

COPYRIGHT AND FACILITATING THE WORK OF MUSEUMS: THE CARROT OR THE STICK?

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*“Copyright protection is above all one of the means of promoting, enriching and disseminating the national cultural heritage. A country’s development depends to a very great extent on the creativity of its people, and encouragement of individual creativity and its dissemination as a sine qua non for progress”.*¹

1. Introduction

The journey of heritage and history has immensely been stepped over the creations of human mind. With the development of society and law, creative works have economically been recognized and awarded under the roof of copyright. Being fundamentally an economic right, copyright presents an

essential legal chapter which grants legal protection for literary and artistic works including works acquired or possessed by museums.

Museums are defined as non-profit, permanent institutions in the service of society and its development, open to the public, which acquire, conserve, research, communicate and exhibit the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment,² although the International Council of Museums has currently recognized the need of a new museum definition.

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¹ World Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use (WIPO Publication 2004) 41

² The International Council of Museums (ICOM) Statute 2007, Article 3

This paper examines the importance of copyright in the context of museums evaluating the current state of copyright law and exceptions and limitations regarding the use of copyright protected works by museums and their patrons, with special reference to Sri Lanka. The second part of this paper proposes possible ways to facilitate the provision of museum services in compliance with the norms of copyright law.

2. Mission of the Museum and Sri Lankan Context

A. Museums

Museums customarily have two different roles as a user and a creator pertaining to the relevance of copyright law. In performing these two roles, copyrighted works, non-copyrighted works and public domain works³ are the works that can be acquired or possessed by Museums. In this backdrop,

³ No interpretation for public domain works is provided in the Intellectual Property Act 2003

⁴ Ibid 2

⁵ Shubha Banerji, ‘‘The Evolution of the Species’ in Anura Manatunga (ed), Abstract Volume: International

acquisition of copyright owned by third parties is significant for museums as similar as management of their own intellectual property, including copyright.

According to the definition of ‘museum’ adapted by the International Council of Museums, Acquisition, preservation, communication and exhibition of cultural heritage and works can be identified as the core mission of museums. ⁴ In cultural heritage tourism, the museum as a story teller opens its doors to experience the story of a new specific region while giving visitors enlightenment and entertainment.⁵

B. Museums and Copyright Restrictions

In South Asian region, museums are linked with history, culture and heritage of the country. For instance, majority of museums existing in Sri Lanka are linked with history, culture and heritage of the country.

Conference on Asian Art, Culture and Heritage (Centre for Asian Studies, University of Kelaniya 2013)

Copyright is considered as the main obstruction in preserving cultural heritage.⁶ However, in general, museums reproduce the copyrighted materials including works at risk, works in obsolete works and works which are rare and fragile for the purpose of preservation. Currently, digitization is being utilized by museums to preserve tangible and intangible cultural heritage.⁷ Intangible cultural heritage⁸ consists of art expressions, drama, acting, literature, language, martial arts, livelihood cultures, food habits, traditional practices, folktale, folksong, folklore, folkdance, oral records, etc⁹

Sri Lankan museums use scanning, photographing and other types of digitizing to reproduce works for preservation purposes.

In general, museums should focus on the question 'what to preserve: and what not to

preserve' before preservation of copyrighted works. To decide such matters, specific provisions should be contained in the law. For instance, legislation may direct museums for preventive preservation. Online preservation is a challenge in this context. However, there is a possibility to lose the value of ancient artefacts in digital formats.¹⁰

Further, as a user of copyrighted works, museums have to consider copyright when they produce and distribute exhibition catalogues. However, South Asian Countries including Sri Lanka, have no specific internal guidelines or specific legal provisions for allowing such reproduced works for distribution of exhibition catalogues. This situation is similar to public display of media works in its collection. However, out of South Asian Countries, Nepal has specific legal

⁶ Chennupati K Ramaiah and Somipam R Shimray, 'Issues in Preservation of Digital Cultural Heritage' (2017) *Re-Envisioning Role of Libraries: Transforming Scholarly Communication*, 146, 154

