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数字时代著作权集体管理的新挑战与对策

New Challenges and Solutions for Collective Management  
of Copyright in the Digital Age

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# 大纲 | Outline

## 01 背景 | Background

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数字环境下集体管理制度面临的

## 02 挑战 | Challenges to collective management systems in the digital environment

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## 03 域外著作权集体管理制度的比较考察 | A comparative examination of copyright collective management systems in other countries

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## 04 对策 | Solutions

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# 问题导向的思考 | Problem-Oriented Thinking

1. [实践论]: 数字环境下应当**加强还是削弱**集体管理制度? 为什么?

[Praxis]: Should collective management systems be **strengthened or weakened** in the digital environment? Why?

反思的因由: 究竟是运用数字技术加强集体管理, 还是数字技术可能取代集体管理?

Causes for reflection: Are digital technologies more likely to strengthen collective management or replace it?

2. [本体论]: 集体管理制度只是中介组织还是有更多元的社会功能?

[Ontology]: Are collective management systems merely intermediary organizations, or do they have more diverse social functions?

3. [价值论]: 集体管理的功能和价值目标应当是什么?

3. [Value theory]: What should be the functions and value objectives of collective management?

4. [立法论]: 集体管理的立法方向?

[Legislative theory]: What is the legislative direction for collective management?



# 一、背景 | Background

- 国内政策背景：国家知识产权强国建设纲要

Domestic Policy Background: *Outline to Boost China's Competitiveness in the Area of Intellectual Property*

- 国际背景： | International Background:

RCEP 第十三条 集体管理组织 | RCEP Article 11.13 *Collective Management Organizations*

技术背景：大数据，人工智能，元宇宙 NFT

Technical background: big data, artificial intelligence, metaverse NFT

我国理论与现实背景：集体管理制度的地位和作用

Theoretical and practical background in China: the status and roles of the collective management system



## 《知识产权强国建设纲要（2021 - 2035年）》

*Outline to Boost China's Competitiveness in the Area of Intellectual Property (2021–2035)*

### 精神解读 | Interpretations of Guiding Principles

(十) 健全统一领导、衔接顺畅、快速高效的协同保护格局.....**完善**著作权集体管理制度，加强对著作权集体管理组织的**支持和监管**。 | 10. Improving the collaborative protection system with unified leadership, seamless connectivity, and rapid and efficient implementation ... We will *improve* the copyright collective management system, and strengthen the *support for and supervision of* copyright collective management organizations.

解读： | Interpretations:

- 1、对集体管理制度的肯定和重视；科学的、实事求是的； | Appreciate and value the collective management system, and take a sound and programmatic approach;
- 2、集体管理制度是知识产权保护制度的重要组成部分； | The collective management system is an important part of the intellectual property protection system;
- 3、国家一方面要加强对集体管理组织的支持，另一方面要加强监管。 How? Why?

The State should further support collective management organizations, while strengthen supervision. How? Why?

最高人民法院法官：**妥善维护**，2021年中国法学会知识产权法学研究会年会 | SPC Justice: *proper safeguard*, the 2021 Annual Meeting of the Intellectual Property Law Association of the China Law Society

## 旧著作权法 | Former Copyright Law

著作权人和与著作权有关的权利人可以授权著作权集体管理组织行使著作权或者与著作权有关的权利。**著作权集体管理组织被授权后**，可以以自己的名义为著作权人和与著作权有关的权利人主张权利，并可以作为当事人进行涉及著作权或者与著作权有关的权利的**诉讼、仲裁**活动。

Copyright owners and the obligees related to copyright may authorize a collective management organization of copyright to exercise the copyright or the rights related to copyright. **The collective management organization of copyright** may, **after being authorized**, claim rights in its own name for the copyright owners and the obligees related to copyright, and may, as a party concerned, participate in the **litigation and arbitration** activities involved with copyright or the rights related to copyright.

**著作权集体管理组织是非营利性组织**，其设立方式、权利义务、著作权许可使用费的收取和分配，以及对其监督和管理等由国务院另行规定

**A collective management organization of copyright shall be a non-profit organization**, and the method of its establishment, its rights and obligations, the collection and distribution of the royalty for copyright licensing, as well as the supervision and management over it shall be separately provided by the State Council.

