

Postprint: Extended Application of the First Sale Doctrine to Libraries' Dissemination and Utilization of Digital Works in China

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Abstract

[Purpose/Significance] To explore the positive impact of applying the first sale doctrine on libraries' dissemination and utilization of digital works, and to propose legislative recommendations. [Method/Process] This paper interprets the legal characteristics of the first sale doctrine and the obstacles to its extension to digital technology and network environments, introduces partial achievements in theoretical research, legislative proposals, and judicial practice, analyzes provisions in China's judicial interpretations regarding the application of distribution rights to network environments, and examines the understanding of this issue by relevant People's Courts in hearing and adjudicating library copyright dispute cases. [Results/Conclusion] In China's legal system, the act of disseminating works through information networks includes acts of distribution, and libraries' business and service activities based on network dissemination are constrained by distribution rights. Therefore, applying the digital first sale doctrine to libraries has legislative legitimacy; applicable conditions should be refined from aspects such as library type, the purpose and nature of libraries' dissemination and utilization of digital works, service objects, modes of conduct, and scope of works, and this principle should be granted mandatory legal status.

Full Text

Preamble

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Exploring the Extended Application of the First Sale Doctrine in the Dissemination and Utilization of Digital Works by Libraries in China
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Abstract

[Purpose/Significance] This paper investigates the positive impact of applying the first sale doctrine on libraries' dissemination and utilization of digital works, and proposes legislative recommendations.

[Method/Process] The study interprets the legal characteristics of the first sale doctrine and the obstacles to its extension to digital technology and network environments. It introduces theoretical research, legislative proposals, and partial achievements in judicial practice, analyzes provisions in China's judicial interpretations regarding the application of distribution rights to network environments, and examines how relevant people's courts have understood this issue when adjudicating copyright disputes involving libraries.

[Result/Conclusion] Within China's legal system, acts of communicating works through information networks include acts of distribution, and libraries' business and service activities based on network communication are constrained by distribution rights. Therefore, applying a digital first sale doctrine to libraries has legislative legitimacy. The applicable conditions should be refined in terms of library types, purpose and nature of dissemination, service objects, modes of conduct, and scope of works, and this principle should be endowed with the attributes of mandatory law.

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1. Legal Basis for Libraries Applying the First Sale Doctrine to Traditional Works

The first sale doctrine (also known as the doctrine of exhaustion of distribution rights) in copyright law stipulates that once the original or copies of a legally created and produced work enter the circulation market through lawful channels, the original rights holder may no longer interfere with the owner's further disposition of that original or those copies (such as gifting, resale, or destruction). As an important copyright limitation policy, the first sale doctrine plays a positive role in balancing the interests between rights holders and the public while protecting overall societal interests. Libraries and other public cultural institutions benefit from this principle in their resource development and services such as lending and reading. It must be emphasized that library operations like fair use, weeding, and donations are similarly protected by this doctrine. Since the U.S. Copyright Act of 1909 first codified the first sale doctrine, many countries and regions have affirmed its legal validity in their copyright systems.

The development of digital technology and the rise of networks have transformed

how works are created and disseminated, making it an unavoidable legal question whether the traditional first sale doctrine, established in an analog environment, can apply to digital technology and network contexts. Currently, academic viewpoints, legislative proposals, and judicial practices show significant divergence on this issue, negatively impacting user rights protection and libraries' fulfillment of their functions. The American Library Association (ALA) has noted that restrictions on the first sale doctrine hinder libraries' normal operations in lending and fair use for searching, reading, excerpting, copying, and printing. IFLA (International Federation of Library Associations and Institutions) has argued that the values of preservation and the first sale doctrine hold equal importance in both digital and print worlds. As China's copyright system undergoes significant reform, in-depth research on the extended application of the first sale doctrine to digital technology and network environments can both provide a basis for legislative improvement and create necessary legal conditions for libraries' digital information services.

