1986

Literary Copyright and Public Lending Right

Daniel Y. Mayer

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation

Available at: https://scholarlycommons.law.case.edu/jil/vol18/iss3/4

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
NOTES

Literary Copyright and Public Lending Right

by Daniel Y. Mayer*

I. INTRODUCTION

Defining the "Public Lending Right" (PLR) is difficult because it is a hybrid term which represents differing and conflicting concepts. It is akin to copyright, but it only affects authors, and protects them not from private infringement, but from public library borrowing of their works. Broadly speaking, PLR refers to ongoing schemes in ten countries in the world whereby authors are compensated when their works are lent to library patrons. PLR is not incorporated in most countries' copyright laws, nor is it a right which can automatically be asserted by all national authors. PLR legislation has two purposes: one, to recognize a right of authors to compensation for the loss of revenue caused by library loans of their works, and; two, a desire to support literature and authorship in a country. Both of these purposes must must be carefully considered and developed by the sponsors of any PLR legislation.

This article will examine the structure and goals of legislation in the countries to recognize PLR, and in the United States. Section one discusses the history of PLR and the conditions which bring about the passage of PLR legislation. Section two examines PLR in Great Britain, and section three examines PLR in the Federal Republic of Germany. Section four discusses the possible forms of PLR that could be introduced in the United States and the effect of such legislation.

Until very recently, PLR was a concept totally foreign in the United States. That status has begun to change and PLR is a topic of discus-

* J.D. candidate, Case Western Reserve University (1986).
2 Id. The ten countries are Norway, Sweden, Finland, Iceland, West Germany, New Zealand, Australia, Great Britain, Denmark, and The Netherlands.
3 Id.
sion and debate. The two main reasons for PLR's change in status are the passage of PLR legislation in Great Britain, and the introduction of a bill into the United States Congress to study PLR. Supporters of PLR in America are watching very closely the progress of Great Britain's Public Lending Right Act of 1979. As funds to authors are paid out, the problems in the payment scheme are being ironed out by the PLR Registrar. Since Great Britain is the second largest country to pass PLR legislation, it provides a viable model for an American PLR plan.

In November 1983, Senator Mathias introduced Senate Bill No. 2192. This bill, which grew out of a symposium sponsored by the Library of Congress' Center for the Book, sought to establish a commission to study and make recommendations on the desirability and feasibility of compensating authors for the lending of their books by lending institutions. Mathias' bill envisioned an eleven-member commission to include two publishers, two authors, three members of the general public to be named by the President, and the Librarian of Congress. The commission would be charged with making a preliminary report on its work in one year, and a final report in two years. This commission under the auspices of the Library of Congress, would have wide discretion on what form of PLR proposal to endorse in its final report. This freedom, it is hoped, will allow the commission to tailor a program to meet the needs of government, authors and libraries. Whatever the fate of Sen. Mathias' bill, the time is ripe for discussion of PLR in the United States.

In March 1985, Mathias introduced Senate Bill No. 658, a bill very similar to his previous bill. The only real difference in the two bills is their focus. The new bill seeks to "establish a commission to study and make recommendations on the desirability and feasibility of amending the copyright laws to compensate authors for the not-for-profit lending of their works." From a practical point of view this change represents nothing more than a change of committee—now, the bill will be considered by the Senate Judiciary Committee (Mathias is chairman of the Subcommittee on Patents, Copyrights, and Trademarks) rather than by the Senate Rules Committee where it had languished for two years. From a theoretical point of view, the refocus is more significant because it in-

---


6 This is not the first time PLR legislation has been introduced into the Senate. In 1973 Congressman Ogden R. Reid (D., N.Y.) at the urging of the Authors League of America introduced into the House of Representatives a bill to "Establish a Commission to Study and Make Recommendations on Methods for Compensating Authors for the Use of Their Books by Libraries in 1973" H.R. 4850, 93d Cong., 1st Sess., 119 Cong. Rec. 5534 (1973); see also Morrison, supra note 4, at 710.


troduces the concept of incorporating PLR within copyright law. Currently, copyright law in the United States specifically denies a PLR to authors. At 17 U.S.C. § 106(c), the owner of a copyright is given exclusive rights to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. This exclusive right is limited, however, by 17 U.S.C. § 109(a) which reads: “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” This means, that the purchaser of a particular copy can resell, lend, or destroy the work as they see fit.

In other words, once you purchase a lawfully made copy the rights of the owner of the copyright are exhausted with regard to the lawfully made copy. This principle is called the first sale doctrine. Congress specifically intended this provision to permit library lending without infringing the author’s copyright. The Congressional Record states:

Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. (Emphasis added.)

It is clear that PLR has been consciously excluded from the Copyright Act.