## 新著作权法 | Amended Copyright Law

著作权人和与著作权有关的权利人可以授权著作权集体管理组织行使著作权或者与著作权有关的权利。**依法设立的著作权集体管理组织是非营利法人**，被授权后可以以自己的名义为著作权人和与著作权有关的权利人主张权利，并可以作为当事人进行涉及著作权或者与著作权有关的权利的诉讼、仲裁、**调解**活动。| Copyright owners and the obligees related to copyright may authorize a collective management organization of copyright to exercise the copyright or the rights related to copyright. **As a not-for-profit legal person, a collective management organization of copyrights lawfully formed** may, with authorization, claim rights in its own name for a copyright owner and a copyright-related right holder, and may, as a party concerned, participate in the litigation, arbitration, and **mediation** activities involved with copyright or the rights related to copyright.

著作权集体管理组织根据授权向使用者收取使用费。使用费的收取标准由著作权集体管理组织和使用者代表协商确定，协商不成的，可以向国家著作权主管部门申请裁决，对裁决不服的，可以向人民法院提起诉讼；当事人也可以直接向人民法院提起诉讼。| **A collective management organization of copyrights shall collect royalties from users based on the authorization. The standards for the collection of royalties shall be determined by the collective management organization of copyrights and the user representative through negotiation. If the negotiation fails, the parties may apply to the copyright authority of the state for a ruling. If they refuse to accept a ruling, they may institute a lawsuit with the people's court; and the parties may directly institute a lawsuit with the people's court as well.**

著作权集体管理组织应当将使用费的收取和转付、管理费的提取和使用、使用费的未分配部分等总体情况定期向社会公布，并应当建立权利信息查询系统，供权利人和使用者查询。国家著作权主管部门应当依法对著作权集体管理组织进行监督、管理。| **A collective management organization of copyrights shall disclose the collection and transfer of royalties, the withdrawal and use of management fees, the unallocated royalties, and other overall situation to the public on a regular basis, and establish a rights information inquiry system for inquiry by right owners, right holders and users. The copyright authority of the state shall supervise and manage collective management organizations of copyrights in accordance with the law.**

著作权集体管理组织的设立方式、权利义务、使用费的收取和分配，以及对其监督和管理等由国务院另行规定。| For collective management organizations of copyrights, their methods of formation, rights and obligations, and collection and distribution of royalties, as well as supervision over and management of them shall be separately prescribed by the State Council.



## 新法修订的亮点和意义



### Highlights and Significance of the New Amendment

- 1. 明确著作权集体管理组织的非营利性法人地位，衔接民法典有关规定。 | Clarify the status of copyright collective management organizations as non-profit legal persons, in line with the relevant provisions of the Civil Code.
- 2. 增加集体管理组织的调解权能，发挥集体管理组织在纠纷解决中的主观能动性。 | Strengthen the mediation function of collective management organizations and give full play to the initiative of collective management organizations in dispute resolution.
- 3. 尊重市场自治，通过对作品使用费协商程序的设置，提高市场自主性。 | Respect and enhance market self-regulation through negotiation procedures for royalties.
- 4. 增强透明度：从法律层面对集体管理组织权利查询、费用明细公布的职责作出规定。使用费的未分配部分等总体情况定期向社会公布，并应当建立权利信息查询系统，供权利人和使用者查询。国家著作权主管部门应当依法对著作权集体管理组织进行监督、管理。 | Enhance transparency: Stipulate by law the duties of collective management organizations to receive rights inquiries and publish fee details. The overall situation, including the unallocated royalties, should be regularly disclosed to the public, and a rights information inquiry system should be set up for inquiry by right owners, right holders and users. The copyright authority of the State shall supervise and manage collective management organizations of copyrights in accordance with the law.

