FINTECH ASSOCIATION OF HONG KONG

*Response to the
Public Consultation on the Copyright
and Artificial Intelligence as issued by
the Commerce & Economic
Development Bureau and the
Intellectual Property Department of the
HKSAR*

September 2024

The FinTech Association of Hong Kong (FTAHK) is a **member-driven, independent, not-for-profit, & diverse organisation** that is the voice of the FinTech community in Hong Kong. It is organised and led by the community, for the community, through a series of committees and working groups.

Our objective is to promote Advocacy, Communication and Education in the wider FinTech ecosystem.

**Build by the community.
Be the #superconnector.**

A.   FOREWORD

The FinTech Association of Hong Kong ("**FTAHK**") is a not-for-profit ecosystem builder that has over 1,000 members and is the largest FinTech association in Asia. Our wide-ranging membership comprises of global and domestic FinTechs, Financial Institutions, Technology Service Providers, Consultancies, and members of Academia.

The FTAHK welcomes the opportunity to provide its views to the Intellectual Property Department of the Commerce and Economic Development Bureau ("**CEDB**"), on the Public Consultation Paper on Copyright and Artificial Intelligence (the "**Consultation**") and the proposed enhancements to the Copyright Ordinance (Cap. 528) (the "**CO**") for the protection of artificial intelligence ("**AI**") developments. We believe this Consultation is timely, given the increased adoption of AI technology across a range of sectors, and with copyright protection playing a critical role in fostering innovation and creativity and enhancing Hong Kong's role as a regional intellectual property trading centre.

The FTAHK believes that the issues raised in the Consultation are timely and crucial. We note that the intersection of law relating to individual intellectual property rights and AI is a critical area that requires careful consideration, especially as AI continues to revolutionise industries (including the financial services sector) and challenge traditional intellectual property rights concepts.

The FTAHK's response has been prepared in consultation with its members representing a broad range of experience and backgrounds, and focuses on the four issues identified within the Consultation Paper.

- Copyright protection of AI-generated works.
- Copyright infringement liability for AI-generated works.
- Possible introduction of specific copyright exception. Other issues relating to generative AI.

B.   RESPONSES

(1)   Copyright Protection of AI-Generated Works

As provided in the Consultation, the CO contains several existing protections for computer-generated works:

- for literary, dramatic, musical and/or artistic works – so long as the requirement for originality is met, the work is afforded copyright protection (albeit more confined that that afforded to works that has a human author); and

- for other works (i.e. sound recordings, films, broadcasts, cable programmes and the typographical arrangement of published editions) –the protection offered is the same regardless of whether the work is created by humans or computers.

The FTAHK agrees with the Consultation's proposed position of maintaining the existing CO provisions, without further changes to enable the Hong Kong courts to continue to determine each circumstance on a case-by-case basis; while maintaining a watching brief with regards to technological developments and relevant updates to similar laws in other jurisdictions.

Given the rapidly evolving pace of technology, the FTAHK would recommend that guidance is provided by relevant authorities to those who develop and use AI to be vigilant in managing their activities, both to safeguard against future intellectual-property related risks and to promote Hong Kong as an intellectual property trading hub. Such guidance may:

- include recommendations on transparency into AI-related activities and an objective assessment of the risks associated with any AI-related activities;
- include template provisions with respect to addressing copyright ownership-related issues through contractual arrangements – noting that while there are so far "no discernible market failure" in such contractual arrangements (per Section 2.33 of the Consultation), template provisions may assist with streamlining negotiations and market practices, and also assist in the protection of smaller individual copyright holders; and
- be issued by relevant authorities in different industries and would benefit from a coordinated approach between those different authorities (potentially coordinated by the CEDB.

Finally, the FTAHK would like to highlight the importance of ensuring that the CO provisions (and any changes thereto) are effective in practice, and in line with the approach taken by other international financial centres. We encourage the authorities to be mindful of international trends when looking to meet local needs, as it is crucial that any legislative updates strike the right balance between encouraging innovation and protecting the rights of creators.

(2)   Copyright Infringement Liability for AI-Generated Works

The FTAHK agrees with the Consultation that the current legal framework for determining liability in cases of copyright infringement by AI-generated works is adequate, as it allows for case-by-case determination based on the specific circumstances. The examples provided in

the Consultation illustrate that this approach is already flexible enough to address various potential scenarios involving AI-generated works.

The FTAHK is supportive of the government's recognition of the role of contractual arrangements between AI system owners and users in managing copyright liability and is of the view that this should continue to be encouraged. These agreements offer a level of flexibility that statutory provisions might lack and can help mitigate the risks associated with AI-generated content. As stated above, we encourage relevant authorities to develop template (non-mandatory) contractual provisions that may assist with streamlining negotiations and market practices.

As a further means of balancing the interests of original copyright owners against those developers of AI-generated works, the FTAHK would be supportive of guidance or a statutory enhancement to the effect of requiring developers to maintain the provenance of AI-generated content, as a means of increasing the transparency about the works that were included in the original training data. Such information could include a record of the platform used to develop the content, information on the settings employed, tracking of the seed-data's metadata, and the specific prompt that was used to create the AI-generated works. In the instance of any dispute, the availability of this information would allow for ready reproduction of the work in question, not only allowing for its veracity to be verified, but also to give insight into the mens rea of the developer – business users would be able to overcome any intellectual property claims, but also be able to demonstrate that the lack of wilful intent to copy or steal.

