

## Legal Aspects of Public Lending Right

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THE RELATIONSHIP OF public lending right (PLR) legislation to the law of copyright is the central legal issue in the development of the PLR concept. Parties to the PLR debate cannot be clearly divided by how they view this relationship; however, most proponents of a public lending right contend that PLR legislation is an integral part of copyright law, while opponents maintain that PLR legislation is hardly a consideration of copyright law at all. In only one of the ten countries to enact PLR legislation has the statute been made a part of copyright law. In the nine other countries, proponents have, in effect, won the PLR battle but lost the main legal point on which they based their attack. In short, regardless of the apparently unconvincing legal basis of their position, advocates of PLR have nonetheless gained support in these countries because the concept addresses the perceived problem of lending library activities undermining the livelihood of the authors who create the books loaned.

Two approaches are used to solve the problem of whether PLR legislation is appropriately considered a part of copyright law. The first approach is analysis of the basic theoretical framework of copyright law and the relationship of PLR to that framework. The second approach is analysis of the practical consequences of deciding that PLR is an integral part of copyright law. The theoretical and practical analyses are reviewed here in recognition of the double-sided dilemma confronting the PLR adversaries. On one side of the dilemma are the proponents who, to enhance the acceptance of PLR legislation, point to the insepa-

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rably close relationship of PLR to two underlying principles of copyright law. Their theoretical arguments are not without merit. However, the linking of PLR legislation to general copyright law, as a practical consequence, in fact diminishes or defeats some of PLR's major social aims in the country in which legislation is enacted. On the other side of the dilemma, opponents of PLR legislation, in denying the relationship of PLR to copyright law, have not thereby convincingly argued that PLR legislation as a practical matter is unwarranted or unnecessary. The history of the legal development of PLR, therefore, is a story of slow acceptance of specialized social legislation passed in recognition that lending libraries in the latter half of this century may be affecting the compensation authors receive for their writings, but without a corresponding acceptance of the major legal principle on which that legislation is premised.

### **National Differences in Copyright Laws**

In the closing chapter of his treatise on U.S. copyright law, Melville Nimmer noted:

The subject matter of copyright under most foreign copyright laws is largely the same as the subject matter under the United States Copyright Act. Thus, all members of the Universal Copyright Convention undertake to provide adequate and effective protection for "literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings, and sculpture." Similarly, the "literary and artistic works" protected under the Berne Convention are said to "include every production in the literary, scientific and artistic domain, whatever may be the form of its expression...."<sup>1</sup>

He also stated: "The rights protected under most foreign copyright laws are in broad outline quite similar to those which may be claimed under the U.S. Act. That is the rights of reproduction, adaptation, distribution, and performance, as recognized under the U.S. Copyright Act, all have counterparts in foreign copyright laws."<sup>2</sup>

However, as Dr. Adolf Dietz stated in the introduction to his detailed comparative study of copyright laws in the nations of the European Economic Community (EEC): "It must be remembered that these copyright laws display not only considerable structural differences, attributable to only a small extent to their different ages, but also that the matters regulated by these laws are not the same in all cases. For example, the copyright laws of some countries refer to matters that are regulated in other countries by other means than copyright law, or are

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not regulated at all."<sup>3</sup> Furthermore, in assessing the interpretation of an EEC treaty provision, Dietz, scientific consultant at the Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law, somewhat grudgingly acknowledges that consideration must also be given to the concept that "copyright cannot be evaluated separately from its culturo-political *ratio legis*." Indeed, perhaps "the culture industry also can be comprehended only on the basis of the interdependence of culturo-political and economico-political objectives," which vary from nation to nation.<sup>4</sup>

The basic concepts of copyright law are sufficiently broad to permit their generalization without regard to national differences, and they are sufficiently complex in application to reveal myriad national variations when subjected to closer scrutiny. Nimmer and Dietz do not disagree on the nature of copyright law; rather, they do not share the same lens in their focus on the question of national differences.

For the most part, proponents and opponents of the PLR concept have contested the question of the appropriate relationship of copyright law and PLR legislation on a theoretical level well above the necessity of examining national differences in copyright law. For this reason, these differences will not be explored in this review, and the salient features of copyright law mentioned later can be applied more or less equally to all the nations in which the PLR debate is being waged.

