

# The Society of Authors

*"New media and new forms of buying and lending are all very interesting, for all kinds of reasons, but one principle remains unchanged: authors must be paid fairly for their work. Any arrangement that doesn't acknowledge that principle is a bad one, and needs to be changed. That is our whole argument."* Philip Pullman, President-elect of the Society of Authors.

*"Authors are keen to embrace the opportunities offered by digital publishing and want to support libraries by offering their eBooks for lending. However, we need to ensure that authors are paid sufficient money from digital to enable them to keep writing. The Society of Authors advises authors to continue to press for a fair share of eBook royalties and to check their royalty statements to make sure that publishing contracts are being interpreted correctly and that they are paid all amounts due."* Anne Sebba, Chair of the Society's Management Committee

## Briefing note on PLR and Royalties from Library lending

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# The Society of Authors' Briefing note on PLR and Royalties from Library lending

## Introduction

The Society of Authors exists to protect the rights and further the interests of authors. The Society was founded in 1884 and today has over 9,000 members writing in all areas of the profession (from novelists to doctors, textbook writers to ghost writers, broadcasters to academics, illustrators to translators). Authors are eligible to join if they have been offered a contract from an independent publisher, broadcaster or agent, or have sold over 300 copies of a self-published book or 500 copies of an ebook.

## Findings

- 1 The Society of Authors welcomes the recommendations of William Sieghart's thoughtful Independent Review of E-Lending in Public Libraries in England which supports a sensible balance between the needs and interests of readers, libraries, publishers and authors allowing libraries to flourish and continue to service the public while giving fair remuneration to authors.
- 2 The Society will fully engage with all discussions and proposed pilot schemes in the hope of identifying sustainable models for lending.
- 3 The Society has become increasingly concerned that the rhetoric of publishers (and sometimes Government) about remuneration for authors from lending is not matched by practice. In particular the Society is concerned that current and proposed models may leave authors with a far smaller share of remuneration from the loan of an ebook than they currently obtain from the loan of a physical book:
  - a. Some publishers using aggregators (notably Bloomsbury and Random House) treat all receipts as sales when accounting to authors, and are therefore paying authors a lower share of net receipts than if the transaction were characterised as licensing. In our view this may be a mistaken interpretation of their contractual terms.
  - b. Authors are not being paid PLR on ebook loans and are sometimes not being paid by publishers for the exercise of their rental/making available rights.
  - c. Lending may be more expensive for libraries than physical lending. Libraries need sufficient funding to update, maintain and augment stock and ensure that an exciting and comprehensive range of books are available for reference and loan.

## Recommendations

We urge library authorities, Government and publishers to ensure that authors receive fair remuneration. In particular the Society recommends:

- 1 Publishers should accept that current models for ebook lending through aggregators are contractually sub-licences, not sales; and remunerate authors in line with their contractual obligations for both the "sale" and the "lending" aspect of the transaction.
- 2 The Society is writing to all trade publishers requesting that they account correctly to authors; and is advising authors and their agents to check publishing contracts and royalty statements and insist on reimbursement plus interest if they find that royalty rates have mistakenly been applied incorrectly.
- 3 Future publishing contracts should state clearly what rights are being granted and what rate is to be applied to licences for ebook lending.

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- 4 Any models for lending should remunerate authors per loan as well as for the “sale” of the ebook.
- 5 An author’s receipts from ebook lending should equate to the total earnings the author would have received on a physical copy over the lifetime of the book from the combination of royalties on sale and PLR on every loan.
- 6 The provisions in the Digital Economy Act 2010 that extend PLR to audio books and loans of on-site ebooks should be enacted without further delay .The overall PLR pot should be increased to recognise the higher number of loans. The failure to enact these provisions to date is patently unjust and a breach of the UK’s obligations under the Rental and Lending Directive (2006/115/EC).
- 7 PLR should be extended to volunteer libraries.
- 8 If it does not prove possible to remunerate authors fully via licensing models, further legislative changes should be made to extend PLR to remote e-loans.