Although PLR is relatively unknown in the United States, the idea of compensating authors for library loans has been around for a long time. The first country to recognize a PLR was Denmark. It is worthwhile to examine the history of PLR in Denmark because it provides a valuable example of how PLR can develop from a radical innovation to an accepted and routine social program. As early as 1918, Danish author Thit Jensen suggested that a tax of five ore (approximately 1.5 cents at 1918 exchange rates) be assessed on each loan of a book by a Danish author.

In 1919, the idea was presented at the Congress of Nordic Authors, and in 1920 the Dansk Forfatterforening (Danish Authors’ Association) requested a meeting with the Ministry of Education to discuss the

---

12 H.R. 553, 94th Cong., 2d Sess. § 5693 (1967).
13 Id.
14 See Seeman, A Look at the Public Lending Right, in COPYRIGHT LAW SYMPOSIUM 71-79 (ASCAP 1980) for a complete discussion of the early history of PLR.
It is interesting to note that although many points of view were heard on PLR proposals in Denmark over the years, the idea of a direct fee imposed on borrowers instead of state funding was never seriously considered. The Danish government also never contemplated a program that would require public library funds be used to pay for PLR.

In 1941, the Danish government finally announced its support of legislation that provided payments with the dual purpose of improving the financial condition of authors, and giving them a "reasonable fee" for the library loan of their works. After World War II, the Danish Public Libraries Law was enacted on March 30, 1946.

Other Scandinavian countries followed Denmark's lead in passing PLR legislation: Norway in 1947; Sweden in 1954; Finland in 1964; and Iceland in 1968. Other countries to pass PLR legislation are: The Netherlands in 1971; West Germany in 1972; New Zealand in 1973; Australia in 1974; and Great Britain in 1979. The PLR plan of each of these countries is individual as to content, scope, and legal basis. Each plan was developed in response to the needs of the country's authors and library structure.

Librarian Thomas Stave sees the development of PLR in the ten countries which have passed legislation in terms of several events of the 20th century. These events which have provided a hospitable environment are: the development of lending libraries, particularly public libraries; the expansion of the copyright; the increase of government support for cultural affairs; a growing consciousness in some countries of the need to nourish a national culture and language; and a growing trend toward collective activism among individuals with an identity of economic interests.

It is interesting to assess the chances of passing PLR legislation in the United States in terms of these five events identified by Stave. Certain events such as the existence of a highly developed public library system, the creation of the National Endowments for the Arts and the Humanities in 1965, and the passage of the Copyright Act of 1976 point favorably to the passage of PLR legislation. On the other hand, recent proposed cutbacks in funding for the National Endowments and

16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
21 Cole, supra note 5, at 427; see also Stave, supra note 15, at 576.
22 Stave, supra note 15, at 572-75.
23 See Cole, supra note 5, at 429.
the infancy of a sense of collective activism among artists in the United States do not bode well for the passage and funding of a PLR bill in this country. Although passage of PLR legislation is not around the corner, the introduction of Senate Bill No. 2192 evidences general interest in the topic for debate and discussion.

Senate Bill No. 2192 reads: "The purpose of the commission [to study PLR] is to consider whether specific compensation for authors for the lending of their works would promote the economic health of authors and authorship in the United States . . . ." The economic hardships of authors is one of the most frequent arguments used to support PLR. Indeed, the image of the struggling author creating great literature in a run-down cold water flat is engrained in our consciousness. A 1979 Columbia University study of 225 American authors found the median income from writing was $4,775. Ten percent of the authors earned over $45,000 a year, and half of the authors earned less than $5,000 a year from their writing. The study found that writing incomes were subject to sharp short term fluctuations and forty-six percent of the authors contacted held paid positions in addition to working as freelance writers. (The median hourly wage for authors was only $4.90 per hour.) The study concluded that "most authors cannot begin to make ends meet from their writing alone . . . [and] writing income places most authors below the poverty line."

While few dispute the financial hardships suffered by many authors, discussing PLR in economic terms raises many more questions than it answers. Some blame publishers for writers' impoverished position, since publishers determine press runs, price discounts, and most contractual terms. Publishers usually hold the upper hand in bargaining with authors; at the most, a publishing author will receive a fifteen percent royalty. While some blame publishers for the authors' plight, others apply a cost-benefit analysis and feel little sympathy for the writer. Some argue that writing need not be a full-time occupation. They point to writers such as Johann Wolfgang von Goethe who was also a diplomat, Walt Whitman who was also a journalist, and Robert Frost who was also a farmer and a college professor. While a cost-benefit analysis is econom-

---

26 See Writers Begin Drive for Public Lending Right, LIBR. J. 12 (Mar. 15, 1985).
28 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id. at 59.
35 Seeman, supra, note 14, at 81.
ically sound, it does little to inspire the promotion of quality literature in a country.