## 国际背景：RCEP 第十三条 集体管理组织

### International Background: RCEP Article 11.13 Collective Management Organizations

- “一、每一缔约方应当致力于促进建立适当的组织对著作权及相关权利进行集体管理。每一缔约方应当鼓励此类组织以公平、高效、公开透明和对其成员负责的方式运作，包括公开和透明地记录许可使用费的收取和分配。 | 1. Each Party shall endeavour to foster the establishment of appropriate organisations for the collective management of copyright and related rights. Each Party shall encourage such organisations to operate in a manner that is fair, efficient, publicly transparent, and accountable to their members, which may include open and transparent record keeping of the collection and distribution of royalties.
- 二、缔约方认识到促进各自集体管理组织间合作的重要性，以相互确保缔约方之间更容易地许可内容，并鼓励相互转让使用另一缔约方国民的作品或其他受著作权保护的主体的许可使用费。 | 2. The Parties recognise the importance of fostering cooperation between their respective collective management organisations for the purposes of mutually ensuring easier licensing of content among the Parties, as well as encouraging mutual transfer of royalties for use of works or other copyright-protected subject matters of the nationals of another Party.
- 评：集体管理制度保护和实现权利人利益，促进作品跨国交易和传播 | *Commentary*: Collective management systems protect and realize the interests of right holders and facilitate the transnational trade and dissemination of works.



- 技术背景：大数据，人工智能，元宇宙 NFT

Technical background: big data, artificial intelligence, metaverse NFT

- 消费者获取音乐的方式发生了变化，流媒体

Changes in consumers' access to music, streaming media

- 我国理论与现实背景：集体管理制度的地位和作用

Theoretical and practical background in China: the status and roles of the collective management system

- 理论界对集体管理制度的功能认识不一 | Differences in theoretical understanding of functions of the collective management system

- 司法实践判决不一：“非法集体管理”、“非会员权利人”与集体管理组织维权判赔 |

Mixed decisions in judicial practice: “unlawful collective management,” “non-member right holders,” and the award of damages to collective management organizations in defense of their rights



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## 二、数字环境下著作权集体管理的新挑战

### II. Challenges to Collective Management Systems in the Digital Environment

传统环境 v. 数字环境

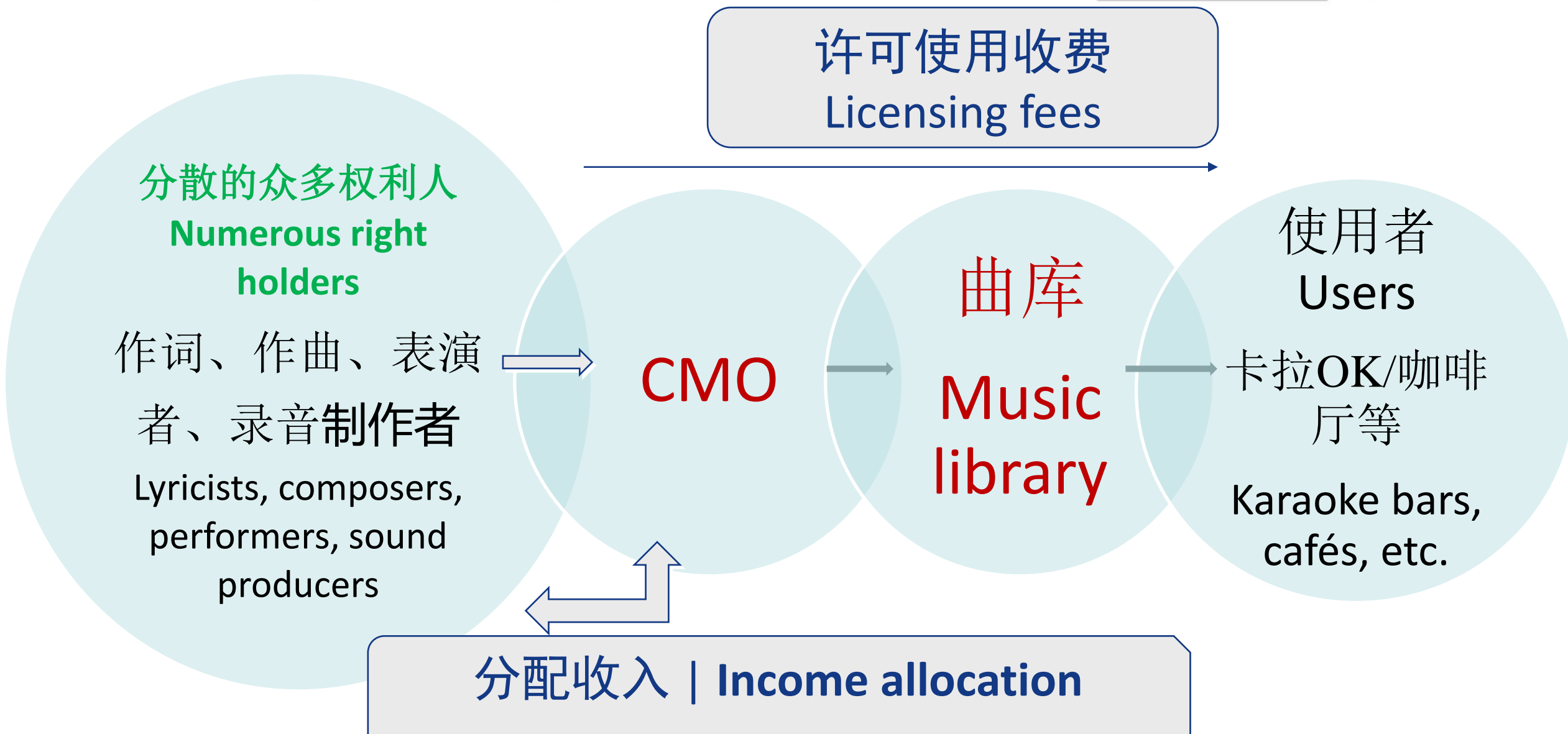
Traditional environment v. digital environment