## The Society of Authors' Briefing note on PLR and Royalties from Library lending

Members of the Society are concerned about libraries, as suppliers of books and library content and as heavy users of libraries both for reading for pleasure and for research. They are strong supporters of libraries and believe that a comprehensive and efficient library service for the 21<sup>st</sup> Century must allow free access to physical books in safe, comfortable, convenient and accessible space. Libraries must be knowledgeably managed and curated by trained professional staff. Continuing library cuts and closures will have a devastating, long-lasting and irreparable effect on local communities as well as on the wider community and the nation.

Libraries need sufficient funding to update, maintain and augment stock and ensure that an exciting and comprehensive range of books are available for reference and loan. Books, whether physical or digital, must be at the core of a library. Libraries see access to ebooks as an important part of their offering. This is to be encouraged- but a number of factors lead authors to be concerned that elending may lead to lower remuneration than equivalent lending of physical work. This is not a purely self-interested point. There is a risk that ebooks have the potential to undermine the perceived value of books generally to a point below which researching, writing and publishing certain works ceases to be commercially viable. The risk is even higher with elending.

### **1 Library Costs and range**

- 1.1. The cost to the library of offering ebooks is not only the cost of the book itself but the cost of buying appropriate hosting services and maintaining websites. If websites are to be relevant and provide a useful service to readers, particularly remote readers who will not have access to real librarians, they will have to be constantly updated. This is expensive. At present there are 151 separately managed library authorities in England alone. Each library authority hosts and curates its own website which leads to unnecessary duplication and staff costs. Already, only a very small proportion (around a tenth) of all the public money received by libraries is actually spent on books (including ebooks); and in many authorities this amount is being further cut to deliver savings. We are also concerned that libraries may spend vast amounts of money on systems which may be obsolete in a few years.
- 1.2. Most libraries do not “buy” ebooks directly from publishers but use aggregators who host the books and make them available. This leads to a further level of provider who needs to make a profit before the author sees any share of income.
- 1.3. A centralised elending service, may provide economies of scale but has drawbacks: in particular, a centralised service may mean that librarians are unable to take into account the needs and preferences of their own area, leading to an undesirable homogenisation of book stock, with particularly detrimental impact on books by local authors or of local interest-books which PLR records confirm are very popular with library users.

### **2. Public Lending Right (“PLR”)**

- 2.1. The Rental and Lending Directive creates a "rental and lending right" under which authors have the exclusive right, subject to limitations, to authorise or prohibit the rental or lending of their works [Art. 2(1)]. The rental and lending right may be transferred. However, even once the rental and lending right is transferred, authors retain an inalienable and unwaivable right to equitable remuneration for the rental and lending of their works.
- 2.2. The PLR scheme provides authors with a modest payment each time one of their books is borrowed from a public library. PLR is designed to balance the social need for free public access to books against an author's right to be remunerated for the use of their work. PLR is

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particularly important to authors whose books are sold mainly to libraries and to those whose books are no longer in print but are still being read.

- 2.3. Press coverage tends to focus on a few successful authors, yet most struggle to make ends meet. PLR provides a significant and much-valued part of many authors' incomes. It amounts to a total of around £6,000,000 per year. Although figures are difficult to come by, it is estimated that the total amount received by authors from sales of their books to libraries is around £3,000,000 per year so the total amount that authors receive each year from library lending of physical books may be around £9,000,000.
- 2.4. S 43 of the Digital Economy Act 2010 extends PLR to audiobooks and ebooks "lent out" from library premises for a limited time, but these provisions have never been implemented. The Government says in its response to the Sieghart Review: *"In the challenging economic climate it has not been possible to date to bring those provisions into force"*. This is patently unjust. Authors have a right to payments for such loans and the Government should not fail in its obligations on economic grounds. The Government also said *"The evidence received by William Sieghart and his Panel suggests that the number of these loans is increasing. The challenging economic climate continues, but Government will consider commencing the appropriate provisions of the DEA 2010 to extend PLR to audio, e-audio and e-books."* We urge that this provision be brought into force immediately and that extra funds be made available to cover PLR payments for such lending. We have been in long correspondence with DCMS on this subject and in relation to lending from volunteer libraries (which is likewise excluded from PLR), but the Government remains in breach of its obligations under the Directive. We are very pleased to note that the Sieghart review recommended that these provisions be effected without further delay and the overall PLR pot should be increased to recognise the increase in rights holders
- 2.5. The amendments in section 43 of the Digital Economy Act 2010 only extend PLR to audiobook and ebook files downloaded within the library premises. This is because DCMS takes the view that, as a matter of copyright law, downloading from outside library premises may constitute "communication to the public" rather than "lending". It is arguable that this view is incorrect:<sup>1</sup> However whether elending is technically "lending" or "communication"

