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Comments on the Scoping Study on Public Lending Right (SCCR/45/7)

In response to the invitation by the Chair at SCCR/45 for delegations to send written comments on the draft Scoping Study on Public Lending Right (PLR) (SCCR/45/7), the undersigned observers representing the international library community have prepared the following comments set out in the Annex. Overall, the study lacks objectivity and assumes that PLR is an appropriate means of incentivizing creativity in developing countries.

In brief, our comments highlight the following points:

Access rights and human rights. The study takes at face value a claim by an authors' group that all uses of human work should be subject to remuneration based on principles set out in the Universal Declaration of Human Rights. The claim can, we believe, be challenged from human rights and copyright law perspectives. To clarify matters, WIPO should commission a study to examine the topic of access rights and human rights since some authors' groups claim human rights principles as the justification for PLR.

PLR and the WIPO treaties. The study fails to acknowledge the extent to which PLR is incompatible with established global copyright norms: the doctrine of exhaustion, a necessary, longstanding corollary to the distribution right, and the principle of national treatment with particular consequences for developing countries (as it would likely mean that most PLR fees would be paid to copyright owners in the global north).

Marrakesh Treaty does not contemplate PLR. The study appears to encourage the application of PLR to publicly funded specialized libraries operating under the Marrakesh Treaty. This position is, we believe, contrary to the spirit of the treaty that does not contemplate the application of PLR to libraries serving people who are blind, visually impaired or otherwise print disabled. It is inappropriate for the study to suggest that it should.

National policy objectives not addressed. While the study makes numerous references to PLR systems being adaptable to diverse national cultural goals and economic contexts, it fails to identify these goals or to give examples of the assessment criteria by which the study's author concludes that the systems are "successful". Examples and case studies of goals and criteria are necessary to enable member states to assess the merits, or otherwise, of introducing a PLR system in their own country and which legal approach, if any, might best apply.

National capacity requirements not addressed. While the study correctly observes that libraries have to be equipped with the necessary capacities to operate a PLR scheme, it fails to provide information on minimum standards that a public library sector must reach in order to implement a PLR system, nor the levels of investment needed (for example, average spending on public libraries in Europe ranges from \$65 per capita in Denmark, \$46 in Sweden and \$35 in the Netherlands, while data obtained for three countries in Africa shows per capita spending of between \$2.10, \$0.11 and \$0.03). Issues of capacity are fundamental to any discussion of PLR - they cannot be ignored.

Administrative costs not addressed. Similarly, the study does not address specific administrative costs of PLR schemes, as the study's author was unable to obtain this information. For this reason, the study provides information on general cost factors only, and includes no information on initial set-up costs. How can governments assess if PLR is an appropriate or cost-effective system if it is not possible to obtain information on set-up or operating costs for existing schemes?

Issues for developing countries not addressed. It is essential to understand the situation of public libraries in developing countries that would be required to implement PLR, but the study does not address these issues. For example, in Africa, public libraries are used mainly by children and students to support formal education, library books are often obtained through donation programmes, and unlike in Europe or Canada, public libraries often are obliged to charge fees to support the delivery of basic services. Unless the study contains an objective assessment of the implications of PLR in a developing country context, it risks being seen as a rich countries' charter for implanting PLR on countries that are less well off.

Neo-colonial approach. Almost all examples of "successful" PLR schemes are from Europe, Canada and other high income countries. The assumption underlying the study seems to be that transposing PLR, which originated in Europe, onto the developing world will necessarily be beneficial, a neo-colonial approach that is, in our view, outdated and inappropriate. And while the Eurocentric PLR model is actively promoted in the developing world, it appears that Europe is no longer committed to its active enforcement at home.

PLR and e-books. The study does not clearly explain the unique compensation model that applies when public libraries pay for access to e-books, such as the fact that remuneration for the loan of an e-book is already built into the cost of the licence.

Bias towards PLR. The study seems to assume that PLR systems are automatically a good thing and should always be encouraged, a point of view that appears to replicate that of rightsholder lobby groups. The study even appears in some instances to be advocating for the introduction of PLR, the broadest PLR systems, and the extension of PLR to schools and educational institutions (even in developing countries).

