

PUBLIC LENDING RIGHT: GENERAL CONSIDERATIONS AND CONTROVERSIAL ASPECTS

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Introduction

The term 'public lending' refers to the act of providing a certain remuneration to those authors whose works have been borrowed from a public library. This issue is becoming of primary importance in the realm of library science, therefore I will conduct my analysis with the aim of addressing this increasingly relevant topic according to this general framework. In this article, firstly I will briefly introduce the Italian legislation as far as the normative about libraries' public lending is concerned, then I will describe what are the main criticisms moved against the idea that libraries' loans cause a direct damage to the authors, finally I will go into details by looking at this topic through the lens of library science and presenting some consideration related to the public lending idea.

European Directive 92/100/EC

European Directive 92/100/EC concerns the rental right, the lending right and other certain rights related to copyright in the field of intellectual property². This Directive legitimises just the author itself to own the right to decide whether to allow or not both the rental and the free loan of its

¹ This article draws in particular on material in the dissertation discussed by the author during the academic year 2008/2009 at the Università degli Studi di Udine (Italy).

² For the sake of clarity, it has to be underlined that that European Directive 92/100/EC has been amended by European Directive 2006/115/EC (see in particular Art. 14). This recent amendment has been promulgated «in the interests of clarity and rationality» because the original Directive was amended several times over the years. However, as far as the bulk of this work is concerned no major changes have been introduced by Directive 2006/155/EC. Therefore, the main reference document remains European Directive 92/100/EC.

work. However, member States may derogate from the exclusive right in respect of public lending: on the one hand, providing that «at least authors obtain a remuneration for such lending», on the other hand, guaranteeing that those institutions completely exempted from the payments of the intellectual property rights receive «no direct or indirect economic or commercial advantage» from the lending.

During the process of implementation, the Italian government decided to make the most of advantage of Art.5. While conceding that only the author owns the economic right of its work, the legislator introduced an exception to this author's exclusive right as to favour all national and public libraries as well as all other public subjects interested into cultural promotion and diffusion to the wide public.

In September 2002, the European Commission promoted an European-wide evaluation of the state of the implementation of European Directive 92/100/EC. Italy was firmly criticized because the libraries' exemption from the intellectual property right payment was seen as jeopardising the effective application of the European normative. Several times Italy was called before the European Court of Justice, and in October 2006 it was sentenced: Italy had to pay monetary sanctions, unless it modified its legislation in order to comply with the European normative. As a consequence, the Italian government established the so called 'Fondo per la retribuzione del diritto d'autore' in order to pay those authors whose works have been borrowed from public institutions. The Fund owns 3 million Euros, which are calculated according to three parameters: first, the number of Italian public libraries' lending, estimated as an average value on the basis of a certain number of selected libraries; second, the Italian population comprised between 18 and 65 years old; third, the number of Italian public libraries excluding school and university libraries, because they are still allowed not to pay the public lending right. The administration of the money of the Fund

lies with the SIAE – Società Italiana degli Autori ed Editori, which is the Italian public society managing the property right of the works: on the one hand, printed works account for the 83% of the Fund, and their remuneration is halved between authors and editors; on the other hand, the remaining 17% of the Fund is destined to phonograms and videograms, and compensations are destined to producers and artists/interpreters.

Main criticisms

In Italy, while the 20% of the Fund is financed by the Regions, the remaining 80% of the money is provided by the State. Therefore, neither taxes are levied on the users nor the libraries should pay any public lending right to the authors. However, Italian librarians are not satisfied with the current situation and have moved firm criticisms against the entering into force of the abovementioned European Directive.

