



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

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# Introduction

The Authors' Licensing and Collecting Society Limited ('ALCS') is the UK collecting society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 68,000), ALCS is a not-for-profit, non-union organisation. The Society's governing body, the Board of Directors, is composed of elected writers. Since its foundation, ALCS has paid writers over £200 million in fees and today it continues to identify and develop new sources of income for writers.

Originally incorporated as the Authors Lending and Copyright Society Limited, ALCS was founded to ensure that UK authors could receive fees due to them under the German library lending scheme, while helping writers campaign for an equivalent right in the United Kingdom. As other European territories have implemented schemes to recognise an author's right to lending remuneration, ALCS has put in place the necessary arrangements to collect and distribute these fees to UK authors. ALCS currently has agreements with the operators of lending schemes in Germany, Austria, the Netherlands, Belgium, France and Spain. We anticipate concluding similar arrangements for Italy and Ireland later this year. Through the European Writers Congress and PLR International ALCS supports efforts to develop and establish further lending schemes in Europe and beyond. To date ALCS has distributed over £7m of overseas lending remuneration to UK writers.

ALCS has been represented on the PLR Advisory Committee from its very outset, offering advice and support on the development of PLR policy, and helping the scheme expand to cover new areas of contribution such as those from translators and illustrators.

Through the All Party Parliamentary Writers Group ALCS has been active in supporting a review of the current PLR system to investigate what extensions, if any, may be appropriate to take account of changes in book lending by libraries in the digital age.

We note that the present review is linked to the Digital Britain legislative programme. If it should not prove possible to carry out this review as part of this process, we look forward to working with DCMS to ensure that the review is delivered by other means.

## 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.**

It seems inevitable that digital production trends for writer's works will over time result in more titles being distributed in non-print formats in libraries. It is important from the start of this review to recognise the role played by the existing PLR regime in remunerating authors when formulating any policy for its expansion.

The scheme acknowledges the social value of providing free access to books through public libraries and balances this with a reward for the writers and other contributors of those works. Although this remuneration – and the efficient way in which it is administered – is greatly appreciated by writers, the relatively modest returns involved reflect the limited, non-commercial uses involved. Library lending (and the associated remuneration provided by PLR) has never sought to provide direct competition for the commercial sales market upon which authors rely for their primary income.

With this in mind we suggest that the appropriateness of PLR as a means to remunerating authors for new formats does to a large degree depend on the formats in question. We will consider each in turn.

Audiobooks (hardcopy). Following the UK implementation of the Rental and Lending Directive, in conjunction with the British Equity Collecting Society (BECS), ALCS set up the Authors' and Performers' Lending Agency (APLA). The formation of APLA was premised on the understanding that the PLR Scheme would not be expanded to cover the lending of audiobooks and therefore aimed to offer a 'one-stop' licensing solution to library authorities to account for the remuneration for 'non-PLR' lending rights, envisaged by the Copyright Designs and Patents Act (CDPA). Almost ten years has passed since the formation of APLA during which time it has been engaged in frustrating tripartite discussions with DCMS and the IPO in trying to secure support for such a scheme. Throughout this period audiobooks have been lent in libraries without remuneration for authors or performers, despite the fact that most libraries charge for access to these works.

This lending activity for this format is now well established and evidenced by the loans figures quoted in the consultation document. We would therefore support strongly an extension to the Scheme to cover remuneration for the lending of physical copies of audiobooks.

Audiobooks (digital format). The principle of rewarding authors for the use of their works applies equally as for hard copies, but the question of how this remuneration is secured in a digital-use environment is perhaps less straightforward.

It may be that the future accessibility of certain audiobooks in libraries is achieved outside of the library lending framework and is therefore not suited to PLR. For example BBC Worldwide announced plans earlier this year to provide access to 1,500 titles from its audiobook collection to library users through the OverDrive distribution system, with

revenue generated from this service being shared between BBC Worldwide and OverDrive. In the normal course of events one would expect BBC Worldwide to account to the author for a contractual share of fees due under this distribution agreement.

In any event it is debatable whether such a quasi-commercial arrangement would even constitute 'lending', given the definition of this activity set out in the CDPA and Directive.

However if, through this review process, a definition of digital library lending could be formulated for the purposes of the PLR Scheme that effectively re-stated the principles that underpin the lending of hard copies of books - a copy of a work lawfully acquired by a public library, where limited access at any one time was granted to library users on a strictly non-commercial basis with a payment going to the author - we would support the extension of PLR payments to digital audiobooks.

E-books. With e-books, similar issues arise for the digital lending of audiobooks. We support remuneration models for library access but it is unclear at this time quite how they will develop. For example The Bloomsbury Library Online project will allow libraries to buy subscriptions to virtual shelves of books from that publisher. Again one can see the development of a quasi-commercial arrangement whereby the library is effectively operating as the access point for digital content. In order for access to e-books to be suited to PLR remuneration we suggest that the criteria referred to above would need to apply.

For both e-books and digital formats of audiobooks various schemes are starting to emerge which will provide access to author's works through libraries. However it is not clear how quickly these schemes will develop, how many works they will include and the extent to which they will provide access as non-commercial loans as opposed to, for example, paid-for streams or downloads.

With this in mind we suggest that if PLR is expanded to cover digital formats it would be appropriate to allow for a level of flexibility in its application to ensure that authors can receive a fair level of remuneration commensurate with the arrangements under which their work is accessed. We believe this to be achievable and would be happy to discuss the detail of how this might work in practice as part of the second stage of this consultation process.

