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The Hong Kong Reprographic Rights Licensing Society
Submissions to Consultation on Copyright and Artificial Intelligence

The Hong Kong Reprographic Rights Licensing Society (**HKRRLS**) notes that the Hong Kong Government launched a two-month public consultation on copyright issues arising from artificial intelligence on 8 July 2024, and appreciates this opportunity to express its views on the proposals and issues set out in the Consultation Paper on Copyright and Artificial Intelligence (**Consultation Paper**). We have instructed Deacons law firm to help draft these submissions to express our views.¹

HKRRLS was established in 1995 by Hong Kong authors and publishers. It is one of the six licensing bodies registered with the Copyright Licensing Bodies Registry in Hong Kong, granting licences to the public, including but not limited to primary and secondary schools, tertiary institutions, various government departments, public institutions, commercial organisations, associations, libraries, and photocopying shops to use the copyright works of its represented authors and publishers. HKRRLS administers millions of publications published in Hong Kong and overseas via its affiliation with the International Federation of Reproduction Rights Organisations. HKRRLS aims to protect the intellectual property rights of its represented authors and publishers and to raise public awareness of copyright and collective management organisations.

1. Copyright in AI-generated Works

HKRRLS notes that the existing Copyright Ordinance (**CO**) affords copyright protection to computer-generated works (**CGW**) with no human author, such as AI-generated works. However, it is submitted that the protection of CGWs with no human author via copyright law does not encourage but rather inhibits human creativity and, correspondingly, investment in human creativity.

Increasingly, AI-generated works generated in mere seconds are being marketed as competitors to, or even replacements for, human-created works. By their nature, human-created works of the same nature and standard of quality take much more time to create than AI-generated works. However, given that the AI-generated works are created merely by exploiting existing human-created works, there is no true creativity or originality that goes into the creation of AI-generated works.

¹ The views expressed in these submissions do not represent the views of Deacons.

Despite this, the flood of AI-generated works that are being created on a daily basis are able to drown out the voices and messages that humans are trying to convey by means of human creativity simply by virtue of their sheer number. Human creators trying to capture an audience will find it more and more difficult to do so when humans are physically unable to create on the same scale, in terms of numbers, as generative AI. This naturally reduces the incentive for humans to create. Affording CGWs the same copyright protection that is extended to human-created works is tantamount to saying that these AI-generated works have the same value and contribution to arts and culture as human-created works, when this simply cannot be the case.

It is also noted that literary, dramatic, musical, and artistic (LDMA) CGWs must still be “original” in order to receive copyright protection under the current CO. Under Hong Kong common law, in order for an LDMA work to qualify as “original”, the author of the LDMA work must have expended a sufficient degree of “skill, judgment, and labour” into the work’s creation. If copyright protection is to be afforded to LDMA CGWs, it should be clarified that the originality requirement is human-centric – that is, the supplier of the necessary originality (i.e. the skill, judgment, and labour) of the work concerned must be a human, and not a computer. Otherwise, the very concept of originality would become meaningless.

2. Copyright Infringement Liability for AI-generated Works

HKRRLS considers that the current law is insufficiently clear to address the liability issues arising from AI-generated works. Due to the lack of clarity in the law and the evolving technology, AI developers and operators may attempt to rely on technical nuances to argue that the use of copyright works to train AI, and the subsequent generation of works that are substantially similar to the copyright works used in training, does not amount to copyright infringement. As an example, they may argue that their acts do not amount to the specific restricted acts of “copying”² or “communicating to the public” based on minor technicalities in how AI training and output generation work.

However, such exploitation of copyright works must amount to an act of infringement. Not only does it make use of the underlying human creativity that went into creating the copyright works in the first place, due to the nature of AI training, the whole of a copyright work, and indeed frequently a massive collection of entire copyright works, must be used in the process. Otherwise, the AI would lack necessary context. Furthermore, an AI that has been trained using thousands upon millions of copyright works can generate output works that can unfairly compete with the original copyright works on which it was trained.

This type of use is precisely the kind of exploitation of a work that is meant to be the exclusive province of copyright owners. It conflicts with the normal exploitation of works by copyright owners and unreasonably prejudices copyright owners’ legitimate interests. Therefore, the CO should be amended to make it clear that the exploitation of copyright works in AI training and creating generative AI outputs amounts to copyright infringement.

² In pending English court proceedings where the stock images provider Getty Images is suing the AI provider Stability AI, Stability AI attempts to argue that the generation of images via text-to-image prompt does not involve any reproduction of copyright works as its AI database comprises only of numbers and weights and not copies of copyright works.

Contractual arrangements are insufficient to address these liability issues as they only shift or apportion liability between the AI developer/operator and end users, both of whom are copyright users, but not vis-a-vis the copyright owners. Moreover, contractual terms on the issue of AI developer/operator indemnification contain multiple-carve outs, making it necessary to examine the circumstances under which work is generated by AI in order to ascertain which party is ultimately responsible for infringement.