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<sup>1</sup> 1. Recital 10 of the Directive says *"(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."* There is no exclusion there for remote lending.

2. Lending is defined as *"1(b) "lending" means 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"*

3. This wording is echoed in the Copyright, Designs and Patents Act 1988 18A 2b *"(b)"lending" means 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."*

but adds: *"(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".*

4. S20 defines infringement by communication to the public.

*"(1) The communication to the public of the work is an act restricted by the copyright in—*

*(a) a literary, dramatic, musical or artistic work, .*

*(b) a sound recording or film, or .*

*(c) a broadcast. .*

*(2) References in this Part 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 of the work 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."*

5 These provisions are distinctly unclear but

5.1. When considering *"when it is made through establishments which are accessible to the public"*, there is no obvious reason for reading *"through"* as suggesting that it only includes physical attendance at a library. Remote borrowing is also carried out *"through"* a library.

5.2. It strains 20 (2)(b) to read it as including downloading of ebooks although it may do. It derives from Art 3 of the Copyright Directive.

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there is at present no statutory entitlement for authors to receive PLR from ebook lending, and authors are therefore losing around 2/3 of the income they would normally receive from physical library lending.

- 2.6. This of course has the corollary that there is no statutory entitlement for libraries to lend ebooks to the public unless licensed by the author or the author's licensee (usually the publisher). Authors will not be willing to permit such loans unless they are properly recompensed (either by the publisher or PLR) by a per-loan (lending/making available) element as well as a licence fee in line with the legal principle that lending or making available are separate rights from the right to sell the work and that authors are entitled to equitable remuneration in respect of them.

### 3. Copyright Exceptions

Whatever frameworks might be developed for lending ebooks, libraries should only be entitled to loan out a work if authors receive equitable remuneration. We understand that there is a suggestion by libraries that lending of ebooks by libraries should be made a statutory exception to copyright with no provision for remunerating authors. Such a change would be unacceptable as it would not comply with the "Three Step Test" which holds that copyright exceptions can only be allowed:

- 1) in certain special cases
- 2) that do not conflict with a normal exploitation of the work and
- 3) do not unreasonably prejudice the legitimate interests of the author.

Library lending would clearly conflict with the normal exploitation of the work (by threatening book sales) and would prejudice the legitimate interests of the author, since the author would not be remunerated.

### 4. Publishers' Accounting Methods

- 4.1. The Society is concerned that some publishers may inadvertently be remunerating authors incorrectly for ebook library loans. There are a number of models for supply of ebooks to libraries, and publishers are understandably reluctant to disclose their business models. However, a very common model is for a publisher to allow an aggregator such as OverDrive to host works on OverDrive's website which enters into agreements with libraries to make those works available to the public. Those agreements commonly contain what the Sieghart Review called "frictions" saying *"The interests of publishers and booksellers must be protected by building in frictions that set 21st-century versions of the limits to supply which are inherent in the physical loans market (and where possible, opportunities for purchase should be encouraged). These frictions include the lending of each digital copy to one reader at a time, that digital books could be securely removed after lending and that digital books would deteriorate after a number of loans. The exact nature of these frictions should evolve over time to accommodate changes in technology and the market."*