The biggest unknown factor in evaluating the economics of PLR is the effect library lending has on authors' incomes. On the one side, there are those who claim that libraries act as shop windows which stimulate reading and book buying among the general public. They also point to the valuable book purchasing power of libraries and argue that first novels and expensive specialized works would have much smaller markets without libraries. On the other side of the debate, there is the view that each book lent by a library is one less book sale, and with American public library circulation, in 1980, at about 450 million loans per year, this could represent a major decrease in book sales caused by library loans. When comparing different countries' PLR laws it must be remembered that book purchasing ratios vary greatly. In 1965, the number of books bought for each one borrowed in France was 10.0, in West Germany was 1.4, in the United States was 1.1, in The Netherlands was 0.7, and in the United States Kingdom was 0.1.

Many authors argue that economic justifications for PLR are irrelevant; the case for PLR rests on simple justice as a claim for fair payment for use. Novelist John Fowles wrote:

The essential, surely, is to get the principle accepted . . . . I believe that for novelists at any rate PLR is wanted almost as much psychologically as financially . . . . [T]he granting of a PLR right, however inadequate to begin with, and the knowledge that both the public and the government have admitted that an injustice not only to us but to the enormous contribution our art has made to our society's life all through its modern history has been done, will have as much a symbolic as an actual financial value.

Sentiments such as Fowles' present the question of whether PLR is a matter of simple justice for authors, or a demand for recognition of their art. Given the limitations of PLR legislation and the limited ability to assert rights within most PLR schemes, one wonders whether PLR is the best route to the "simple justice" demanded by authors.

II. PLR IN GREAT BRITAIN

The model most American PLR visionaries look to when debating PLR is the plan adopted by Great Britain. Although the needs of Brit-

36 See generally Pollak, supra note 29, at 58.
37 Id. at 51.
38 Id.
39 Stave, supra note 15, at 570.
40 Id.
41 Pollak, supra note 29, at 63.
lish authors are different from those of their American counterparts, their common language unites them. Although both countries share a desire to assist their national authors, they do not have the same need to support their national language that most other PLR countries share in common. The market for English language books is the largest in the Western world. Thus, while Swedish authors can argue that supporting them through PLR is necessary because the market for Swedish literature is limited, it is much more difficult for English or American authors to make the same argument.

Another similarity shared by the United States and Great Britain is cultural diversity. Although Great Britain is not the nation of immigrants that America has become, it is very sensitive to its ethnic minorities. Just as any PLR plan in the United States would have to grapple with the tremendous regionalism in this country, the British government had to address the issues of establishing a PLR scheme that met the needs of the Welsh, Scottish, Irish and other minorities.42

PLR in Great Britain struggled for 30 years for government approval before final legislation was passed by Parliament. The idea of PLR was first raised in England by authors Eric Leyland and John Brophy in 1951. Brophy’s proposal that library borrowers should pay a penny each time they borrowed a book became known as the “Brophy penny.”43 PLR was first brought before Parliament on July 11, 1957 when Francis Hastings, Earl of Huntington, proposed a scheme modeled on the Danish system which paid authors a percentage of the funds allocated to the public libraries.44 Hasting’s scheme received little attention and prompted no legislation.45

On July 21, 1960 the first PLR bill was presented in the House of Commons. The bill called for both public and private libraries to pay one penny for each title borrowed. This first bill died for lack of support from the Conservative Minister of Education, and authors’ apprehensions about the implementation of the scheme.46 Finally, the ninth PLR bill, which was introduced by the Labour government on November 3, 1978 survived a Conservative filibuster in Parliament and was carried by 214 votes to 19. After a third reading in the House of Lords on March 6, the “Public Lending Rights Act” received the royal assent on March 22, 1979.47

The PLR Act consists of five sections and a schedule for developing a scheme for implementation. The principle on which the Act operates is

42 Rider, PLR and Local Favourites, 84 LIBR. A. REC. 433 (1982).
44 Id. at 668.
45 Id.
46 Id. at 669
47 Id. at 676.
to grant to authors an entitlement for their books lent to the public by local authority library systems throughout Great Britain.\textsuperscript{48} The Act's wording carefully avoids any extension of authors' copyright privileges or restrictions; the restriction prohibiting the expansion of the Copyright Act of 1956 to include library loans was a major concern of opponents of PLR in Parliament.\textsuperscript{49} Members of Parliament feared redefining copyright laws of authors because they anticipated legal problems for British writers, publishers, librarians, and foreign writers.

A framework for a library-loan-based entitlement system was established by the Act. The yearly budget for the entitlement system's administrative costs and payments to authors was set at £2 million,\textsuperscript{50} although this limit can be raised with the approval of the House of Commons.\textsuperscript{51} The Act stipulates that authors have to register their works to receive payments,\textsuperscript{52} and PLR in a book takes effect from the date of publication and continues until the end of the fiftieth year after the author's death.\textsuperscript{53} The Act includes a clause making it an offense to knowingly or recklessly provide false information in respect to the registration of any particular book.\textsuperscript{54}