CMO的功能

Functions of CMO



# 集体管理的运行框架: 碎片化权利的集中行使桥梁 | Operational Framework of Collective Management: Bridges to Centralized Exercises of Fragmented Rights





# 集体管理制度的正当性

## Justifications for the Collective Management System

- 联结版权权利人与使用者的桥梁：授权他人合法使用作品

Connect copyright holders and users: Authorize others to legally use works

- D Gervais: CMO影响文化产品的数量和质量

D Gervais: *CMO influences the quantity and quality of cultural products*

- 降低管理成本：应对权利的碎片化 CMO 一站式授权

Reducing administrative costs: Address the fragmentation of rights by CMO one-stop-shop licensing



## Roles of Collective Management Organizations

- (1) 管理权利人难以行使的权利，为创作者获得补偿提供切实可行的机制； | Manage rights that are difficult for right holders to exercise and provide practical mechanisms for creators to obtain remuneration;
  - (2) 是版权体系的重要内容，是对权利单个行使的补充； | As important elements of the copyright system, complement the individual exercise of rights;
  - (3) 作为权利人和使用者之间的桥梁，为获取作品和支付报酬提供便利；（RCEP第13条） | Act as bridges between right holders and users, facilitating access to works and payment of remuneration; (RECP Article 11.13)
  - (4) 公益职能：提供社会、文化和推广服务（保障人权维度），如哥伦比亚 | public interest functions: provide social, cultural and promotional services (to safeguard human rights), e.g. Colombia
- D Gervais (p6): CMO发展到监督遵守版权的情况、打击盗版及履行各种社会和文化职能。 | D Gervais (p6): The role of CMOs has evolved to oversee copyright compliance, fight piracy, and perform various social and cultural functions.
- 小结：集体管理从市场自发机制演变成立法认可的多功能社会机制 | Summary: Collective management has evolved from a spontaneous market mechanism to a multifunctional social mechanism recognized by law.



# Daniel Gervais



# 数字环境下的新挑战 | New Challenges in the Digital Environment

- 旧的侵权形式仍在，改编制成有声读物、衍生品开发等，卡拉OK | Old forms of infringement still exist, such as adaptation into audiobooks, development of derivatives, etc., and karaoke.
- 新的侵权花样频出：网络直播 盗播 合成 改编 洗稿 数字音乐供下载 利用人工智能模仿等 | New infringement methods emerge constantly: webcasting, pirated broadcasting, synthesizing, adapting, copywriting, digital music for downloading, using AI to imitate, etc.

