

# Research on the Legislative Path for Digitization of Out-of-Commerce Works in Chinese Public Libraries in the Post-Epidemic Era

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## Abstract

Due to restrictions on the right of reproduction and communication to the public, public libraries cannot digitize their collections, especially Out-of-Commerce Works, and make them available to the public on a large scale. The the European Union's transplant of the Nordic extended collective management system for copyright has solved the problem of making Out-of-Commerce Works available online to the public during The COVID-19 pandemic. However, the transplantation of the extended collective management system of copyright in China faces challenges in terms of the lack of social soil for the system, the worrying operation of collective management organizations and the lack of supporting systems. In the post-epidemic era, there are two options for the digitization of Out-of-Commerce Works in public libraries: one is to introduce a statutory licensing system, the other is to exempt public libraries from the risk of infringement during special public events.

## Keywords

Copyright; The Chinese Public library; Out-of-commerce works; Digitization.

## 1. Introduction

The outbreak of the new crown epidemic has destroyed the traditional borrowing mode of public libraries, and the general public have turned to online access and reading the digital works collected by public libraries during their stay at home. However, restricted by the right of reproduction and the right of dissemination to the public, public libraries cannot digitize their collections, especially Out-of-Commerce Works, on a large scale and provide them to the public. In fact, the relevant provisions of Article 7 of the digital single market copyright directive adopted by the EU legislative body in 2019 are intended to solve the conflict of interest between public libraries and relevant rights holders about the digital copyright of Out-of-Commerce Works in the digital environment. The legal provisions are undoubtedly of great significance to solve the problem of providing Out-of-Commerce Works of European public libraries to the public online during the forced closure of the new crown epidemic. In the face of public emergencies such as the new crown epidemic, whether the public library can learn from the EU legislative measures on the digital legislation of Out-of-Commerce Works in order to maintain normal reader reading services. As early as in the legislation process of the European Union's digital single market Copyright Directive, Chinese scholars such as he lianghong, zheng hongfei, duan beihong, Li Zhendong and He Rong have published articles calling on the Chinese Library academia to introduce the copyright extended collective management system to solve the digital copyright problem of Out-of-Commerce Works in Public Libraries. Different from the previous scholars, this paper intends to explore the challenges and feasible legislative path of the digital legislative transplantation of Out-of-Commerce Works collected by public libraries

in China in the post epidemic era from the aspects of the emergence of the copyright extended collective management system and the overseas transplantation.

## **2. The Emergence and Characteristics of the Extended Collective Management System of Copyright**

The extended collective management system of copyright originated in Sweden in the 1960s. At that time, in order to solve the conflict of interest between broadcasting organizations and rights holders on the massive use of musical works in radio programs, the Swedish legislative department passed the copyright law on literary and artistic works on December 30th, 1960, Its Article 26 (I) stipulates that when the collective management organization representing the interests of the majority of Swedish rights holders in the field of musical works and literary works reaches a work use agreement with the broadcasting organization in the field of broadcasting, the user has the right to use all works within the scope of the agreement, regardless of whether the authors of these works are members of the collective management organization. [1] Thus, Sweden became the first country in northern Europe to establish an extended collective management system of copyright. Denmark, Norway, Finland and Iceland introduced the copyright extended collective management system in the field of broadcasting in the subsequent copyright law reform. Since then, the copyright law reform in Sweden, Denmark, Norway, Finland and Iceland has successively extended the copyright extended collective management system to the replication of educational purposes, the digitization and dissemination of public cultural institutions and other fields. From the perspective of the emergence and development of the extended collective management system of copyright in northern Europe, the extended collective management of copyright combines some factors of collective management and compulsory licensing, and is an alternative to the compulsory licensing system of copyright.