Authors and illustrators named on the title page can apply for PLR entitlements\textsuperscript{55} provided they are alive at the time of registration and are citizens of an EEC country and are United Kingdom residents.\textsuperscript{56} Translators, editors, compilers, and revisers are not eligible for entitlements.\textsuperscript{57} To qualify, books have to be more than thirty-two pages long (twenty-four pages for poetry and drama),\textsuperscript{59} have to have been put on sale, and have to have been the work of no more than three individuals.\textsuperscript{60} Reference works are not included in the entitlement program.\textsuperscript{61} Authors are limited to entitlements of £5,000 a year with a minimum payment of £5.\textsuperscript{62} Anything less than £5 will be carried over to the next year.\textsuperscript{63} Payments are based on library loans calculated from data from sixteen sam-

\textsuperscript{48} See generally Public Lending Right Act, 83 STAT. INST. 271-79 (1979); see also McFarlane, The Significance of the Public Lending Right Act of 1979, 123 SOLIC. J., 395 (1979).
\textsuperscript{49} Id.
\textsuperscript{50} Public Lending Right Act, 83 STAT. INST. 271-79 (1979).
\textsuperscript{51} Id. at § 2(3).
\textsuperscript{52} Id. at § 4(5).
\textsuperscript{53} Id. at § 1(6).
\textsuperscript{54} Id. at § 4(7).
\textsuperscript{55} Public Lending Right Scheme, 719 STAT. INST. 1201-17 (1982).
\textsuperscript{56} Id. at § 5.
\textsuperscript{57} Id. at § 4(2).
\textsuperscript{58} Id. at § 6(2).
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at § 46(2)-(4).
\textsuperscript{63} Id.
ple service points located throughout Great Britain. This figure represents 1.2% of all public library loans.

A total of 7,750 authors registered some 66,850 titles during the PLR Act’s first “year” (the Act’s first year was only six months) which ended June 30, 1983. Operating and set up costs totaled £412,000, leaving £1,588,000 to distribute to authors. (During the previous two years £772,000 was spent to establish the computer-based system).

In distributing the money, the payment per loan was calculated at 1.02 pence, and the average payment was £261. The distribution of payments was as follows: 46 payments at the maximum of £5,000; 81 payments between £2,500 and £4,999; 247 payments between £1,000 and £2,499; 318 payments between £500 and £999; 1,516 payments between £100 and £499; and 3,878 payments between £1 and £99, for a total of 6,086 payments.

For 1985, the Act’s second year, more than 9,600 authors received payments. The government increased funding for PLR by £750,000 to £2.75 million, with about £350,000 of the total going to operating costs. In 1985 the rate per loan of book was 1.27 pence, compared with 0.92 pence for the previous year. Sixty-three authors received the maximum payment of £5,000, 2,433 authors received between £100-500, and over 6,200 authors received less than £99.

Criticisms of Great Britain’s PLR Act are many and loud. Some complain of the high administrative costs, while others complain about the scheme of payments itself. Objections have been voiced over the

---

64 Id. at § 38(2).
65 Sumison, Registrar Describes How the Scheme Will Work, 84 LIBR. A. REC. 243, 243-44 (1982).
66 Id. See also Sumison Apropos the PLR in the United Kingdom, in PLR: REPORTS OF AN ALAi SYMPOSIUM AND ADDITIONAL MATERIALS 186-92 (1983). In this article Mr. Sumison describes how the sample libraries will be completely rotated every four years by dropping four libraries from the sample each year and replacing them with four new ones in the appropriate regions. Whether this happens remains to be seen. In the same article, Mr. Sumison discusses the difficulty of finding libraries equipped with the computer equipment to read ISBN’s and record PLR loans.
68 Id.
69 Id.
70 Trewin, British Authors Get First PLR Royalties, PUB. WEEKLY, Feb. 17, 1984 at 31.
71 Id.
72 Thorncroft, Authors to Gain More Time from Borrowed Library Books, Financial Times, Jan. 9, 1986, at 11. In collecting the PLR data the Registrar was also able to calculate that in 1985 there were 644.5 million library borrowings, of which 217 million were of books registered with the PLR office, with the remainder written by dead or foreign authors, or by authors that had not registered their works.
exclusion of reference works, the proscription of translators from the program, and the bias against co-authors and illustrators. Othercomplain that the service points where loans will be recorded are too few, and authors complain that the registration procedure is too complicated and the central fund too small.

The most common criticism of Great Britain's PLR program is that it rewards those who need it the least. In its first year of operation Jeffrey Archer earned the maximum payment of £5,000, which he said he will donate to the Spastics Society charity. Barbara Cartland made £4984.31 and Ursula Bloom made £4,999.37. On the other end of the spectrum, fourteen authors failed to make the minimum amount of £1, or at least ninety-nine borrowings a year, and 3,878 authors received payments between £1 and £99. Authors of nonfiction works were the most disappointed since their titles were the least borrowed, and the most likely to be used within the library.