The fact that the PLR adversaries have debated the issue of PLR in the context of a law of copyright which transcends national differences does not mean that the cultural, economic and political differences to which Dietz refers are not important elements for consideration. The varieties of proposed and enacted PLR legislation reflect national differences not only in their existing legal structures, but also in their social problems, goals and objectives. Furthermore, it is the cultural and economic differences in nations which perhaps provide the impetus for successful PLR legislative campaigns in some countries, while the same arguments fail in others. For example, in the United Kingdom development of an efficient, heavily used library system is presented as a significant factor contributing to the plight of British authors: "During the debate on the Public Lending Right bill in the House of Commons, in 1973, figures were quoted to show that in 1971 in Holland 18 books were borrowed for every 12 bought, in the United States 13 for every 14, and in the United Kingdom 38 for every 4."<sup>5</sup> As Arthur Jones notes in his article, the difference in the Scandinavian countries is the relatively small population which provides a limited market for authors writing in the vernacular who must compete with the use of translations and

second-language publications. Thus, while PLR proponents advocate legislation based on an argument in copyright law which transcends national differences, they have pressed for reform in those countries where the relevant social differences are greatest.

### Natural Justice in Copyright Law

Advocates for PLR contend that the concept is closely related to the underlying principles which form the basic theoretical framework of copyright law. One principle to which they point is the source of copyright law as a precept of natural justice—specifically, that a creation belongs first to its creator:

Our whole law relating to literary and artistic property is essentially an inheritance from England. It seems that from the time "whereof the memory of man runneth not to the contrary," the author's right to his or her manuscript was recognized on principles of natural justice, being the product of intellectual labor and as much the author's own property as the substance on which it was written....[A]ges before Blackstone, an Irish king had enunciated the same principle in settling the question of property rights in a manuscript: "to every cow her calf."<sup>6</sup>

This underpinning to the copyright law has an important corollary: the right of literary ownership is not one conferred to authors by virtue of legislative enactment. Statutes and regulations have developed from the necessity of establishing limitations on the use of literary property by persons other than the owner. In 1710 the Statute of Anne<sup>7</sup> became: "the first statute of all time specifically to recognize the rights of authors and the foundation of all subsequent legislation on the subject of copyright both here and abroad."<sup>8</sup> However, by 1710 the English Parliament already recognized the wisdom of limiting the exclusive right of publication to a term of years in order to cultivate a body of knowledge which would enter the public domain. The Statute of Anne limited authors or their assigns to the sole right of publication for fourteen years with the privilege of renewal for an additional fourteen years if the author were living at the expiration of the term. In other words, the exclusive right of ownership did not last in perpetuity, and the first embodiment of the principle of natural justice of ownership of literary property had struck a balance with a conflicting social objective.

All copyright legislation since the Statute of Anne represents additional responses to cultural change and technological development. The older, more widespread, and more universally accepted the responses have become, the more they have taken on the character of

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being a part of the embodiment of natural justice in copyright law. Indeed, the right of exclusive reproduction, now considered the heart of copyright legislation, could not have been a serious issue until the development of moveable type allowed reproduction of works in relatively large quantity.<sup>9</sup>

Neither side in the PLR debate offers much more than assertion and denial in answering whether PLR is a matter of natural justice. Using the art of nomenclature alone, those favoring the idea have seized the initiative. "Public lending right" is the popular designation for the concept of author compensation for library lending which is used by friend and foe alike, even though statutory language generally omits this terminology. Proposed legislation elevated to the importance of protecting a right may produce an initial predisposition to recognize the proposal as a part of natural justice.

The foundation for any notion of natural justice is the concept of fairness, and an appeal for fairness not only gives validity to intuitive reaction to the problems addressed by the PLR idea, but also provides a contextual basis for presentation of detailed factual information. Proponents of PLR ask for legislative support simply as a matter of fairness to authors. Opponents claim that fairness is not so simply discerned when other segments and interests of society are considered. There is no monopoly of fairness in the PLR debate; and factual detail is not conclusive in establishing the economic plight of authors, or the ways in which libraries contribute to their economic predicament, or the royalty scheme best suited to provide recompense.

Appealing to a sense of fairness has marked the downfall of the natural justice argument that public lending right is appropriately a part of copyright law. Whereas the question of whether PLR is a natural right of the owners of literary property must be answered either *yes* or *no*, the question of fairness need not be answered so absolutely. Many legislative schemes can satisfy the call for fairness to authors without the necessity of amending copyright law. This fact helps resolve the seeming paradox that, in those nations which have enacted PLR legislation, the copyright laws have not been amended even though the theoretical basis for the legislation is argued on principles of copyright. Conversely, opponents of PLR are faced with the discomforting prospect of winning the theoretical legal arguments but still losing the legislative battle on less esoteric grounds.

