

For information

**Legislative Council
Panel on Commerce, Industry, Innovation and Technology**

**Designation of Libraries, Museums and Archives under
Section 118(2FB) of the Copyright Ordinance Eligible for Exemption
from Criminal Liability of Business End-user Possession Offence**

PURPOSE

This paper briefs Members on the proposal of the Secretary for Commerce and Economic Development (“SCED”) to designate certain libraries, museums and archives (collectively referred to as “designated libraries, museums and archives”) under section 118(2FB) of the Copyright Ordinance (Cap. 528) (“CO”) for exemption from the criminal liability of the business end-user possession offence imposed by section 118(2A) and (2B) of the CO (see paragraph 2 below for the criminal liability), subject to compliance with certain statutory conditions provided in section 118(2E) or (2F) of the CO.

BACKGROUND

2. Under section 118(2A) and (2B) of the CO, a person commits the business end-user possession 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 the purpose of or in the course of 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:

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

3. Having regard to the important roles and functions of certain libraries, museums and archives in preserving, conserving and showing certain copyright works, particularly those of historical, cultural or heritage value, and the balance between the legitimate interests of copyright owners

and public interest, section 118(2E) and (2F) 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 a movie, a television drama, a musical sound recording or a musical visual recording, by designated libraries, museums and archives under the following circumstances:¹

- (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;
- (b) For other purposes if—
 - (i) the infringing copy was—
 - (1) an infringing copy donated or given to such libraries, museums or archives by the public; or
 - (2) 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.

¹ Specific examples of this conditional statutory exemption include the following scenarios—

- (a) In the course of conducting businesses, libraries, museums and archives for the purpose of heritage conservation possess copies of copyright works (such as films) donated by third parties or obtained from various sources, or for the same purpose with genuine needs duplicate such copies to stable materials to keep deterioration to the minimum and ensure that a copy of the work of quality continues to exist.
- (b) Before libraries, museums and archives 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. Such exemption does not:
- (a) apply to unauthorised possession of an infringing copy of a computer program by a designated 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.
5. In accordance with section 118(2FA) of the CO, a designated library, museum or archive refers to—
- (a) a library, museum or archive owned by the Government²; or
 - (b) a library, museum or archive designated by the SCED under section 118(2FB).
6. Regarding paragraph 5(b) above, section 118(2FB) of the CO empowers the SCED to, having regard to the advice of the Director of Leisure and Cultural Services (“DLCS”), by notice³ published in the Gazette, designate any eligible library, museum or archive. A designated library, museum or archive must be owned by:

² Libraries, museums or archives owned by the Government include public libraries, museums and the Hong Kong Film Archive managed by the Leisure and Cultural Services Department, libraries managed by other government bureaux and departments, as well as the Public Records Office, etc, but not the libraries, museums or archives of the Legislative Council (“LegCo”) and the Judiciary. Having regard to the roles of the libraries, museums or archives (if any) of the LegCo and the Judiciary in preserving and conserving certain copyright works, particularly those of historical, cultural or heritage value, and considering the legislative intent of section 118(2E) and (2F) of the CO, we are of the view that the libraries, museums or archives (if any) of the LegCo and the Judiciary have reasonable justifications and should be eligible to have the same exemption from criminal liability as designated libraries, museums and archives if the circumstances and conditions prescribed in section 118(2E) or (2F) of the CO are complied with. We are actively exploring amendments to section 118(2FA) of the CO to include the libraries, museums or archives (if any) of the LegCo and the Judiciary in the scope of designated libraries, museums and archives stated therein.

³ The notice concerned is a piece of subsidiary legislation. According to section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), subsidiary legislation includes any regulation, order, notice or other instrument made under or by virtue of any Ordinance and having legislative effect.

- (a) a charitable institution or trust of a public character that is exempt from tax under section 88 of the Inland Revenue Ordinance (“IRO”) (Cap. 112); or
- (b) a statutory body⁴ that is exempt from tax under an Ordinance other than the IRO, or a subsidiary⁵ of such a statutory body.

APPLICATION AND DESIGNATION

7. For the purpose of exercising the statutory power referred to in paragraph 6 above, we accepted applications for designation from eligible libraries, museums and archives between 2 May and 2 July 2024. The Intellectual Property Department also held a briefing session on 10 May 2024 to explain the application criteria and procedure to stakeholders.

8. In accordance with section 118(2FB) of the CO, when considering the relevant applications, the SCED sought the advice of the DLCS and took into account a number of relevant factors, including but not limited to whether the applicant 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, and whether keeping such copies in its own collection of works serves legitimate purpose(s) such as for public access or use in furtherance of its day-to-day functions, operations and missions, e.g. for heritage preservation and conservation. The SCED eventually proposed to designate 25 eligible libraries, museums and archives (see the list in the **Annex**).

LEGISLATIVE PROPOSAL

9. We propose that a notice be published in the Gazette for the SCED to formally designate the libraries, museums and archives listed in the Annex under section 118(2FB) of the CO.⁶

⁴ “Statutory body” means a body established or constituted by or under the authority of an Ordinance.

⁵ “Subsidiary” has the meaning given by section 15 of the Companies Ordinance (Cap. 622).

⁶ The Government will review and update the list of designated libraries, museums and archives from time to time as appropriate. If more eligible libraries, museums and archives would like to become designated libraries, museums and archives in the future, the Government will accept applications again.

LEGISLATIVE TIMETABLE

10. We are drafting the abovementioned notice and plan to table the relevant subsidiary legislation before the LegCo for negative vetting in the second quarter of 2025 in order to complete the relevant designation as soon as possible.

ADVICE SOUGHT

11. Members are invited to note the contents of this paper.

Commerce and Economic Development Bureau
Intellectual Property Department
March 2025

List of Libraries, Museums and Archives for Proposed Designation

1. Hong Kong Arts Development Council Arts Information Centre
2. Hong Kong Maritime Museum
3. The Hang Seng University of Hong Kong Library
4. The Hong Kong Polytechnic University Pao Yue-Kong Library
5. University Archives of the University of Hong Kong
6. The University of Hong Kong Libraries
7. Chung Ying Theatre Archives
8. Lingnan University Library
9. Hong Kong Baptist University Library
10. The Chinese University of Hong Kong Library
11. Vocational Training Council Library
12. Saint Francis University Library
13. The Education University of Hong Kong Library
14. Hong Kong Museum of Education
15. The Education University of Hong Kong Archives*
16. Library & Archives, Hong Kong Chronicles Institute
17. Hong Kong Scout Archives
18. Run Run Shaw Library, City University of Hong Kong

19. Hong Kong Shue Yan University Archives
20. Hong Kong Shue Yan University Library
21. Gratia Christian College Library
22. Hong Kong Metropolitan University Library
23. M Plus Museum*
24. The Hong Kong University of Science and Technology Lee Shau Kee
Library
25. The Hong Kong Academy for Performing Arts Libraries

* The library, museum or archive only has an English name.