PLR in Great Britain is loan based and, therefore, rewards by measuring the quantity of readers of specific authors, devoid of any quality criteria. The vehicle for recognizing and rewarding quality literature in Great Britain is the Arts Council of Great Britain. The Literature Department of the Arts Council is its smallest artistic division; it was created in 1950 as a panel for poetry, and reconstituted in 1965 as a department for literature. In 1980-81 it received only £638,000, or one percent of the Arts Council's total budget. The Literature Department supports literary societies, literary magazines, publishers, creative writing fellowships, and literary competitions.

The Arts Council's quality-based funding of literature is not without its share of pitfalls and detractors. As a result of a government White Paper, "A Policy for the Arts" which stated, "one of the main objectives

74 Astbury, supra note 43, at 680.
75 McCormick, PLR Could Cost Libraries Millions, 14 AM. LIBR. 107 (1983); see also Rider, supra note 42, at 433, in which Rider describes a letter to the Library Association which decried that:

Books by Vivian Bird on West Midlands topography and local history are widely read and are stocked in libraries within the region to a degree unlikely to be matched outside it. A book such as 'The Folklore of Warwickshire' by Roy Palmer will presumably generate most interest locally, and may well be underrepresented, in percentage terms, in the sample libraries, none of which is in the West Midlands area.

76 McCormick, supra note 75.
77 Trewin, supra note 70, at 31.
78 Id.
79 Id.
80 Id.
81 Id.
83 ARTS COUNCIL OF GREAT BRITAIN, ARTS COUNCIL. BULL. NO. 46, 45-55.
of the government’s policy is to encourage the living artist,\textsuperscript{85} the Literature Department began a Grants-to-Writer program.\textsuperscript{86} At its peak in 1976 the Grants-to-Writers scheme distributed forty-five grants totaling £83,900.\textsuperscript{87} (Grants ranged from £200 to £2,000; the average amount awarded was £1,864.)\textsuperscript{88}

The Grants-to-Writers program was phased out by the late 1970s, and it is not considered one of the Arts Council’s more successful efforts.\textsuperscript{89} In a report “Writers and Arts Council,” Literature Department panel member Jim McGuigan was very critical of the Grants-to-Writers program, and charged it with elitism and a bias towards established writers.\textsuperscript{90} Grant recipients were, in the main, from the south of England, and had professional backgrounds in cultural occupation and higher education.\textsuperscript{91} Unsuccessful applicants were, young, less established and poor.\textsuperscript{92} The inequities in grant recipients was aggravated by an application process which required that all potential grantees be sponsored. Sponsors outside the commercial literary networks were rarely successful in securing grants for writers.\textsuperscript{93}

The lesson of the failed Grants-to-Writers program is that no form of funding literature has been found that is acceptable to all, and without its biases towards one group of clients or another. The Grants-to-Writers scheme was a “quality-based” program that illustrated all the problems in determining artistic “quality” to be regarded in a funding program. Establishing criteria for quality literature is at best a difficult task, and at worst an impossible one. PLR cannot be evaluated in isolation. Rather, it must be examined in comparison to the other forms of literature funding available to a government.

III. PLR IN THE FEDERAL REPUBLIC OF GERMANY

Although it is likely that Great Britain will serve as the model for any PLR legislation in the United States, the Federal Republic of Germany offers a very interesting and different approach to PLR. West Germany is the largest country to recognize PLR, and the only country to

\textsuperscript{85} J. McGuigan, Writers and the Arts Council 7 (1983).

\textsuperscript{86} See R. Findlater, The Book Writers: Who Are They? Findlater’s work on authorial poverty greatly influenced the Literature Department. Of the 1,587 published writers he contacted, only one-sixth earned over £20 per week (£1,050 a year). Only approximately three-eights of those surveyed earned over £500 a year from their writing. See also UNESCO Cultural Policy 26 (1970).

\textsuperscript{87} J. McGuigan, supra note 85, at 6-8.

\textsuperscript{88} Id.

\textsuperscript{89} Id. at 41-105.

\textsuperscript{90} Id.

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} Id.
incorporate PLR within its copyright provision. Section 27(1) of Germany's copyright law reads:

For the hiring and lending of copies of a work in respect of which further distribution is permitted under Sec. 17(2), an equitable remuneration shall be paid to the author if the hiring or lending is executed for the financial gain of the hirer or lender, or if the copies are hired or lent through an institution accessible to the public (library, record library or collection of other copies). The claim for remuneration may only be asserted through a collecting society.\textsuperscript{94}

This PLR, or Buchereitantieme, amendment went into effect on January 1, 1973, and applies to all libraries in the Federal Republic and West Berlin that are open to the public.\textsuperscript{95}

Protected within the German scheme for compensation are all copyrighted library materials, such as copies of books, periodicals, records, sound and video cassettes, and slides.\textsuperscript{96} The protection period is seventy years after the originator's death,\textsuperscript{97} and only five percent of the books held or circulated by public libraries are estimated to be out of the copyright.\textsuperscript{98}