Relatedly, the FTAHK would also be in favour of guidance that would clarify the position of infringing content that is produced as a result of prompts that violate the terms and conditions of the relevant AI generating tool. In such an instance, it would seem fair for any such content not to be attributable to the developers, however under the current legislation, the relevant developer may be held jointly labile with the AI user and seen as implicitly authorising the infringing act.

(3) Possible Introduction of a Specific Copyright Exception

The FTAHK is of the view that any modifications to the CO should be in line with modifications that are being implemented by peer jurisdictions. We note that certain jurisdictions allow for exceptions around the premise of fair use, text and data mining, and temporary copying.

Given the global trends and the legal precedents in jurisdictions like the EU and Japan, the FTAHK is of the view that Hong Kong's approach should be similarly progressive, allowing for a broad text and data mining ("TDM") exception that supports both non-commercial and commercial AI development. The suggested safeguards, such as lawful access to copyrighted works and restrictions on further use, are necessary to maintain a balance between fostering AI innovation and protecting the legitimate interests of copyright owners.

The FTAHK is generally supportive of the proposal to introduce a specific exception for TDM, and consider this a positive step toward fostering innovation, whilst respecting the rights of copyright owners. We believe that this will have the positive effect of reducing uncertainty regarding the use of such data, particularly in situations where parties have made claims as to ownership. From the perspective of developing I&T sectors, the introduction of a TDM exception may also give Hong Kong a competitive advantage over other jurisdictions and drive organisations to build their AI systems in the city, in the knowledge that they are safe from infringement actions or demands of licensing fees from alleged data owners. It should also be noted that an unintended side effect may be to incentivise some original text and content

creators to move their content creation and maintenance offshore to enable them to maintain copyright protection maintained in those third-party host countries.

The success of this initiative will depend on the scope and limitations of the exception, especially regarding commercial uses and the potential for copyright owners to "opt out" from the use of their work for TDM purposes. The FTAHK would further recommend that, in drafting the TDM exception, the authorities consider the "fair use" exception provided for in the United States[1], as an exception that is drafted too broadly may result in a flood of low-quality machine-generated content – a situation opposite to the desired outcome from the proposed amendments.

(4)   Other Issues Related to Generative AI

The Consultation also raises important issues beyond the traditional scope of copyright, such as the ethical implications of deep fakes and the transparency of AI systems. While these issues intersect with copyright, they also touch on broader concerns, including those of privacy, misinformation, and AI ethics.

The FTAHK:

- agrees that a review of these issues require a holistic approach that goes beyond copyright law and would require the involvement of a broader coordination of other government departments and their concomitant regulatory frameworks. We encourage the CEDB to take a lead role in such coordination; and
- notes that the data privacy authorities and financial services regulators in different jurisdictions have been taking a lead role in the development of regulatory standards and guidelines with respect to generative AI. For example, the Office of the Privacy Commissioner for Personal Data have recently developed the Model Personal Data Protection Framework for Artificial Intelligence, the HKMA has published guiding principles in respect of use of generative artificial intelligence in customer-facing applications from a consumer protection perspective, and the HKMA and Cyberport have recently launched the Generative AI Sandbox. We encourage the CEDB to closely coordinate with such efforts, given that they significant overlap with some aspects of the Consultation – and the development of a comprehensive regulatory framework for AI will significant boost Hong Kong's efforts to be an I&T and intellectual property trading hub.

(5)   Additional Remarks

In addition to our comments above, the FTAHK would appreciate if the relevant authorities could also provide clarification on the intellectual property status of prompts.

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[1] According to the provision of the fair use exception in the US Copyright Act, in determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—
(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 and 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.

The FTAHK recommends that clarification on the intellectual property protection afforded to prompts be afforded to the market. Prompts guide AI systems on their functionality and have become increasingly sophisticated as the nature of generative AI systems have developed.

An argument can be made that prompts are functionally akin to software as both prompts and code are required to generate the output. As can be seen with many generative AI platforms, where multiple results are provided for each prompt, the user is able to select the preferred option for further processing, thereby heightening the individuality or the end-result. The FTAHK is also aware of collections of prompts being readily available online, with the prompt authors selling them directly or through appropriate platforms[2]. In addition, the fact that major AI players have not released information on their prompts (effectively affording prompts the same status as other intellectual property).

An understanding of the intellectual property status of prompts would be useful for companies that are involved in the development of AI applications, and also for taxation purposes[3].

(6)   Conclusion

In conclusion, the FTAHK:

- is generally supportive of the Consultation's conclusions regarding amending (or not amending) the CO, and view the Consultation (and continuing monitoring of international regulatory standards) as necessary to maintain Hong Kong's position as a global I&T and intellectual property trading hub;
- would, however, urge caution when designing any exceptions so as not to deter potential I&T innovators from establishing a presence in Hong Kong, or unintentionally impact the creation of original works in the non I&T sectors; and
- encourages a coordinated approach between different authorities, potentially led by the CEBD.

The FTAHK trusts that this Response will be received by the CEDB in the constructive manner in which it is intended. We are open to further discussions on any aspect of our Response, would be pleased to consult with and assist the CEDB and regulatory authorities in the development of further guidelines, precedents and template positions.

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[2] See, for example, PromptBase: https://promptbase.com
[3] The recent Inland Revenue (Amendment) (Tax Concessions for Intellectual Property Income) Ordinance 2024, which implements the Government's patent box" tax incentive, provides tax concessions for qualifying profits derived from eligible intellectual property (IP).