新的技术、新的作品使用场景和模式：机遇还是挑战？ | New technologies, new scenarios and modes of use of works: opportunities or challenges?

CMO自身的碎片化问题：没有一个组织能够授权所有版权，没有全球性版权的授权，特别是没有线上使用的全球性CMO授权； | Issue of CMO fragmentation: no one organization can license all copyrights; there is no global copyright licensing, specifically, no global CMO licensing for online use

法律责任问题：网络平台版权侵权责任不清，免费模式普遍 | Issue of legal liability: unclear liability for copyright infringement on online platforms, and free use is prevalent

透明度问题 | Transparency issues

使用费分配不均的问题 | Issue of unequal distribution of royalties



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# 三、域外集体管理制度的比较考察

## III. A Comparative Examination of Copyright Collective Management Systems in Other Countries







“2018年美国出台《音乐现代化法案》，包含《音乐许可现代化法案》（MMA法案）、《作品对社会有重要贡献的艺术家遗产补偿法案》（CLASSICS法案）以及《音乐制作人分配法案》（AMP法案）三部分独立内容。美国《音乐现代化法案》生效后，建立和运行新的**集体管理组织MLC（Mechanical Licensing Collective）** **整合**了代表词曲著作权的集体管理组织和代表邻接权唱片公司的机制。全面规定了强制许可的收费制度。“In 2018, the U.S. introduced The Music Modernization Act, which is divided into three key titles: Musical Works Modernization Act (the MMA Act); Classics Protection and Access Act (the CLASSICS Act), and Allocation for Music Producers Act (the AMP Act). After the Music Modernization Act came into effect, a new **collective management organization, the Mechanical Licensing Collective (MLC)**, was established. The MLC **integrates** the mechanism of collective management organizations which represents songwriter’s copyrights and the mechanism of record labels which represents neighboring rights. A comprehensive royalty system for statutory licensing was also established.

区别于欧盟的制度设计在于，《音乐现代化法案》**只规定了一家管理组织且是非营利性的**，不像欧盟有三家营利性的集体管理公司，能够最大程度保证词曲作者和唱片公司取得尽可能多的许可费。如果数字音乐平台和MLC之间对于费率有异议，可以先协商，然后到**美国版权局下属的仲裁机构进行费率仲裁**，如果仍无法解决，可到法院寻求司法救济。” | Unlike the European Union, which has three for-profit collective management companies, the Music Modernization Act **provides for only one management organization which is non-profit**, ensuring that songwriters and record labels receive the maximum amount of royalties possible. If there is a disagreement about rates between a digital music platform and MLC, they may negotiate between themselves first and then go **to Copyright Arbitration Royalty Panels under the U.S. Copyright Office**. If the issue still cannot be resolved, they can go to court to seek judicial relief.”



