IFPI Comments to the Hong Kong Government's Consultation on Copyright and Artificial Intelligence

September 2024

I. INTRODUCTION

IFPI is the voice of the recording industry worldwide, representing over 8,000 record company members across the globe. We work to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music around the world.

The recording industry is at the heart of the creative sector, which contributes substantially to countries' GDPs and provides direct and indirect employment to millions across the globe. In 2023, record companies' global revenues from record sales and licensing totalled USD 28.6 billion, with Hong Kong's recorded music industry worth USD 76.5 million.[1]

The music industry embraces opportunities presented by new technology, with AI being no exception. AI is already used to enhance how artists create and make music, how platforms organise music in playlists, how artists connect with fans, and how fans access music. Record labels and artists alike have been involved in truly unique and cutting-edge projects, using AI to enhance human artistry. Examples of such partnerships include:

- Universal Music's partnerships with YouTube, Endel, BandLab and SoundLab.
- Sony Music's project with David Gilmour and the Orb.
- Warner Music's Edith Piaf and Randy Travis projects.
- Symphonic Distribution's partnership with Musical AI.

These and other existing and emerging commercial partnerships demonstrate that the robust protection of copyright and promoting the development of high-quality human-centric AI are not mutually exclusive goals. In fact, the contrary is true. The future development of meaningful AI depends on the constant supply of new, innovative and creative content, which necessitates that creators and investors in creativity are able to continue their activities. The exclusive rights provided by copyright ensure that right holders have the possibility to receive fair payments for the use of their works by AI providers, which is needed to generate the virtuous circle where creators can continue to innovate and create, and AI providers have access to new content on freely negotiated terms.

[1] IFPI Global Music Report 2024: https://globalmusicreport.ifpi.org/.

We thank the Hong Kong Government for the opportunity to provide comments on the Copyright and Artificial Intelligence Public Consultation Paper (the "Public Consultation Paper") and welcome the Government's intention to review its IP regime in keeping with the rapid development of AI and, in particular, generative AI. However, we respectfully caution against taking any steps that may undermine the development of a robust voluntary licensing marketplace where partnerships between right holders and AI providers can flourish, all of which is predicated on robust copyright rules.

In particular, we reject that there is any need to introduce a text and data mining (TDM) exception in Hong Kong. The existing copyright regime based on exclusive rights ensures the creation of a healthy and mutually beneficial licensing market for copyright works. On the contrary, undermining this could cause irreparable harm to creativity and innovation to the detriment of human culture, consumers and, ultimately, AI providers, a hazardous step to take when there is no substantiated evidence that such a measure is in fact necessary.

This position is not only shared across the recorded music sector but reflected in the Human Artistry Campaign, which is supported by more than 200 organisations representing the recording industry and other creative industries globally[2]. It is also consistent with the support for the rights of copyright holders expressed by policy leaders in statements relating to generative AI at the international[3] and national level[4].

II. KEY RECOMMENDATIONS

We make the following recommendations, which are central to ensuring that Hong Kong's legal framework is compatible with international treaties, and that it supports the responsible development of AI and creation of a sustainable and fair licensing market for copyright works:

1. Recommendations regarding the copyright protection of AI-generated works

- Material solely generated by AI, with no human creative input, should not be rewarded with copyright protection.

- In light of the emergence of generative AI, the justification for maintaining the existing provision for computer-generated works should therefore be reassessed, and repeal thereof considered.

[2] Human Artistry Campaign: https://www.humanartistrycampaign.com/.
[3] For example, the Hiroshima Process International Guiding Principles for Advanced AI system, endorsed by the G7 on 30 October 2023, available at https://digital-strategy.ec.europa.eu/en/library/hiroshima-process-international-guiding-principlesadvanced-ai-system.
[4] For example: the Chinese Interim Measures for the Administration of Generative AI Services (https://www.cac.gov.cn/2023-07/13/c_1690898327029107.htm); the UK Government's Response to the Culture, Media and Sport Committee's report on 'Connected tech: AI and creative technology' (https://committees.parliament.uk/publications/42766/documents/212749/default); the Indian Ministry of Commerce & Industry publication on generative AI and copyright (https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2004715).

2. Recommendations regarding copyright infringement liability for AI-generated works

- Key entities in the generative AI chain must not be able to escape liability where copyright infringements are carried out in the course of an AI process, including by shifting responsibility via contractual or other means.

