

The Public Lending Right in Canada: a Librarian's Perspective

Rob Tiessen
Books and Media Collection Development Librarian
University of Calgary Library

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Margaret Ann Wilkinson (mawilk@uwo.ca) is Canadian Library Association Copyright Committee editor for the Copyright Column. These copyright columns are authored or co-authored by members of CLA's Copyright Committee, and are published after peer-review by the rest of the Committee. The opinions expressed in these columns are those of the authors and do not represent the position of the Committee, of CLA or of OLA on any given topic. No column is intended to provide legal advice.

2011 was the 25th anniversary of the establishment of the Public Lending Right (PLR) in Canada. The 25th anniversary was cause of much celebration among writer's groups and especially The Writer's Union of Canada (TWUC), which fought so hard for establishment of the PLR. The PLR was seen as a major accomplishment for stabilizing the income of Canadian authors. Among librarians, the 25th anniversary was mostly ignored.

The PLR is based upon the idea that libraries deprive authors of book sales by circulating books. According to this theory every library circulation of a book deprives the book's authors (and publishers) of a sale¹. Therefore, according to the theory, authors deserve to receive compensation for these lost sales. This is the foundation of the PLR. While Canadian authors may think of the PLR as an actual right that is either part of copyright law or other law, in fact, in Canada it remains a voluntary government program funded from general revenues, based upon library holdings (rather than circulation), that can be cancelled at any time.² Indeed, even in Europe, where the PLR

¹ Evidence of this perspective is provided as part of the discussion surrounding The Writers' Union of Canada below.

² In Canada, the program has been implemented as part of the Federal Government's support provided to the Canada Council for the Arts ("the Council"), which, in turn, manages the funds through its Public Lending Right Commission. The Council is, itself, an independent Crown corporation that "fosters and promotes the study and enjoyment of the arts and the production of artistic works." As part of the current government's Economic Action Plan 2014, the federal government plans to provide \$25 million to the Council to fund its programs, including the PLR. See "Canada Council for the Arts: Canada's Economic

is required to be legislated, it does not necessarily form a part of the copyright regime of member states.³

Historically, as this column will demonstrate, Canadian librarians have been mostly uncomfortable with the concept of PLR for a number of reasons. First, in Canada and the United States, copyright law has never included amongst the rights of the copyright holder the right to loan books.⁴ It is clear that, without the freedom to freely lend physical copies of copyrighted works, Canadian libraries could not perform the roles they have historically fulfilled. Librarians therefore tend to find the PLR and the concept that authors deserve compensation for libraries *lending* books to be threatening. Second, in Canadian law there is a clear separation between the personal property rights of those who possess the books and those who possess intellectual property rights (copyright interests) in the works embodied by the books.⁵ In the United States copyright context, that same notion of separation is expressed in copyright terms as the doctrine of First Sale.⁶ Once a physical copy containing a copyrighted work has been sold, the owner of that physical copy has complete control over that physical copy of the work.⁷ The physical copy can be loaned, resold or gifted to whomever the owner of the copy wants. In other jurisdictions the same idea is conceived of as the copyright doctrine of exhaustion: “the doctrine limits [copyright] holders’ ability to restrict any ‘use’ of the product transferred.”⁸ However this notion of separation of personal property ownership in the artefact of the book and the intellectual property rights inherent in a literary, artistic, dramatic or musical work appearing in the book is expressed, an

Action Plan” <http://actionplan.gc.ca/en/initiative/canada-council-arts>. The lack of a legislative basis for the PLR in either Canada or the United States is confirmed by their absence in the compilation of laws created by Kenneth Crews (see Study on Copyright Limitations and Exceptions for Libraries and Archives (Geneva: World Intellectual Property Organization, 2014).

³ See further Crews, *supra* note 1.

⁴ See further Crews, *supra* note 1. But see also *Copyright Act* s 3(1)(f) & (g), added in 1997, which create rights to “rent out,” respectively, computer programs and sound recordings embodying musical works.

⁵ See *Théberge v Galerie d’Art du Petit Champlain Inc.* 2002 SCC 34. See also de Beer & Tomkowicz (*supra*, note 1) discussion at 12-14.

⁶ De Beer & Tomkowicz (*supra* note 1) point out, at 7, that both legislative and judicial treatment of this concept has been greater in the United States than in any other jurisdiction.

