THE PUBLIC LENDING RIGHT (PLR)

Ana-Maria MARINESCU*

Abstract

The study underlines the main characteristics of the public lending right (PLR) and the systems implemented at the level of the European Union and also internationally.

In brief, the public lending right (PLR) is the economic right that allows authors and other copyright owners to receive payments in order to compensate the free loan of their books by public and other libraries. Usually, the payments are ensured by the state budget of the state in which the system is implemented.

Most PLR systems are founded in Europe (Denmark being the first country to establish a PLR system in 1946, followed by Norway in 1947 and Sweden in 1954), where the member states of the European Union are required by law, under the Rental and Lending Right Directive (Directive 2006/115/EC), to provide authors with an exclusive right over the lending out of their works or at least to provide them with a remuneration for the lending out of their works. Other systems are implemented also internationally, at the present in the world are established 33 systems and 27 countries are counted as in development, even that the public lending right is not compulsory required under any international convention or treaty, by consequence the states are not obliged to regulate or to implement it. This demonstrates the importance of the public lending right in the general context of copyright development and infrastructure.

Also, the study draws attention to the fact that in Romania the system is neither implemented nor functional, which has caused prejudice to authors and other copyright holders who have not been remunerated for the use of their works through the public lending made in libraries.

Keywords: *public lending right, remunerations, Renting and Lending Directive, systems implemented, Romanian latest developments.*

1. Introduction

The public lending right is one of the economic rights establish in the favour of the rights holders.

At international level, the treaties and conventions in the field of copyright and related rights are regulating distinctively the right of lending and the right of renting. The first is referring to activities that are made without looking for a profit, and the second for those made with the scope of obtaining a profit.

The rental right was regulated for the first time under the TRIPS[1] Agreement in connection with the letting of the originals or copies of computer programs to the public. Subsequently, the World Intellectual Property Organization Copyright Treaty[2] (Article 7) extended the scope of rental right to computer programs, cinematographic works and phonograms, and the World Intellectual Property Organization Performances and Phonograms Treaty[3] (Article 9 and 13) to works and interpretations fixed on phonograms. The Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations do not regulate the rental right.

The public lending right is not governed by any convention or international treaty or the TRIPS Agreement. In the mid-1990s, the World Intellectual Property Organization proposed a Protocol to amend the Berne Convention to regulate the lending right, but the proposal was not supported by the Member States.

In 1992, the European Commission adopted the Renting and Lending Right Directive[4], which is currently the only supranational law on lending, and which sets out the specific legal framework for the recognition by the Member States of the lending right for the copyright and related rights owners.

Article 1 of the Directive regulates the exclusive right of lending and Article 2 provides the definition of the lending right meaning: 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.

The rightholders and subject matter of lending right are[5]: the author in respect of the original and copies of his work; the performer in respect of fixations of his performance; and the phonogram producer in respect of his phonograms; the producer of the first

* PhD Candidate, Faculty of Law, "Nicolae Titulescu" University, Bucharest, Director General PERGAM (e-mail: amm_marinescu@yahoo.com).

[1] Trade Related Aspects on Intellectual Property Rights.

[2] WCT.

[3] WPPT.

[4] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)

[5] Art. 3 of Renting and Lending Right Directive.

fixation of a film in respect of the original and copies of his film. The exceptions to the subject matter are: buildings and works of applied art.

The lending right may be transferred, assigned or subject to the granting of contractual licences.

Article 6 of the Directive establishes a derogation from the exclusive public lending right. In this way, the Member States may derogate from the exclusive lending right in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

Most PLR systems are founded in EU, where from 28 member countries 24 implemented PLR systems, namely: Austria, Belgium, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and United Kingdom. The 4 countries in EU that have not implemented PLR systems are: Bulgaria, Greece, Portugal and Romania.

Denmark was the first country in the world that established a PLR system in 1946, followed by Norway in 1947 and Sweden in 1954.

At international level, the countries that implemented PLR systems are: Australia, Canada, Faeroe Islands, Greenland, Island, Israel, Liechtenstein, New Zeeland and Norway.

By consequence, at the present in the world are established 33 PLR systems[6]. The PLR system is not implemented in USA or Russia.

The number of the countries that implemented PLR systems demonstrates the importance of the public lending right in the general context of copyright development and infrastructure.

Still at international level, 27 countries are considering implementing PLR systems[7]: Albania, Andorra, Armenia, Butan, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Switzerland, Ethiopia, Greece, Hong Kong, Kazakhstan, Kenya, Kosovo, Macedonia, Malawi, Mauritius, Moldova, Mozambique, Portugal, Romania, St. Lucia, Samoa, Serbia, Singapore, Turkey and Ukraine.