1.1 Transfer of Ownership in Traditional Work Dissemination

Specifically, the first sale doctrine limits the distribution right in copyright, which is characterized by the transfer of ownership of the original or copies of a work. In other words, the first sale doctrine restricts the exercise of distribution rights by protecting the ownership rights of lawful owners of work originals or copies, thereby achieving a balance of interests. Article 6 of the WIPO Copyright Treaty (WCT) provides that authors shall enjoy the exclusive right of authorizing the making available to the public of originals and copies of their works through sale or other transfer of ownership. Under Section 109(a) of the U.S. Copyright Act, beneficiaries of the first sale doctrine are the "owners" of work originals or copies. Article 10(6) of China's Copyright Law stipulates that distribution rights regulate the right to communicate works to the public through "sale" or "gift." Clearly, both "sale" and "gift" entail the transfer of ownership of the original or copies. Consequently, the first sale doctrine applies only to acts involving the transfer of ownership of work originals or copies.

For instance, after libraries acquire originals or copies of works through purchase, donation, or other means from original rights holders, successors-in-interest, or authorized publishers, they may conduct lending, reading, and other services, as well as activities like gifting, destruction, weeding, and sealing, without interference from the rights holder's distribution right. If ownership does not transfer during dissemination—if it is merely a "license"—then the first sale doctrine does not apply. Section 109(d) of the U.S. Copyright Act provides that lawful acquisition of work originals or copies through rental or other means without ownership transfer does not permit the owner to exercise rights under the first sale doctrine unless authorized by the rights holder. When libraries exhibit works they do not own (such as copyrighted literature deposited at the library or works temporarily entrusted for exhibition), they obtain only the right to use the exhibition right (and the right of publication for unpublished works) from

the rights holder, not the right to lend, sell, or gift exhibited works under the first sale doctrine.

1.2 Specific Copies in Traditional Work Dissemination

Section 109(a) of the U.S. Copyright Act limits the first sale doctrine to “particular copies,” which are defined as lawfully made copies—those legally published according to law. This provision aims to prevent interference with normal market order by “non-particular copies” and to avoid imposing unreasonable burdens or disadvantages on rights holders or authorized parties that could harm their economic interests. For example, if libraries reproduce 馆藏 works through printing, photographing, copying, or rubbing without rights holder authorization or legal basis (such as fair use, statutory licensing, or compulsory licensing), such copies cannot benefit from the first sale doctrine. In these cases, rights holders may block libraries’ lending, reading, or gifting of these non-particular copies, demand their sealing or destruction, and pursue legal remedies.

Furthermore, the first sale doctrine targets distribution rights, not reproduction rights or derivative rights such as adaptation or translation rights. Unless authorized by the rights holder or explicitly permitted by law, owners of work originals or copies may not reproduce or create derivative works from those originals or copies. While most copyright legislation worldwide grants libraries the right to reproduce 馆藏 works under fair use provisions for public interest and social functions (such as Section 108 of the U.S. Copyright Act and Article 22(8) of China’s Copyright Law), libraries exceeding statutory conditions infringe the reproduction right and cannot use the first sale doctrine as a defense.

1.3 Physicality of Carriers in Traditional Work Dissemination

Distribution rights do not target the “work” itself but the “original or copies” of the work. The “original” refers to the material carrier that first “fixes” the work, while “copies” refer to subsequently created material carriers that “fix” the work. Therefore, objects regulated by distribution rights should be tangible material carriers of works. The first sale doctrine addresses the conflict between copyright interests enjoyed by rights holders and property rights enjoyed by owners of tangible material carriers bearing the copyright.

The terminology, legislative history, and case law all clearly indicate that the first sale doctrine applies only when the owner of a work original or copy disposes of physical possession of that original or copy. The Agreed Statement concerning Article 6 of the WIPO Copyright Treaty clarifies that “originals and copies” refer exclusively to fixed copies that can be put into circulation. The preamble to the EU Information Society Directive states that copyright includes the exclusive right to control distribution of works embodied in tangible objects. In March 2013, the U.S. District Court for the Southern District of New York held in *Capitol v. ReDigi* that Section 109(a) of the U.S. Copyright Act applies only to “sales of physical objects.” Traditional works use paper, film, and other tangible

media as dissemination carriers, meeting the first sale doctrine’s requirement for “physical objects.”

