narration for audio books.

Rights administered via agreements with other European collecting societies include the rental, private copying, cable retransmission and communication to the public rights.

BECS works to secure and distribute revenues to performers that recognise the value of performances within the increasingly diverse services now being developed through advances in technology in the digital age.

As part of this work, BECS and ALCS jointly established The Authors' and Performers' Lending Agency Limited (APLA). The objects of APLA include representing the interests of its members for the licensing of lending to the public copies of literary, dramatic, musical and artistic works, sound recordings and films.

In particular, APLA was established with a view to the company operating licensing schemes including a licence scheme for the purposes of Section 66 Copyright, Designs and Patents Act 1988 (CDPA) and a licence scheme for the purposes of paragraph 14A of Schedule 2 CDPA. However, if the licensing arrangements can be achieved through an extension of PLR for hard copy audio books, BECS would support this.

This submission from BECS therefore concentrates in responding to the consultation from the perspective of performers whose performances are included or fixed in the formats relevant to the Consultation.

In addition BECS notes that the Consultation is currently linked to the Digital Britain legislative programme. If it does not prove possible to take forward the proposals within the Digital Economy Bill, BECS looks forward to working with DCMS to take forward the issues supported in this response by other means.

¹ This expression is defined by BECS' constitution. It covers actors, singers, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary, dramatic or musical works or otherwise perform in any way other than musicians.

Existing “lending rights” for Performers

The lending rights recognised for performers under section 182C – CDPA are important to performers. The right to consent to “lending” to the public copies of a recording which includes a performance is important to ensure that performers are in a position to secure reward from the lending of their works.

However, in practice, when recordings are made comprising narration for audio books, it has proved difficult for performers to assert the lending rights in their works against the publishers who commission the making of a recording, before the recording is sold to a “public library” for subsequent lending.

The level of “lending” for a particular recording is often difficult to anticipate in advance of a library holding a recording for rental.

This has led to some contracts under which performers are engaged to record performances, failing to specifically address the consents necessary for authorising lending of the performers’ work.

Where specific consent is secured, any provision for payment in return for the consent is frequently general in its terms. In other words, general wording is relied upon in an attempt to “sweep up” consents for lending.

Rarely is detailed provision made for specific payments to be made for the “lending” of an audio book recording by “public libraries” (as they are defined by s 178 CDPA).

In the case of recordings involving narration for audio books, this has led to a system of recognition of rights without reward for the rights owner.

This is despite the fact that sales of audio books to libraries comprise a significant part of the overall sales market for audio books.

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.

BECS believes that there is a case for extending “books” relevant to the PLR Scheme to include the loan of physical format “hard copy” audio books which are lent for a maximum period and physically returned.

The loan of such hard copy audio books is now a well established part of library business. PLR are able to provide figures for the most borrowed audio books. DCMS is referred to the list of the most borrowed audio books between July 2007 and June 2008 (as supplied by PLR). Despite this monitoring, at present, PLR fails to recognise this new area of business.

Authors and narrators are therefore reliant upon a chain of contractual arrangements (between libraries and retailers/wholesalers , retailers/wholesalers and publishers, publishers and authors and publishers and narrators to secure equitable remuneration from the lending of such hard copy audio books.

Please see response to question 2 below concerning other formats.

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.

BECS believes that extension to cover soft copy audio books and E-books may be premature because:-

- (a) the lending of such formats by libraries is still a fairly new phenomenon and subject to a number of licensed pilot projects;
- (b) the nature of the use by libraries may not fall within the definition of “lending” contained in s 182C (2) (b) CDPA namely :-
“lending” means making a copy of a recording available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic commercial advantage, through an establishment which is accessible to the public”; and
- (c) PLR should not erode the right for performers to secure equitable or other remuneration from the exercise of exclusive rights to consent to making available a recording of their performance to the public under s 182CA – CDPA.

Article 6 of Directive 2006/115/EC on rental rights and lending right and on certain rights related to copyright in the field of intellectual property (codified version) is referred to in the Consultation Paper.

It is important to recognise that the derogation permitted for public lending within Article 6 is contingent upon “authors” obtaining remuneration for such lending.

When considering the role of “performers”, the distinctions between

- (a) rental
- (b) lending; and
- (c) communication to the public of commercially published sound recordings in ways when a performer is entitled to receive equitable remuneration from the owner of copyright in the sound recording need to be preserved to ensure that the different “routes” by which performers are currently paid “equitable remuneration” are properly taken into account and not unintentionally overruled.

If this is done, BECS submits that this will highlight the failure of the current law to practically enable performers who narrate audio books which are lent by public libraries to receive “equitable remuneration” for such lending. The proven inefficiency in the current system is therefore currently fairly narrow.

However, it is an inefficiency which can be addressed if additional PLR finds are identified for allocation to narrators whose performances are included in hard copy audio books lent by public libraries.

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.

The concept of “lending” needs to be distinguished from “communicated to the public” in terms of copyright law.

Article 2.1 (b) of the codified Rental and Lending Directive (Directive 2006/115/EC) includes the following definition of “lending”:-

“lending” means making available for use, for a limited period of time and not for direct or indirect economic commercial advantage, when it is made through establishments which are accessible to the public.

However, the concept of “communication to the public” is recognised under Article 3 of the European Copyright Directive². This provides for rights owners to have the exclusive rights to authorise or prohibit any communication to the public of their works, by wire or wireless means, **including** the making available to the public or their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Section 20 (2) CDPA provides that (for the purposes of the CDPA) references to “communication to the public” are to communication to the public by electronic transmission, and in relation to a work include:-

- (a) the broadcasting of the work
- (b) the making available to the public by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them”.