Maureen Duffy, writer and veteran of the authors that led to the right being introduced in the UK in 1979 after a twenty-year struggle, summarizes PLR as follows: *"First and foremost, PLR upholds the principle of 'no use without payment'. This is the basis for the concept of 'fair remuneration' which then carries over into photocopying and digital uses. It is based on the Universal Declaration of Human Rights by which we are entitled to receive income from any exploitation of our work. If it is claimed that this interferes with another universal right – to access to knowledge and culture – our answer is that it supports the creation of new work, and we do not ask teachers to work for nothing."*[8]

2. Content

Analysing the established PLR systems in the world[9], result their main characteristics which in some cases can vary between countries.

In most of the countries the legal basis for the PLR is the copyright law like: Austria (1993), Belgium (1994), Croatia (2003), Czech Republic (2006), Estonia (2000), Finland (1963, 2007 and 2016), Germany (1972), Hungary (2008), Ireland (2007), Latvia (2000), Lithuania (1999), Luxembourg (2001), Netherlands (1988), Poland (2015), Slovakia (2015), Slovenia (1995), Spain (1994) and Sweden (1954). Some other countries provide for a particular law regarding PLR like: Australia (1974), Faeroe Islands (1988), France (2003), Italy (2206), Norway (1987) and United Kingdom (1979), and other countries regulate the PLR system through the law on public libraries: Denmark (1942), Greenland (1993) and Island (1988 and 2007). Few countries implemented the PLR system without any legal regulation like: Canada, Cyprus, Israel, Liechtenstein, Malta and New Zeeland.

All the PLR systems establish eligibility criteria for the rights holders, usually they have to register their works within the system, they must be citizens or have permanent residence in the country in which the system is implemented and must distribute the remunerations also for the foreign rights holders based on reciprocal agreements concluded with similar bodies or collective management organisations abroad. So, some of the criteria are referring to citizenship and/or language requirement. For example, in Austria beneficiaries of the PLR system are Austrian/EU citizens and permanent residents of Austria; in Canada beneficiaries are Canadian citizens wherever they reside and permanent residents of Canada; in Germany, there is no nationality or language restriction, but the distribution to foreign authors is made only through the collecting management organisations. For small countries, like Faeroe Islands and Greenland, the language and/or the citizenship are considered core restrictions, by consequence the beneficiaries must have the Faroese citizenship or must write in the Faroese, respectively the publications must be in Greenlandic or translated into Greenlandic. The same is the situation in Israel, where beneficiaries are only the citizens of Israel who write in Hebrew or Arabic.

In the majority of the countries that have implemented PLR systems the method of calculation of the remunerations is the loans based (Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, Germany, Hungary, Island, Ireland, Israel, Latvia, Liechtenstein,

[6] https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html
[7] https://plrinternational.com/indevelopment
[8] https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html
[9] https://plrinternational.com/established

Lithuania, Luxembourg, Malta, Poland, Slovakia, Slovenia, Spain, Sweden and United Kingdom). In some other countries, the method is the stock count (Australia, Denmark, Faeroe Islands, Greenland and Norway), or the titles published and how many libraries hold a copy of each title (Canada), or the number of copies of each eligible material (New Zeeland), or direct grants paid to rights holders (Cyprus, Finland and Norway). In France, the method of calculation is complex formed by payment per copy purchased (6% of book price) and Euro 1.5 per library member and Euro 1 for university library members.

In conclusion, the remuneration due to the rights owners is calculated based on the number of loans of the work made through public libraries, or remuneration is paid depending on the number of copies of books of an author under the stock libraries, or on the number of users of public libraries, or through direct grants to the rights holders.

The eligible materials are in the majority of the countries the books. Some other eligible materials are the audiovisual works (Austria, Belgium, Germany, and Italy), recorded music or phonograms (Denmark, Latvia, and Lithuania), multimedia materials (Netherlands) and sheet music (Latvia). Very important, in some of the countries, eligible materials are also the e-books and/or the audio books (Belgium starting from 2017, Denmark starting from 2018, Germany, Greenland, Island, Italy, and United Kingdom starting from 2010 for the audio books and from 2017 all the e-books).

For introducing the e-books as eligible materials and for establishing the notion of e-lending, the judgement of the Court of Justice of the European Union in the Case C-174/15 Vereniging Openbare Bibliotheken v Stichting Leenrecht, a reference for a preliminary ruling from the Rechtbank Den Haag — Netherlands, was very important.