In Italy, the first concrete protests took place in 2004, when the European Union (EU) started the infringement procedure against not only Italy but also other five Member States (MS), namely Spain, Portugal, Ireland, Luxembourg and France, which were all accused to allow too many institutions not to pay the public lending right. The protest, which started on a Spanish website, has been spread in Italy firstly by the blog *Bilb'aria* and then by the website <<http://www.nopago.org/>>, run by the Cologno Monzese (Milan)'s librarians. This website has been mainly used by Italian, Spanish and Portuguese librarians who wanted to keep in touch in order to conduct a common protest. *Non pago di leggere* (a pun that mean I won't pay to read, but also I'm not satisfied with reading) is a catchphrase used by the group protesting against the very founding principles of the European Directive, that is the idea that libraries' loans damage authors and editors. Basically, the librarians sustain that:

1. libraries provide the authors free advertisement and promotion of their work, especially thanks to the activities proposed by the users themselves;
2. libraries buy books therefore they encourage authors' production;

3. quite a high percentage of libraries' loans refer to books written by authors who publish them either on their own expenses or thanks to the financial support of companies whose primary aim is the spread of knowledge³;
4. there are national normative and provisions already aiming at favouring publishing industry (such as financial incentives, direct financial support, promotion of books and edited works);
5. it has been widely demonstrated that there is no direct relationship between loans and purchase;
6. bookshops and libraries serve different goals: moreover, bookshops do not encourage the knowledge of old/classical works.

On the contrary, both authors and editors maintain that it is necessary for them to be to some extent paid as to compensate the losses caused by libraries' loans. They support such a claim by stating that in other EU MSs existing normative provide for this right. For example, in 1946 the Danish government levied the so called *Biblioteksafgift*, which is the first example of remuneration to the authors whose works are borrowed from public libraries. Similar laws have been adopted by Norway (1947), Sweden (1954), Finland (1963) and Iceland (1967). Some restrictions were issued, for instance the remuneration was guaranteed only to nationals who were writing their work in their original language, in order to favour and promote national culture. Later, the Federal Republic of Germany (1972) and the United Kingdom (1979) introduced quite a significant novelty in this field: they guaranteed the remuneration in the realm of the legislation about copyright.

In many cases, the provision of some sort of remuneration to the authors whose work were lent by public libraries was a cultural measure in its very scope. In fact, it was considered a way for the states to support their national culture and cultural production, in broader terms. Thanks to European Directive 92/100/EC, these

³ As for the notion of library free loan, see the AIB's opinion on <<http://www.aib.it/aib/cen/prestito0506.htm>>

norms have been, on the one hand, harmonized among those states that already applied similar rules and on the other hand extended to all the other MSs. However, unexpected consequences came into play, especially in those states where libraries were still a young and weak institution⁴. For this reason, the Spanish region Castilla La Mancha asked for a grace period in order to allow Spanish libraries' standards to reach the same level of the other European states (their concrete proposal was about 25 years before the European Directive 92/100/EC to be applied in Spain). But the European Commission did not step back, once more enhancing the hypothesis that the public lending right was introduced under the political pressure made by lobbies (such as software producers and editors), who exerted the Scandinavian praxis without any cultural scope but just a commercial one⁵.

In addition, the doubts concerning the very aim of the European Directive 92/100/EC are augmented by other actions undertaken at the EU level. In fact, notwithstanding the different times and the different forms, the European Commission has started the infringement procedure against all the MSs. Not only Italy, but also Austria, Germany and the Nederland have been firmly criticized in the 2002 Report because of their missing recognition on the public lending right. Moreover, Denmark, Finland and Sweden have been included among the unfulfilling nations too, because of the exclusive recognition of the public lending right to the authors whose works were produced in the national language. It is quite

⁴ Paolo TRANIELLO, *Biblioteche e società*, Bologna, Il Mulino, 2005, pp. 136-137.

⁵ Pietro CAVALIERI, *La biblioteca come modello di accesso collettivo alle risorse informative*, in *I diritti della biblioteca: accesso alla conoscenza, proprietà intellettuale e nuovi servizi*, a cura di Cristina Borgonovo e Alessandra Scarazzato, Milano, Bibliografica, 2009, p. 282.

peculiar that the nation that inspired the normative is put before the law because of the wrong application of the very same norm.

Furthermore, the European Commission condemned several MSs because of non-compliance to the norm: Belgium was judged in 2003, while Italy, Luxembourg, Spain, Portugal, Ireland and France were judged in 2006.