2. Legal Obstacles for Libraries Applying the First Sale Doctrine to Digital Works

2.1 Non-Transfer of Ownership in Digital Work Dissemination

Under analog technology, ownership of the material carrier could transfer with work dissemination, creating conflicts between copyright and property rights—the legal basis for applying the first sale doctrine to traditional works. If digital works use physical carriers like hard drives or optical discs, ownership transfer can similarly occur during dissemination, making the first sale doctrine applicable. However, the situation differs for network dissemination. In network environments, works are communicated through optical and electrical signals without transferring the material carrier—that is, without changing ownership of the original or copies. Although copies may be created during transmission, these are not the “particular copies” from the rights holder but “new copies” generated in users’ computer systems, causing an absolute increase in the number of copies.

For example, in the famous “Amazon Kindle Deletion Incident,” a core dispute between users and rights holders was whether “online sale of e-books constitutes transfer of ownership.” Theoretical understanding remains inconsistent on whether the first sale doctrine applies to network dissemination that does not involve ownership transfer, legislation is virtually blank, and judicial outcomes vary widely. This situation enables rights holders to exploit technical characteristics of network communication, adopt copyright licensing models, and circumvent the first sale doctrine to restrict user rights. Under licensing models, libraries’ usage rights for digital works are diminished—they possess only usage rights, not ownership or permanent preservation rights, and may lose information service capabilities due to financial constraints. Additionally, licensing models cause libraries’ resource development budgets to continuously rise, rendering joint purchasing strategies for reducing financial pressure ineffective.

2.2 Reproductive Nature of Digital Work Dissemination

Digital work dissemination is inherently reproductive and does not require carrier transfer. Through internet technology, Bluetooth, storage media, and information software, digital works can detach from original carriers and attach to new ones to form copies. When libraries obtain digital works from rights holders via networks, multiple copies are created in their systems. These copies are not the “particular copies” communicated by rights holders but two or more different copies, not constituting ownership transfer of “particular copies.” Without

rights holder authorization or specific legal provisions, libraries' disposition (including downloading, lending, etc.) of these "new copies" cannot benefit from the first sale doctrine.

Since network dissemination of digital works creates new copies, it inevitably involves the exercise of and exceptions to reproduction rights. However, the first sale doctrine does not limit reproduction rights. Except in statutory circumstances or with rights holder permission, libraries' reproduction of digital works infringes reproduction rights. In *Capitol v. ReDigi*, the court held that users' dissemination of digital works through the ReDigi website constituted reproduction, which is not governed by the first sale doctrine. In another case, the court similarly ruled that a defendant's dissemination of digitally purchased works on eBay infringed reproduction rights. The U.S. White Paper on the National Information Infrastructure argued that network communication would make distribution and reproduction coexistent, with distribution being reproduced communication, and that limiting distribution rights would unreasonably limit reproduction rights. Although cases have expanded the interpretation of distribution rights to apply the first sale doctrine to network dissemination, substantive legislative progress has not been achieved.

2.3 Intangibility of Digital Work Dissemination Carriers

In civil law, an owner's property disposition rights over lawful tangible items form the theoretical basis of the first sale doctrine, enabling property rights in tangible objects to counterbalance copyright attached to them. From this perspective, network dissemination similarly cannot apply the first sale doctrine. As emphasized in the U.S. National Information Infrastructure White Paper: "Distribution rights traditionally refer to rights transferring possessory interests in tangible copies of works, and there is no reason to differentiate between distributing works to the public through network transmission and through other traditional means." The limitation of the first sale doctrine to works in tangible carriers, not network environments, allows rights holders to control libraries' subsequent resale, lending, and gifting behaviors, potentially obtaining economic returns from each "reuse" of works by libraries, even though rights holders have already received reasonable economic benefits from the initial sale to libraries. This is clearly unfair to libraries.