Although there are differences in the provisions of the copyright laws of the Nordic countries on the extended collective management system, they have five common characteristics, as follows: first, qualified collective management organizations. According to the copyright laws of the five Nordic countries, only qualified collective management organizations (representative) are qualified to sign extended collective management agreements; The second is the copyright extended collective license agreement, that is, the copyright extended collective license agreement reached between the user and the collective management organization through free negotiation authorizes the user to use the works of non member rights holders covered by the agreement; [2] Third, non member rights holders have the right to personal remuneration. According to the copyright extended collective management agreement, the collective management organization is responsible for collecting and distributing the license fees for the use of works by members and non member rights holders; Fourth, non member rights holders opt out of the mechanism. According to the copyright law of Nordic countries, non member rights holders have the right to choose not to apply the copyright extended collective management clause to prohibit the use of their works, or non member rights holders hope to reach separate licensing agreements with users on the use of works; Fifth, the dispute settlement mechanism, the copyright extended collective management system based on the collective negotiation system in the Nordic labor market, and the introduction of a large number of relevant systems in the field of labor law, including dispute mediation and arbitration mechanisms. The above five characteristics have also become the basic principles for EU countries to transplant the system.

### **3. Transplantation of Extended Collective Management System of Copyright in European Countries (Regions)**

In recent years, European countries (regions) such as Germany (2013), the Czech Republic (2000, 2006), Slovakia (2015), Hungary (2016) and the European Union (2019) have transplanted the Nordic copyright extended collective management system at the legislative level to solve the problem of digitizing Out-of-Commerce Works in public libraries and promote the construction of the "Digital Library" project. Among them, the most influential is the EU digital single market Copyright Directive (hereinafter referred to as the directive), which was adopted by the EU in June 2019. Article 7 introduces the copyright extended collective management system to solve the problem of digitizing Out-of-Commerce Works in public libraries. [3]

Generally speaking, in the process of transplanting the Nordic copyright extended collective management system to solve the digitization of Out-of-Commerce Works, European countries (regions) adhere to the basic principles of the Nordic copyright extended collective management system, although the contents of the legislative provisions are different. For example, the implementation of copyright extended collective management plan by Nordic countries' collective management organizations should be representative, which has also become a general consensus of European countries (regions) to transplant the system and a basic principle adhered to by the immigration countries. In addition, the principles that European countries (regions) adhere to in transplanting the extended collective management system also include: the competent authority reviews the collective management organization applying for the implementation of the extended collective management plan, and the collective management organization proves its representativeness, transparency, accountability and good governance. In order to protect the rights and interests of the obligee, we should implement the obligee's opt out mechanism, the obligee's dispute settlement mechanism, appropriate publicity means, equal treatment of non member obligees, and timely distribution of licensing fees.

### **4. Challenges Faced By the Extended Collective Management System of Legislative Transplantation of Out-Of-Commerce Works Collected By Public Libraries in China**

In the process of European Union's legislation on the digitization of out of print works in public libraries, Chinese scholars called for learning from the European Union's practice and transplanting the Nordic copyright extended statistical management system to solve the problem of digital authorization of Out-of-Commerce Works in Chinese public libraries. Especially during the epidemic period, due to the restrictions and blockades of public libraries, and the habitual contact of the general public with the digital content of public library collections, whether China should speed up the legislative process of digitizing Out-of-Commerce Works and transplant the system for the urgent need of the digital content of public libraries. In fact, the successful transplantation of any legal system is not only based on the specific historical and social environment, but also needs to cooperate with other systems. [4] The lack of social soil, the worrying operation of collective management organizations and the lack of supporting systems are the main challenges faced by China's transplantation of copyright extended collective management system.

#### **4.1. Social Soil Resulting from The Lack of Extended Collective Management System of Copyright in China**

The copyright extended collective management system is rooted in the special social and cultural factors of the Nordic countries, that is, the Nordic countries have the tradition of collective negotiation between employee organizations and employers, and the small homogeneous social characteristics make their policies based on a high degree of trust and transparency. The main reasons for transplanting the system in European countries (regions) are similar to the cultural and social conditions of the original society of the Nordic legal system, while China's current national conditions do not have the soil suitable for transplanting the extended collective management system.