As a consequence, the European Directive 92/100/EC looks more like a provision that tries to strengthen the copyright norms than an useful element sustaining and promoting culture. This position is taken by several scholars as well as experts dealing in their everyday life with the issue of library lending, and their firm commitment against the European Directive 92/100/EC can be quickly identified. As it is put forward by Giuseppe Corasaniti, the European Directive 92/100/EC regulates both rental and loans activities. Therefore, he maintains that this is a telltale sign of such a terminological confusion that a normative indefiniteness – where economic and cultural aims are considered as overlapping goals, even though they are not – is implied⁶.

Marco Marandola presented to the 2004 IFLA General Convention one petition containing a concrete remark about public lending right that has been undersigned by the Latino-American representatives of the librarians⁷. Marandola's proposal perfectly matches the IFLA position on public lending right, which has been published in 2005 by the *Committee on Copyright and other Legal Matters*⁸. Once more, the Committee's document underlines the crucial role played

⁶ Giuseppe CORASANITI, *Diritti d'autore e prospettiva sociale: quali opportunità per le biblioteche*, in *I diritti della biblioteca: accesso alla conoscenza, proprietà intellettuale e nuovi servizi*, a cura di Cristina Borgonovo e Alessandra Scarazzato, Milano, Bibliografica, 2009, p. 38.

⁷ Marco MARANDOLA, *Il prestito nella normativa italiana, europea e internazionale*, Milano, DEC, 2004, pp. 131-135.

⁸ COMMITTEE ON COPYRIGHT AND OTHER LEGAL MATTERS, *The IFLA position on public lending right*, 2005, <<http://www.ifla.org/III/clm/p1/PublicLendingRigh.htm>>.

by the libraries as far as the development and the permanence of democracy is concerned. In fact, they guarantee legal access to those works that are protected by copyright rules. Furthermore, the IFLA suggests that the public lending right should not be brought into those states defined as "low income" according to the World Bank standards for two main reasons: on the one hand, they could not undertake such a levy unless they cut their expenses for other basic sectors (such as healthcare); on the other hand, complying to the public lending right would probably mean favouring foreigner authors more than nationals.

Roberto Ventura contends that the effectiveness of the public lending right as a form of support to the cultural development in general terms is still to be proved. Also, it has never been compared to alternative hypotheses aimed at promoting cultural activities related to reading, nor it has been compared to the possibility to issue financial incentives destined both to public libraries and to private buyers as to favour their inclination to buy books and original works⁹.

Consequences in the field of library science

From the librarians' point of view, it can be said that the reasons that lay behind European Directive 92/100/EC refer to the success of their work. In fact, the request of books lending has continuously grown, becoming a right hold and exerted by all citizens. This attitude led to an increase in the number of loans, which are estimated to be 65 millions per year in the sole Italy. However, because of the recent development of internet as an

⁹ Roberto VENTURA, *025.5 Utente*, in *Biblioteconomia: guida classificata*, diretta da Mauro Guerrini, a cura di Stefano Gambari, Milano, Bibliografica, 2007, p. 685.

instrument of research and work, this increase has been to a certain extent impeded by the diminishing number of accesses to archives where the users could consult the books in loco. Therefore, it looks clear that the distributive function of the libraries is in inverse proportion connected to their informative one, and this distorts the very nature of the libraries as well as it reinforces the impression that the libraries act as competitors against bookshops and supermarkets (Dominique Peiget, in Luca Ferrieri 2006: 190.)¹⁰. As a consequence, these newly prominent functions of the libraries can be considered to be the ground on which some sectors of the cultural industry, namely publishers, urged the EU intervention in the field of library loans.

As it has been said above, some editors perceive books' loans as failed sells. This is quite a superficial attitude that has never been proved, but it might be truly grounded, to some extent. In fact, British editors noted that often libraries promote best sellers instead of classics and niche literature. Therefore, since they do so thanks to public funding, they make an inappropriate use of their resources and condemn private investors¹¹. Actually, by favouring the reading pleasure of a wide range of people more than the specific interest of an elite group the risk of trivializing the very scope of such institution, which offers a much wider range of services and which aims at developing individual interests and vocation, increases¹².

¹⁰ Claudio GAMBÀ e Maria Laura TRAPLETTI (a cura di), *Le teche della lettura: leggere in biblioteca al tempo della rete*, Milano, Bibliografica, 2006.