3. Thoughts on Establishing a Digital First Sale Doctrine for Libraries in China

3.1 Significance of Establishing a Digital First Sale Doctrine for Libraries

The *Bobbs-Merrill Co. v. Straus* case in 1908 established the legal foundation for the first sale doctrine, with its core principles incorporated into the 1909 U.S.

Copyright Act as an important legal norm. Currently, laws in Germany, Japan, the UK, Russia, and instruments like the Treaty Establishing the European Community and the EU Information Society Directive all contain provisions on the first sale doctrine. Since legislation on the first sale doctrine involves economic interests of different countries and regions, international treaties like TRIPS and the WIPO Copyright Treaty leave legislative authority to individual members. Although China's Copyright Law and its implementing regulations do not explicitly provide for the first sale doctrine, a purposive restrictive interpretation of the distribution right under Chinese law can affirm that distribution rights are limited by the first sale doctrine. Scholars have suggested that China should take the opportunity of its third Copyright Law amendment to add provisions on the first sale doctrine.

The establishment and application of the first sale doctrine provide legal grounds for libraries to develop collections through acquisition, purchase, exchange, allocation, and donation, and to conduct services like lending, reading, and reference. IFLA advocates "implementing the first sale doctrine worldwide." The emergence of digital technology and network communication has triggered controversies over the applicability of the first sale doctrine, and the lack of legislation and uncertainty in judicial practice have caused considerable confusion for libraries regarding copyright issues. The U.S. library community believes that restrictions on the first sale doctrine impact normal operations such as interlibrary lending, off-site access, collection preservation, and use of donated digital works, strongly demanding legislation to create a "Digital First Sale Doctrine."

Establishing a digital first sale doctrine in China's library sector is an objective requirement proposed by technological innovation and library development for legal reform. It is an inevitable choice for coordinating copyright interests, meeting user service demands, and protecting public information rights. Specifically: (1) It can free library work from copyright constraints, facilitating the construction of public cultural service systems and service activities; (2) It helps correct policy preferences for copyright expansion and maintain balanced interest relationships; (3) It promotes the circulation and value exploitation of digital works; (4) It protects libraries' property rights in legally owned digital resources; (5) It supports new economic forms and fosters the development of "second-hand" digital work markets and sound competition mechanisms. Establishing a digital first sale doctrine also helps resolve copyright disputes. For instance, in *Yin Zhiqiang v. Jinling Library*, the plaintiff argued that the library's printing of materials from databases for users infringed distribution and remuneration rights. Although the library ultimately prevailed, the court did not explicitly address whether distribution rights apply to digital technology in its adjudication.

In 2005, the 109th U.S. Congress proposed the BALANCE Act (H.R. 1066), suggesting the extension of the first sale doctrine to network environments, but it failed to pass due to significant disagreements. In 2013, the U.S. Department of Commerce's Green Paper on "Copyright Policy, Creativity, and Innovation in the Digital Economy" addressed the application of the first sale doctrine to

network environments, reigniting discussion on the issue.

Libraries are effective advocates on the public policy stage, with a responsibility to provide information and knowledge to the public. Since copyright law governs ownership and dissemination of knowledge, copyright policy is a necessary concern for libraries. The library community has a responsibility to communicate with policymakers with a mission to advance public interests, promoting policy and legal systems that allow libraries and society to maximize access to knowledge resources. The ALA argues that strict formalistic interpretation of the first sale doctrine should be avoided, emphasizing that “consumers’ rights to dispose of works cannot be deprived.” It has proposed amendments to Section 109(a) of the U.S. Copyright Act: lawful owners of work copies may communicate works online without rights holder authorization, provided they delete the copy after transmission.