- A new statutory obligation should be introduced relating to record-keeping and disclosure of content - namely, key entities in the generative AI chain must be required to keep detailed records of the content (including copyright content) used to develop and train generative AI models, and disclose these records to parties with legitimate interests (e.g. right holders). This is necessary to enable right holders to establish if the content to which they have rights has been used and ensure that they can license and enforce their rights accordingly.

- The Government must prevent "AI laundering" by establishing clearly that models which have been developed outside Hong Kong using copyright works without authorisation, or infringing AI content generated outside the territory, cannot be marketed or distributed in Hong Kong.

3. Recommendations regarding the possible introduction of a specific copyright exception

- A new TDM exception is unwarranted and its introduction should be rejected – it is a misconception that AI innovation requires a weakening of copyright protection. The existing copyright regime based on exclusive rights ensures the creation of a healthy and mutually beneficial licensing market for copyright works. Undermining this could cause irreparable harm.

4. Recommendations regarding other issues relating to generative AI

- Deepfakes: Protections must be in place to prevent an artist's voice, image, name and likeness being used without authorisation.

- Transparency: Material solely generated by AI should be labelled and/or marked as being AI generated.

III. DETAILED COMMENTS

1. Recommendations regarding the copyright protection of AI-generated works

Material solely generated by AI, with no human creative input, should not be rewarded with copyright protection.

We respectfully disagree with the Government's interpretation of the existing Copyright Ordinance provisions in relation to the protection of AI-generated works. This is based on the fundamental importance of human authorship to copyright.

Copyright is designed to protect the unique value of human intellectual creativity – more specifically to help incentivise and reward original human creativity. It sits at the heart of the Berne Convention and the WIPO Copyright Treaty which reflect two essential criteria for copyright protection – that there is a human author and that the work is original.

Human input is also required for sound recordings. Protected under the Rome Convention and the WIPO Performances and Phonograms Treaty ('WPPT'), sound recording protection was granted as a means to protect and incentivise the production of new sound recordings. This requires at least some human involvement, evident from the definition of a producer of a sound recording in the WPPT as "*the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds*". Further, in the US, where sound recordings are protected under copyright, clarification of the role of human involvement is provided under their Compendium of U.S. Copyright Office Practices, which states that sound recordings must result from human authorship through performance and/or production, and that a recording without human authorship, such as a recording that results from a purely mechanical or automated process, shall not be registered for copyright[5].

In light of the emergence of generative AI, the justification for maintaining the existing provision for computer-generated works should therefore be reassessed, and its repeal considered.

Given the increasing capabilities of generative AI technologies, it is all the more important to recognise that the role of the human artist remains fundamental to the creation of music and copyright protection. Though the exact threshold of human involvement required for copyright protection when it comes to the use of generative AI as a tool will be for the courts to consider, it nonetheless follows that material which is solely generated by machines without human creativity should not be rewarded with protection, either as works under copyright or as sound recordings under related rights.

The Government's interpretation of the existing Copyright Ordinance provisions in the context of AI-generated works would, therefore, be a significant step away from the approaches taken by the international community.

[5] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 101 (3d ed. 2021), Chapter 800, Section 803.5(c), available here: https://www.copyright.gov/comp3/chap800/ch800-performing-arts.pdf.

We further submit that artificially extending copyright protection to AI generated outputs is not required to incentivise investment in AI. Appropriate incentives are already provided by IP protection for the code and algorithms underpinning the AI models. We, therefore, respectfully suggest that the Government reassesses the need to maintain the existing computer-generated works provision and consider its repeal, to avoid unnecessary confusion and to maintain a clear distinction between human created copyright protected works and other non-protected outputs.

2. Recommendations regarding copyright infringement liability for AI-generated works

Key entities in the generative AI chain must not be able to escape liability where copyright infringements are carried out in the course of an AI process, including by shifting responsibility via contractual means.

The fact that an AI system generates an infringing output should not shield infringers from liability. That an infringement occurs during or as a result of an automated process does not preclude the liability of the person or entity that initiated or otherwise has control over that process.

As recognised in the Public Consultation Paper, entities in the generative AI chain (in particular, compilers of generative AI training datasets and generative AI providers) should, therefore, be held liable for copyright infringement where they have used protected content without prior authorisation. The copyright liability rules – including those regarding contributory or secondary liability – should be fully applicable to infringements carried out in the course of generative AI processes. This should also prevent AI providers from shifting responsibility for infringements solely to users via contractual means, such as terms of use or service.

A new statutory obligation should be introduced to require key entities in the generative AI chain to keep detailed records of the content (including copyright content) used to develop and train generative AI models, and disclose these records to parties with legitimate interests (e.g. right holders).