Misrepresentation of IFLA's position. In a number of instances, the position of IFLA (International Federation of Library Associations and Institutions) is presented in a way that is misleading or confusing. For example, it omits to mention that IFLA opposes the introduction of PLR schemes in developing countries based on the unsuitability of PLR in this context.

In conclusion, significant further research would be needed to rectify these fundamental gaps in the study, including with respect to issues outside the normal scope of work of SCCR (e.g., tax incentives for creators). For this reason, the Committee should not spend any more time or resources on this topic.

Sincerely,

International Federation of Library Associations & Institutions (IFLA)
Electronic Information for Libraries (EIFL)
Library Copyright Alliance, USA (LCA)
Canadian Federation of Library Associations (CFLA-FCAB)



Annex

Comments on the Scoping Study on Public Lending Right (SCCR/45/7)

This annex contains detailed comments from the International Federation of Library Associations & Institutions (IFLA), Electronic Information for Libraries (EIFL), Library Copyright Alliance, USA (LCA), Canadian Federation of Library Associations (CFLA-FCAB) on the draft Scoping Study on Public Lending Right (SCCR/45/7)¹.

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Access rights and human rights

The study takes at face value the claim by an authors' group that all uses of human work should be subject to remuneration based, they say, on principles set out in the Universal Declaration of Human Rights (p. 11, 21-22)².

The claim can be challenged from human rights and copyright law perspectives. While a remuneration interest can certainly derive from human rights for certain types of uses (commercial) and certain rightsholders (creators), it can be argued that it may not be

¹ These comments focus on the content of the study. They do not deal more generally with the role of public libraries in supporting authors, promoting and preserving their works, nor do they go into detail on issues such as e-books in public libraries and dealings with CMOs.

² Footnote 5, p.11 should also make clear that the claim is the view of an authors' group (the European Writers' Council (EWC)) because without attribution, the footnote reads as a statement of fact.

justified by competing human rights, such as freedom of expression, freedom of information, artistic freedom and the right to share in the benefits of scientific advancements, that may reflect a stronger interest. This has to be determined on a case-by-case basis according to the facts of the case, justification of the use in question and the principle of proportionality. The stronger the justification by competing human rights, the weaker the claim to remuneration³.

International copyright law contains numerous examples of unremunerated limitations and exceptions to exclusive rights, such as limitations on the term of protection, the right of distribution and types of work that are subject to protection. The Berne Convention (1886) has specific unremunerated exceptions for quotation (mandatory), teaching, news reporting, and political speeches, and the Marrakesh Treaty (2013) contains mandatory exceptions for uses by persons with print disabilities. Additionally, WIPO Member States, supported by international agreements⁴, have enacted unremunerated exceptions in national law for educational and research uses, and uses by libraries and archives, among others. And if the assertion were true - that every single use must be compensated (as a human right) - the limitation on the author's right due to fair use and fair dealing, found in more than 40 countries around the world, would be eviscerated.

WIPO should commission a study to examine the topic of access rights and human rights since it has come up in the context of a WIPO study, and some authors' groups claim human rights principles as the justification for PLR.

PLR and the WIPO Treaties - Exhaustion and National Treatment

While the scoping study's discussion of the WIPO Treaties, the Distribution Right, and Exhaustion generally is technically correct, it obscures the forest for the trees. To be sure, nothing in the Berne Convention, the WIPO Internet Treaties, or TRIPS prohibits the adoption of a PLR. But the study fails to acknowledge the degree to which a PLR departs from the global norms of copyright law. Early copyright laws, such as England's Statute of Anne, granted the author only an exclusive right of reproduction, not distribution. And when copyright laws were expanded to provide the author with a distribution right, it was

³ See 'Copyright as an Access Right: Concretizing Positive Obligations for Rightholders to Ensure the Exercise of User Rights', Christophe Geiger and Bernd Justin Jutte, June 2024 (with a focus on the EU) at <https://communia-association.org/publication/copyright-as-an-access-right/>