⁷ In the Canadian Copyright Act (RSC 1985, c C- 42), the Copyright Modernization Act (SC 2012, c 20) has added, to s 3(1) [...“copyright... means... and includes the sole right”],

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

In the Parliamentary debate, Hon Claude Carignan (Deputy Leader of the Government) explained that the 2012 amendments

will also give copyright owners “distribution rights,” which will enable them to control the first sale or other transfer of ownership of every physical copy of their work.

(see *Hansard*, Wednesday, June 20, 2012)

⁸ Jeremy de Beer and Robert Tomkowicz, “Exhaustion of Intellectual Property Rights in Canada,” (2009) 25 *Canadian Intellectual Property Review* 3 (de Beer & Tomkowicz) at 6. It may be noted that the authors themselves point out that, in Canada, to the extent this notion is treated in terms of an intellectual property concept at all, it is most often seen as an issue of implied license, not exhaustion, and that “Canadian courts have usually invoked contract doctrine to reconcile conflicting rights of intellectual and classic property owners” (*supra*, note 1, at 11)

objection to the PLR is that it undermines this separation.

A third objection to the PLR is that authors have never been able to put together statistics showing that library circulation diminishes book sales any more than any other factor diminishes sales.

The concept of the PLR first arose after World War I. Danish Arctic explorer and author Peter Freuchen was outraged that authors didn't receive compensation for circulation of books by both public and subscription libraries in Scandinavia and is credited with popularizing the idea of government provision of author compensation. UK author and MP Sir A.P. Herbert popularized the idea in the UK and came up with its English name: Public Lending Right. PLR schemes were first established, after World War II, in the Nordic countries: Denmark 1946; Norway 1947; Sweden 1954; Finland 1964; and Iceland 1968. The PLR was seen as a method of supporting Danish and Norwegian authors and re-establishing their national cultures after the war.⁹

The Writer's Union of Canada was founded in 1973 in order to further authors' rights. According to the TWUC, authors deserved better standard contracts so that publishers couldn't take advantage of them and both the federal and provincial governments needed to create more grants for authors. TWUC also argued that books by Canadian authors should receive preferential treatment by bookstores, schools and libraries. But, overall, the number one demand during the founding of the TWUC was for the Public Lending Right because, according to it, by not receiving compensation for library lending, authors were being forced to subsidize public libraries.¹⁰

At the time, the main models for the PLR were those of the early adopters, the Nordic European countries.¹¹ Denmark based its PLR on providing a government grant equal to 6% of the government grant made to public libraries. Sweden had a system that depended upon measuring circulation statistics and library holdings. The Netherlands had adopted a scheme in 1971 and, in 1973, New Zealand and Germany adopted ones.¹² Authors particularly found the German model of PLR compelling because it was then the only national model that included the PLR as part of copyright legislation.¹³ One month before the TWUC's founding conference, there was a very public exchange in the "Letters to the Editor" section of the *Globe and Mail* regarding the PLR. On

⁹ Rudolph Ellsworth, "Public Lending Right in its Canadian Context," (1976) 60(1) *Ontario Library Review* 22-26.

¹⁰ From an early (1973 or 1974) TWUC recruiting brochure. From the Rudy Wiebe Fond. Rudy Wiebe is a prominent Canadian author who took up a position at the University of Alberta in 1967. Having been active in the TWUC earlier, and a Executive Council member, in 1985 he was Vice-President and assumed the TWUC Presidency in 1986. He was Emeritus at the University of Alberta after 1992 and his papers are held there.

¹¹ Rudolph C. Ellsworth, "Library Compensation to Authors Nordic Style," (1972) 29(6) *Canadian Library Journal* 474.

¹² International, PLR. "Established PLR Schemes." <https://www.printernational.com/established/established.htm>.

¹³ In the European Union, all countries must legislate PLR: see Council Directive No 92/100/EC of November 1992 (OJ No L346, 27.11.92, p. 61 ("the Rental Directive")). This Directive led directly to "The Copyrights and Related Rights Regulations 1996 (S I 1996/2967) in the United Kingdom.

October 2, 1973, Albert Bowron, a library consultant and past president of the Ontario Library Association, reacted to an earlier article by William French¹⁴ in the *Globe and Mail* (about the prospects of Canada adopting the PLR) by saying “[a]pparently, libraries because they freely lend books, films, recordings and tapes are the enemies of authors, producers and musicians and therefore would never agree to any lending rights scheme, let alone support one.”¹⁵ While Bowron was cool to the idea of the PLR, he urged authors to open lines of communication with both the Canadian and Ontario Library Associations.