##### **4.1.1. China Has Not Fully Established the Collective Negotiation System Between Trade Union Organizations and Employers**

As stated above, the cornerstone of the copyright extended collective management system in the Nordic countries is the collective negotiation tradition between employee organizations and employers formed in the Nordic countries on the basis of highly developed trade union organizations. In contrast, China's trade union law, amended in 2001, clearly stipulates that trade unions have the right to negotiate on an equal footing and sign collective contracts on behalf of workers. On the basis of the labor law and the trade union law, relevant departments promulgated the provisions on collective contracts (2004) and the notice on the implementation of the provisions on collective contracts. Since then, China has initially established a collective negotiation mechanism at the legislative level.

In practice, there are many problems in China's collective negotiation system. First, the scope of the current collective agreement implementation is relatively narrow, mainly concentrated at the enterprise level, and the regional and industry level collective agreements are not involved. Second, in the process of implementing collective negotiation and collective agreement, the soul of the collective negotiation system, collective negotiation, was ignored, and agreement signing was emphasized. Even the collective agreement was not negotiated, which was only the product of the personal will of the enterprise and trade union leaders. [5] Third, the representativeness and independence of trade unions are not enough. Compared with the strong position of trade unions at the central level, the status of trade unions at the enterprise level is low, and there is even a risk of merger. In the process of the formation of trade union organizations, the proportion of senior managers in trade union members is high, which seriously weakens the representativeness of trade unions. The phenomenon that party and government cadres in some enterprises concurrently serve as trade union chairmen seriously weakens the independence of trade unions. Fourth, the strength of trade unions is weak. The law does not stipulate the right to establish free trade unions, and the funds and personnel of trade unions are dependent on employers. [6] It can be seen that China's collective negotiation system started late, developed imperfectly, and China's labor market has not formed the tradition of collective negotiation mechanism between trade unions and employers' organizations.

##### **4.1.2. There Are Significant Differences In China's Social and Economic Development**

Compared with the high degree of homogeneity of Nordic Society, economy and culture, China has a vast territory, a large population and nationalities, and is in the period of social transformation, with serious social stratification, which is a great challenge to the implementation of the copyright extended collective management system. At the same time, China's social and economic development presents great imbalance, which is reflected in regional and urban-rural development. In 2020, the per capita disposable income of Shanghai will reach 72000 and 69000 respectively, while that of Gansu and Tibet will be 20000 and 22000 respectively, and the urban income level is 2.55 times that of rural areas. [7] The

imbalance of economic development has also led to the widening gap between the rich and the poor in China. Internationally, the Gini coefficient is usually used to measure the degree of income distribution differences among residents, and 0.4 is regarded as the warning line of the gap between the rich and the poor. By 2019, China's Gini coefficient has still reached about 0.465, still exceeding the warning line and higher than the level of 0.24-0.36 in developed countries. [7] Due to the significant differences in China's social economy, the differentiation of social strata and the increasing diversification of values, it is difficult to form a high degree of consensus on the extended collective management of copyright. At the same time, due to many problems in China's information disclosure and the widespread existence of department led legislation, relevant interest groups have low trust in relevant policies. It can be seen that there are no similar social and cultural factors in northern Europe in the transplantation of the extended collective management system in China, so the effective implementation of the extended collective management system of copyright in the future will be greatly reduced.

## **4.2. The Current Situation of the Collective Management of Copyright in China Is Worrying**

The copyright collective management organization is the key factor for the successful transplantation of the extended collective management system, and its actual operation effect determines the success or failure of the system transplantation. In response, the Swedish Minister of justice pointed out at the International Symposium on the 25th anniversary of the founding of the Norwegian photocopying and reproduction Association (kopinor) in 2005 that the successful implementation of the copyright extended collective management system lies in the mature collective management organization system in relevant fields. [8] A perfect collective management organization system means that in addition to being representative, the collective management organization should also have high operation efficiency and transparency. [8] However, China's copyright collective management organizations have deficiencies in representativeness and transparency.

