September 6, 2024

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

Re: Response to the Public Consultation Paper on "Copyright and Artificial Intelligence"

Dear Sir/Madam,

The International Publishers Coalition in China ("**IPCC**") is a not-for-profit industry coalition established in 2010. IPCC currently represents 29 members whose activities span a wide range of fields, including scientific, technical, and medical publishing, society and association publishing, educational publishing, university and scholarly presses, trading publishing, and publishing services.

IPCC appreciates the opportunity to respond to the public consultation paper on "Copyright and Artificial Intelligence" (the "**Consultation Paper**"), issued by Commerce and Economic Development Bureau ("**CEDB**") and the Intellectual Property Department ("**IPD**") on July 8, 2024. The Consultation Paper proposes, among other things, the introduction of a new copyright exception (the "**TDM Exception**") for text and data mining ("**TDM**") activities, applicable in both commercial and non-commercial contexts. This submission specifically addresses the proposed TDM Exception and does not delve into other issues or concerns raised in the Consultation Paper.

IPCC strongly supports a regulatory framework that enhances transparency, safeguards human authorship, and promotes the responsible development of artificial intelligence ("**AI**") while maintaining and strengthening Hong Kong's competitive position on the global stage. We believe that copyright serves as the cornerstone of innovation and forms the foundation for generating high-quality, trusted content, which must be both protected and valued.

Given the rapid evolution of generative AI, we believe that transparency and disclosure requirements regarding the copyrighted content ingested by AI systems for training and development purposes are essential. Such transparency and disclosure provide the greatest assurance that AI technology is trained on materials that are reliable and trustworthy. Additionally, these measures facilitate copyright owners in exercising and enforcing their rights.

Our position is that (1) any large-scale copying and use of copyrighted works for training and developing AI systems requires the explicit consent of rights holders, and without such consent, it constitutes infringement; and (2) the current legal framework in Hong Kong, which allows only fair dealing of copyrighted works for research and private study, supported by licensing

arrangements, is sufficient to accommodate and foster the continued development of AI in Hong Kong without any need for amendments.

The Consultation Paper presents several reasons to justify the introduction of the proposed TDM Exception. However, upon closer examination, these justifications appear to be based on reasoning that is, in many instances, questionable and does not account for the broader implications. In this submission, we analyze these justifications in the order they are presented in the Consultation Paper and outline why introducing the TDM Exception would be a significant misstep:

(a) "*Promote AI development and wider economic growth*" (paragraph 4.13(a), Consultation Paper)

It is asserted in the Consultation Paper that the proposed TDM Exception would facilitate greater accessibility to copyright works for the development and training of AI systems, leading to significant productivity gains. While this may be true in theory, it does not justify bypassing the need for permission to use copyrighted works.

The argument further suggests that the TDM Exception would attract more tech companies and talent to Hong Kong, fostering its status as an international hub for information and technology. While we recognize the potential of AI to enhance productivity and efficiency for the benefit of society, advancing technological and economic agendas should not come at the expense of fundamental values, norms, and ethics.

Copyright and the protection of creative works should not be viewed as obstacles to innovation and progress. Instead, tech companies and AI developers should collaborate with copyright owners, recognizing the value that literature and other intellectual property bring to their innovations. The government should not permit what would otherwise constitute copyright infringement in the name of innovation, particularly when doing so would harm authors, publishers, and other creators. The U.S., which excels in most indicators in the AI index, does not grant such exemptions, and is currently engaged in intense debates, both within and outside the judiciary, regarding the limits of "fair use" for AI development. Therefore, the notion that Hong Kong would benefit from a similar policy change is deeply flawed.

(b) "*Facilitate the research community*" (paragraph 4.13(b), Consultation Paper)

The Copyright Ordinance already allows for the reasonable use of copyrighted works for research, private study, and education. Even without a TDM Exception, the scientific and research communities already engage in text and data mining to examine digital resources on a large scale. Moreover, copyright owners routinely license their works for various digital uses, and professional and scholarly publishers already make their databases available for TDM activities. When research is conducted for non-commercial purposes and the researcher has access to a publisher's database through an institutional license, a licensing fee is often not required.

Given these existing practices, it is difficult to see how the introduction of a TDM Exception would significantly benefit the research community or contribute to the relevant fields.

As a matter of fact, IPCC firmly believes that no exceptions, even for non-commercial uses, should be permitted. The rationale behind this position is that what begins as a non-commercial activity can easily transition into a commercial one. This has been the case with many AI tech companies, as exemplified by the evolution of OpenAI. Initially trained by non-commercial institutions, AI models are often later deployed by third parties, including commercial entities. This progression demonstrates that the line between commercial and non-commercial activities is increasingly blurred and difficult to delineate.

(c) "*Maintain competitiveness and pursue overall good*" (paragraph 4.13(c), Consultation Paper)

It is suggested in the Consultation Paper that "… by moving in sync with major jurisdictions, which offer TDM exceptions, Hong Kong can maintain its competitive edge on the global stage …". This is nothing short of a misstatement. We would like to highlight that no major common law jurisdictions, including the UK, Australia, Canada, and New Zealand, have implemented TDM exceptions that apply to both commercial and non-commercial activities. We have also considered the current position in the U.S. on this matter.

If Hong Kong were to introduce such a TDM Exception, it would stand as an outlier, disconnected from the practices of other major common law jurisdictions.

(d) "*Afford legal certainty to users*" (paragraph 4.13(d), Consultation Paper)

The argument for legal certainty puts the cart before the horse; legal certainty should be a result of well-considered legislation, not a justification for introducing an exception such as the TDM Exception.