⁴ For example, Article 7 of the TRIPS states that "IP rights should contribute to the mutual advantage of producers and users in a manner conducive to social and economic welfare, and to a balance of rights and obligations". The Preamble to the WIPO Copyright Treaty states, "Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,...". The Agreed Statement to Article 10 (Limitations and Exceptions) permits members to extend existing limitations and exceptions for the digital environment, and to devise new ones that are appropriate for the digital network age.

understood that the distribution right with respect to a particular copy was exhausted with the first authorized sale of that copy. This exhaustion doctrine was necessary for the development in the 19th century of distribution chains for copyrighted works. Without an exhaustion doctrine, a wholesaler of books could not lawfully sell a copy of a book to a retailer, and the retailer could not sell the copy to a consumer, unless both the wholesaler and the retailer had a license from the copyright owner. The transaction costs of these additional licenses would have been prohibitive.

The exhaustion doctrine likewise was essential in many countries for the development of distribution chains for consumer products because those products were distributed, in increasing proportion, in copyrighted packaging. Again, the transaction costs of negotiating licenses for the right to distribute the copyrighted packaging would have impeded the growth of robust consumer markets.⁵

In short, the exhaustion doctrine is a necessary, longstanding corollary to the distribution right in any modern copyright system. Historically, the variation among countries with respect to exhaustion concerned only the issue of international versus domestic (or regional) exhaustion, that is, whether one could import a lawfully made and purchased copy without the permission of the copyright owner.⁶ PLR thus represents a radical departure from the traditional norms of copyright law. The scoping study fails to make clear how radical PLR really is.

The study also fails to emphasize the conflict between PLR and national treatment, a fundamental principle of the Berne Convention. If a country's PLR regime required national treatment, most of the PLR payments would likely go to the copyright owners in a handful of countries in the global north. This would be incompatible with the underlying purpose of PLR systems – the support of domestic authors.

⁵ The U.S. Supreme Court in *Kirtsaeng v. Wiley & Sons*, 133 S. Ct. 1351, 1363 (2013), recognized that the exhaustion doctrine is “a common-law doctrine with an impeccable historic pedigree,” citing 17th century English precedent. The Court understood that “a law that permits a copyright holder to control the resale or other disposition of a chattel once sold is...’against Trade and Traffic, and bargaining and contracting.”

⁶ The only other derogation to the exhaustion doctrine is *droit de suite* or the artists' resale royalty right. This right emerged in France more than 50 years before Denmark adopted the first PLR regime. It applies to a very limited set of works and the compensation it requires is paid by private art galleries, not governments or government-funded institutions.

Marrakesh Treaty for persons with print disabilities

The scoping study states that the inclusion in a PLR system of publicly funded specialized libraries operating under the Marrakesh Treaty can be “a commitment to recognizing the broader cultural and educational landscape and to ensure compensation for rightsholders across various formats” (p. 27). In our view, the statement is somewhat disingenuous (does a country that does not extend PLR to such libraries somehow lack a commitment towards rightsholders?). It also runs contrary to the spirit of the Marrakesh Treaty that has a clear humanitarian and social development dimension.

The objective of the Marrakesh Treaty is to reduce barriers (and costs) associated with the production and international transfer of specially-adapted books. It mandates the introduction of unremunerated exceptions for the benefit of people with print disabilities for non-commercial purposes, and it does not contemplate the application of PLR to specialized libraries serving people who are blind, visually impaired or otherwise print disabled. It is therefore not appropriate for the study to suggest that it should.

National policy objectives

The study makes numerous references to PLR systems being adaptable to diverse national cultural goals and economic contexts that “exemplify the alignment of PLR with local needs” (p. 6). However, it fails to identify these goals or to give examples of the assessment criteria by which the study’s author concludes that the systems are “successful”.

