

Response to the public consultation paper: *‘Updating Hong Kong’s Copyright Regime’*

Both M Plus Museum Limited (“M+”) and the Hong Kong Palace Museum Limited (“HKPM”) are wholly owned subsidiaries of the West Kowloon Cultural District Authority (“WKCD”), a statutory public body established by the WKCD Ordinance (Cap 601) in 2008.

The definition and functions of a museum are succinctly outlined in the International Council of Museums’ (“ICOM”).

*“A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which **acquires, conserves, researches, communicates and exhibits** the tangible and intangible heritage of humanity and its environment **for the purposes of education, study and enjoyment.**”*

M+ is a new institution with a clear mission to be a global museum dedicated to collecting, exhibiting, and interpreting visual culture of the twentieth and twenty-first centuries, whilst HKPM is an international museum featuring traditional Chinese art through the world-renowned collection of Palace Museum. Both museums broaden the mix of cultural facilities in the West Kowloon Cultural District (“WKCD”) by showcasing a rich tapestry of Chinese and western art in both traditional and modern genres.

WKCD wishes to express its support for the national ambition to develop Hong Kong as a regional IP trading centre.

We have a strong interest in the effectiveness of Hong Kong’s copyright regime, as M+ and HKPM are both users and creators of copyright works. A copyright regime that balances the interests of owners and users of copyright works is in the interests of both museums. **WKCD welcomes the present consultation and supports the government’s proposal to complete the long overdue legislative amendment exercise, taking the Copyright (Amendment) Bill 2014 (“2014 Bill”) as the basis.** Our submissions below are based on the assumption that all the proposed amendments to the Copyright Ordinance set out in the Copyright (Amendment) Bill 2014 will be carried over to the next Bill to amend the Copyright Ordinance. In addition, **WKCD has the following comments** in response to the consultation paper published by the Commerce and Economic Development Bureau (“CEDB”):

(A) Communication Right

WKCD supports the introduction of a technology-neutral Communication Right as proposed in the 2014 Bill and regards this as a forward-looking rationalisation in line with other jurisdictions.

(B) Criminal Liability

The availability of enforceable sanctions is essential to the effective operation of the copyright system, and we, therefore, do not have objection to the introduction of criminal liability except that

the framing of provisions must take due account of the problem of “orphan works”, described under (C), below.

Further, while previously all major public museums have been under the administration of the Leisure and Cultural Services Department, following the establishment of WKCDA and opening of its two museums, **it will be necessary to revise the proposed new Section 118(2FB) under the Copyright Amendment Bill 2014 to include M+ and HKPM under WKCDA which are not exempted from tax under Section 88 of the Inland Revenue Ordinance (Cap 112).**

(C) Exhaustive Approach to Exceptions (paragraph 3.9 of the consultation paper)

For the sake of legal certainty, **WKCDA supports the continuation of an exhaustive approach to exceptions, in line with most jurisdictions worldwide.**

However, taking an exhaustive approach to exceptions requires that express exceptions be incorporated into the Copyright Ordinance so that museums can legitimately carry out their mission without having to bear the risk of civil or criminal liability. There are several aspects to the matter.

(1) General exception for “orphan works”

An important and valuable feature of the copyright system is that registration is not required before a work can be protected. However, without a register, sometimes it will be impossible to trace copyrights-holders (their whereabouts and contact details cannot be discovered by ‘*reasonable enquiry*’), meaning that some copyright works are effectively ‘orphaned’. For M+ or similar museums holding large, diverse collections of copyright works, “*orphan works*” present a significant problem. In such cases, the museum’s institutional mission obliges it to adopt the legal risk of copying and reproducing “*orphan works*” without being able to obtain permission. It appears unreasonable that the institution and its staff should be exposed to such legal risk in the conduct of public service duties.

WKCDA would therefore like to take the opportunity of this consultation to request that museums be given a general exception to use “*orphan works*” for non-commercial activities necessary for museums to carry out their mission of conserving, researching, communicating, and exhibiting the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.

(2) Exceptions for museums parallel to exceptions granted to libraries and archives

WKCDA is pleased to note and fully supports the proposals in the 2014 Bill to extend to museums certain exceptions granted to libraries and archives.

It is noted that under the proposed amendment to Section 46(1)(b) of the Copyright Ordinance, the Secretary for Commerce and Economic Development may, by notice in the Gazette, specify libraries, museums or archives for the purposes of any provision in sections 47 to 53 of the Copyright Ordinance.

WKCDA submits that both M+ and HKPM should be included in the notice in the Gazette.

(3) Exceptions for museums parallel to exceptions granted to educational establishments

Both **M+** and **HKPM** deliver educational and learning experiences to widely diverse audiences onsite at WKCD and offsite, enriching school programmes and lifelong learning for the Hong Kong public. Such non-commercial, educational activities are similar to the education programmes delivered by schools, and **WKCD would like to request that museums supporting the community with educational activities should be granted exceptions to copyright infringement similar to those granted to educational establishments under Section 41A to 45 of the Copyright Ordinance.** This serves Hong Kong's development goals for IP trading by developing public awareness of the creative economy.

(4) Exception in relation to the use of copyright works in catalogues of the permanent collection

The use of images of copyright works is essential to the fulfilment of our museums' core function to inform the public about the objects in their permanent collections.

WKCD notes that under Cap 528, Section 72, "*Advertisement of sale of artistic work*", commercial entities such as galleries and auction houses are entitled to reproduce copyright works in sales catalogues without the need to secure permission from the copyright-holder.

WKCD would like to request that museums which are the purchasers of copyright work (often with public funds) should, for the sake of legal certainty, be granted a similar exception, entitling them to reproduce copyright works to create illustrated catalogues, in print or online, for non-commercial purposes of creating a public record of their collections and informing the public about their collections.

(5) Exception catering for Quotation

WKCD welcomes the introduction of the proposed exception to cater for quotation, which clarifies practice.

The West Kowloon Cultural District Authority
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