

Application by Non-Government-owned Libraries, Museums or Archives for Designation under Section 118(2FB) of the Copyright Ordinance

Guidance Note for Applicants

1. This note outlines the information required and the procedures for an eligible non-Government-owned library, museum or archive to apply for designation by the Secretary for Commerce and Economic Development (“SCED”) under section 118(2FB) of the Copyright Ordinance (Cap. 528) (“CO”) to qualify for certain exemption from the business end-user possession offence imposed by section 118(2A) and (2B) of the CO (as explained in paragraph 2 below).

Background

2. Under section 118(2A) and (2B) of the CO, a person commits an offence if he, without the licence of the relevant copyright owner, possesses an infringing copy of any of the following five categories of copyright works for use in business¹:

- (a) a computer program;
- (b) a movie;
- (c) a television drama;
- (d) a musical sound recording; or
- (e) a musical visual recording.²

(hereafter referred to as “business end-user possession offence”)

3. In recognition of the important roles and functions of libraries, museums and archives in preserving and conserving works, particularly those of historical, cultural or heritage value, for public access, section 118(2E), (2F) and (2FA)(a) of the CO provides that the business end-user possession offence does not apply to the possession of an infringing copy of four of the aforesaid five categories of copyright works, namely

¹ Section 118(2A) of the CO provides that:

“A person commits an offence if he, without the licence of the copyright owner of a copyright work to which this subsection applies, possesses an infringing copy of the work for the purpose of or in the course of any trade or business with a view to its being used by any person for the purpose of or in the course of that trade or business.”.

² See section 118(2B) of the CO. For definitions of the copyright works of items (b) to (e), see section 198(1) of the CO.

a movie, television drama, musical sound recording or musical visual recording, by **libraries, museums or archives owned by the Government** (such as public libraries, museums and the Hong Kong Film Archive managed by the Leisure and Cultural Services Department, libraries managed by other bureaux or departments of the Government, and the Public Records Office) under the following circumstances:³

- (a) For the **purpose of heritage conservation** if—
 - (i) the infringing copy was donated or given to such libraries, museums or archives by the public; or
 - (ii) the infringing copy was made by such libraries, museums or archives to preserve or replace the infringing copy referred to in paragraph (i) against loss, deterioration or damage;⁴

- (b) For **other purposes** if—
 - (i) the infringing copy—
 - (1) was an infringing copy donated or given to such libraries, museums or archives by the public; or
 - (2) was made by such libraries, museums or archives to preserve or replace the infringing copy referred to in subparagraph (1) against loss, deterioration or damage;
 - (ii) it is not possible by reasonable enquiry to ascertain the identity and contact details of the copyright owner of the work in question; and
 - (iii) a copy (other than an infringing copy) of the work in question cannot be obtained on reasonable commercial terms.⁵

³ Specific examples of this conditional statutory exemption include the following scenarios—

- (a) libraries, museums and archives may receive donated copies of works (such as films) or salvage from various sources with unclear status of copyright ownership in the course of conducting their businesses. Some of such copies would need to be preserved to keep deterioration to the minimum and through duplication to stable materials so that these institutions can ensure a copy of the work of quality continues to exist. In this connection, it may not be feasible for these institutions to seek copyright clearance of the donated or salvaged copies before they could duplicate or act on the copies to preserve their quality;

- (b) before libraries, museums and archives may make use of donated copies of works (such as films) which are out of print or not commercially available in the market, for purposes other than preservation such as for showing or making them available for public access, it may not always be possible for them to ascertain the identity and contact details of the copyright owners concerned by reasonable enquiry.

⁴ Section 118(2E) of the CO.

⁵ Section 118(2F) of the CO.

4. Acknowledging that certain *non-Government-owned libraries, museums and archives* may share the same roles and functions of preserving and conserving works, the Copyright (Amendment) Ordinance 2022 (effective since 1 May 2023) introduces a new section 118(2FB) into the CO which empowers SCED to, having regard to the advice of the Director of Leisure and Cultural Services (“DLCS”), designate, by way of subsidiary legislation, any eligible library, museum or archive to which the business end-user possession offence would not apply under the circumstances as described in paragraph 3 above.