### Protection of Tangible Expressions in Copyright Law

Not all aspects of ownership are included in the theoretical framework of copyright law. Thus, the principle of ownership in natural justice which provides that the author is the first owner of his artistic creations must be tempered with a second principle which identifies those aspects of ownership specifically within copyright protection. This second principle of copyright law extends protection to the author only for the tangible expression of his ideas: "Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>10</sup>

Copyright law does not protect against the use of an idea, but rather protects the expression of that idea in a tangible form:

The principle of non-protectability of ideas, long recognized by the courts, has been expressly adopted in the current Copyright Act. To grant property status to a mere idea would permit withdrawing the idea from the stock of materials which would otherwise be open to other authors, thereby narrowing the field of thought open for development and exploitation. This, it is reasoned, would hinder rather than promote the professed purpose of copyright laws....Indeed, it has been said that copyright protection is granted for the very reason it may persuade authors to make their ideas freely accessible to the public so that they may be used for the intellectual advancement of mankind.<sup>11</sup>

The U.S. statute states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>12</sup>

Once an idea is fixed into a tangible medium of expression, copyright law grants to the creator or his assigns the exclusive right to reproduce copies for a term fixed by statute: "In any new Copyright Act it might be possible to start by defining copyright as a right subsisting in relation to all original works, meaning by the word 'original' the product of some person's skill and/or labour, if fixed so that they can be reproduced."<sup>13</sup> As part of the bundle of rights which inhere in copyright, the owner has the exclusive right not only to reproduce, but also to derive from, distribute, perform, or display the copyrighted material. In continental Europe there are additional rights, known as *droit moral* (moral right), which include the right to withdraw a publication if it no longer expresses the views of the author, the right to be known as the

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author of a work and to prevent others from claiming authorship, the right to deny authorship which has been falsely attributed, and the right to prevent alterations to the work. The *droit moral* has received little attention in the United States, and was not included in the 1976 Copyright Act. All countries provide some limitations on the exclusive rights of the copyright owner. The United States, for example, has developed the judicial doctrine of "fair use"<sup>14</sup> to enable some copying which would otherwise be an infringement of the copyright owner's exclusive rights.

Each copyright owner has the exclusive right to produce copies of the work, a copy being the material object in which the work has been tangibly expressed. Using the limited monopoly position afforded by copyright, the author is free to exploit his position commercially with the sale of copies to others. Sale of a copy of the work conveys no copyright interest to the buyer, and under existing law the author has exhausted his economic and legal interest in that copy once it has been sold.

The lines of argument are clearly drawn on the question of whether PLR is appropriately a concern of copyright law based on the principle of ownership rights which are traditionally protected. Both sides in the controversy acknowledge that authors currently have no legal claim to compensation for the use libraries make of copies of their works unless there is specific statutory authorization for compensation, since there is no copying involved and the author has no residual ownership interest in the copies purchased by libraries. Opponents of the idea of incorporating a public lending right into copyright law assert two major points: removing the necessity of copying from the conceptual framework of copyright is an unwarranted step; and, altering broad social legislation, such as copyright law, to correct a specific economic imbalance as may exist between libraries and authors, is an inappropriate blunt means of achieving a relatively subtle end.

In addressing the claim that the nature of copyright law necessarily involves the exclusive right of reproduction and distribution, proponents of PLR legislation point to compulsory licensing statutes, such as those sections of the Copyright Act which cover phonorecords, retransmissions by cable television systems, and jukeboxes.<sup>15</sup> "Essentially, a compulsory license is one conferred by statute...[which] enables others to use a copyright work, by copying, performing, displaying, or otherwise, without infringement when the user has fulfilled specified conditions, including the payment of royalties."<sup>16</sup> In short, copyright law has already altered the exclusive right of reproduction and distribution with compulsory licensing statutes, and no new conceptual framework is

established by including compensation for authors in a similarly arranged PLR scheme. Furthermore, the proponents maintain that there is no functional difference between the multiple loaning of a single copy from a library and the copying of protected works.