Given that the measurement of success of a PLR system should objectively be based on whether it meets the specific policy objectives of the country in which it operates, the study should include examples of these policy objectives for each country and how the PLR system meets, or does not meet, these objectives. PLR should be considered relative to other government programmes with goals to compensate authors and drive growth of national culture, such as grant programs for authors, tax credits, or business development supports. It would also be helpful to include case studies for each of the legal approaches that apply to PLR (copyright law, right to remuneration, cultural policy). The examples and case studies are necessary to assist member states’ understanding of how to assess the merits, or otherwise, of introducing a PLR system in their own country and which legal approach, if any, might best apply.

National capacity requirements

While the scoping study correctly observes that libraries “have to be equipped with the necessary capacities (personnel and IT infrastructure) for the provision of data” (p. 74), it fails to provide necessary information on what these capacities might entail. For example, PLR systems often require that libraries share data about their holdings and their loans, and this data is stored in a library management system. For libraries to operate these systems, they must at a minimum have stable electricity, networked IT infrastructure, trained staff and adequate budgets.

Active PLR systems documented in the study operate effectively because governments in these countries have invested significantly in public libraries over many years. Considerable further research is required to identify fundamental characteristics of the public library sector necessary to establish and sustain a functioning PLR system - these would appropriately include essential infrastructure such as stable electricity and internet access, staffing (including ICT staff to operate the library management system), the percentage of the population that reads books, and per capita funding for the public library sector.

While per capita funding varies widely from country to country, funding for public libraries in countries with PLR systems is illustrative of the level of investment typical in those countries. Examples of approximate average funding for public libraries include Denmark at €59/\$65 per capita⁷, Australia at €31.50/\$35⁸, the Netherlands at €29.41/\$32⁹, United Kingdom at €14.35/\$16¹⁰, and Canada ranging from €14-€38/\$15-42¹¹. In comparison, data obtained for per capita funding in three countries in southern and east Africa show spending of €1.90/\$2.10, €0.10/\$0.11 and €0.03/\$0.03 respectively (in one case, public libraries have not been allocated a book budget for a decade).

Issues of capacity are fundamental to any discussion of PLR. They cannot be ignored or glossed over. This data is essential for governments to understand minimum standards that a public library sector must reach in order to have the capacity to invest in an effective PLR system.

⁷ <https://naple.eu/finland-spends-six-times-as-much-as-germany-on-public-libraries/>

⁸ Australian Public Libraries Statistical Report, 2021-22, National and State Libraries Australasia, <https://www.nsla.org.au/wp-content/uploads/PLS-2021-22-final.pdf>

⁹ <https://naple.eu/finland-spends-six-times-as-much-as-germany-on-public-libraries/>

¹⁰ <https://www.librariesconnected.org.uk/content/library-funding-uk-2019-20>

¹¹ Various sources, including <https://culc.ca/wp-content/uploads/2021/03/2019-CULC-Public-Library-Statistics.pdf>

Administrative costs

The author of the study was unable to obtain sufficient information relating to the administrative costs of existing PLR systems citing complexity (such as governance models, collection methods, and distribution mechanisms), and noting that publicly available information would not provide reliable comparisons (p. 61-62). For this reason, the study provides information on general cost factors only, and includes no information on initial set-up costs.

However, the issue of costs is critical - how can governments assess if PLR is an appropriate or cost-effective system if information on set-up or operating costs for existing schemes is not available?¹² If it is not possible to obtain the relevant information, due to factors such as complex administration or lack of transparency by CMOs that administer PLR schemes, this should be stated in the study.

Developing countries

While acknowledging that previous discussions at WIPO were contentious with regard to PLR in developing countries¹³, the scoping study fails to address the concerns. It is essential to understand the situation of public libraries that would be required to implement a PLR system. For example, in Africa, public libraries are used mainly by children and students to support formal education (most schools don't have libraries), library books are often obtained through donation programmes¹⁴, and unlike in Europe or Canada, public libraries often are obliged to charge fees to support the delivery of basic services, such as daily access fees for individuals or annual fees for schools and other learning institutions.

The study's conflation of 'PLR Systems in Development' with countries in development is problematic (p. 66). The topic of countries in development merits a dedicated section (or a new annex) that would usefully include information on the context (e.g. economic, social and cultural), public library infrastructures (e.g. buildings, access to reliable electricity

¹² At SCCR/44, Brazil requested that the study include an analysis of costs, Kenya raised questions of funding and sustainability.