3. Possible Introduction of Specific Copyright Exception for TDM

HKRRLS notes that the Government is considering to introduce a new copyright exception that would permit the use of copyright works for text and data mining (TDM) activities. As considered in the Consultation Paper, “TDM” activities are very broad and enable the extraction, recombination, and processing of knowledge from large datasets, identifying patterns and associations of seemingly unrelated information. Therefore, an open-ended TDM exception should be avoided to prevent potential misuse.

In fact, other jurisdictions with existing TDM exceptions in their copyright law enacted such exceptions *prior* to the recent proliferation of generative AI and LLMs. The fact that their TDM exceptions happen to cover generative AI is an example of unintended consequences. There is a real risk that these TDM exceptions may result in lasting harm to rightsholders and affected industries, which were not contemplated at the time the exceptions were enacted. Any TDM exception must be carefully considered to avoid the risk of unintended consequences. The use of copyright works unrestrictedly for all TDM purposes cannot be fair for copyright owners.

The Hong Kong Government still has the opportunity to avoid these major risks. Generative AI and LLM technologies are relatively nascent, but the free market has already started to provide solutions to address their copyright needs. For example, the Copyright Clearance Center in the US has recently added AI rights to its Annual Copyright License, and the Copyright Licensing Agency in the UK has also recently announced a TDM licence. Solutions are available to address copyright users’ TDM needs without the need for a broad TDM exception.

It must be emphasised that AI should be viewed as a tool for humans to enhance productivity. Therefore, the Hong Kong Government should formulate clear guidelines to avoid copyright infringement, exercise caution when reforming Hong Kong’s copyright regime, and must balance the needs of rightsholders / creators with the need to support technological advancement. The proposed TDM Exception, if it is to be introduced into Hong Kong law, must be limited and precisely tailored to appropriately balance promoting AI development and use of copyright works for TDM. Appropriate safeguards need to be adopted to adequately protect copyright owners’ rights, including their ability to protect and control free access to and exploitation of their works and to guard against unfair use without reasonable compensation to the owners.

To mitigate the aforesaid risks, in order for copyright users to avail of any proposed TDM Exception, we believe that at least the following conditions must be met:

1. Lawful access

The user must have lawful access to copyright works on which TDM is to be conducted. If TDM is conducted on works that are unlawfully accessed, e.g. via bypassing technological protection measures, such TDM must fall outside the scope of the exception and be treated as infringing.

2. Transparency obligation

Transparency is crucial for balancing the interests of copyright owners with the advancement of AI technologies. However, AI providers have historically been opaque about their training data, including with regard to the use of copyright works in training. It is difficult, if not impossible, for outsiders to ascertain whether and what copyright works a particular AI has been trained on if the AI developer does not publicly disclose their training data. Major jurisdictions, including Mainland China and the EU, have already implemented legal transparency obligations on AI service providers to safeguard the public interest.

For instance, Article 53 of the EU AI Act requires AI providers to, among other legal obligations, put in place a policy to comply with EU law on copyright. Such providers must provide technical documentation and publish a summary about the content used for training. Notably, many legal obligations under the EU AI Act apply to AI providers regardless of whether they are based in or outside of the EU, in recognition of the non-territorial nature of the technology and its provision. The Interim Measure for the Administration of Generative Artificial Intelligence Services of mainland China (生成式人工智能服務管理暫行辦法) also specifically requires those that provide generative AI services to respect intellectual property rights and take effective measures to increase transparency in the provision of such services.

HKRRLS notes that the Consultation Paper touches upon the issue of transparency and AI. It is submitted that, in line with international trends and ethical standards, AI developers and providers in Hong Kong should be legally obligated to comply with specified transparency standards. This is especially the case if the Government intends to introduce a new copyright exception to cater for AI technologies.

In particular, in order to increase transparency and to respect the works of copyright owners, those who rely on a TDM copyright exception must disclose their use of copyright works in the TDM activity. This is similar to the “sufficient acknowledgement” requirement in the UK’s TDM exception.

3. Opt-out available (by contract or other means)

It has long been the approach of the Government to maintain a non-interference approach to contractual arrangements between copyright owners. In other words, HKRRLS believes that it is appropriate to continue to allow parties to use various means such as licensing agreements to exclude, restrict or limit the application of statutory copyright exceptions, as this is consistent with the long-established and core principle of freedom of contract under Hong Kong laws. The interests of copyright users are adequately protected through the availability of other existing legal mechanisms such as existing provisions in the Copyright Ordinance that empower the Copyright Tribunal to scrutinise the terms of a licensing scheme and determine whether the licensing scheme is reasonable.

In addition, copyright owners derive rewards and compensation for their skills and creativity from revenue from the exploitation of their copyrighted works. Licence agreements are an important source of such revenue, including for many of the authors and publishers that HKRRLS represents. Against this background, retaining the non-interference approach will be in the interests of both licensors and the licensees as it will provide greater flexibility to both copyright owners and licensees to negotiate the terms of a licence agreement, as whether or not a licensor and/or a licensee may wish to allow or restrict the applicability of certain copyright exceptions will often depend on the specific circumstances, e.g. the nature of the licence, the types of works to be used by the licensee, the permitted acts under the license and/or the agreed licence fee to be paid by the licensee.

