

## **TVB's Response to the Consultation Paper on Copyright and Artificial Intelligence**

### **Executive Summary**

- We acknowledge the Government's dedication to AI advancement but disagree with the introduction of text and data mining ("TDM") exception, which will prejudice copyright owners' rights in receiving remuneration for their works, impacting Hong Kong's creative industry adversely.
- Given the challenges in detecting infringements in TDM outputs, the TDM exception will aggravate misappropriation of copyright works.
- If the TDM exception is to be introduced, a narrow approach similar to the UK's model is recommended. This should entail the requirements of (i) lawful access, (ii) non-commercial research usage, (iii) sufficient acknowledgment, and (iv) non-transferable rights.
- Additionally, it is necessary to (i) disallow TDM exemption where licensing schemes are available (duty on the TDM users to ascertain), (ii) provide opt-out choices for copyright owners, (iii) limit further distribution of copies, (iv) restrict the exemption to accredited academic institutions, and (v) establish a mechanism for content creators to track data utilized in TDM activities.
- Strengthening protection mechanisms before implementing the TDM exception, including (i) specific provisions for illicit streaming devices and (ii) a copyright-specific site blocking mechanism, is crucial.

### **Introduction**

1. Television Broadcasts Limited welcomes the opportunity to comment on the Paper.
2. With the significant advancements in technologies, statistical methods and computational powers, computational data analysis and processing, which includes TDM, has evolved into a powerful tool for uncovering hidden patterns and predicting future trends in the digital era. Computational data analysis and processing allows analysts to recombine and extract further knowledges from large amounts of text and data within a short period of time without human intervention, and aids research and development activities such as training of AI models and algorithms.
3. Copyright issues arise when computational data analysis and processing involves the acts restricted by copyright in a work. For example, data mining systems may make copies of copyrighted works for the purpose of extracting and analysing the data contained therein, and if no consent is obtained from the copyright owner or the act does not fall within the scope of any of the exceptions under the copyright law, making such copies can constitute copyright infringement.

4. Currently, there is no specific TDM exception in the Copyright Ordinance (Cap. 528) (“CO”) in Hong Kong.
5. To keep track of the latest developments in AI and to ensure the copyright regime in Hong Kong is robust and in line with other jurisdictions<sup>1</sup>, the Government proposes to introduce into the CO a new and specific TDM exception for computational analysis and processing of text, data, images and/or other types of information. The proposed TDM exception will cover both commercial and non-commercial use of copyright works during computational data analysis and impose certain condition(s), such as requiring lawful access to copyright works, prohibiting the relevant data analysis activities if licensing schemes are available or copyright owners have expressly reserved their rights, and/or restricting further dealing, distribution or communication of the copies made under the TDM exception.
6. While we appreciate the Government’s efforts to foster the growth of the Hong Kong data economy, we disagree with the Government’s permissive approach to the introduction of the proposed TDM exception, as it will prejudice copyright owners’ legitimate interests in exploiting and receiving remuneration for their works.
7. Our detailed response to the key legislative proposals of the Paper is set out below.

### **Our Concerns**

8. Although the exact wording for the proposed TDM exception has yet to be determined by the Government, we understand from the Paper that the proposed TDM exception will be on the permissive side of the spectrum, providing support for both commercial and non-commercial TDM activities. In other words, the effect of the proposed TDM exception will be that anyone can scrape text and data created by others and use it for commercial gain without payment to the original creator, as long as the conditions imposed are met.
9. The proposed TDM exception will have a negative impact on Hong Kong rights holders and will create an unfairness that benefits those using content for TDM purposes. We, as one of the rights holders within the creative industries, are deeply concerned with this blanket exemption from copyright. To train and teach AI models to make accurate predictions or decisions, developers will feed curated data sets into the AI models as learning inputs to help the system refine itself. Such data sets may contain works that are protected under the CO and the ingestion of which by AI is a licensable activity that the respective owners are entitled to remuneration for. In the entertainment and media sector, the equivalent could include motion pictures, television programmes, music, video and audio recordings, text and book publishing and so forth. The current legislative framework and the creative industries already offer accessible licensing options for use of copyright works. Introducing a specific copyright exception for TDM as the Government proposes will allow AI content to be generated freely using copyright works, with no compensation to the rights holders. The proposed TDM exception therefore discourages creativity and disadvantages owners who currently have the legal right to be paid for the use of their works for TDM activities.

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<sup>1</sup> The European Union (“EU”), Japan, Singapore and the United Kingdom (“UK”) have introduced specific copyright exceptions for TDM activities with varying scopes and conditions.