# 欧盟《集体权利管理与在线使用音乐作品权利的跨境许可指令》 2014/26/EC

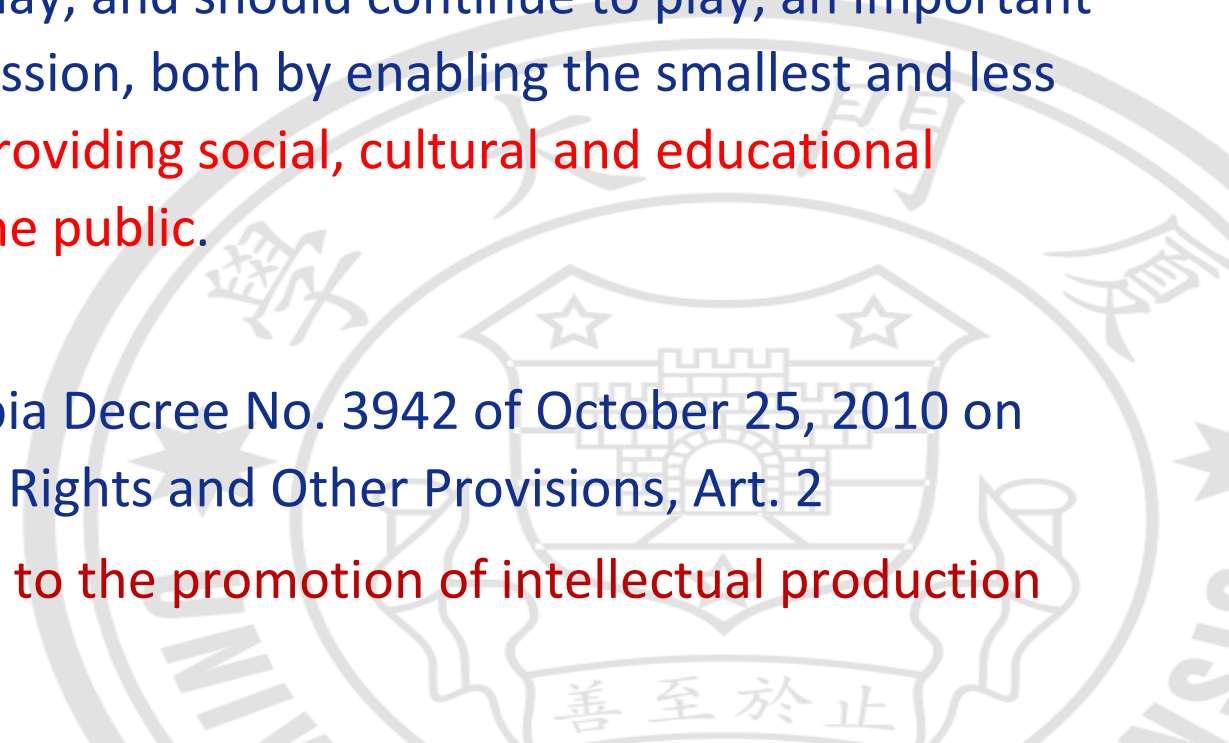
## EU Directive 2014/26/EC on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market

### 前言3 | Preamble (3)

“集体管理组织通过使数量最小和人气较低的作品库能够进入市场并为权利人和**公众利益提供社会、文化和教育服务的方式**，为促进文化表现形式的丰富多彩发挥着并应继续发挥重要作用” | Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by **providing social, cultural and educational services for the benefit of their rightholders and the public.**

哥伦比亚《集体管理组织条例》第2条 | Columbia Decree No. 3942 of October 25, 2010 on Collective Management of Copyrights and Related Rights and Other Provisions, Art. 2

“促进智力生产和国家文化的改善” | “contribute to the promotion of intellectual production and the improvement of the national culture”



# 欧盟第2019/970号《数字化单一市场版权指令》 | EU Directive 2019/970 on Copyright and Related Rights in the Digital Single Market

□ 第17条规定：线上交易平台获得版权许可的义务，备受争议

Article 17 sets out the obligation of online trading platforms to obtain copyright licenses, which has drawn much controversy.

第17条：“在线内容共享服务提供商存储和提供大量作品访问权限”，应对其托管（host）的内容的直接责任。

Article 17: “An online content-sharing service provider stores and gives access to a large amount of copyright-protected content,” and shall bear direct responsibility over the content it hosts.

学者认为，集体管理组织可能是解决新指令中复杂义务的关键。为此，CMO要成为更好的调解者和谈判者。 | Scholars believe that collective management organizations may be key in solving the convoluted obligations of the new Directive. In order to do so, it is imperative that CMOs become better mediators and negotiators.

E.I.P.R. 2020, 42(5), 272-280

Alina Trapova, Reviving collective management: will CMOs become the true mediators they ought to be in the digital single market?



# 世界知识产权组织工具包

## WIPO Good Practice Toolkit for Collective Management Organizations

工具包，第7页，“最佳指南” | The Toolkit, Page 17, “Good Practice Tools”

CMO “在其职责范围内并为所代表的权利人的利益，CMO可开展活动提高公众对版权及相关权、集体权利管理和集体管理组织的认识，并更加认识到它们对国民经济和文化多样性，包括其文化和社会活动产生的积极影响。”

“Within the limits of its mandates and in the interest of the Rightholders it represents, a CMO may engage in activities aimed at increasing public awareness about copyright and related rights, collective rights management and CMOs, as well as highlighting evidence of their positive effect on the national economy and on cultural diversity, including its cultural and social activities.”