Marian Engel a Canadian author who would, in a month, become the TWUC’s founding president and later a winner of the Governor General’s Award reacted to Bowron bitterly in a responding letter published on October 5, 1973:¹⁶

...I must now for my own protection consider the libraries as my enemy...Straight ahead is a woman in furs who is taking out my book for nothing...I am not against free libraries, I am against rip-offs...As for the public lending right, we need it because earned money is moral money, not government grant money. When a production budget for a Canadian book is based on a maximum sale of 3,000 copies, books are necessarily expensive.

The following year, Marian Engel turned her letter to the *Globe and Mail* into an article in *Maclean’s* promoting PLR but the later article never captured the emotion and raw anger of her original letter.¹⁷

In 1974, Australia created a PLR scheme and, in 1979, the United Kingdom did also. Adoption of the PLR by New Zealand, Australia and the United Kingdom, in turn, put pressure on Canada because Canada was then seen as out of step with other Commonwealth countries.

The “elephant in the room” was the United States. The US has never adopted the PLR,¹⁸ but there were proposals and discussions about adopting the PLR circulating in the US throughout the 70s and 80s.¹⁹ For many cultural proponents in Canada, there was a real fear at the time that the US would adopt the PLR before Canada.

A particular concern of the TWUC was that Canada would adopt the Australian model. Australia was the only national model where *publishers* received part of the Public Lending Right funding. Under all the other models, only authors received the PLR funds. The Canadian Copyright Institute proposed that Canada copy Australia’s

¹⁴ William French, “United Pens,” *Globe and Mail*, 1973.

¹⁵ Albert Bowron, “Royalties,” *Globe and Mail*, October 2, 1973.

¹⁶ Marian Engel, “Libraries Forget Why They Exist, Says Writer Protesting Ripoffs,” *Globe and Mail*, October 6, 1973, <http://www.theglobeandmail.com/>.

¹⁷ Marian Engel, “Our authors are being ripped off,” (1974) 87(6) *Macleans* 44-49.

¹⁸ See PLR International, “Frequently Asked Questions,” <https://www.plrinternational.com/faqs/faqs.htm>

¹⁹ See, for example, the Spring 1981 issue of *Library Trends*.

model.²⁰ The Canadian Copyright Institute was founded in 1965 to represent the copyright interests of both publishers and authors but, on this issue, the TWUC (representing only authors) was totally opposed to the Canadian Copyright Institute: TWUC argued that the PLR was needed to boost the incomes of authors, not to give extra funding to publishers.

While most librarians seemed to be opposed to the PLR or at least not very enthusiastic, there were librarian supporters of the PLR. The most prominent supporter was Basil Stuart Stubbs who, in the 70s, was University Librarian for the University of British Columbia and, in 1981, became Head of the UBC Library School. Rudolph Ellsworth, from Queens University, was also an active supporter, tirelessly writing article after article in support of PLR for many different library magazines. Diana Mason, member of the Ontario Library Association ad hoc PLR Committee, was another strong advocate for the PLR.

Together with author George Woodcock, Basil Stuart Stubbs wrote the key article in support of the PLR (which appeared in *Saturday Night* in 1974).²¹ The article argued that ever since the creation of public libraries authors had been subsidizing public learning and education; authors tended to be poor and the PLR was an issue of social justice; many culturally important Canadian books couldn't get sales outside of Canada. The article's authors argued that the PLR should be thought of as equivalent to the public performance right which compensates musicians when their work is performed in public. In terms of the mechanics of funding the PLR, the article argued that too many Canadian public libraries were underfunded by their respective provincial and municipal governments and that, therefore, funding for the new PLR should come from the federal government and not provincial or municipal coffers. Finally the article argued that, rather than a complicated system based upon library circulation, there should be a simple system based upon library holdings.

The two major Canadian librarian critics of the PLR were George Piternick and Samuel Rothstein, both faculty members at the UBC Library School. Their most prominent article on the PLR appeared in *Feliciter* in 1975.²² In it they asked how printing could have existed for 500 years and yet the PLR was only now coming up as an issue. They asked rhetorically why car rental agencies didn't pay a royalty to car manufacturers for car rentals, since the principal was the same as the PLR. They reiterated that authors and publishers had no data that could prove that library lending damages book sales. They pointed out that authors wanted the royalties from book sales to libraries, but then wanted the PLR as well. Piternick and Rothstein proposed that libraries should stop purchasing books from Canadian publishers for a year: if sales of books increased,

²⁰ Canadian Copyright Institute, "A Submission on Copyright to the Bureau of Intellectual Property by the Canadian Copyright Institute," Toronto: 1974.