### **4.2.1. Chinese Copyright Collective Management Organizations Are Not Representative**

Representativeness is an important condition for the implementation of the copyright extended collective management system. What is representativeness? According to the judgment made by the Norwegian cable television dispute court in 2011, the "considerable number of rights holders" (i.e. representativeness) in the Norwegian Copyright Law means that the copyright collective management organization should represent the majority of rights holders and the proportion should at least exceed 50%. [9] When interpreting the "representativeness" in the Danish copyright law, the Danish legislator pointed out that the rights holders represented by collective management organizations should account for a large proportion and a large number of rights holders. [10] In practice, for example, the Swedish collective management organization of music creators and publishers is one of the collective management organizations implementing extended collective licensing in Sweden, which mainly manages and licenses music and lyrics performance and mechanical rights on behalf of the obligee. [11] The organization is mainly composed of Swedish composer Association, Swedish songwriters, composers and Writers Association, music publishing institutions and independent individual members, with a total of 95469 members by the end of 2020. [11] Compared with Sweden, a small country with a population of only 10.38 million (at the end of 2020), the proportion of music copyright owners in the membership of the organization reached 1:92.

In contrast, China's copyright collective management organizations, due to their late establishment, inadequate development and greater influence by government administrative factors, have led to the small strength and monopoly nature of China's existing national collective management organizations. Taking the China Music Copyright Association, which is currently in good operation, as an example, by the end of 2020, there were 10633 registered

members (6356 songwriters, 3772 lyricists and 106 publishers). [12] Compared with the huge group of music copyright owners in China (the national group of music copyright owners cannot be counted), the China Music Copyright Association has not met the "representativeness" requirements for collective management organizations to implement extended collective management of copyright. The Chinese character Copyright Association, which is closely related to the digital authorization of Out-of-Commerce Works in public libraries, is unable to count its specific number of members due to information disclosure. However, the author estimates that the number of representative members of the aforementioned collective management organization is far from reaching the "representativeness" requirement in the extended collective management system due to its relatively short establishment time.

#### **4.2.2. Low Information Transparency of China's Copyright Collective Management Organizations**

In the process of implementing extended collective management of copyright, the Nordic countries pay special attention to the information transparency of collective management organizations. According to the Swedish copyright collective management law, which came into force in 2017, collective management organizations must prepare and publish the financial revenue and expenditure transparency report of the previous year every year. At present, the international standards for determining the transparency of collective management organizations mainly include seven items: the list of members, directors, types of use, tariff rate, royalty distribution policy, annual income report and the percentage of royalty distribution. [13] The relevant information disclosed by copyright collective management organizations in Nordic countries completely contains the above seven contents, and the content is more detailed. Take the annual report of the collective management organization of Swedish music creators and publishers (2020) as an example. The annual report has the following characteristics: first, it publishes the details of the above seven items, such as the operating costs (19 items), in addition to the conventional employee costs, pension costs, office and administrative costs, and even the property costs, billing fees and other minor costs; Second, the published data are authoritative. The third-party independent auditors independently audit the information disclosed in the annual report according to the international auditing standards (ISA) and the auditing standards generally accepted in Sweden, so as to ensure a fair reflection of the financial situation of the collective management organization. [14]

In contrast, the depth and breadth of information disclosure of China's copyright collective management organizations are far from the level of developed countries in Europe and the United States. According to the above seven indicators of transparency research, none of the five domestic copyright collective management organizations in China can fully publish the above seven contents. The three collective management organizations, namely, the China literary copyright association, the China photography Copyright Association and the China Film Copyright Association, do not even have annual report information disclosure. Take the China Music Copyright Association, which has a high degree of information disclosure, for example, The disclosure of its annual report information mainly has the following problems: first, the authority of the information is insufficient. According to the regulations on collective administration of copyright in China, the organization for collective administration of copyright shall publish financial statements and accept audit supervision in each fiscal year. The articles of association of China Music Copyright Association also stipulates that the financial statements should be subject to audit supervision, but the annual report published by China Music Copyright Association has not been audited; Second, the published information is not detailed enough. For example, the annual report of the China Music Copyright Association only publishes the financial expenditure in the collective management organization, without specifying the specific expenditure.