Copyright statutes are no longer just the embodiment of broad principles of copyright law, and the 1976 Copyright Act is an example of the trend in copyright legislative development: "Where previously the statute had too little to say in many vital copyright areas, it may now be argued that it says too much. I for one regret this departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law implanted upon a statutory base consisting of general principles. This has now been replaced with a body of detailed rules reminiscent of the Internal Revenue Code."<sup>17</sup> One of the provisions of the new act is devoted to library photocopying.<sup>18</sup> Not only are copyright statutes increasing in complexity with the willingness to attempt fine-tuning of conflicting social interests, but also the U.S. statute has already addressed the issue of the impact of library activities. Those who advocate the inclusion of PLR in copyright law could argue that the more detailed the copyright law becomes, the more appropriate additional detail becomes.

Those seeking to adjust the balance of interests between libraries and authors might disagree that the task is a minor one. It is a "societal policy (funding of ubiquitous lending libraries) that alters the workings of the copyright scheme." Indeed, "the trouble is caused by an activity of government—the establishment, funding, and staffing of public libraries—in a degree so great that the micro-economic balance of the copyright scheme rewards is interfered with...."<sup>19</sup> These remarks from *Exemptions and Fair Use in Copyright* by Leon Seltzer, director of Stanford University Press, are presented to suggest that a PLR scheme is sufficiently important and related to the theoretical framework of copyright principles and legislation that its incorporation into the copyright statute is appropriate, as most PLR proponents contend. However, in concluding his analysis of the issues surrounding PLR, Seltzer suggests that any scheme should be outside the scope of copyright.

### **Tactical and Practical Considerations**

There is no agreement among scholars or PLR adversaries on the appropriate relationship of PLR legislation to copyright law. Equally valid jurisprudential arguments support opposite conclusions. Furthermore, those favoring PLR legislation do not necessarily recognize



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its close relationship to copyright law. Conversely, opposition to PLR legislation does not necessarily indicate opposition to a close relationship. Nonetheless, there are tactical reasons for, and practical consequences of, asserting that the relationship should appropriately be considered a particular way. The quandary confronting all parties in the PLR debate is the perverse way in which tactics and practical consequences conflict.

As a tactical matter, supporters of a PLR concept advocate that it is an element of copyright law. There are three main reasons for their viewpoint. First, being a part of copyright law gives the PLR concept an additional legitimacy to the claim of authors who might otherwise be accused of seeking mere social welfare legislation. Second, each nation which acknowledges PLR legislation as a part of copyright creates pressures for other countries to do the same as a matter of reciprocity agreements and copyright treaty. Thus, as an international movement, passage of PLR legislation becomes progressively easier even if documentation of the economic condition of authors becomes more difficult in the separate country. Third, once incorporated into a system of copyright, a PLR scheme would be more difficult to repeal than it would be as a free-standing piece of legislation.

There are two tactical disadvantages to claiming that public lending right legislation is an integral part of copyright law. First, the impetus to revise or amend one of the fundamental laws of a nation may take years to generate action. (The experience of the United States in revising the Copyright Act of 1909 is a case in point.) On the other hand, specialized legislation can be urged and enacted at any time. Second, as a practical consequence of PLR legislation enacted as a part of copyright law, nations are bound by treaty obligation to extend the same rights of protection to foreign authors from all other nations that are treaty signatories.<sup>20</sup> This result is so significant that some advocates of PLR legislation disclaim the relationship of public lending right to copyright law on this basis alone. In Scandinavian countries with PLR legislation, the drain of lending right royalties to foreign authors might actually worsen the condition of vernacular writers rather than help them if the PLR schemes were part of copyright. In nations of the European Economic Community, the movement to harmonize the copyright laws could also aggravate the purposes of public lending right schemes which are considered a part of copyright.<sup>21</sup>

In the United States the doctrine of federal preemption may prove a special disadvantage to asserting that PLR legislation is a part of copyright protection. The U.S. Constitution empowers Congress "To

promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>22</sup> It also provides that the "Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land."<sup>23</sup> These two constitutional provisions are the source of the doctrine of federal preemption, a doctrine which may prevent states from enacting legislation in areas of law occupied by the exercise of powers delegated to the federal government. Thus, the protection for works in their tangible expression afforded by the Copyright Act of 1976 could preclude individual states from enacting a PLR scheme if it is asserted to be a part of copyright law. Whether any type of PLR legislation can be enacted by an individual state is problematical because of the preemption doctrine. The problem is explored in more detail later.