**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.**

Subject to our comments above regarding the need to separate out PLR lending rights from more commercial access schemes we agree with the scope of the additional formats. We assume that more detailed issues, such as how to expand the definition of 'a book' will be dealt as part of the further consultation on the changes to the Scheme.

As for concerns, with any digital access scheme the security of delivery methods and processes for monitoring usage are key issues. All rightsholders will no doubt seek assurances that access terms and technical measures will be sufficiently robust to ensure that a digital loans scheme was not open to abuse.

**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 extension as envisaged seems to hinge on the interplay between the PLR Scheme and the CDPA – the proposal is to extend the definition of books that are eligible under the Scheme, which in turn would expand the reach of the current exception granted to libraries under section 40A. However lending envisaged by the CDPA involves a library making a book available “on terms that it will or may be returned”. Clearly some of the uses described in paragraph 19 of the consultation document do not allow for a return of the work and so technically would not appear to be covered by the current section 40A. Clearly this will need to be addressed if digital extensions are to be taken forward. (One solution could be to replace the wording used to describe lending in the CDPA with the more flexible wording used by the Rental and Lending Directive, which talks of making a work available, “for a limited period of time”).

Another key element of the CDPA definition of lending is the non-commercial requirement. This may help to distinguish genuine lending situations (potentially covered by PLR and, by extension, section 40A) from new digital access models based around partnerships between libraries and commercial bodies. In light of the Berne three-step test it is vital that this distinction is clarified through this review process prior to any moves to extend the reach of section 40A.

The distinction between lending and other rights may be further clarified by the enhanced rights that e-book publishers/ audiobook producers offer when they make content available through libraries. For example the OverDrive system provides for a ‘Burn to CD’ option – a right to copy. By definition, commercial schemes for temporary access are more like rental rights which has implications in copyright terms for the management of remuneration rights. Similarly, download-to-own options may be offered. Even with more flexible definitions under the CDPA, we would not envisage this kind of activity being covered by lending/ the PLR Scheme.

However where genuine lending scenarios (as outlined in our answer to Question 1) do arise in respect of e-books/ digital audiobooks, PLR would be a valuable addition for authors.

**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?**

The original PLR legislation, the 1979 Act, sets out its intention to confer a remuneration right on the authors of books. To date this has meant writers, editors and illustrators. We can however see how the proposed extensions may be made in line with the wording of the original Act.

Although in copyright terms there is generally a distinction drawn between authors and performers this does not necessarily appear to require an amendment to the 1979 Act. The Scheme established in 1982 under the powers granted by the 1979 Act defines ‘authors’, not by reference to copyright law, but to the extent that they are eligible for payment under the Scheme. In this way Article 4 of the Scheme talks of persons “treated as an author of a book for the purpose of this Scheme.”

As for the producers of audiobooks we understand the reasoning behind their inclusion in this discussion on an expanded PLR Scheme, as CDPA considers the producer as the ‘author’ of the sound recording and, as such, their exclusive lending rights would theoretically be affected if the section 40A exception was extended to cover audiobooks.

However the CDPA also defines the sound recording producer as “the person by whom the arrangements necessary for the making of the sound recording are undertaken.” It may be that in most cases this may effectively mean an employed or freelance producer working under contract for a commercial publishing organisation under terms that vests the copyright in the sound recording in that organisation.

The consultation document notes that the intention behind the proposed extension to new formats is to recognise rightsholders who “contribute creatively to their production”. In the above example the rightsholders in question are in fact the audiobook publishers who contribute economically to the production of the work and receive returns on a quite different basis from the underlying creative contributors that PLR has historically sought to remunerate.

On that basis we believe that the extension to audiobooks, if sanctioned, should reflect this in the apportionment of PLR fees. Clearly this is a level of detail that can be addressed in the further consultation process.

**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?**

As ALCS only represents writers we will leave colleagues from bodies representing performers and producers to respond on this point.

**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?**

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

In terms of hard copies of audiobooks it is our understanding that, while an author's publishing contract will provide for a royalty payment for sales of the audiobook to a library, they do not generally deal with the rights and payments relevant to the subsequent lending of that audiobook by the library. It is for this reason that ALCS together with BECS set up APLA to offer a simple collective licensing solution and collect this unpaid remuneration. If this can be achieved through an extension of PLR for hard copy audiobooks, we support this fully.

For digital access, as already stated, the flexibility of delivery methods and gradual emergence of new business models makes the position less straightforward. Commercial distribution arrangements (even where a public library is acting as the point of access) are likely to trigger contractual remuneration mechanisms in respect of various 'non-lending' rights. However where genuine lending scenarios arise for digital works, we feel that the author should have the ability to register for PLR to secure a level of remuneration for that lending.

**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.**

**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?**

While a blanket application of the PLR scheme to non-print works will ensure "certainty of payment and protection of rights", it may not achieve the necessary balance in terms of providing a fair level of remuneration for authors. As already discussed there are uncertainties over how the models by which books in digital forms will be accessed through libraries will develop.

In some cases works may be subject to new arrangements set up by third parties - such as the BBC Worldwide audiobooks project or the Bloomsbury Library Project - which may go beyond lending rights (being more commercial in nature) and offer authors certainty of remuneration through contractual terms.

Equally certain works may not be included in these new third party access arrangements but will nonetheless be acquired legitimately by libraries and offered on a non-commercial basis to the public as digital loans as part of the expanding services offered. It is important

that a system is available to allow libraries to carry out these activities within a framework that enables authors to receive lending remuneration.

We would hope that through this review of PLR a system could be developed that was able to cope with both scenarios. We suggest that this requires a level of flexibility in the way that PLR operates in relation to the lending of works in digital formats and look forward to discussing with DCMS how this might be achieved through the further consultation process.

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