MPA
ASIA PACIFIC

Commerce and Economic Development Bureau
Division 3
23rd Floor, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong
By email

September 2, 2024

PUBLIC CONSULTATION ON COPYRIGHT AND ARTIFICIAL INTELLIGENCE (AI)

Dear Sir/Madam,

The Motion Picture Association (MPA) is a trade association representing six international producers and distributors of film and television entertainment.[1]

Our member companies produce and distribute a wide range of film and television content in Hong Kong. MPA member companies are already using a variety of technologies, including generative AI, to support the creation and delivery of a wide range of works that bring benefits (both economic and cultural) to society.

In response to the Hong Kong Intellectual Property Department's current public consultation on Copyright and Artificial Intelligence, we share below our high-level comments in response to selected issues raised in your consultation paper of July 2024.

2.36
Do you agree that the existing Copyright Ordinance (CO) offers adequate protection to AI-generated works, thereby encouraging creativity and its investment, as well as the usage, development, and investment in AI technology? If you consider it necessary to introduce any statutory enhancement or clarification, please provide details with justifications.

At the current time we see no need to introduce any statutory changes to the existing CO with respect to computer generated works.

[1] The MPA-represented companies are: Walt Disney Studios Motion Pictures; Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios, LLC; and Warner Bros. Entertainment Inc.

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MPA notes that technology has long been used in the production of films and audiovisual content and this has not raised issues for originality, human authorship and copyright subsistence. Further, MPA notes that the use of generative AI in the production of a film does not automatically deny originality and authorship (and therefore copyright subsistence) and that originality and authorship is essentially a factual determination. Use of AI technology in this manner may be considered "AI-assisted", rather than "AI-generated".

MPA notes that while there are a handful of jurisdictions like Hong Kong that protect computer generated works, there is yet to be significant case law that provides guidance on the scope of protection for computer generated works. That said, we agree that the existing CO is broad enough to offer adequate protection to AI-generated works and welcome the HKIPD's clarification that "[t]he general expression "computer-generated"...is sufficiently flexible to accommodate evolving technologies. Such expression covers works generated by computer where there is no human author but a necessary arranger can be identified."[2] Further, MPA also welcomes the important distinction between "AI-generated works" and "AI-assisted works" and the consultation paper's conclusion that "established principles of the current copyright law are generally applicable to AI-assisted works."[3]

MPA further notes that many markets for the production of copyright works (e.g. the United States and the European Union) require a level of human authorship and originality. There is a risk that should a computer-generated work not meet the threshold established for originality and human authorship in these markets, computer-generated works originating from Hong Kong may not enjoy copyright protection.

3.20
Do you agree that the existing law is broad and general enough for addressing the liability issues on copyright infringement arising from AI-generated works based on the individual circumstances? If you consider it necessary to introduce any statutory enhancement or clarification, please provide details with justifications.

MPA considers that the principles for assessing copyright infringement are fit for purpose and do not require any changes for AI. The principles of substantial similarity and access remain relevant and are adaptable to technological developments. Moreover, infringement is assessed on a case-by-case basis on the facts available to a court and setting rigid rules would hamper a court's capacity to assess infringement in unique factual situations involving emerging technologies. Furthermore, the principles for assessing moral rights infringement remain similarly fit for purpose.

4.18
Is copyright licensing commonly available for TDM activities? If so, in respect of which fields/industries do these licensing schemes accommodate? Do you find the licensing solution effective?

What conditions do you think the Proposed TDM Exception should be accompanied with, for the objective of striking a proper balance between the legitimate interests of copyright

[2] p 19, para 2.31.
[3] P 8, fn 7.

owners and copyright users, and serving the best interest of Hong Kong? Are there any practical difficulties in complying with the conditions?

MPA notes that AI developers are increasingly turning to copyright licensing over unauthorized use.[4] This is to solve two essential problems 1) to obviate potential liability and 2) obtain access to content that is either not freely available on the public internet or of a higher quality. Voluntary licensing provides certainty to all relevant parties and should be promoted.

MPA does not see the need for a new text and data mining exception in Hong Kong, and such an exception would create uncertainty at a time when the licensing of copyright works by AI developers is evolving, therefore undermining such licensing practices. However, if the Hong Kong Government were minded to consider a new exception, it must contain the following safeguards for rightsholders.

Lawful content/access

The TDM exception must be predicated on the user having lawful access[5] to the work used for AI training. The exception should not authorize training AI on infringing works or pirate sites, or on works to which access has not been authorized or where it would be a breach of contract or terms of service, or where doing so would involve circumventing technological protection measures.

Opt-outs

Any TDM exception must provide rightholders the ability to easily exclude their works from training in an effective and non-burdensome manner. AI systems offered to the general public or external commercial customers must be required to comply with the choice of the rightholder. The Hong Kong Government should encourage AI developers that use copyright works under the TDM exception to develop technical measures or standards, with input from rightholders, to enable rightholders to exclude their works including on a "per work" basis.

Record keeping

Where AI developers rely on a TDM exception for training AI systems and services that are offered to the general public or external commercial customers, they should maintain reasonable records of training data, including copyright protected works, and make those records available for review, to provide transparency to rightsholders and users.

Deepfakes and Transparency

We note the consultation paper addresses issues outside of copyright policy in chapter 5.