The Court ruled that the[10]:

- Article 1(1), Article 2(1)(b) and Article 6(1) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the concept of 'lending', within the meaning of those provisions, covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.
- the EU law, and in particular Article 6 of Directive 2006/115, must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purpose of Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- Article 6(1) of Directive 2006/115 must be interpreted as meaning that it precludes the public lending exception laid down therein from applying to the making available by a public library of a digital copy of a book in the case where that copy was obtained from an illegal source.

Some of the systems are excluding from payment categories of materials like: textbooks for student use, remaindered books, old or used books, sheet music, self-published books sold by authors, journals, magazines etc. (France) or non-fiction books (Israel).

Taking into account the eligible materials the main eligible recipients (rights owners) are the authors, illustrators, editors, translators and publishers. In some countries, the eligible recipients are also the performers and producers (Belgium, Latvia), photographs (Czech Republic, Ireland, and Netherlands), composers (Denmark and Island), film producers (Latvia), directors and screen writers (Slovenia). The diversity of the PLR systems indicates that some countries limit the eligible recipients only to authors (Hungary, Malta, New Zeeland, Norway, Slovakia and Spain) or are excluding from the payment the editors/publishers (Denmark and Finland).

The general fund for PLR is allocated from the state budget, central or local. In general, the remunerations distributed to the rights holders are modest, establishing the maximum and the minimum remunerations to be paid. For example, the maximum remuneration that can be paid to an author in United Kingdom is £ 500.

From this point of view, was very important the judgment of the Court of Justice of the European Union in the Case C-271/10 Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat, a reference for a preliminary ruling from the Belgian Raad van State (Belgian Council of State)[11].

VEWA, a Belgian collective management organisation, brought an action in the Belgian courts to annul the Royal Decree transposing Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (now replaced by 2006/115/EC). According to VEWA, by fixing a flat rate of remuneration of 1 EUR per adult per year and 0.50 EUR per child per year, Article 4 of the Royal Decree infringed the provisions of Directive 92/100/EEC

[10] https://publications.europa.eu/en/publication-detail/-/publication/39a236ef-dbbe-11e6-ad7c-01aa75ed71a1/language-ro/format-PDFA1A
[11] https://www.ifrro.org/content/ecj-ruled-belgian-plr-case-case-c-27110-vewa-v-belgische-staat

which require that 'equitable remuneration' be paid in respect of a loan or rental.

Consequently, the Belgian court asked the Court of Justice whether Directive 92/100/EEC precludes a national system under which the remuneration payable to authors in the event of public lending is calculated exclusively in accordance with the number of borrowers registered with public establishments, in particular libraries, on the basis of a flat-rate sum fixed per borrower per year.

The Court of Justice ruled that the remuneration must enable authors to receive an adequate income; its amount cannot be purely symbolic. Even though it is in the discretion of the Member States to determine the most relevant criteria when calculating the amount of the remuneration within their own territory, the amount of the remuneration payable should take account of the extent to which those works are made available, as that remuneration constitutes consideration for the harm caused to authors by reason of the use of their works without their authorisation. Thus, a public lending establishment should take account of the number of protected works made available. Large public lending establishments should pay a greater level of remuneration than smaller establishments. Also, account should be taken of the number of persons having access to the protected works, i.e. the borrowers registered with an establishment.

Also, the Court of Justice ruled that the Belgian royal decree takes into account the number of borrowers registered with public lending establishments, but not the number of works made available to the public. Moreover, given that the Royal Decree provides that in case a person is registered with a number of establishments, the remuneration is payable only once regarding that person, that system may have the result that many establishments are, de facto, almost exempted from the obligation to pay any remuneration in accordance with Directive 92/100.

In conclusion, the Court of Justice held in the VEWA Case that the Belgian law does not comply with Article 5(1) of Directive 92/100/EEC, as it does not take into account, on the one hand, the number of a copyright owner's works made available by a lending establishment, and, on the other hand, the number of establishments lending a particular work.

In some systems, the remuneration shall be distributed also to pension funds, health insurances, grants or scholarships (for example, in Austria 26% of funds are allocated to the social needs of the authors, in Germany 55% for health insurances, in Slovenia 50% for grants and scholarships, in Sweden and France for supplementary pensions).