For right holders, while existing liability rules remain applicable in the context of generative AI, the large-scale ability of generative AI models to ingest, copy and appropriate protected content gives rise to a specific challenge: being able to exercise and enforce existing laws when it is near impossible to ascertain if and how content has been used to train AI models and whether or not such use may have been unlawful.

This fundamental problem can be resolved if key entities in the generative AI chain (e.g. compilers of generative AI training datasets and generative AI providers) are required to uphold key data governance principles, in particular, to keep detailed records of the content (including copyright content) used to develop their models, make publicly available sufficiently detailed information of this to enable parties with legitimate interest, such as copyright holders, to make a prima facie determination if and how their rights have been engaged, and to provide a mechanism through which those with legitimate interests can obtain full records of the training data.

There is precedent for this idea in the European Union Artificial Intelligence Act (EU AI Act), which requires AI providers to provide a sufficiently detailed summary about the content used for training the relevant general purpose AI models to enable right holders to exercise and enforce their rights.[6]

With this in mind, to ensure rights can be fairly and effectively licensed and enforced, we suggest the following framework:

- Record-keeping obligations should be applied to all generative AI models put on the market in Hong Kong and cover the recording of material that was used to train the generative AI model regardless of the jurisdiction in which it took place and extend to the very beginning of the training of the application to provide a full chain of use. Such requirements would ensure accountability in instances where generative AI providers try to escape liability by forum shopping, e.g., by training AI applications in a jurisdiction in which it may be difficult to enforce rights.

- A mechanism should be provided to allow parties with legitimate interests, including IP right holders, to obtain full records of the content used for development and training. This two tier-system would allow such parties to enforce their rights whilst protecting generative AI providers from frivolous requests from parties with no legitimate interests as well as competitors.

- Failure to keep records should lead to a rebuttable presumption that the content in question had been used by the AI provider, to reinforce the need to ensure that the correct licences and/or permissions are obtained, as well as a means to hold generative AI providers accountable for harm or damage caused by those models.

The impact of implementing such a framework would not only create trust among right holders but also give downstream businesses and the wider public means to know what content the models they are using have been trained with and whether the training has been conducted lawfully, encouraging greater engagement with AI systems. This is highly relevant not only for the exercise of copyright but to ensure accountability in relation to all fundamental rights, to check the risk of bias or discrimination through the use of certain content, and to ensure that businesses and users can trust and rely on these models generally.

<u>The Government must prevent "AI laundering" by establishing that models which have been developed outside Hong Kong using copyright works without authorisation, or infringing AI content generated outside the territory, cannot be marketed or distributed in Hong Kong.</u>

To avoid "forum shopping" and "AI laundering", measures should be introduced to establish that AI models that are trained using protected works in third countries without authorisation, or infringing content generated by AI outside Hong Kong, cannot be put on the market in the territory.

[6] Recital 107 and Article 53(1)(d) of the EU AI Act: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf.

The viability of such an approach has been demonstrated in the EU AI Act, which sets out the need for general purpose AI models placed on the market in the EU to comply with EU laws, including copyright rules, regardless of where they acquired data or trained and developed the models. The EU AI Act also explicitly states that "no provider should be able to gain a competitive advantage in the EU market by applying lower copyright standards than those provided in the Union"[7].

3. Recommendations regarding the possible introduction of a specific copyright exception

A new TDM exception is unwarranted and its introduction should be rejected – it is a misconception that AI innovation requires a weakening of copyright protection. The existing copyright regime based on exclusive rights ensures the creation of a healthy and mutually beneficial licensing market for copyright works. Undermining this could cause irreparable harm.

Music companies and AI companies that have embraced responsible AI development have already forged partnerships for the authorised use of artists' music and voices in generative-AI tools underpinned by commercial licensing and authorisations, and such discussions are underway with numerous other AI companies.

The music industry, for example, has developed a broad range of licensing solutions in the last decade and works continually with technology companies to facilitate licensed innovation, including in relation to AI. As indicated in the introduction to this submission, recent examples of such partnerships include Universal Music's partnerships with YouTube, Endel, BandLab and SoundLab; Sony Music's project with David Gilmour and the Orb; and Warner Music's Edith Piaf and Randy Travis projects; and Symphonic Distribution's partnership with Musical AI. Licensing has also occurred in other sectors, e.g., Shutterstock has concluded licensing deals with Reka and OpenAI, and News Corp has signed a partnership agreement with OpenAI.