5. It should be noted that the *exemption from the business end-user possession offence granted to a designated library, museum or archive is subject to its compliance with the relevant statutory pre-conditions* (see paragraph 3(a) and (b) above), and that such exemption does not—

- (a) apply to unauthorised possession of an infringing copy of a computer program by such library, museum or archive for use in business; and
- (b) affect the rights of any copyright owner to take civil action against such library, museum or archive for its unauthorised possession of an infringing copy of any of the aforesaid five categories of copyright works for use in business.

Application by non-Government-owned library, museum or archive for SCED’s consideration to be designated under section 118(2FB) of the CO

(A) Eligibility for designation

6. Section 118(2FB) of the CO stipulates that a non-government-owned library, museum or archive eligible for designation by SCED **must be owned by—**

- (a) a charitable institution or trust of a public character that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap.112) (“IRO”); or
- (b) a statutory body⁶ that is exempt from tax under an Ordinance other than the IRO, or a subsidiary⁷ of such a statutory body.

⁶ “Statutory body” means a body established or constituted by or under the authority of an Ordinance.

⁷ “Subsidiary” has the meaning given by section 15 of the Companies Ordinance (Cap. 622).

7. In considering whether a non-government-owned library, museum or archive should be designated under section 118(2FB) of the CO, SCED would, having regard to the advice of DLCS, take into account, amongst others, whether such library, museum or archive in its normal course of operation accepts or will accept copies of movies, television dramas, musical sound recordings and/or musical visual recordings donated or given by the public from time to time, and also its legitimate purpose(s) of keeping such copies in its own collection of works for public access or use in furtherance of its day-to-day proper functions, operations and missions, e.g. for heritage conservation and preservation.

(B) Application procedures

8. To facilitate SCED to consider whether a non-government-owned library, museum or archive meets the eligibility requirements set out in paragraphs 6 and 7 above, the concerned non-government-owned library, museum or archive is required to complete the application form in the **Annex** and provide supporting information and documents as set out in the application form.

9. The Intellectual Property Department (“IPD”) will assist SCED in processing the applications. Completed application forms with all supporting information and documents must be sent to the IPD **on or before 2 July 2024** by hand or post at the following address:

Copyright Team
Intellectual Property Department
24/F Wu Chung House
213 Queen’s Road East
Wanchai, Hong Kong

10. Upon receipt of the applications, the IPD would seek DLCS’s advice and then submit the applications to SCED for consideration. During the process, the applicants may be requested to provide supplementary supporting information and documents should their applications submitted be incomplete or lacking sufficient documentary proof. Failure to submit the requested supplementary supporting information and documents within the specified period will result in the applications being assessed only based on the information already provided. The applicants will

be notified of the outcome of their applications in due course.

11. Any designation of a non-government-owned library, museum or archive by SCED under section 118(2FB) of the CO will take effect by a designation notice.

12. After making a designation notice, SCED will, having regard to DLCS's advice, periodically review and, if necessary, revise the notice. This may include removing a designated library, museum or archive from the notice for reasons such as the designated library, museum or archive no longer meeting the eligibility requirements set out in paragraphs 6 and 7 above, or in other circumstances SCED considers justifiable. Before removal, the designated library, museum or archive affected will be notified in advance and given an opportunity to make, within a specified period, a written submission (with supporting documents) to SCED to support its continued inclusion. After reviewing the written submission and having regard to DLCS's advice, SCED will make a final decision and inform the relevant designated library, museum or archive of the decision.

13. For enquiries on this guidance note, please contact the Copyright Team of the IPD via email at ipdcopyright@ipd.gov.hk.

Commerce and Economic Development Bureau
Intellectual Property Department
May 2024