The actual method of compensation is through a general contract (Gesamtvertrag) between the federal government and the eleven federated states, and four collecting societies.\textsuperscript{99} The contract provides that an author cannot apply for PLR as an individual, but only through a collecting society to whom they assign their PLR rights.\textsuperscript{100} VG Wort is the German literary collecting society.\textsuperscript{101} It is the largest collecting society, and participation in it is limited to authors who derive at least fifty percent of their income from freelance writing.\textsuperscript{102} VG Wissenschaft is the scientific publishers' and authors' society; GEMA is the composers' collecting society;\textsuperscript{103} and VG Bild/Kunst is the illustrators' and photographers' collecting society.\textsuperscript{104} VG Wort and VG Wissenschaft share about ninety-one percent of the funds;\textsuperscript{105} and the other three collecting societies have formed a common body, the Zentralstelle Bibliothekstantieme.

\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 31.
\textsuperscript{103} This is the German equivalent of the American Society of Composers, Authors and Publishers (ASCAP). \textit{See} Seeman, supra note 14, at 80.
\textsuperscript{104} Koch, supra note 94, at 653.
\textsuperscript{105} The two principal societies have pooled their resources for administrative purposes, with
(ZBT) to distribute their nine percent of the funds.\textsuperscript{106}

An annual lump sum of nine million DM was fixed as the government's PLR payment in 1974, when the copyright law was amended.\textsuperscript{107} The amount of the payment is part of a contract which runs until 1985, but the size of the lump sum can be renegotiated.\textsuperscript{108} (The payment was increased to thirteen million DM in 1980).\textsuperscript{109} Ten percent of the lump sum is paid by the federation and ninety percent is paid by the states, which undertook the responsibility for public libraries.\textsuperscript{110} An obligation on the libraries to provide information on their circulation on a sample basis was stipulated as part of the general contract.\textsuperscript{111} The contract also stipulates that no extra costs would fall on the libraries for the collection of PLR data.\textsuperscript{112}

Each of the collecting societies distributes its share of the lump sum differently. After deducting taxes, administrative costs, and ten percent for a social welfare fund for authors in need, VG Wort divides the remainder into two equal parts.\textsuperscript{113} Half the money is transferred to the Authors' Old Age Security Corporation (autorenversorgungswerk), a pension fund for freelance writers.\textsuperscript{114}

The other half of VG Wort's share is paid individually to authors (seventy percent) and publishers (thirty percent).\textsuperscript{115} For the purposes of payment, authors are divided into nine groups according to test loan figures.\textsuperscript{116} These groups range from the ninth group of authors with more than 500 test loans, to the largest first group of authors with 1-5 test loans. In the first group the annual payment in 1976 was about 30DM, in the fifth group (31-50 test loans) the payment was over 200DM, and in the ninth group, it was several thousand DM.\textsuperscript{117} It is interesting that according to VG Wort this test loan payment scheme

\begin{footnotes}
\footnote{VG Wort monitoring all public libraries for both societies, and VG Wissenschaft monitoring research libraries for both societies. Dietz, supra note 99, at 29-39.}
\footnote{\textsuperscript{106} Id.}
\footnote{\textsuperscript{107} Koch, supra note 94, at 653.}
\footnote{\textsuperscript{108} Id.}
\footnote{\textsuperscript{110} The last increase was mainly due to the effect of an additional agreement which includes the loans of books made by church and factory libraries into the general agreement.}
\footnote{\textsuperscript{109} Id.}
\footnote{\textsuperscript{111} Id.}
\footnote{\textsuperscript{113} Id. at 654. See also Nordemann, \textit{Public Lending Rights in Federal Germany}, 90 \textit{REVUE INTERNATIONALE DU DROIT D'AUTEUR} 61, 75-81 (1981); Kreile, Reinhold & Mundt, \textit{Bibliothek-}
\footnote{\textsuperscript{115} Id.}
\footnote{\textsuperscript{116} Dietz, supra note 99, at 27.}
\footnote{\textsuperscript{117} Id.}
\footnote{\textsuperscript{117} Id.}
\footnote{\textsuperscript{114} Id.}
\footnote{\textsuperscript{115} Id.}
\footnote{\textsuperscript{116} Id.}
\footnote{\textsuperscript{114} Id.}
\end{footnotes}
particularly benefits authors of children’s books and translators.\(^{118}\) (In contrast, both of these kinds of authors are largely excluded from Great Britain’s PLR program.)

