



05 September 2024

## BSA COMMENTS ON ENHANCEMENT OF COPYRIGHT ORDINANCE REGARDING PROTECTION FOR ARTIFICIAL INTELLIGENCE TECHNOLOGY DEVELOPMENT

**Submitted Electronically to the Commerce and Economic Development Bureau and Intellectual Property Department**

BSA | The Software Alliance (**BSA**)<sup>1</sup> welcomes the opportunity to submit comments to the Commerce and Economic Development Bureau and Intellectual Property Department in response to the public consultation on Copyright and Artificial Intelligence (**AI**) and the accompanying Consultation Paper (**Consultation Paper**).<sup>2</sup>

BSA is the leading advocate for the global software industry. BSA members create technology solutions that power other businesses, including cloud storage services, customer relationship management software, human resources management programs, identity management services, security solutions, and collaboration systems. Because our members rely on copyright to safeguard their investments in research and development, BSA has long supported effective copyright protection around the world. We are therefore acutely aware of the critical role that copyright policy plays in fostering the development of cutting-edge technology such as AI.

In 2022, BSA responded to public consultations on Updating Hong Kong's Copyright Regime.<sup>3</sup> In our response, we encouraged Hong Kong to introduce a specific copyright exception into its Copyright Ordinance for purposes of computational data analysis and processing. AI training involves computational analysis of data to identify probabilities, correlations, and trends. Such training involves the application of mathematical and statistical analytical techniques across millions or billions of units of data, or "tokens," that have been semantically and structurally transformed by breaking pieces of text or data into discrete machine-readable units for purposes of computational analysis. Tokenization is necessary to improve the reliability, quality, and suitability of the data for analysis, helping to address quality challenges, such as missing values, duplicates, outliers, and inconsistent formatting across the entire data set.

---

<sup>1</sup> BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Asana, Atlassian, Autodesk, Bentley Systems, Box, Cisco, Cloudflare, CNC/Mastercam, Cohere, Dassault, Databricks, DocuSign, Dropbox, Elastic, ESTECO SpA, EY, Graphisoft, Hubspot, IBM, Informatica, Kyndryl, MathWorks, Microsoft, Nikon, Notion, Okta, OpenAI, Oracle, PagerDuty, Palo Alto Networks, Prokon, Rockwell, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Workday, Zendesk, and Zoom Video Communications, Inc.

<sup>2</sup> Copyright and Artificial Intelligence Public Consultation Paper, July 2024, [https://www.cedb.gov.hk/assets/resources/cedb/consultations-and-publications/Eng\\_Copyright%20and%20AI%20Consultation%20Paper%20\(2024.07.08\).pdf](https://www.cedb.gov.hk/assets/resources/cedb/consultations-and-publications/Eng_Copyright%20and%20AI%20Consultation%20Paper%20(2024.07.08).pdf)

<sup>3</sup> Submission of BSA | The Software Alliance to the Commerce and Economic Development Bureau on Updating Hong Kong's Copyright Regime, February 2022, [https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/written\\_submission\\_2022/0040.pdf](https://www.cedb.gov.hk/assets/resources/citb/consultations-and-publications/written_submission_2022/0040.pdf)

This computational analysis does not use the analyzed data for its expressive content and, therefore, does not infringe any copyright in the underlying data. As such, we are heartened that this latest Consultation Paper proposes to introduce a text-and-data mining exception (**Proposed TDM Exception**) to the Copyright Ordinance.

## Proposed TDM Exception

### **BSA strongly supports introducing the Proposed TDM Exception to the Copyright Ordinance.**

We agree with the reasons for doing so as highlighted in the Consultation Paper, namely: a) it promotes AI development and wider economic growth; b) it facilitates research; c) it allows Hong Kong to maintain its competitiveness on the global stage and sustain its position as a hub for growth and investment; d) it affords legal certainty to users; and e) it strikes an appropriate balance between copyright protection and reasonable use of copyright work.<sup>4</sup> **BSA also supports** extending the Proposed TDM Exception to cover commercial endeavors.<sup>5</sup> Companies should be able to train on data to which they have lawful access without incurring copyright liability.

To support artists and rightsholders, we also encourage voluntary industry conversations about automated tools to indicate that the rightsholder does not want their website used for training purposes, similar to current “do-not-crawl” tools. Discussions moving forward should focus on effective, international, and consensus-based technical mechanisms developed through industry-led processes.

## Copyright Protection of AI-Generated Works

The Consultation Paper notes that issues relating to the authorship and originality of AI-generated works should be dealt with in the same way as those concerning works created by human authors, and determined by considering all the circumstances (including evidence) of each individual case.<sup>6</sup> The Consultation Paper also posits that the fast-changing nature of AI technology and evolving discussions on AI-generated works mean that there is no settled legislative norm, and that as such, it is not “justifiable to propose any substantive legislative amendments concerning AI-generated works at this stage”.<sup>7</sup>

BSA agrees with this prudent approach and the observations that guide it. As a general principle, where generative AI is used to enhance human creativity, the resulting work should be protectable by copyright. The analytical touchstone should be whether the exercise of a sufficient degree of human skill and judgment was involved in the creation of an original work, regardless of what instrument or technology was used to aid its expression. This is consistent with established practice where software tools are used by artists to create works that are regularly deemed copyrightable, even though their creation was aided by technology. If copyright protection is not available simply because AI was used in the creative process, it will limit the responsible use of AI and undermine the purpose of copyright laws.

## Copyright Infringement Liability for AI-Generated Works

The Consultation Paper observes that “the infringement liability of human-generated works has all along been determined by virtue of the underlying facts of each case and the applicable laws” and that “the same approach continues to apply to copyright infringements involving AI-generated works, where the liability issue is subject to the necessary inquiry of facts and supporting evidence in each and every case”. Consequently, the Copyright Ordinance is sufficiently broad to determine whether copyright infringement in AI-generated works exist.

We agree with the above observations and conclusion — whether an AI-generated work is infringing is typically not related to the technology used. Where a work is infringing, there should be liability for that infringement regardless of whether AI is used in producing the infringing copy. This is also

---

<sup>4</sup> Consultation Paper (2024), p. 35-36.

<sup>5</sup> Consultation Paper (2024), Section 4.16, p. 37.

<sup>6</sup> Consultation Paper (2024), p. 20.

<sup>7</sup> Consultation Paper (2024), p. 20.

consistent with established law which focuses on whether a work infringes and is less concerned with the particular method used to create the work.

For completeness, we enclose [BSA's AI and Copyright Policy Position Paper](#),<sup>8</sup> which sets out our positions on: a) responsible AI training and protecting copyright holders; b) remedies if AI-generated works infringe; and c) copyright protection for creators using AI.

We hope that our comments will assist the Government of Hong Kong in its deliberations on copyright and AI. Please do not hesitate to contact me if you have any questions regarding this submission or if I can be of further assistance.

Yours sincerely,



**Jared Ragland**  
Senior Director, Policy – APAC

---

<sup>8</sup> Artificial Intelligence and Copyright Policy: Advancing Technology and Creativity in the 21<sup>st</sup> Century Economy, <https://www.bsa.org/files/policy-filings/01082024bsaicopyright.pdf>.