BECS submits that the methods described in paragraph 19 of the Consultation Paper need to be assessed to decide if the activity involves any “electronic transmission” that would amount to a communication to the public.

The Consultation Paper suggests that “lending” might involve “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”.

If this activity involves a library user (as a member of the public) requesting that a library makes available a digital book (from a “remote” place individually chosen by the user) this may then involve a library “communicating works to the public” in copyright terms.

It is submitted that it would be inappropriate for PLR to extend to replace any exclusive rights that performers may have to consent to the “communication to the public” in the form of making available on demand any recordings of performances

² Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

relevant to the rights recognised under section 182CA(1) CPDA.

In addition when audio books comprise commercially published sound recordings to which section 182D – CDPA applies, PLR should not extend to or replace the right of performers to receive equitable remuneration from the “communication to the public” of their work in ways other than “making available to the public as provided by section 182CA(1).

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?

In considering the possible extension of PLR, BECS would submit that the current definition of “eligible book” under Article 6 of the Public Lending Rights Scheme should remain the core definition against which any changes should be justified.

The exclusions from the definition of “eligible book” under Article 6 (2) will remain important.

These exclusions cover

- (a) publications by companies or unincorporated associations (when the authors name is not specified)
- (b) musical scores
- (c) books where copyright is vested in the Crown
- (d) books which have not been offered for sale to the public
- (e) serial publications, including newspapers, magazines, journals or periodicals; and
- (f) books without International Standard Book Numbers.

Whilst the ISBN exclusion may need review, it is submitted that the other exclusions will remain important to avoid confusion between the exclusive rights of owners involved in such works and the application of PLR.

Since PLR was established for the benefit of “authors” it is submitted that it would be inappropriate for the expansion of PLR to attempt to cover the rights of “producers” of audio books.

In effect the “producers” of audio books are likely to be the owners of the sound recording within which the narrators’ performance(s) are fixed. However, the way in which copies of audio books are sold or licensed to libraries in hard copy formats is similar to the way in which print copies are sold or licensed. For this reason the producers of audio book “sound recordings” would seem to be in the same market position as the publishers of books for the purposes of agreeing terms for the provision of the “books” to libraries.

However, for the “market failure” reasons described above, BECS believes that there is a case for the narrators or audio books which are lent by public libraries in physical formats to be eligible to receive PLR payments as equitable remuneration for the lending of their performances. This would involve a relatively modest change to the definition of “Authors” under Article 4 of the Public Lending Right Scheme.

If this limited addition to the “authors” covered by PLR was considered, it is important that money available through PLR is increased to enable the rights of new “authors” of physical copies of audio books lent by libraries to be properly compensated.

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?

In practice, most contracts for narrators to contribute to audio books provide for the performer to consent to “lending” of copies of their work. However, some do not. It is quite common for the consent to be swept up in general consent clauses without any proper regard to equitable remuneration being paid to the narrator as a result of the subsequent lending of copies of the performance of the narrator.

This creates an unreasonable market failure which could be addressed by including narrators of audio books as “eligible authors” for the purposes of the application of PLR when physical copies of audio books are genuinely “lent” by public libraries (as opposed to copies being communicated to the public by libraries by means of any electronic transmission).

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?

Yes – in BECS’ view the lending rights of performers who contribute to audio-books are currently less effective than they should be due to the market failure reasons described above.

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

There are inefficiencies in the current system which could be corrected by making the relatively minor change described in this response.

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.

BECS would submit that it would be inappropriate for the “publishers” of audio books to become entitled to PLR payments (since this would create an imbalance with the publishers of other “eligible books” relevant to PLR).

However, the inclusion of “narrators” and “authors” of audio books as “eligible authors” for PLR payments will create greater confidence and certainty for publishers in providing copies of audio books to libraries for subsequent lending. Existing uncertainties about the underlying rights position which may currently affect the way in which publishers approach providing copies of audio books to libraries, would be removed.

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?

Yes in the limited case of hard copy audio books and in respect of authors and narrators relevant to such audio books only.

BECS believes that a limited expansion of PLR to cover the narrators of audio books and the authors of such books will deal with current market failure to respect lending rights of these rights owners.

The change would then provide greater confidence and transparency for the application of contractual arrangements around the expanded PLR provision.

If the change is facilitated through an enabling provision included in the Digital Economy Bill, it is noted that this may provide suitable flexibility for further adaptation of PLR in respect of genuine “lending” of books by public libraries in future digital formats.

However care will be needed to distinguish the lending rights of performers applicable specifically to narrators of audio books from the lending rights of performers when performances are fixed in sound recordings or films that **are not** relevant to audio books.

Any enabling provision would need to preserve and operate without prejudice to the (non commercial) lending rights of performers whose performances are fixed in sound recordings or films which would not (as formats) be equated with “books” envisaged by the Public Lending Right Act 1979.

At present licensing arrangements are put in place for libraries to secure copies of certain music sound recordings and films for subsequent lending. Section 182C Copyright Designs and Patents Act 1988 recognises that a performer’s rights would be infringed in rental of such sound recordings or films took place without the consent of the performer(s).

In BECS’ view application of PLR to any performances fixed in such additional sound recordings or films would require further consultation to ensure that the “market failure” operating with respect to recognition of the lending rights of narrators of hard copy audio books is relevant for any such additional formats.

In any event it will be important that any PLR extension does not remove any exclusive rights of performers to authorise the making available of their performances by means of electronic transmission “on demand”.

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