VG Wort calculates test loans by measuring lending volumes twice a year for a fortnight in libraries of varied size and composition.\(^{119}\) The libraries involved are designated by the German Library Association and change yearly.\(^{120}\) During the data collection period, a record of the title and imprint page are photomechanically kept, and then later the record is compiled for all the libraries involved and payments calculated for VG Wort’s approximately 20,000 German-language authors and 7,000 translators.\(^{121}\)

The VG Wissenschaft society has a very different distribution scheme for its share of the lump sum.\(^{122}\) Most scientific authors have other professions and therefore do not need a pension scheme, and annual circulation of scientific treatises are so low that any payment based on annual loans per volume or article would be deceptive.\(^{123}\) The society, therefore, has tailored a program to suit their needs. After deducting administrative costs, the remaining sixty-five percent is divided equally between publishers and authors.\(^{124}\) The publishers’ share is not distributed individually, but is used for various purposes, such as printing cost subsidies and support for research.\(^{125}\) The authors receive payment in proportion to the number of new publications, new editions, and reprints which appear each year.\(^{126}\)

Although West Germany’s PLR is tied to copyright, it does not resemble copyright as exists in the United States. This is primarily because PLR in Germany was created for social aims, not as a recognition of artistic rights. There can be no doubt that in 1972, the German government’s intention in amending copyright law\(^{127}\) for authors was to finance, at least in part, a social security program for sick and aged authors.\(^{128}\) These social aims are seen in the general contract between the government and the collecting societies. The claim to compensation under PLR is therefore exercised only by a collecting society. This “collectivization”

\(^{118}\) Id.
\(^{119}\) Id.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.

\(^{127}\) The original lending right provision of the copyright law of 1965 included only those lenders with a profit motive, thus excluding public libraries. This original provision offered little of benefit to authors. See generally Dietz, supra note 99.

\(^{128}\) Id. at 77.
of the claim was introduced to ensure that not all the income would be distributed to individuals but would be used for social funds.\textsuperscript{129}

IV. PLR in the United States

One of the most striking things about the West German approach to PLR is how it defines its own parameters within the body of copyright law. The German PLR program is established as a part compensation scheme, and part social fund for authors. The program does not alter general copyright provisions, but carves out an exception to assist one specific type of artist, the published author. Germany's law grants authors a public lending right, but it is a right clearly defined and limited by the role of the collecting society as intermediary, and by the frequency of compiling library usage data.

United States copyright law also distinguishes between different art forms in rights and application.\textsuperscript{130} Although basic principles remain constant, the Copyright Act of 1967\textsuperscript{131} defines the limitation on exclusive rights in a copyrighted work in six different ways: fair use, reproduction by libraries and archives, effect of transfer of particular copy or phonorecord, exemption of certain performances and displays, secondary transmissions, and ephemeral recordings.\textsuperscript{132} The Copyright Act is unified by principle, and divided by its application to the various art forms covered under the law.

Recently, the United States Congress passed the "Record Rental Amendment of 1984;"\textsuperscript{133} this bill illustrates how copyright can be modified to address the needs of a specific group of artists while still preserving the exclusive rights in a copyrighted work enumerated in section 106 of the Copyright Act.\textsuperscript{134} The Record Rental Amendment was passed in response to complaints from the record industry that record rental establishments adversely affected the ability of copyright holders to exercise their reproduction rights under the Copyright Act.\textsuperscript{135} Congress acted after hearing testimony describing the economic effect on the recording industry of record rental shops which rent records for twenty-four to

\textsuperscript{129} Id. at 28.
\textsuperscript{130} 17 U.S.C.S. § 102 (Law. Co-op. 1981) lists seven categories included within the copyright protection: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. Copyright is protected in each of these categories in the method best suited to the art form.
\textsuperscript{131} 17 U.S.C. § 101 et seq. (1967).
\textsuperscript{133} Record Rental Amendment of 1984, PUB. L. No. 98-450, 98 Stat. 1727.
\textsuperscript{135} Id.
seventy-two hours for fees of $.99 to $2.50 per disc. The Record Rental Amendment amends 17 U.S.C. section 109 to restrict the owner of a record from renting, leasing, or lending the record for direct commercial advantage unless the owner of the record is authorized to do so by the owners of the copyright.

The Record Rental Amendment is important because it illustrates how copyright could be modified to accommodate PLR. There are several parallels between the Record Rental Amendment and PLR legislation. Both types of legislation seek to modify the first sale doctrine, that the copyright holder has no right to control distribution of a copyrighted work beyond the point of first sale of that copy. Both types of legislation also recognize the economic deprivation caused by subsequent transactions of a particular copy. Just as the Record Rental Amendment was drafted in response to lost record sales caused by inexpensive rental of records, PLR is created in response to lost book sales caused by library lending.

There are, however, two important differences between the Record Rental Amendment and PLR that must be noted. First, the Record Rental Amendment was proposed and supported by the record industry, which is much more organized and better financed than authors in America. Second, the Record Rental Amendment only directly affects the economic health of record rental establishments and the record industry, and makes no claim on public funds. PLR compensates authors for lost book sales out of public funds and therefore affects everyone. The underlying fact remains, however, that the Copyright Act could be amended to accommodate PLR.