Moreover, the non-interference approach to contractual arrangements has always been in place in Hong Kong and there is no evidence suggesting that it has created any prejudice or injustice to licensees. The non-interference approach is in line with the TDM exceptions in the UK, EU, and Singapore.

4. Exception should automatically be inapplicable if a licensing scheme is available

As mentioned above, HKRRLS believes it is appropriate to maintain the current non-interference approach to contractual arrangements with respect to any TDM exception. In line with this, in addition to maintaining the ability for rightsholders to control whether their works are used for TDM by opting out, rightsholders who are willing to allow their works to be used for TDM by way of licensing scheme should be permitted to obtain reasonable compensation from copyright users without interference.

Therefore, any TDM exception should automatically be inapplicable if a copyright work belongs to a licensing scheme. The Copyright Tribunal under the Copyright Ordinance will have oversight on the reasonableness of the licence terms, thereby ensuring licenses will be granted on a fair and reasonable basis.

5. Restrictions on dealings with any copies made pursuant to the exception

HKRRLS considers it necessary to limit the conditions under which a user can be permitted to use copyright works to mitigate the risk of unauthorised and widespread circulation of copyright materials, especially online. In light of the current digital landscape, licence fees for online content provide an important source of revenue for copyright owners. Given the free flow of information on the internet and the ease of uploading, sharing and downloading materials online, HKRRLS is concerned about the risk if copies of works that are made for TDM are disseminated online, thus adversely impacting the legitimate revenue that copyright owners would and should otherwise obtain from licensing their works.

To mitigate this risk, any copies of copyright works that are made pursuant to relying on a TDM exception must be dealt with solely for the purpose of the TDM activity. Any other dealings with the work(s) should be treated as infringing. Furthermore, such copies must be retained only for as long as necessary for the TDM activity. This is in line with the TDM exceptions of the UK, EU, and Singapore.

6. Exception restricted to TDM for non-commercial research use only

HKRRLS notes that the Government may be considering to introduce a TDM exception for commercial uses. HKRRLS strongly considers that a copyright exception which permits commercial TDM activities is not in the best interests of Hong Kong.

It is noted that all copyright exceptions under the CO, including any TDM exception, would be subject to the primary considerations that the user's act does not (i) conflict with a normal exploitation of the copyright work by the copyright owner and (ii) unreasonably prejudice the legitimate interests of the copyright owner (**Primary Considerations**). However, it is submitted that the use of copyright works for TDM for commercial purposes is in inherent conflict with the Primary Considerations.

Notably, in many jurisdictions where TDM for commercial purposes may be excepted from copyright infringement (such as Singapore, Japan, and the US), the copyright regimes of those jurisdictions already contained open-ended copyright exceptions that permit "fair use" of copyright works. Therefore, any specific legal provisions that create a copyright exception for TDM are arguably unnecessary and already covered by the existing "fair use" provisions. This is vastly different from copyright regimes with closed categories of copyright exceptions such as Hong Kong and the UK. In the case of the latter, it is also notable that a 2022 proposal by the UK government to expand their existing TDM exception to cover commercial uses was officially shelved in 2023 due to the potential prejudice that such an exception could cause to rightsholders and insufficient consultation of the creative sectors and other affected parties.

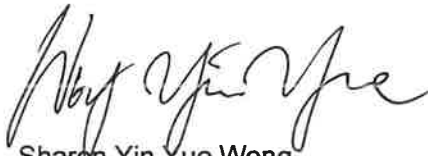
The Consultation Paper states that the Government does not propose any amendments to the CO with respect to copyright ownership or infringement in order to avoid unintended consequences. HKRRLS respectfully submits that the same rationale applies to any proposed TDM exception, and especially so if such TDM exception will permit TDM activities for commercial purposes. Rather than making sweeping changes to the law by introducing a broad TDM exception that includes commercial uses, it would be far more prudent and reasonable – if a TDM exception is even necessary at all – to limit the scope of the exception to non-commercial research purposes pending further research and consultation on the impact on rightsholders.

4. Conclusion

In conclusion, HKRRLS supports the Government's initiative and effort in ensuring that Hong Kong's copyright regime keeps up with the international trend. However, it must be cautioned that any legal reforms must adequately protect copyright owners' interests in the context of ongoing digital transformation. HKRRLS's main concerns are in relation to the proposed TDM exception and the proposal that it may cover commercial TDM activities, which HKRRLS sincerely hopes that the Government will acknowledge and address by adopting additional parameters as proposed above to adequately safeguard the interests of the copyright owners that HKRRLS represents.

Please feel free to contact the undersigned if you have any questions or wish to discuss.

Yours faithfully,



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