²¹ George Woodcock and Basil Stuart-Stubbs, "When You Read a Library Book, Should the Author Be Paid?" (1974) 89 *Saturday Night* 25-28.

²² George Piternick and Samuel Rothstein, "Public Lending Right Questioned," (1975) 21(6) *Feliciter* 1,16-18.

there would be solid proof then that library lending cut into book sales. Not surprisingly, authors and publishers weren't interested in taking up this proposal!

The TWUC badly wanted the Canadian Library Association (CLA) to support the PLR. Its sense was that its only chance of getting the PLR was if all major stakeholders agreed that the PLR was a good thing. In 1974 a resolution in support of the PLR failed at CLA's Conference in Winnipeg. After the Piternick-Rothstein article appeared in *Feliciter* in March 1975,²³ another resolution on the PLR failed at CLA's 1975 conference in Toronto. A special issue of the *Canadian Library Journal* was published on the PLR in late 1975. In March 1976, the CLA Executive Council defeated a resolution on the PLR.

At the 1976 annual conference in Halifax, there was a special forum on the PLR. After the forum, a compromise resolution on the PLR passed the next day.²⁴ To show his support, the resolution was moved by former critic George Piternick. The resolution recognized the "cultural importance of the contributions of Canadian writers" and sympathised with their "financial difficulties." CLA urged the Federal Government to "fund a system of financial rewards" for authors. CLA was willing to support the use of library holdings data in development of a funding model but did not recognize any legal entitlement for a public lending right. In other words, while CLA did not recognize the existence of a legal public lending right, it was willing to allow library holdings data to be used as a basis for distributing federal subsidies to authors.

It took ten years after CLA's resolution for the PLR to be established in Canada. Little did people realize that the big election victory by the Progressive Conservatives under Brian Mulroney in 1984 would bring the political champion that the PLR needed: Marcel Masse was one of the many Quebec nationalists elected to Parliament under the Mulroney banner. As author and then TWUC Vice President, Rudy Wiebe scrawled in his notes from a 1985 TWUC meeting: "Marcel Masse is the only nationalist in the cabinet – knows the connection between power & culture."²⁵ Marcel Masse indicated in a later 1985 letter²⁶ to Rudy Wiebe that he wanted to move the PLR along. It was critical to federal government support that there be no costs or administrative burden for libraries.²⁷ The federal government provided the initial \$3 million in September 1986.

²³ Supra.

²⁴ "Resolutions passed at annual meeting," (1976) 22 (7/8) *Feliciter* 15. See also Canadian Library Association. Position Statements: Position Statement on Financial Support To Writers June 15, 1976 (amended by Executive Council June 14, 1994).
http://www.cla.ca/AM/Template.cfm?Section=Position_Statements&Template=/CM/ContentDisplay.cfm&ContentID=3040.

²⁵ Rudy Wiebe, "Rudy Wiebe Fonds."

²⁶ Ibid.

²⁷ Canadian PLR payments have always been calculated "based on the 'presence' and not the 'loans' of book in public libraries and there has recently been consideration given to reviewing that approach. See "Message from the Chair," Annual Report on the Activities of the PLR Commission and of the PLR Program (Canada Council for the Arts. Public Lending Rights Program. Public Lending Right Commission. 2013-2014) at 7.

The PLR Commission²⁸ was quickly established and the first cheques were mailed to authors in March 1987.

The Public Lending Right as it was established in Canada ended up being established along the lines that the Canadian Library Association wanted. While the Public Lending Right is the name of the government subsidy, it is not enshrined in law. Nor does it burden libraries. Libraries have willingly shared holdings data with the Public Lending Right Commission. The PLR is entirely funded by the federal government – at levels established from time to time through the federal budgeting exercise. Funding for the operation of public and post secondary libraries, on the other hand, comes from provincial and municipal governments. This means that there is no danger at present that provincial or municipal governments will divert funding from public libraries to pay for the PLR. It turns out that, of those early forecasts arguing over the PLR, the article written by Basil Stuart Stubbs and George Woodcock²⁹ was the most prescient in describing how a PLR would work in Canada.

Questions do remain about the future. Will the PLR in Canada receive more funding to encourage further participation? More people participate in the PLR than any other program offered by the Canada Council.

Another major issue that is faced by every PLR country, including Canada, is whether to include and, if inclusion is appropriate, how to include library e-book holdings.

²⁸ The Commission was established, and remains, a program of the Canada Council for the Arts. See again “Message from the Chair,” *supra*, at 6.

²⁹ *Supra*, note 15.