These and other existing and emerging commercial partnerships demonstrate that robust protection of copyright and promoting the development of high-quality human-centric AI are not mutually exclusive goals. In fact, the contrary is true. The future development of meaningful AI depends on the constant supply of new, innovative and creative content, which necessitates that creators and investors in creativity are able to continue their activities. The exclusive rights provided by copyright ensure this by providing strong incentives for the creation and production of new works, enabling AI providers and right holders to agree on fair and mutually beneficial ways to co-operate, and ensuring that right holders to have the possibility to receive fair payments for the use of their works by AI providers. This is what is needed to generate the virtuous circle where creators can continue to innovate and create, and AI providers have access to new content on freely negotiated terms.

Weakening copyright protection on the other hand, for instance by introducing a new TDM exception, would harm creators and reduce the quality of the output of different AI applications -- and thereby their general relevance. This is because high quality content is one of the key inputs for high quality AI systems, on the same level of importance as technical

[7] Recital 106 of the EU AI Act: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138_EN.pdf.

talent and computing power in which AI companies invest vast sums of money. Undermining copyright protection would reduce incentives in the creation of and investment in new works and be counterproductive to the sustainable development of AI models. It would also fall foul of the three-step test incorporated in the international treaties which could not allow the wholesale use of copyright material without authorisation to train models that can generate outputs that compete with the very content appropriated to train the model.

There is also no justification for doing so. AI providers do not *need* to ingest music to develop AI models. Rather, they *want* to do so in order to generate commercially attractive offerings that can be monetised. However, music is not simply data to be scraped and used without authorisation. Simply because technology is capable of doing that, it does not mean that AI providers should be entitled to do so subsidised by right holders. In fact, the volume of works used in developing an AI model makes it more imperative, not less, that AI providers obtain authorisation in advance from right holders. When building a business that relies on others' copyrighted works, obtaining authorisation is simply a necessary cost of doing business.

Finally, there is no evidence that taking rights away from right holders through a TDM exception would, in any case, encourage investment in AI research and development – countries currently dominating in the field of AI research, investments and startups, namely the US, China and UK, do not have extensive TDM exceptions of their own and this has not hindered investment prospects.

For the reasons described, there is no evidential basis to justify the introduction of an exception for text and data mining. On the contrary, to ensure that the emerging market in this area can develop sustainably, it must remain for right holders to determine whether to license such uses and agree on such terms with AI providers.

4. Recommendations on other issues relating to generative AI

Whilst the Government has decided not to propose any legislative change regarding deepfakes and the transparency of AI systems, we would take this opportunity to provide our input on these points.

<u>Deepfakes: Protections must be in place to prevent an artist's voice, image, name and likeness being used without authorisation.</u>

As with material protected by copyright or related rights, the use of the voice, image, name and likeness of an artist in a generative AI process (to the extent not protected by copyright or related rights) must also require prior authorisation.

Alongside the rise of deepfakes on social media, the music market has seen a proliferation of AI 'voice cloning' models that let others generate synthetic content that mimics an artist's voice, image, name and likeness without authorisation. This activity can mislead fans, causing potentially serious harm to an artist's reputation as well as interfering with carefully planned promotional campaigns for the artist's legitimate releases. It also distorts competition by allowing those generating the clones to unfairly compete with artists whose music and likeness has been used to train the AI model, unfairly leveraging the goodwill the artist has

built with their fans, as well as the significant label investment which has been made in that artist's career.

To this effect, several prominent pieces of legislation have been introduced in the US to combat these issues, including the ''Nurture Originals, Foster Art, and Keep Entertainment Safe'('NO FAKES') Bill in July 2024, introduced in the US Senate to protect individuals' voices and likenesses from AI-generated replicas, as well as Tennessee's 'Ensuring Likeness Voice and Image Security' ('ELVIS') Act, including protections for songwriters, performers, and music industry professionals' voices from the misuse of AI.

Transparency: Material solely generated by AI should also be labelled as being AI generated.

In addition to our earlier comments on the need to keep detailed records of the content used to develop and train generative AI models, and disclose these records to parties with legitimate interests, the need for transparency should also see that solely AI generated material is labelled as being AI generated. Labelling solely AI-generated content is important to inform consumers and enable them to differentiate between solely AI-generated content and human artistry (which may or may not involve the use of AI as a tool in the creative process).

IV. CONCLUSION

We thank you for the opportunity to make this submission. We stand ready to assist with further information on any of the above points.

For further information, please contact:

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