¹¹ Madeline BENTLEY, *Are public libraries dumbing down?*, «Library and information update», 6 (2007), n. 3, p. 16.

¹² Stefano PARISE, *La formazione delle raccolte nelle biblioteche pubbliche: dall'analisi dei bisogni allo sviluppo delle collezioni*, Milano, Bibliografica, 2008, p. 24.

Mauro Guerrini traces back the origins of the debate to the very birth of the public library, which was a leisure facility with popular books acting as a counterpart to the usually unedifying recreational centres attended by English workers. This led to the growing of a debate concerning the function of the public library: how could the public library be a leisure facility, given its original mission of high culture provider? Nowadays, a similar debate concerns multimedia: should libraries provide their users with CDs, DVDs, videogames? Is it meaningful to trace a difference between entertainment and edutainment (education plus entertainment), favouring just the latter¹³?

Furthermore, Alberto Petrucciani wonders whether the same principle of free service that relates to those books that have an undeniable cultural function is applicable to movies and rock music discs. In fact, it is tough to say that the latter have the same positive externalities that the former (novels included) have¹⁴. Indeed, the need for harmonization in the field of lending thanks to the European Directive 92/100/EC has been justified by the European Commission by stating that «if rental and lending rights were not addressed together, the steady increase in public lending activities in the music and film sector might have a considerable negative effect on the rental business and thereby deprive the rental right of its meaning».

As far as new technologies is concerned, the binomial software piracy/library has been called into question because the European Directive 92/100/EC was inspired by the 1988 Green Paper on Copyright, which was the first Commission document to address the need for harmonisation in the area of copyright and neighbouring

¹³ *Guida alla biblioteconomia*, a cura di Mauro Guerrini, Milano, Bibliografica, 2008.

¹⁴ Alberto PETRUCCIANI, *Biblioteca pubblica senza identità? No, grazie*, «Bollettino AIB», 46 (2006), n. 4, pp. 377-382.

rights in a conceptual framework. It consisted of seven chapters describing and analysing the areas in which the Commission considered a need for action. Chapter 4 was devoted to the distribution right, exhaustion and the rental right, whereas Chapter 2 dealt with piracy. It is in these two chapters that the Directive has its origin¹⁵. Yet, EBLIDA (European Bureau of Library, Information and Documentation Associations) made a point about the same topic: it affirmed that libraries do not favor piracy, instead they guarantee the protection of the documents they possess.

As a conclusion, what has emerged from this overview of the state of play concerning the public lending right is that it is worth wishing that both users and mainly institutions and editors change their mind about the role of public libraries. In fact, especially as for piracy, their role has proved to be respectful of the law.

Further reading

Quite a complete analysis of the issue is presented by the Italian website *Non pago di leggere* <http://www.nopago.org>, which hosts direct links to Spanish and Portuguese web pages.

As for the main criticisms expressed in the north European countries, Siv Wold-Karlsen provides quite a complete overview of the state of play (*Il diritto negato: come i paesi scandinavi hanno affrontato la Direttiva europea sul prestito a pagamento e i problemi del copyright*, «Biblioteche oggi», 25 (2007), n. 3, pp. 26-34). On the contrary, publishers' reasoning finds good presentation on the PLR International Network website <<http://www.plrinternational.com>>.

As far as Germany is concerned, Irmgard Schmitt, *Entwicklung des Public Lending Right (PLR) in Deutschland*, «Bibliotheksdienst», 37 (2003), n. 10, pp. 1300-1310 is suggested.

¹⁵ *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union*, COM(2002) 502 final, Bruxelles, 2002.

Finally, more about Italy can be found in the articles by Luca Ferrieri (mainly on the Italian review «Biblioteche oggi»), in the official position expressed by the Associazione Italiana Biblioteche <http://www.aib.it>, and in the book Marco Marandola, *Il prestito nella normativa italiana, europea e internazionale*, Milano, DEC, 2004. In particular, as for the Fondo per la retribuzione del diritto d'autore, see the special issue «Accademie & biblioteche d'Italia», n.3-4/2007.