In an effort to discourage the passage of any type of PLR legislation, opponents generally maintain that there is no relationship between copyright law and authors' royalties statutes. In general, their arguments have been successful, even in those countries where PLR legislation has been adopted. Whether a public lending right is a conceptual extension of the rights of copyright law will continue to be debated. Whatever the outcome of the theoretical arguments, the idea of payments made to authors for public library use of their works "reflects a sense that the author's appropriate expectations of reward for his work are not properly taken care of by the ordinary economics of the copyright scheme, that somehow the nature of libraries themselves—at least as they have come to be developed in some countries—unacceptably dilute[s] those expectations."<sup>24</sup>

### Public Lending Right in the United States

A bill introduced in Congress in 1973 requesting a study of the PLR concept died in committee without a hearing, and thus ended the first legislative test for authors' royalties legislation in the United States.<sup>25</sup> Investigation of a similar European concept which has met with greater acceptance in the United States may indicate how some elements of the PLR controversy will likely be received in the lawmaking process.

In some respects the idea of a public lending right is an extension of an older European concept, the *droit de suite* (art proceeds right), which requires the payment of royalties to artists for the resale of their works. The first *droit de suite* legislation was adopted in France in 1920, and similar legislation later gained approval in Germany and Italy.<sup>26</sup>

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Although there are differences in the royalty schemes of each country, the principle of each law is the same—artists should be compensated for each resale of their original works. This compensation is justified not only to promote the arts, but also to protect artists from economic exploitation by dealers, galleries and collectors. As noted by Monroe Price, the notion of protection from economic exploitation is “a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece.”<sup>27</sup>

In 1976 the California legislature enacted the Resale Royalties Act<sup>28</sup> and became the first state to require the payment of royalties to artists. California remains the only state with *droit de suite* legislation, although similar legislative proposals have been examined in Florida, Iowa, Maine, Minnesota, New York, Ohio, Rhode Island, and Texas.<sup>29</sup> Under the California statute, whenever a work of fine art is sold, the seller must pay 5 percent of the sale price to the artist provided that the sale price exceeds \$1000, the artist is alive, and the seller is a state resident or the sale takes place in California. Provision is made for the royalty to be placed with the California Arts Council if the artist cannot be located. “Fine art” is defined by the statute as “an original painting, sculpture or drawing.”<sup>30</sup>

The California statute has been criticized for its technical flaws, such as its vague yet narrow definition of fine art and for the difficulty of enforcement, as well as for the oversimplification of its underlying premise of supporting the arts by marketplace participation in some transactions. However, in *Morseburg v. Balyon*,<sup>31</sup> the first court test of the statute, dealers based their refusal to pay the royalty primarily on the assertion that the federal Copyright Act preempted California law. Federal District Court Judge Takasugi disagreed and, in his decision upholding the California law, concluded:

Not only does the California law not significantly impair any federal interest, but it is the very type of innovative lawmaking that our federalist system is designed to encourage. The California legislature has evidently felt that a need exists to offer further encouragement to and economic protection of artists. That is a decision which the courts shall not lightly reverse. An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of, a free and vital community of artists. The California Resale Royalties Act may be a small positive step in such a direction.<sup>32</sup>

The decision was affirmed in the Ninth Circuit Court of Appeals, where the court based its preemption decision solely on the Copyright Act of

1909, since the transactions in question occurred before the effective date of the 1976 act.<sup>33</sup>

In *Royalties for Artists*, a research monograph prepared for the Oregon Legislative Administration Committee, Allan Green, director of legislative research, notes that those who favor artists' royalties legislation argue that: "The California law sets an important precedent for support of artists. State legislation will encourage Congress to provide royalties for artists on the national level."<sup>34</sup> In fact, federal *droit de suite* legislation was first introduced in 1965, but the bill languished in committee without a hearing through both sessions of the 89th Congress. In recent years federal royalties legislation has been introduced more regularly, perhaps encouraged by state activity.

The *droit de suite* and PLR are similar concepts. Both provide economic rewards to artists on the basis of transactions in which they no longer have an ownership interest in the material item which is the subject of the transaction. The *droit de suite* and PLR provide economic protections in addition to those afforded by the general laws of copyright. Because an author has a greater set of comprehensive protections under the federal law of copyright, there is a greater chance that PLR is preempted from state involvement. However, the reasoning of the courts in *Morseburg* applies equally well to the encouragement of authors as to artists.

## Conclusion

As in European countries, the concept of a public lending right does not fit neatly into the principles of copyright law in the United States. Nonetheless, PLR legislation does address the growing social concern of the economic impact of libraries on the livelihood of authors. And, if the brief but successful legal development of *droit de suite* legislation in California is an indication, PLR is a workable concept in the U.S. legal structure.

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