It is further argued that users can save time and transaction costs related to rights clearance, which is necessary for the development of AI models that may require large volumes of copyrighted works from various rights holders. However, shifting the burden of these costs onto copyright owners is fundamentally unfair and contrary to established principles of copyright law. It raises the question: why should copyright owners be expected to subsidize the development of AI technologies?

Moreover, this argument overlooks the fact that scholarly and professional publishers already license their databases for TDM activities. Furthermore, trade and educational publishers are capable of working with AI developers to explore appropriate licensing options. Creating a digital royalty system to compensate copyright owners and other rights holders is not a novel concept and should be considered as a fair and practical alternative.

Have any of these been studied and explored by the Hong Kong government? The Consultation Paper does not seem to have addressed any of these.

(e) "*Reasonable balance of interests*" (paragraph 4.13(e), Consultation Paper)

The Consultation Paper suggests that the proposed TDM Exception would strike an appropriate balance between copyright protection and the reasonable use of copyright works, ensuring that no user's act (1) conflicts with the normal exploitation of the work by the copyright owner, or (2) unreasonably prejudices the legitimate interests of the copyright owner.

One must ask: is it not a legitimate interest of the copyright owner to receive compensation when their work is used? While AI may be among the most significant technological advancements of our time, its use should adhere to the same common-sense regulations as any other activity, i.e., the requirement to obtain consent from copyright owners and provide fair compensation for the use of their works. As the U.S. Supreme Court stated in *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, "It will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work. Recall, payments like these are incentives for artists to create original works in the first place." We would further emphasize that without the original works created by our authors, there would be no high-quality materials upon which AI models could be trained.

Generative AI technologies are evolving rapidly, with AI models capable of ingesting vast amounts of data instantaneously and on an unprecedented scale. This presents an existential challenge for the creative sector. The argument that it is burdensome for AI developers to seek permission due to the volume of works they use does not justify placing the livelihoods of authors, publishers, and others in the creative industry at risk. When weighing the interests at stake, the conclusion, after any balancing exercise, should be abundantly clear: *sparing AI developers the inconvenience of seeking authorization should not come at the cost of precipitating an existential crisis for the creative sector*.

Other Considerations

Generative AI is a new technology whose direction and economic impact are still uncertain. While generative AI is a very useful tool that provides opportunities to many sectors of the economy, it also poses significant risks and challenges to society. Issues such as disinformation, misinformation, deep fakes, hallucinations, and large energy consumption have been widely discussed. Leading AI researchers and industry practitioners are increasingly questioning the current trajectory of generative AI, particularly large language models.

Yann LeCun, the 2018 Turing Award winner and "godfather of deep learning," predicted that large language models may disappear within five years due to their high energy consumption and limited reasoning capabilities, comparable to tasks that an eight-year-old child can easily

perform[1]. Leading consulting firms, such as Gartner[2], have also predicted that generative AI may be overhyped and could follow the path of other technologies that have faded over time. Additionally, Daron Acemoglu, a renowned MIT economist, recently published a paper arguing that the potential productivity and growth benefits of generative AI in the U.S. over the next decade – and possibly beyond – may be more limited than expected[3].

The publishing industry, along with other creative and copyright industries, has been a cornerstone of the global economy for over 500 years, creating millions of jobs and producing high-quality, trusted content. Altering the existing copyright regime to accommodate a new technology with unclear direction and sustainability would be premature, especially when doing so could potentially harm a well-established industry that has consistently provided jobs and value to society.

As noted in the Consultation Paper, the introduction of the proposed TDM Exception could disrupt and potentially undermine market practices, where licensing schemes or arrangements for TDM activities are in place. This would negatively impact the freedom and development of the copyright licensing business. Furthermore, it would deprive authors and publishers of their rightful returns on their work, ultimately damaging Hong Kong's reputation for upholding the rule of law and protecting private property. Hong Kong has long been a hub for world-renowned arts and thriving creative industries, and respect for copyright and human authorship remains integral to preserving the cultural and creative heart of the city.

Conclusion

We understand that the government's intention in proposing the copyright exception for TDM activities is to promote the development of AI and broader innovation in technology within Hong Kong. However, allowing the unlicensed use of copyrighted works to train AI systems is inconsistent with the foundational principles of copyright law and the objectives it seeks to achieve. Any prudent policy initiative must be grounded in thorough research and analysis of both the economic and societal impacts. The potential harm that the proposed TDM Exception would inflict on Hong Kong's creative industry far outweighs any benefits that might accrue to AI developers.

The notion that this policy change would provide Hong Kong with a competitive edge in the AI race is misguided. Rather than granting AI developers the license to infringe upon copyright, which would undoubtedly harm Hong Kong's reputation for upholding the rule of law and protecting private property, we believe it would be more beneficial to explore alternative approaches. These could include innovative licensing options, compensation methodologies, and other mechanisms that support both AI development and the rights of copyright holders.

[1] Yann LeCun, *Towards Machines that can Learn, Reason, and Plan*. https://mlfoundations.org/talk/lecun/
[2] https://www.gartner.com/en/articles/what-s-new-in-artificial-intelligence-from-the-2023-gartner-hype-cycle
[3] Daron Acemoglu, *Don't Believe the AI Hype*, Financial Review, https://www.afr.com/technology/don-t-believe-the-artificial-intelligence-hype-20240526-p5jgnm

For these reasons, we strongly oppose the introduction of the TDM Exception and urge CEDB and IPD to reconsider this issue. We welcome the opportunity for further dialogue on this matter and would be pleased to discuss alternative solutions.

Yours sincerely,
Guoyi Zhao
Chief Coordination Officer