## 小结：集体管理制度的演变

### Summary: Evolution of Collective Management Systems

历史视角，三个变化 | Historical perspective, three changes

(1) 自发秩序（法国咖啡馆，行业规约）到法定秩序 | From spontaneous order (French cafés, industry norms) to statutory order

(2) CMO从单纯的收费分配机制到多功能的版权保护机制 | CMOs evolve from pure royalty distribution mechanisms to multi-functional copyright protection mechanisms.

(3) 法律规制逐步精细化，从外部规制向内外兼制转变，加强内部治理 | Legal regulations are fine-tuned over time, turning from external regulation to both internal and external regulation, and internal governance is strengthened.

(4) 在数字环境下，现代CMO应该是一个“数据处理协会”。 | In the digital environment, a modern CMO should be a “data processing association.”

随着版权的碎片化，集中的CMO具有明显的效率优势 | With the fragmentation of copyrights, a centralized CMO has obvious advantages in efficiency.





## 四、对策 | IV. Solutions

### 4.1 国家支持集体管理，具体路径 | Specific methods for the State to support collective management

1、在适当领域引入强制集体管理制度和延伸集体管理制度，如卡拉OK等领域。参见美国音乐现代化法案，德国立法；（救济市场失灵） | Introduce compulsory collective management systems and extended collective management systems in appropriate areas, such as karaoke and other areas.

See US *Music Modernization Act*, German legislation. (remedies for market failures)

2、侵权损害赔偿，对CMO会员和非会员一视同仁，以CMO使用费标准为基准； | In terms of infringement damages, treat CMO members and non-members alike, based on CMO royalty rates.

3、建立一个广泛的在线管理系统 | Create an extensive online management system.

4、制定《集体管理组织治理指南》，参见WIPO工具包。 | Develop “Guidelines for Governance of Collective Management Organizations.” See WIPO Toolkit.

5、建立使用费争议解决机制，重点关注效率与成本问题。 | Establish a dispute resolution mechanism for royalties, and pay special attention to efficiency and costs.



## 4.2 加强对集体管理组织的监督

### Strengthen Supervision of Collective Management Organizations

1. 建立透明度制度：年度透明度报告，收费和分配的明细与说明，对权利人、使用者、社会的透明度责任，参见德国新法； | Establish a transparency system: annual transparency report, breakdown and description of royalties and allocations, responsibility for transparency to right holders, users, and society. See the new German law.
2. 建立集体管理组织的监管机制：政府、会员和社会 –（监委会）； | Establish a regulatory mechanism for collective management organizations: government, members and society – (supervisory board).
3. 完善会员代表大会制度； | Improve the system of members' congress.
4. 加强权利人的知情权和监督权； | Strengthen right of right holders to information and supervision.
5. 建立科学高效的版权纠纷解决机构：如使用费裁决； | Establish a sound and efficient copyright dispute resolution institution: e.g. royalty adjudication.
6. 加强对CMO的反垄断法规制：参见马普所J Drexel报告，2013。 | Strengthen antitrust regulation of CMOs. See report by J. Drexel from Max Planck Institute for Innovation and Competition, 2013.



## 4.3 立法認可CMO的社會價值

### Recognize by Law the Social Value of CMOs

著作權法及配套法規修訂 | Amend the Copyright Law and supporting regulations

1. 理念：堅持著作權集體管理制度，認可其社會價值 | Guiding principle: uphold the copyright collective management system and recognize its social value
2. 價值：充分發揮著作權集體管理組織使用人與權利人的橋樑作用；保護權利人合法權益，促進作品的利用與傳播。 | Value: Give full play to the role of copyright collective management organizations to connect users and right holders; protect the legitimate rights and interests of right holders, and promote the use and dissemination of works.





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