⁷ For the definition of cultural property, see the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, Article 01 and Convention concerning the Protection of the World Cultural and Natural Heritage, Article 01

⁸ For the definition of intangible cultural property, see the Convention for the Safeguarding of the Intangible Cultural Heritage, Article 02

⁹ Chennupati K Ramaiah and Somipam R Shimray, 'Issues in Preservation of Digital Cultural Heritage' (2017) *Re-Envisioning Role of Libraries: Transforming Scholarly Communication*, 146, 147

¹⁰ Discussed in the "Regional Seminar for the Asia Pacific Group on Libraries, Archives, Museums and Educational and Research Institutions in the Field of Copyright", held on April 29 and 30, 2019, in Singapore. Author was a Chair of one of four working groups in this regional seminar.

provisions enacted for publicly displayed media works.¹¹

Using a mobile application, Sri Lankan Museums allow the user online access to collections in the form of virtual visits.¹² Also, collections available on the website of museums can be accessed by users. However, no legal provisions have been introduced to make certain the legality of copyright in making digitized collections accessible to visitors on terminals onsite or allowing online access outside the premises of the museums.

Sri Lankan museums allow visitors to take photographs and the National Museum of Sri Lanka grants permits for this purpose.¹³ Nevertheless, they have no mechanism to review photos uploaded on social media by visitors. The Sri Lankan law on copyright is silent on taking photographs in museums and uploading photos on social media by visitors. On the other hand, no law has been enacted

to limit the museum's liability regarding such uses.

Sri Lanka does not allow cross-border lending for exhibitions. In addition to the above context, Sri Lankan Law on copyright has not identified cross border issues for museums. As reported, Sri Lanka does not have prior experience of cross-border lending for exhibitions. However, this situation does not thwart the legislative changes which can be made for future use.

Although museums are supposed to be non-profit organizations, the question of future sustainability arises here. In this context, museums need to question themselves on the continuity of government funds and long-term support for daily activities. Against this backdrop, commercialization of some of the activities such as opening museum cafeteria and souvenir shops, replica production can be considered for self-sustenance of the museum.

¹¹ The Copyright Act, 2059 (2002) of Nepal, s 23 According to the Section 23 of the Nepal Copyright Act, public exhibition is allowed. However, such public display has to be made without the help of film, slide, television image or otherwise using the screen or device of other kind.

¹² For instances; 'Virtual Tour' (Ancient technology Museum - Department of National Museums) <<http://ancienttechnologymuseum.gov.lk>>

accessed 03 October 2019; 'Virtual Tour' (National Telecommunication Museum) <http://slt.lk/museum/virtual_tour> accessed 03 October 2019

¹³ 'Video/camera permit' (Department of National Museums) <www.museum.gov.lk/web/index.php?option=com_content&view=article&id=48&Itemid=103&lang=en> accessed 02 October 2019

In this context, it is significant making the legal certainty regarding the copyright of works when they engage with commercial activities.

For education and research purposes, Sri Lankan Museums permit reproducing a part of a copyrighted work. For instance, some museums issue a one third of a copyrighted book for this purpose. Further, they issue photographs, scanned copies and photocopies for the same purpose.

3. Legal framework

A. Domestic Law Regime

The Law of Copyright crossed the Sri Lankan domestic legal system by regulating the Copyright Ordinance No. 12 of 1908 which dates back nearly 111 years. The present copyright law has been encompassed in the Intellectual Property Act No. 36 of 2003. It consists of the provisions which can be applied to protect the original intellectual creations in the literary, artistic and scientific domain. Sections 6(1) and 7(1) of the

Intellectual Property Act No. 36 of 2003 recognize the works which attract the copyright protection in particular.