- 4.2. The Society recently wrote to all trade publishers asking the following *"We note from OverDrive's submission to the Sieghart review that in the ten months to November 2012 it made 576,125 loans of ebooks through British libraries: The feedback we are receiving from our members (in all genres) is that they are finding it difficult to identify any income from that source in their royalty statements. We would expect to see any such licensing clearly identified and paid for. In particular, we would expect to see any such income accounted separately from ebook sales as, if granted at all, such licences would usually be subsidiary rights and would typically attract a higher*

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*share of royalties than ebook sales. I am therefore writing to the chief executives of trade publishers in order to seek reassurance for authors that all such income is being properly accounted and paid.*

*I would be very grateful if you would let us know the following:*

- 1 *Do you license ebook rights to OverDrive or any other aggregator for library use?*
- 2 *Do you seek specific permission from authors for such licences?*
- 3 *How do you account to authors for the proceeds from such licences and how do you divide the proceeds between different authors?*
- 4 *Are authors remunerated on a rate per loan basis or an overall licence fee?*
- 5 *Please send us a typical royalty statement showing how such payments are identified."*

**4.3.** The responses are not yet complete but early indications suggest that some publishers using aggregators treat all receipts as sales when accounting to authors, thus inadvertently paying authors a lower share of net receipts than if the transaction were characterised as licensing. This is a surprising interpretation given the statements of various stakeholders in their evidence to the Sieghart review all of which suggest that the model is a licence rather than a sale:

**4.3.1.** Publishers Association *"It should be noted that one of the key benefits of the commercial models already in existence is that publisher and author remunerations come through clearly articulated and guaranteed licence agreements."*

**4.3.2.** OverDrive *"For each library system to which OverDrive supplies eBooks and its lending services, the library is required to purchase the rights to each eBook unit or copy it offers for lending. OverDrive acquires the permission to enable remote eBook library and school lending as a result of distribution agreements it has entered into with more than 260 UK publishers and over 1,000 publishers from the US, Canada, Australia and the rest of the world. OverDrive's remote eBook lending catalogue for libraries includes titles in every genre of publishing including popular adult fiction, non-fiction, reference, children's, young adult, career, educational, and professional materials. For each eBook title in every UK public library's catalog, **OverDrive has paid the publishers, agents and authors, all amounts due under the terms of OverDrive's library lending and distribution agreements.**"*

**4.3.3.** **Society of Chief Librarians** Position on ebook lending in libraries April 2012

*"1) Licensing models It is essential that public libraries respect the licensing models that e-book suppliers (by this term we mean the aggregators who act as intermediaries between publishers and library authorities) sign up to with publishers and it is important that the way these work are transparently clear to all"*

**4.3.4.** **CILIP " Appendix B Models**

*Aggregators*

*Aggregators such as, EBSCOhost, Credo, Bloomsbury, EBL (EBook Library), ebrary, NetLibrary and OverDrive supply content from a range of different publishers. Unlike vendors who sell content on behalf of publishers, aggregators license content from them and sell directly to libraries, hosting the ebooks on their own platform rather than the publisher's website.*

*Business models*

*Several different business models have been developed: some key elements and options are summarised below:*

*Purchasing individual titles or packages*

*Individual titles can be acquired either directly or through library suppliers.*

*Many ebooks are also available in packages ("bundled") whereby they are grouped by subject (e.g. Palgrave Connect) or publication date (Springer Science+Business Media eBooks). In most cases the selection is made by the supplier (e.g. PsycBooks from the American Psychological Association) whilst in other cases the supplier offers the library a degree of choice (e.g. Credo Reference)*

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### *Outright purchase or subscription*

*If an ebook is purchased outright the library can theoretically retain indefinite access to the ebook. [Our emphasis] The price charged usually bears some relation to the price of the print version. There may also be an annual platform fee to cover ongoing hosting on the supplier's website.*

*Alternatively a subscription can be taken out whereby access is granted for a specific period. Prices are set according to subject area and the number of titles offered, and may also relate to the number of potential users (e.g. in HE to the size of the institution and the number of FTE students requiring access to the collection). Discounts are often given for multi-year deals.*