¹³ p. 15 India was concerned that PLR could pose unjustified financial burdens on library systems in developing countries, and concern was expressed by developing country delegates that countries with large amounts of translated works may be forced to distribute most PLR payments to authors outside the country (due to national treatment).

¹⁴ For example, in 2023, Book Aid International worked with public library authorities and other partners to deliver books to Ghana (177,335), Kenya (85,667), Malawi (70,334), Rwanda (51,094), Sierra Leone (58,161), Tanzania (76,454), Uganda (122,909), Zambia (99,186), Zimbabwe (145,395). See <https://bookaid.org/wp-content/uploads/2024/07/BookAid-Annual-Review-2023-WEB.pdf>

supply, IT, staffing), funding (e.g. per capita, book budgets, book donation programmes), government policies (e.g. reading, literacy and promotion of free public education), impact on access, costs of implementation and who pays (e.g. under national treatment, if implemented under copyright law).

The fact that many developing countries with a legal basis for PLR still have, according to the study, no active system in place after many years (p. 66-68) indicates that there are challenges, yet the study sheds no light on the reasons. In countries where public libraries rely on donations, rather than purchasing books, for example, one can imagine it would be hard to find state funding for PLR payments (a hallmark of a successful system, according to the study). Therefore it would be instructive to learn about the experiences of developing countries that have PLR on their statute books but haven't yet implemented PLR schemes, and the reasons why it hasn't happened.

In addition, two countries (Singapore and South Africa) should be removed from Table 21 'Overview of PLR systems in development' (p. 66) because as the table correctly shows, neither country has enacted a legal basis for PLR (nor are there plans to do so). The case study on South Africa, that is entirely based on a description of efforts by some lobbyists to introduce PLR, should also be removed¹⁵.

Unless the study contains an objective assessment of the implications of PLR in a developing country context, it risks being seen as a rich countries' charter for implanting PLR on countries that are less well off.

Europe - the source jurisdiction

Almost all examples of "successful" PLR schemes are from Europe, Canada and other high income countries. As noted in the study, successful systems are typically funded by state budgets or regulated by market mechanisms (p. 7). It is therefore no coincidence that Denmark, Finland, Norway and Sweden (where PLR originated) continue to top the list of countries for per capita spending on public libraries¹⁶. The assumption underlying the study seems to be that transposing PLR, which originated in Europe, onto the developing world will necessarily be beneficial. While the proponents of PLR openly state that the EU Rental and Lending Right Directive and subsequent European court

¹⁵ The library sector has opposed efforts to introduce PLR. See 'Public lending right: prospects in South Africa's public libraries?' SA Jnl Libs & Info Sci 2008, 74(1)
<https://sajlis.journals.ac.za/pub/article/view/1257/1404>

¹⁶ Denmark €59/\$65; Finland €60.10/\$66; Norway €42.49/\$47; Sweden €42/\$46 from
<https://naple.eu/finland-spends-six-times-as-much-as-germany-on-public-libraries/>

judgements arising from it are “a yardstick by which PLR systems internationally may be measured”¹⁷, this neo-colonial approach is in our view outdated and inappropriate.

In addition, while the European Commission has in the past actively enforced the 1992 Rental and Lending Right Directive¹⁸, in more recent years, it appears that infringement proceedings against member states for non- or incorrect implementation are not being issued¹⁹. Therefore while the Eurocentric PLR model continues to be actively promoted in the developing world, it appears that the ‘source jurisdiction’ is no longer committed to its active enforcement at home in Europe.