In November 2004, the “Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Intellectual Property Infringement” (Article 11(3)) stipulated that communicating others’ works to the public through information networks constitutes “reproduction and distribution” under Article 217 of the Criminal Law. In January 2011, the “Notice of the Supreme People’s Court, Supreme People’s Procuratorate, and Ministry of Public Security on Several Issues Concerning the Application of Law in Handling Criminal Cases of Intellectual Property Infringement” (Article 12) specifically provided that “distribution” includes communication through information networks. These provisions confirm the distributive nature of network communication within China’s legal framework, indicating that acts of communicating works through information networks include acts of distribution. In *Yin Zhiqiang v. Jinling Library*, the court did not directly exclude the application of distribution rights to network environments, holding only that the library’s conduct did not constitute infringement, implicitly recognizing that distribution rights apply to network contexts. Therefore, libraries’ network-based business and service activities in China face potential constraints from distribution rights, creating institutional space for applying a digital first sale doctrine.

3.2 Specific Recommendations for Establishing a Digital First Sale Doctrine

The prerequisite for establishing a digital first sale doctrine is to clarify the applicability of distribution rights in digital technology and network environments from a legal theory perspective. Extensive exploration and attempts have been made in theoretical research, legislative proposals, and judicial practice. For instance, regarding ownership transfer of copies in network environments, scholars have suggested treating “licenses” as a special form of “sales.” In foreign cases like *New York Times v. Tasini* and *International Corp. v. UsedSoft GmbH*, courts have held that network communication constitutes distribution, or that work originals or copies include both tangible and intangible carriers, and that

digital works fall within the scope of the first sale doctrine. The consensus is that if users download works to tangible carriers (like disks) via networks without subsequently uploading them to networks or creating new tangible copies, the first sale doctrine applies. The 1995 U.S. National Information Infrastructure White Paper, the 2001 U.S. Copyright Office Report on Section 104 of the Digital Millennium Copyright Act, and the EU Court of Justice's *UsedSoft* case all support this view.

International society is diversifying legislative techniques for digital copyright systems to more finely balance interests. When designing a digital first sale doctrine, the rationality of the following systems could be considered: (1) Publication period limitations—applying only to digital works published for a certain period; (2) Notice systems—libraries publicly announcing intended uses, with silence deemed consent; (3) Proportional use systems—legal limits on quantities or proportions transmitted per user; (4) Commercial availability tests—applying only to out-of-print or unavailable works; (5) Copy deletion systems—technically controlling absolute increases in copy numbers; (6) Warning systems—requiring libraries to formulate digital copyright policies.

The following clause is recommended for addition to China's Copyright Law: “Libraries, archives, museums, memorial halls, art galleries, and other cultural institutions may, upon user request, communicate legally published digital works in their collections through networks without rights holder authorization, or digitize works in their collections for display, preservation, or replacement purposes, and rights holders may not claim legal remedies for infringement. However, such network communication and digitization must comply with statutory conditions regarding motivation, purpose nature, service objects, conduct modes, and work scope.”

Since the digital first sale doctrine constitutes a copyright limitation, the balance principle of “limitation plus anti-limitation” requires setting necessary conditions. Scholars suggest refining applicable rules based on different user transfer methods and work types. The following conditions are proposed:

(1) Motivation: Libraries' network communication must be upon user request, except for push services within library premises' local networks. Requests may be written or electronic, with formats complying with statutory norms (the National Copyright Administration should produce standard request templates). Digitization is limited to display, preservation, or replacement purposes.

(2) Applicable Entities: Include both public welfare libraries and for-profit libraries (e.g., corporate libraries, for-profit school libraries, for-profit hospital libraries, for-profit research libraries). Including for-profit libraries aims to attract private capital and mobilize social forces for public cultural development.

(3) Purpose Nature: Must be for public welfare without any commercial nature. Even for-profit libraries must apply the principle on a public welfare basis without economic benefits.

(4) **Service Objects:** Include formally registered users of the library and users from libraries with formal interlibrary cooperation. Concurrent user numbers per work must comply with legal requirements.

(5) **Conduct Modes:** First, apply to “point-to-point” electronic document delivery and online interlibrary lending for browsing, not “point-to-multipoint” delivery unless within library premises’ local networks. Second, digitization for preservation, display, or replacement is permitted only when works are damaged, lost, stolen, or stored in obsolete formats. Third, users may not download copies.