In the majority of the countries, the system is managed by a collective management organisation (in Austria by Literar Mechana[12], in Belgium by Reprobel[13], in Croatia by ZAMP[14], in Czech Republic by DILIA for authors, translators, adaptors and by OOA-S for illustrators, photographers, in Finland by SANASTO for authors, KOPIOSTO for artists and TEOSTO for composers, in France by SOFIA[15], in Germany by VG Wort for authors and Bild Kunst for artists, in Hungary by MISZJE[16], in Latvia by AKKA/LAA[17], in Liechtenstein by ProLitteris[18], in Lithuania by LATGA-A[19], in Luxembourg by LUXORR[20], in Netherlands by Stichting Leenrecht[21] working with LIRA[22], in Poland by Copyright Polska[23], in Slovak Republic by LITA[24] and in Spain by CEDRO[25]). Also, in other countries the system is managed by state or government departments (Australia, in Canada by PLR Commission under the Canada Council for the Arts, in Denmark by the Agency for Culture and Palaces / Literature, in Estonia by the Authors Remuneration Fund, Island, in Ireland by the PLR office under The Library Council, in Malta by the National Book Council, Norway, Slovenia by the Slovenia Book Agency and in Sweden by the Swedish Authors Fund), by the writers unions (Cyprus and in Italy by the Federazione Unitaria Italiana Scrittori) or by the National Library (Faeroe Islands, Greenland, New Zeeland and United Kingdom).

In the majority of the PLR systems, the libraries covered are the public ones, including specific libraries like educational or scientific ones (Australia, and Austria), on contrary in some countries the educational or scientific libraries are excluded (Belgium, Italy, Latvia and Luxembourg), and also the university and schools' libraries (Denmark, Faroe Islands, France, Germany, Island and Norway).

In Romania, according with the Article 14^4 alin. (1) of Law on copyright and related rights, lending means making available for use, for a limited period and without a direct or indirect economic or commercial advantage, of a work through the agency of an institution allowing access of the public for this

[12] http://www.literar.at/
[13] https://www.reprobel.be/
[14] The collective management organization of the performers.
[15] http://www.la-sofia.org/
[16] http://www.miszje.hu/
[17] http://www.akka-laa.lv/lv/
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[25] https://www.cedro.org/

purpose, and PLR is regulated at the same article alin. (2) and (3) as follows:

"(2) Lending through the agency of libraries does not require author's authorization and entitles him to an equitable remuneration. This right cannot be waived.

(3) Equitable remuneration provided for under paragraph (2) shall not be owed, if the lending is made through the libraries of educational establishments as well through public libraries with free access".

The Rental and Lending Directive was transposed into Romanian domestic law starting from 2004, based on the provisions of Law no. 285 amending and completing the Law no. 8/1996, thus regulating the legal regime of PLR.

As results from the above-mentioned legal dispositions, the provisions of the Directive have been incorrectly transposed into the national law, since libraries in all educational institutions and all public libraries with free access are exempt from the payment of PLR equitable remuneration. For this reason, the PLR system has not been put into practice, and currently there is no methodology on PLR, so the collective management organisations have not collected PLR remunerations, and the right holders have not benefited from the appropriate remuneration.

Not even in 2018, when the Law on copyright and related rights was republished, as amended and supplemented[26], this problematic aspect of PLR, wasn't took into consideration by the legislator.

The latest developments in the field date from 2018, when the collective management organisations in the field of written works (books) and visual arts under the supervision and coordination of the Romanian Copyright Office have proposed new amendments of the Law on copyright and related rights regarding the PLR and have argued to the Ministry of Finance the necessity to allocate from the state budget a minimum amount for implementing the PLR system. The Ministry of Finance has declined its competence in the field, indicating the Ministry of Culture and National Identity as the specialized body of the central public administration with attributions regarding the drafting or endorsement of normative acts in the field, including PLR, as well as the initiator of the Law on copyright and related rights.

By consequence, the copyright holders and the collective management organisations in the field will continue their efforts towards the Ministry of Culture and National Identity and the Romanian Government in order to implement the PLR.

3. Conclusions

The PLR systems are covered under the umbrella of PLR International (PLRI) that brings together countries with PLR systems in order to facilitate the exchange of best practice. PLRI also provides advice and technical assistance to countries looking to set up PLR systems for the first time[27].

PLR currently applies in many countries to both printed books and a range of audiovisual material (including 'talking books') lent out by public libraries. In these countries a wider range of creators will therefore be eligible for payment, including authors, composers, publishers, producers and performers[28].

Being an important source of remuneration for the copyright owners, the states should pay more attention for regulating and implementing in the national legislation the PLR system. The same is the case of Romania in which the PLR system is not implemented nor functional.

All the Romanian interested entities, including the Romanian Government should take the necessary measures for implementing the PLR.

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