In terms of Intellectual Property Act, the owner of copyright of a work has economic rights for works that receive the copyright protection.¹⁴ Economic rights have been defined as the rights referred in Section 09 of the Act, namely, exclusive right to carry out or to authorize the reproduction of the work; translations of the work; adaptation, arrangement or other transformation of the work; the public distribution of the original and each copy of the work by sale, rental, export or otherwise; rental of the original or a copy of an audiovisual work, a work embodied in a sound recording, a computer program, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned; importation of copies of the work, (even where the imported copies were made without the authorization of the owner of the copyright); public display of the original or a copy of the work; public performance of the work;

¹⁴ Intellectual Property Act 2003, s 09

broadcasting of the work; other communication to the public of the work. Quite apart from the ownership of the economic rights referred in Section 9 of the Act, the author of a work receives moral rights regarding his work.¹⁵

B. Recognition of the doctrine of fair use under Sri Lankan IP law

The doctrine of fair use can be recognized as the major restriction on copyright.¹⁶ Section 11(1) of the Act presents the fair use doctrine as follows.

Notwithstanding the provisions of subsection (1) of section 9, the fair use of a work, including such use by reproduction in copies or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, shall not be an infringement of copyright.

However, it has been recognized that the purposes of fair use referred in section 11(1) does not constitute an exhaustive list of purposes. In words of D.M. Karunaratne, *'they are consequently open-ended covering any act of use performed to achieve a fair purpose'*.¹⁷ Section 11(2) provides the factors that will be considered in determining whether the use of a work is a fair use;

a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

b) The nature of the copyrighted work;

c) The amount of substantiality of the portion used in relation to the copyrighted work as a whole; and

d) The effect of the use upon the potential market for, or value of, the copyrighted work.

In addition to above legal provisions, section 12 of the Act provides circumstances which can be located under the fair use concept. However, it does not present any instance

¹⁵ Ibid, s 10

¹⁶ D.M. Karunaratna, An Introduction to the Law relating to Literary and Artistic Creations (Sarasavi Publishers 2019) 178

¹⁷ Ibid 15

with regard to museums. In this context, it can be argued that fair use of a copyright protected work acquired and possessed by museums for the purposes of preservation, can be considered under the fair use concept.

Although the Intellectual Property Act recognizes separate provisions and circumstances with regard to libraries, archives and educational institutions¹⁸, it does not consist of specific provisions with regard to museums. Thus, this absence of separate legal provisions in the Intellectual Property Act creates a legal uncertainty on the subject. However, it can be argued that some legal provisions which are applicable to libraries and archives ¹⁹ might be applicable to museums.

C. International Legal Framework and Emerging Trends

Berne Convention for the Protection of Literary and Artistic Works provides provisions regarding exceptions and free uses of works.²⁰ It incorporates the three-step test

which allows exceptions to the right of reproduction. Article 9(2) of the Berne Convention allows exceptions with respect to the right of reproduction;

(1) in certain special cases

(2) that do not conflict with a normal exploitation of the work

(3) that do not unreasonably prejudice the legitimate interests of the author.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) also encompasses fair use doctrine as follows;

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.²¹

Article 13 of the TRIPS Agreement has extended the three-step test of the Berne Convention to cover any type of copyright.²² Further, the WIPO Copyright Treaty also

¹⁸ Intellectual Property Act 2003, s 11-12

¹⁹ Intellectual Property Act 2003, s 12(5)

²⁰ Berne Convention for the Protection of Literary and Artistic Works 1886, Article 9, 10

²¹ TRIPS Agreement 1995, Article 13

²² Daniel J. Gervais, 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test' (2005) 9:1 Intellectual Property Law Review 1, 14

incorporates the three-step test to determine limitations and exceptions²³.

Sri Lanka is a party to the above discussed international instruments.²⁴ However, international legal framework in intellectual property does not specifically cater provisions for the field of museums.