(6) **Work Scope:** First, except for bestseller literature, hit film/TV works, and computer software, other work types face no restrictions when communicated within library premises’ local networks. Second, applies only to works by Chinese rights holders, not foreign ones. Third, applies only to legally published works, not pirated or unpublished works. Fourth, for “orphan works,” libraries may use them after “diligent search” or filing with the National Copyright Administration. Fifth, applies only to works legally collected by the library itself.

These conditions must achieve interest balancing while remaining clear and understandable. Overly complex or vague conditions would not only affect the operability and practical value of the digital first sale doctrine but also impose a “tightening curse” on libraries, making it difficult to clarify legal boundaries and anticipate legal risks.

3.3 Endowing the Digital First Sale Doctrine with Mandatory Law Attributes

Freedom of contract is often regarded as a fundamental right. However, rights holders frequently use “contracts” as tools for copyright monopolization to maximize profits, and law may provide policy support for such practices. For example, the U.S. Congress left a “loophole” in legislation: while permitting libraries to lend lawfully obtained copies, it required compliance with agreements between libraries and rights holders. This shows that the first sale doctrine in U.S. copyright law has the nature of optional law, making the library community’s demands to prioritize the first sale doctrine over copyright licensing agreements both weak and meaningless.

In digital technology and network environments, standard form contracts are favored by rights holders for their simplicity, practicality, efficiency, and ease of imposing unilateral will, becoming “mass contracts” widely used in digital work licensing and severely limiting user rights. For instance, a German e-book website’s agreement stipulates that users purchase only a non-transferable right for personal use, without rights to modify, copy, transfer, resell, or communicate. Contractual models undermine the legal foundation of the first sale doctrine, concealing its justification and monetizing the relationship between rights holders and libraries. Without legal restrictions on contractual effectiveness, even a codified digital first sale doctrine may be unenforceable.

China's Contract Law contains explicit provisions on standard form contract validity. Some scholars argue that if rights holders use standard form contracts to severely restrict users' rights to resell, rent, gift, or sublicense digital works, such terms may constitute exclusion of the other party's main rights and be invalid. However, other scholars analyzing Articles 40 and 54 of the Contract Law conclude that these provisions cannot effectively negate the validity of terms excluding copyright limitations, and neither China's Copyright Law nor its implementing regulations address the relationship between contracts and copyright limitations. Some scholars contend that exhaustion of rights caused by the first sale doctrine creates civil rights that parties should freely dispose of or waive, meaning rights holders and lawful copy holders may contractually limit the copy's circulation through agreement.

For libraries to truly benefit from the digital first sale doctrine, the Copyright Law must provide that "any contract limiting or excluding the application of the digital first sale doctrine is unenforceable," endowing the principle with mandatory law attributes.

Copyright technological protection measures have an "all-or-nothing" characteristic. While defending against infringement, they may also be used by rights holders as tools to circumvent the digital first sale doctrine, rendering libraries' statutory rights mere "paper tigers." The "contract plus technology" model provides "double insurance" for copyright protection. If libraries circumvent technological measures without authorization to apply the digital first sale doctrine, they may violate the law and struggle to find defenses in litigation. To address this "lock-in" problem, the law should respect rights holders' concerns about work security and integrity, permitting necessary technological protection measures while clearly stipulating that such measures must not exceed necessary limits or affect the doctrine's application.

Practice demonstrates that during periods of intense rights conflict, law must demonstrate considerable flexibility, elasticity, and adaptability to avoid obsolescence and achieve sustainable development. Cyberspace cannot break this rule, and network behavior norms need not break it. As understanding of relevant legal theories deepens, judicial experience accumulates, and copyright technological protection measures improve, legal obstacles to establishing a digital first sale doctrine will gradually clear, and justifications for its legislation will become more compelling. Sandy Norman, former legal and parliamentary affairs manager of the UK Library Association and IFLA copyright advisor, noted that libraries require special treatment because their role is to prevent social stratification in public knowledge access due to economic reasons. China's library community should advocate for further copyright system innovation to grant legal status to the digital first sale doctrine. Although the legislative path is destined to be difficult and lengthy, persistence and unremitting effort are essential.

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