When considering the nature of "deepfakes" and any potential regulation (including but not limited to transparency obligations, such as labelling of outputs of generative AI), careful consideration must be given to motivation. In the film and television industry, as outlined

[4] See Appendix A for examples of licenses.
[5] See Appendix B for relevant legislative examples.

above and in the consultation paper, technology has been used for decades to augment the audience experience. However, bad actors can use similar technology to cause harm and mischief.

In this regard a distinction can be made, where our industry uses AI technology in the production of creative content that is used to entertain and inform, while other sectors may use AI technology to create content that misleads or deceives – "deepfakes" which create harms for consumers and the public. Requirements to disclose use of AI in the creation of content are neither necessary nor useful where the content is part of an evidently creative work. Required disclosure can impair the consumer experience. Disclosure requirements may be appropriate where the content is likely to deceive consumers, but such requirements should be the exception, and only required when absolutely necessary.

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The MPA appreciates the opportunity to provide you with these high-level comments. We remain ready to provide further information and answer further questions or meet with you to discuss.

Yours sincerely,

Trevor Fernandes
SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, ASIA PACIFIC

Appendix A: Licensing Arrangements Between Generative AI Services and Rightsholders (Non-Exhaustive as of August 28, 2024)

1. AI companies with Photobucket (in progress)
2. AI companies with Freepik
3. AI companies with Thomson Reuters
4. ElevenLabs with HarperCollins
5. Google with Stack Overflow
6. Google with Reddit
7. Google with Universal Music (in progress)
8. LG with Shutterstock
9. Meta with Shutterstock
10. Microsoft with Informa
11. Midjourney with Tumblr
12. NVIDIA with Getty Images
13. NVIDIA with Shutterstock
14. OpenAI with Axel Springer
15. OpenAI with The Associated Press
16. OpenAI with The Atlantic
17. OpenAI with Condé Nast
18. OpenAI with Dotdash Meredith
19. OpenAI with Financial Times
20. OpenAI with Le Monde
21. OpenAI with News Corp
22. OpenAI with Prisa Media
23. OpenAI with Reddit
24. OpenAI with Shutterstock
25. OpenAI with Stack Overflow
26. OpenAI with Tumblr
27. OpenAI with Time
28. OpenAI with Vox Media
29. Runway with Getty Images

Appendix B

Table of legislative examples for "lawful access" to works

	Jurisdictions	Provisions
	European Union	DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC Article 2 Definitions (2) 'text and data mining' means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations; Article 3 Text and data mining for the purposes of scientific research 1. Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access. 2. Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results. 3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective. 4. Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively. Article 4 Exception or limitation for text and data mining 1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining. 2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining. 3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred

		to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online. 4. This Article shall not affect the application of Article 3 of this Directive.
	Singapore	**Copyright Act 2021** **Copying or communicating for computational data analysis** 244.—(1) If the conditions in subsection (2) are met, it is a permitted use for a person (X) to make a copy of any of the following material: (a) a work; (b) a recording of a protected performance. (2) The conditions are — (a) the copy is made for the purpose of — (i) computational data analysis; or (ii) preparing the work or recording for computational data analysis; (b) X does not use the copy for any other purpose; (c) X does not supply (whether by communication or otherwise) the copy to any person other than for the purpose of — (i) verifying the results of the computational data analysis carried out by X; or (ii) collaborative research or study relating to the purpose of the computational data analysis carried out by X; (d) X has lawful access to the material (called in this section the first copy) from which the copy is made; and Illustrations (a) X does not have lawful access to the first copy if X accessed the first copy by circumventing paywalls. (b) X does not have lawful access to the first copy if X accessed the first copy in breach of the terms of use of a database (ignoring any terms that are void by virtue of section 187). (e) one of the following conditions is met: (i) the first copy is not an infringing copy; (ii) the first copy is an infringing copy but — (A) X does not know this; and (B) if the first copy is obtained from a flagrantly infringing online location (whether or not the location is subject to an access disabling order under section 325) — X does not know and could not reasonably have known that; (iii) the first copy is an infringing copy but —

		(A) the use of infringing copies is necessary for a prescribed purpose; and (B) X does not use the copy to carry out computational data analysis for any other purpose. (3) To avoid doubt, a reference in subsection (1) to making a copy includes a reference to storing or retaining the copy. (4) It is a permitted use for X to communicate a work or a recording of a protected performance to the public if — (a) the communication is made using a copy made in circumstances to which subsection (1) applies; and (b) X does not supply (whether by communication or otherwise) the copy to any person other than for the purpose of — (i) verifying the results of the computational data analysis carried out by X; or (ii) collaborative research or study relating to the purpose of the computational data analysis carried out by X. (5) For the purposes of this Act, the supply of copies of any material in circumstances to which this section applies — (a) is not to be treated as publishing the material (or any work or recording included in the material); and (b) must be ignored in determining the duration of any copyright in the material (or the included work).
	United Kingdom	**Copyright, Designs and Patents Act 1988** **29A Copies for text and data analysis for non-commercial research** (1)The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that— (a)the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and (b)the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise). (2)Where a copy of a work has been made under this section, copyright in the work is infringed if—

		(a)the copy is transferred to any other person, except where the transfer is authorised by the copyright owner, or (b)the copy is used for any purpose other than that mentioned in subsection (1)(a), except where the use is authorised by the copyright owner. (3)If a copy made under this section is subsequently dealt with— (a)it is to be treated as an infringing copy for the purposes of that dealing, and (b)if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes. (4)In subsection (3) “dealt with” means sold or let for hire, or offered or exposed for sale or hire. (5)To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.**]**