Kluwer Copyright Blog

E-books and a public lending right: is it time for an update?

Rita Matulionyte (Macquarie Law School) · Friday, November 13th, 2015

E-book lending in public libraries (e-lending) and the need to extend the public lending right (PLR) to these practices has been discussed on several recent occasions. Following the Sieghart report on e-lending in 2013, the UK government has extended the PLR to e-book downloads occurring within the premises of UK libraries. In 2013-14 the Commission carried out a consultation on the Review of EU Copyright rules, with e-lending being one of the issues. This year the Dutch court referred a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) asking a number of questions related to e-lending, including the application of the PLR exception for e-books (C-174/15 *Vereniging Openbare Bibliotheken)*.

Updates from the PLR International Network

The PLR and e-books questions were discussed during the PLR International Network conference that was held on 24-25th September in The Hague. At the conference, Prof Dirk JG Visser presented on the case pending before the CJEU. As a representative of the libraries in the case, Prof. Visser speculated that the CJEU could (and should) find that the PLR, as implemented in the Rental and Lending Right Directive, applies to e-books, at least provided that the e-books are lent under a one-licence one-user model. He acknowledged that the historical interpretation of the Directive speaks against such a broad interpretation. However, he expressed the hope that the CJEU would follow the rationale underlying the *Usedsoft* decision and apply the technologically neutral approach to the PLR.

The UK government representative, Julia Eccleshare, provided an update on the UK PLR scheme for e-books. Currently it applies only to on-site lending, i.e. to e-books that are downloaded inside the premises of the library and the UK government is hesitant to extend the scheme to off-site downloads. This would trigger the making available right that is harmonised under the EU Information Society directive and therefore EU-level action would be needed. Initially, the UK government planned to push for such action at the EU level. However, more recently they have suggested searching for voluntary private stakeholder solutions on the issue. Keeping in mind the fairly conflicting relationship between UK publishers and libraries on e-lending, it will be interesting to see where such private party negotiation leads.

Even more interestingly, Annette Bach from the Danish PLR office explained that the Danish PLR office is recommending that the Danish government extends PLR payments to e-books as well. The government report in favour of the extension of the PLR scheme to e-books was issued in June 2015 and the corresponding legislation is expected in 2016. The speaker argued that it would be a

cultural support scheme and the measure would not be based on copyright law.

A similar approach, with the PLR as a form of cultural support, has been established in Canada. As Peter Schneider from the Canadian PLR office explained, the Canadian PLR scheme is not based on any legislation and is not tied to copyright law. Thus, the PLR Commission has full authority to decide to whom and under what conditions the PLR funds will be distributed. Following a few years of discussion, the PLR Commission decided that e-books would be included in the scheme as of 2016. Since the Canadian system is based on holdings and not on number of loans, authors whose books are available both in print and e-format will not receive any additional compensation. Thus, the scheme would only affect the compensation for those books that are available in e-book format only.

European PLR and e-books: is it time for an update?

The current e-lending debate in Europe is led by libraries. They are largely unsatisfied with the limited number of e-book titles that publishers make available for e-lending in public libraries, excessive e-book prices in some cases and varied and restrictive e-lending conditions set by publishers. As part of a 'right to e-read' campaign libraries are requesting the right to buy and lend any e-book they wish, for a fair price without any limitations. It is however questionable whether the extension of the PLR exception to e-books could and should have such an effect. The traditional PLR exception gives libraries a 'right' to lend books upon the payment of a fee to right holders. It does not extend to a 'right' to buy these books or, in other words, an obligation for publishers to sell these books. It is questionable whether the PLR exception, if extended to e-books, should extend this far and how it could affect the emerging e-publishing markets in Europe. Alternatively, the accessibility and pricing issues could initially be addressed in negotiations among stakeholders (e-lending is still an emerging issue and all parties struggle with it). If no compromise could be reached in a reasonable time, maybe competition law could be of help?

Interestingly, authors, who are the main beneficiaries of PLR schemes, are less active in the public discussion. When approached, they seem to support the idea that compensation for e-book lending in libraries should be the same as that for as print book lending. On the other hand, they are aware of a potential double dipping issue. When publishers license e-books to libraries, the publishers are able to (and often do) get remuneration for e-lending and do not need PLR schemes to compensate the loss. Publishers are supposed to share revenues from e-lending with the authors. If that were the case, additional compensation from PLR schemes would mean that right holders are paid twice for the same exploitation of their works. Of course, the question is whether authors really get their share and, if the currently emerging e-lending practices expand, how authors would be better compensated: via contractual arrangements with publishers or via PLR schemes. As some participants in the PLR International Conference noted, in most European countries where a PLR system exists (not all of them yet!) PLR payments are still insufficient or negligent. Therefore, authors may have a better chance of compensation if they negotiate their e-lending compensation directly with publishers?

The most interesting question is how publishers and e-publishing markets would be affected by a PLR exception. Everyone seems to agree that immediate and unlimited lending of any e-book by libraries would distort emerging e-book markets in the EU. A further question would then be what restrictions should be introduced to a potential e-lending exception. Since the e-lending models still vary greatly and limitations on e-lending are in constant flux, it seems too early to define any such restrictions as part of legislation.

The arguments in this post are taken from a paper by Matulionyte, R. 'E-Lending and a Public Lending Right: Is it Really a Time for an Update?' available here.

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