Upon first hearing about PLR, most Americans' reaction is disbelief that such a system could be administered effectively without creating a bureaucratic nightmare. Again, the German PLR law offers a guide on how to institute PLR efficiently and easily. Only Sweden compensates authors by a large sampling of all library loans on a year-round basis to

---

136 Id.
137 Id. The Amendment is carefully worded to include only transactions for direct commercial advantage, thereby distinguishing itself from PLR which does not provide commercial advantage to libraries.
138 Fields, Senate Bill to Study U.S. PLR, 224 PUB. WEEKLY, 15 (1983). At the Library of Congress' Center for the Book Symposium, which was the impetus for S.2192, Dorothy Schrader, general counsel for the Copyright Office, told authors to watch the progress of the Record Rental Amendment as an indication of the likelihood of amending copyright to accommodate PLR.
139 Id.
140 Id. Dorothy Schrader warned: "[A]uthors themselves have to get far more energized on the issue" and line up strong allies, such as the publishing industry. Robert Caro, of the Authors Guild, echoed such sentiments several times during the symposium.
141 See generally The Record Rental Amendment of 1984, PUB. L. No. 98-450, 98 Stat. 1727.
compute PLR.\textsuperscript{142} Both Great Britain and West Germany only measure a representative sampling of library loans. Any program in a country as large and diverse as the United States would have to adopt a broad random sampling method of calculating loans to compensate authors. A system could be worked out by which a representative number of libraries in each state would record all library loans to calculate just compensation to authors. State governments would be instructed to select a representative group of libraries equal to the number of the state's United States congressmen. It would be up to state governments, to choose libraries which included representation of all the regions of the state, and included libraries of all sizes.

A mechanism is already in place to calculate all loans on a national scale. Most of the time when a book is published in the United States, the title is assigned an International Standard Book Number (ISBN). This ISBN could be used as a "common language" to collect data on library borrowings and to calculate PLR payments. When authors register their titles with the United States Copyright Office or the Library of Congress, they could at the same time register for payments for PLR. (A similar system exists in Great Britain by which each author who registers with the PLR office is assigned a number, and at the end of the year that number is matched with the circulation of the specific ISBNs.) Such a system requires a sophisticated computer system. This would not create too much of a problem since many library systems are now computerized, and it is predicted that all libraries will be using a bar coding system within the next twenty years. At worst, Congress could create a temporary program to assist libraries in financing computerization programs.

Other methods of compensating authors for PLR could also be introduced in this country. The U.S. tax code could be amended to make income derived from authorship tax free.\textsuperscript{143} This solution has the advantages of ease in administering, and of compensating authors according to their success, thereby creating a quantity-based "right." Another alternative to measuring library loans is to require libraries to pay a premium for the books they purchase, and this premium would be passed along to the author. This solution has the advantages that it is still tied to library borrowing preferences, and it would reward authors of highly specialized books, or books of localized interest. (This second alternative would have to be at least indirectly financed by the individual library system and the state.) Whichever alternative is chosen, the conclusion is that a program recognizing PLR is feasible in the United States.

\textsuperscript{142} Seeman, supra note 14, at 105.

\textsuperscript{143} In the Republic of Ireland, all artists are given tax breaks. The effect of exempting all book royalties from taxable income on the United States tax base could be fairly easily calculated by the Treasury Department.
V. CONCLUSION

The more difficult question to answer is the desirability of PLR legislation. There must exist a need for greater support for literature, and a desire to recognize a right of authors to compensation for the loss of revenue caused by PLR. Currently the main source of government support for literature in the United States is the National Endowment for the Arts (NEA). In 1983, the NEA gave $4,325,137 in literature grants.\(^{144}\) (This represents less than four percent of NEA’s 1983 federal appropriation.)\(^{145}\) NEA’s major literature grants went to fellowships for creative writers, professional development, assistance to literary magazines and small presses, and writer-in-residence programs.\(^{146}\) Although their assistance cannot be dismissed, these NEA programs do not have the kind of sweeping, across the board, impact on authors of a comprehensive PLR plan.

The NEA represents the American government’s first steps in recognizing the need for public support for the arts. The NEA is not, however, specifically established to aid authors nor does it recognize a right of authors to any kind of compensation. The two purposes to PLR legislation outlined in the introduction to this paper of recognizing the right of authors to compensation for loss of revenue, and a desire to support literature and authorship are not the goals of any large interest group nor society at large. If PLR legislation is to be passed by Congress and accepted by the general public, two things must first happen. One, the proposed PLR commission must be formed, and must fashion a PLR plan that suits the needs of American authors and is acceptable to librarians, politicians, and the general public which uses the library system. Second, a massive education campaign, led by authors and their supporters must take place.

If PLR is to succeed it will require a much broader base of support than it currently has in the United States. Support for PLR must be nurtured over time — it should be remembered that British authors fought for thirty years for the passage of PLR legislation. If the public can be convinced that PLR represents a right which authors are entitled to, PLR can become a major positive force in the growth of literature in America.

\(^{144}\) National Endowment for the Arts, 1983 Ann. Rept. 102.
\(^{145}\) Id. at 317.
\(^{146}\) Id. at 102-14.