### *A credit system*

*Ebooks are purchased with a number of credits and each use (download or online) deducts a set amount of these credits (e.g. Dawsonera). Once the credits run down to zero the library has to purchase another copy.*

### *Rental*

*Some companies offer the option for short-term rental of individual ebooks (e.g. EBL Rental). If the user sees a title that is not owned by the library, they can request rental. The library pays a fee and the user is granted temporary access. This model is broadly equivalent to interlibrary loan"*

- 4.4. Author contracts vary but those we have analysed suggest that the assertion that receipts from aggregators for library ebook lending should be categorised as sales is difficult to sustain on close interpretation of the contractual wording and is likely to be mistaken.
- 4.5. While all ebook "sales" are in fact licences in law, recent judicial comment in cases like "Meltwater" and "Usedsoft" suggests that time limited and conditional sales such as these are likely to be treated as analogous to licences, while a model where a consumer is given a perpetual (though personal) licence is more likely to be seen as a sale (with the attendant risk that a court may seek to apply the principle of exhaustion of rights).
- 4.6. Further, in addition to any licence/sale, the publisher is also granting the aggregator a licence of the author's right of rental/making available:
  - 4.6.1. In many contracts the publisher does not have these rights at all;
  - 4.6.2. In some contracts the publisher has the rights but can only exercise them with the author's consent;
  - 4.6.3. In some contracts the publisher is entitled to sub-license these rights but at a higher share of net receipts for the authorDespite this, publishers do not always ask the author's permission, and often mistakenly license these rights as if they were sales.
- 4.7. It should be noted that when physical books are lent by libraries authors receive their PLR payments with no share going to publishers, but publishers are now routinely claiming 75 per cent of the proceeds of ebook lending. This is unfair and does not lead to equitable remuneration for the author.
- 4.8. The Society is writing to all trade publishers requesting that they account correctly to authors; and is advising authors and their agents to check royalty statements and insist on reimbursement plus interest if they find that royalty rates have been inadvertently applied incorrectly.
- 4.9. Future publishing contracts should clearly state what rate is to be applied to licences for ebook lending, and that rate should equate to the earnings an author would have received on a physical copy from the combination of PLR and sale royalty. Authors will be reluctant to license these rights if publishers continue to offer artificially low royalties for them.

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### CONCLUSION

Authors' incomes continue to be squeezed: advances have fallen while more unpaid work is expected of authors in marketing and publicising their work, including appearances and use of social media. In a survey in 2006, ALCS concluded that writing is a very risky profession with median earnings of around £12,000 for "professional" authors and around £4,000 for all authors, less than one quarter of the typical wage of a UK employee. Benchmarking the results against the Society's survey, reported in 2000, indicates that the earnings of a typical author are deteriorating in real terms. This trend is continuing. Authors need to earn reasonable amounts from the considerable effort put into writing in order to continue producing inspiring and informative books (in whatever format) in all genres.

Authors would be happy with any method of remuneration for ebook lending which ensures they receive payment which fairly remunerates them for the initial "purchase" of the ebook and for individual loans. Publishers should be free to negotiate with libraries to agree favourable and appropriate terms. Different models may work in different circumstances. However, any model proposed should be carefully tested by authors, publishers and bookshops, and its impact evaluated before introduction to ensure that the rightsholders' interests and bookshop sales are not adversely affected.<sup>2</sup>

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<sup>2</sup> Definitions

For the purposes of this paper we have used the following definitions:

"Ebook": a digital copy of a printed book that embodies the verbatim text or text plus illustrations (if there is no printed volume form book, a work in digital form), for reading and including text-to-speech functionality but without other audio or visual components or enhancements.

"Electronic version": any digital version of a work other than as an ebook (including "apps" but excluding audiobooks, films, videos, television programmes or computer games).

"Library": a public library which a local authority considers to be part of its statutory library service as set out in the Public Libraries and Museums Act 1964 (this would exclude school libraries and some volunteer libraries);

"Lending" or "elending": making an ebook available to be read on an ereading device for a short and defined term by a library (technically this might amount to "lending", "rental" or "communication to the public" in copyright law).