Among 192 WIPO Member States, 50 countries provide specific limitations and exceptions for museums while 141 member states provide general limitations and exceptions and/or licensing solutions.²⁵ As per the study commissioned for the SCCR from Yaniv Benhamou (SCCR/38/5), exceptions regarding reproduction of works for preservation and archiving purposes, use of works in exhibition in exhibition catalogues, exhibition right, communication to the public (displaying and making available online to the public), use of non-attributed works have been discussed in terms of specific exceptions for the museums. In addition to the specific exceptions, exceptions

regarding reproduction of works for private purposes, reprographic reproduction, and use for educational and scientific research have been considered as general exceptions which may be relevant for some museums activities.

²⁶

According to the Resolution No. 03 adopted by ICOM's 22nd general assembly held in Vienna, Austria in 2007, the ICOM General Assembly resolved '*to support the efforts of WIPO and other relevant organizations to develop and implement a new WIPO Convention and other Conventions aiming to ensure the protection of the collective moral rights of the originators, inheritors, transmitters and performers of the world's traditional cultural expressions, and traditional knowledge*'.

As a recent discourse, WIPO has conducted an International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational and Research Institutions in October, 2019 in accordance with the Action Plan on

²³ WIPO Copyright Treaty (WCT) 1996, Article 10

²⁴ 'Sri Lanka (6 texts)' (WIPOLex) <<https://wipolex.wipo.int/en/legislation/profile/LK>> accessed 04 October 2019

²⁵ Yaniv Benhamou, Revised Report on Copyright Practices and Challenges of Museums (WIPO 2019) 15

²⁶ Yaniv Benhamou, Revised Report on Copyright Practices and Challenges of Museums (WIPO 2019) 16 - 21

Limitations and Exceptions approved by Member States during the 36th session of the Standing Committee on Copyright and Related Rights (SCCR) held in June 2018.²⁷ 39th session of the Standing Committee on Copyright and Related Rights, held from October 21 to October 25, 2019 also mainly focused on copyright exceptions and limitations.²⁸

Conclusions

When analyzing the Sri Lankan IP law, a direct reference to museums cannot be found in the Intellectual Property Act No. 36 of 2003. Similarly, no specific legal provisions have been enacted to facilitate the provision of museum services in compliance with the norms of copyright law. This situation deliberately makes a legal uncertainty of copyright, copyright management and the applicability of fair use doctrine.

In this context, copyright law should be amended with an aim of facilitating the provision of museum services in compliance with domestic law regime. On the other hand, these legal amendments should be focused on insertion of provisions for the copyright protection of copyrighted works in museums and applicability of the fair use doctrine for the missions of museums. However, *'there is little doubt that IP laws necessitate additional administrative functions on the part of the museum'*.²⁹ In this context, the nature of museums and its mission should scrupulously be studied and examined to recognize the integral necessity of IP rights in the field and introduce a set of comprehensive legal provisions and guidelines for IP rights which are applicable to museums.

The other significant factor is that, it will be remarkably easy for professionals and users to understand and implement relevant laws when separate legal provisions are available

²⁷ WIPO, 'International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions' (WIPO) <https://www.wipo.int/meetings/en/2019/international_conference_copyright.html?fbclid=IwAR3sNZyHB-gt2NyBGvD600O_-PLVC1PJUCU_0UoZ9MVmM5IvovNkU7LzMXk> accessed 04 October 2019

²⁸ WIPO, 'Standing Committee on Copyright and Related Rights, thirty ninth session' (WIPO) <https://www.wipo.int/meetings/en/details.jsp?meeting_id=50425> accessed 04 October 2019

²⁹ Rina Elster Pantalony, Guide - Managing Intellectual Property for Museums (2013 edition, WIPO 2013) 8

for separate fields. Building awareness is also essential for due implementation of exceptions and limitations to copyright.

Thus, introduction of a new WIPO Convention for exceptions and limitations of copyright and regional instruments can be considered as important for removing legal uncertainty of law. Using regional and international instruments, there is a possibility that issues including cross border issues in museum field can be solved. As a part of above changes, collective management of copyright and related rights should be strengthened in the region.