PLR and e-books

The study identifies that there are challenges on all sides in the area of e-book lending, including whether and how PLR should apply. However, it does not explain the unique compensation approach for publishers and authors that is applied when libraries pay for access to e-books. Most e-books are licensed to libraries using a model that constrains the library’s ability to lend the e-book, and the publisher charges a price that is per-loan, or that limits the term of the licence to a certain period of time. Under these licences, the publisher, and through them the author, receive direct compensation for the lending of the library e-book, and the library pays a price that is substantially higher than a single consumer licence. The rationale for PLR is to remunerate the author for the loan, and this remuneration is already built into the licence models currently available to libraries. Should alternative approaches arise for libraries to purchase e-books that more closely resemble how libraries purchase print books, which do not include loan-based pricing, there may be a greater rationale for the introduction of PLR on e-book lending.

Bias towards PLR

The study should be independent and objective on the issue of PLR. It should recognise that there are costs as well as benefits and that in some cases, PLR might not be the appropriate solution. The study does not take this balanced approach. Instead, it seems to assume that PLR systems are automatically a good thing and should always be

¹⁷ PLR international Steering committee: Towards a charter of Best PLR practice, <https://internationalauthors.org/wp-content/uploads/2017/10/PLRi-Charter-english.pdf>

¹⁸ For example, in 2004 the Commission opened infringement proceedings against Spain, France, Italy, Ireland, Luxembourg and Portugal for failure to implement the Rental and Lending Directive or incorrect implementation, https://ec.europa.eu/commission/presscorner/detail/en/IP_04_60

¹⁹ In 2024, rightsholders wrote to the European Commission urging immediate action for alleged non-compliance of the Rental and Lending Directive by member state, Romania https://ifro.org/resources/documents/General/IFRRO_Complaint_to_the_EC_Bookster_Romania_180724.pdf

encouraged, a point of view that seems to replicate that of rightsholder lobby groups. The study appears in some instances to be advocating for the introduction of PLR, the broadest PLR systems, and the extension of PLR to schools and educational institutions (even in developing countries).

For example (underline added):

- a. “PLR systems should encompass all publicly accessible libraries without excluding criteria such as size or place of a library”, (p. 8)
- b. “Other publicly funded libraries, but not considered to be public libraries, such as school libraries and other libraries in educational institutions, universities or specialist libraries, depending on the access rules can be included with the objective to also promote authors and publishers of non-fictional and academic works. (p. 8)
- c. “Based on the findings, the study aspires to offer recommendations useful for implementation of new PLR systems and for further development of existing ones”. (p. 12)
- d. “The coverage of lending in school libraries and lending in academic institutions can help in creating a cultural effect on the availability of nationally authored children’s books and the promotion of educational material tailored to regional requirements. For developing countries, this could be useful in view of national heritage fiction works and scientific and non-fiction works reflecting specifically national needs”. (p. 65)
- e. “To facilitate the establishment of Public Lending Right (PLR) systems in developing countries, detailed information and guidance mechanisms are essential”. (p. 69).

Misrepresentation of IFLA’s position

In a number of cases, the author’s representation of the position of IFLA (International Federation of Library Associations and Institutions) is misleading. In particular:

- It is surprising that the scoping study omits to mention IFLA’s official position that opposes the introduction of PLR schemes in developing countries based on the unsuitability of PLR schemes in this context. Instead, IFLA argues for investment in measures to promote reading in the first place.
- The study’s author suggests that IFLA believes that PLR is a compensation for harm suffered (p. 16). However, IFLA’s statement also states: *While the cultural and social support for authors that most existing PLR schemes provide is indeed laudable, the justification usually given for PLR – that the use of copyright works through public libraries detracts from primary sales – is unproven. In fact, lending*

by publicly accessible libraries often assists in the marketing of copyright works, the promotion of new authors' works, and encourages sales.

- The characterization of IFLA's position on p. 22 is very odd. It would be clearer to simply underline that for IFLA, PLR is an issue that we believe should not be treated under copyright law. Otherwise, the paragraph makes little sense.
- We note that the study does not recommend talking with national library organizations when considering the introduction of PLR. This approach is unlikely to give governments a balanced view of the implications of PLR in general, or of different ways to implement PLR in particular.

Editorial

There is no Chapter 6.1.3.1 in the study

"EWC suggests exploring the possibility of reciprocal agreements as set out in more detail under Chapter 6.1.3.1". (p. 66)