### 4.3. China Lacks the Supporting Mechanism to Implement the Extended Collective Management System of Copyright

The establishment and operation of the copyright extended collective management system cannot be separated from the relevant supporting mechanisms, such as the right holder dispute resolution mechanism, the non member right holder opt out mechanism, and the open and reasonable remuneration distribution mechanism. The Scandinavian extended collective management system has a perfect dispute resolution mechanism, which originated from the collective negotiation system between employee organizations and employers in the labor market of the Nordic countries. The Nordic labor law has a perfect labor dispute mechanism. For example, Sweden's 1974 labor dispute procedure law stipulates that Sweden's collective agreements and other private law disputes involving the relationship between employers and employees can be brought to the special labor court and the general district court for settlement. [15] secondly, the Nordic copyright law itself stipulates the dispute resolution mechanism in the extended collective management of copyright. For example, the Swedish copyright law stipulates that, except for individual provisions (broadcasting published works), the mediation mechanism is applicable to disputes arising from the implementation of the extended collective management, and the mediator can propose arbitration after the mediation mechanism fails. [16] in addition, Nordic countries also provide supporting systems such as non member obligees' opt out mechanism and obligees' right to receive personal remuneration. In contrast, Article 6 of China's regulations on the collective administration of copyright stipulates that no organization or individual may engage in the collective administration of copyright, except for the copyright collective administration organizations established in accordance with the provisions of these regulations. At present, the collective management of copyright in China is in fact in a monopoly state, which on the one hand causes the obligee to lose the right of choice, on the other hand causes many problems such as low operation efficiency and low service awareness in the existing collective management organizations. The current copyright law lacks relevant supporting systems to ensure the operation of the extended collective management system, and the rash transplantation of the system will inevitably cause many problems.

## 5. Conclusion

The global pandemic of the new crown epidemic is affecting readers' cognition and reading habits of public libraries. Due to the blockade and restriction of public libraries, ordinary readers are forced to contact the digital products of public library collections. The extended collective management system of copyright, as one of the solutions to the large-scale digitization of Public Libraries' works during the new crown epidemic, is increasingly favored by the academic circles and legislators in European and American countries (regions). The author does not deny that the extended collective management system of copyright can solve the problems of large-scale digital authorization, improve licensing efficiency. It has great advantages in promoting transactions and many other aspects. However, when transplanting a legal system, we should not only consider the advantages of the system itself, but also consider whether the transplantation is compatible with the social, economic and cultural conditions of the country of immigration. The copyright extended collective management system originated from the special socio-economic and cultural background of northern Europe, especially the collective negotiation system between trade unions and employers formed in the labor market of northern Europe for a long time, while China does not have the corresponding social and institutional basis.

In the post epidemic era, there are two legislative paths for the digitization of out of print works in the collection of Public Libraries in China: first, on the basis of the existing legal licensing

system and the experience of Europe and the United States, increase the legal licensing for the digitization of Out-of-Commerce Works in the collection, and cover the object range of books, journals, posters, brochures, photography, audio and video recording and other forms. In terms of utilization methods, public cultural institutions can be provided with the right to digitize out of print works in their collections, provide digital texts to registered readers and disseminate them between libraries. At the same time, we can fully learn from the right holder's opt out mechanism in the solutions of European and American countries (regions), and protect the author's spirit and economic rights and interests by opening the identification information of Out-of-Commerce Works. Second, based on the need of public interest, during the occurrence of extreme public events such as the new crown epidemic, the public library will be exempted from the risk of copyright infringement by digitizing and providing the public with out of print works in its collection. The foregoing exemption must be based on specific conditions, such as protecting the right of relevant obligees to obtain remuneration for non-commercial purposes during the closure of public libraries due to extreme public events such as the new crown epidemic.

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