10. The Government should also be aware of the possibility that infringers may take advantage of the proposed TDM exception to use copyright works without authorization in computer-based data analysis and processing activities. As commonly known, these mining activities often require the input of a large batch of data originating from different sources, and the final result of a TDM project does not usually contain any original parts of the content used in the process. Even if a rights holder's works have been unlawfully accessed, copied and used in TDM activities, as the output is shaped by a mix of vast quantities of data, it would be difficult to identify and prove the subsistence of copyrighted content and pursue legal actions. Also, copyright owners will not be able to rely on similarity detection tools to locate and pinpoint instances of infringement within the output due to the immaturity of these technologies. For example, although the "Turnitin" software is used to compare submitted papers to text in a massive database of content, it still requires a certain level of similarity for identifying areas that match other pieces of writing. Accordingly, we take the view that the proposed TDM exception will allow further misappropriation of copyright works and will seriously undermine the current intellectual property framework.
11. We believe the proposed changes to the TDM regime in Hong Kong are misguided and the Government has taken insufficient account of the potential adverse impact on the creative industries. Notably, the proposed TDM exception is incompatible with Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works<sup>2</sup> ("**Berne Convention**") and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>3</sup> ("**TRIPS**"). We suggest that the Government withdraws plans for introducing the proposed TDM exception or pursues alternative approaches to adapt to this technological trend.

### **The UK Approach**

12. The current copyright framework in the UK provides an exception for TDM under section 29A of the Copyright, Designs and Patent Act 1988 ("**CDPA**"), which stipulates that:

*(1) The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that –*

*(a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and*

*(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).*

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<sup>2</sup> Article 9(2) of the Berne Convention provides that "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

<sup>3</sup> Article 13 of the TRIPS provides that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

*(2) Where a copy of a work has been made under this section, copyright in the work is infringed if –*

*(a) the copy is transferred to any other person, except where the transfer is authorised by the copyright owner, or*

*(b) the copy is used for any purpose other than that mentioned in subsection (1)(a), except where the use is authorised by the copyright owner. ...*

13. In other words, as summarized in the Paper, TDM is allowed for non-commercial research purposes only when the user has lawful access to the copyright work (for example, by way of a license or subscription), there is sufficient acknowledgement and the copy of the work is not transferred to any other person or used for any other purpose (unless it is authorized by the copyright owner).
14. We aver that if an exception is to be introduced for TDM for the purpose of elevating Hong Kong's position in the innovation economy, it should be narrowly circumscribed in a way similar to the restrictive regime in the UK. The proposed TDM exception should be limited to non-commercial research only and impose the same conditions to protect rights holders' legitimate interests, as opposed to the Government's attempt to include in the proposed exception commercial uses.
15. It is worth noting that in 2022, the UK government also expressed its intention to expand the scope of the existing exception, allowing TDM for any purpose. The UK government's proposal quickly attracted overwhelming criticism and opposition from creative industries. Apart from the concern that the proposed expansion would result in no economic reward for copyright owners where their works are used for commercial gain, stakeholders were worried that generative AI systems trained and created by using TDM techniques already threaten creative industries and the proposed changes to the exemption served to further diminish the competitiveness of natural persons. By virtue of this significant backlash, the UK government axes its plans to broaden the TDM regime.

### **Other Conditions**

16. As stated above, the TDM exception in the UK currently applies on the conditions that the copyright works have been accessed lawfully, any use is for non-commercial research only and copies made are accompanied by sufficient acknowledgement and not transferred to any other person or used for any other purpose.
17. In addition to these requirements, we would suggest that the proposed TDM exception, if introduced, be accompanied by other prerequisites. The Paper mentions the possibility of disallowing TDM activities in situations where licensing schemes are available, providing an opt-out option to copyright owners and restricting further communication, distribution or dealing of the copies made pursuant to the proposed exemption. We agree that these conditions should be imposed on text and data miners to ensure adequate safeguards are put in place and to maintain a proper balance of interests between technology developers and content creators.

18. We also recommend the Government to consider further limiting the beneficiaries of the proposed exception to recognized academic institutions only, similar to the first exception regulated by the EU copyright law<sup>4</sup>, which benefits exclusively research organizations and cultural heritage institutions that conduct TDM for scientific research purposes. Although the introduction of an exception that applies to commercial TDM is intended to speed up development of AI, it will inevitably render rights holders unable to charge for licenses for TDM and come at the cost of the creative industries.
19. Moreover, according to the Paper, one of the safeguards rights owners will have to protect their content under the proposed TDM regime is that TDM will be prohibited if it is carried out using copyright works that are licensable. If the proposed TDM changes to the CO will be implemented, we are of the opinion that users should be imposed a duty to approach rights holders to ascertain whether licensing schemes or business models around TDM are available, as it is often the case that such information may not be readily accessible by the general public due to issues of confidentiality.

### **Better Protection Mechanism**

20. Before formulating pro-innovation legislative proposals to benefit AI developers, we aver that an improved protection mechanism that effectively prevents unauthorized access to data and ensures greater transparency over the data used for TDM must be in place. The current copyright framework is failing to ensure that rights holders are properly rewarded for their creations and prevent others from using their content without authorization, and is inadequate in the following aspects:
  - (1) The CO lacks specific provisions to govern devices used for accessing unauthorized and illegal content on the internet, including TV set-top boxes and application programmes. Illicit streaming devices are commonly used and can be easily purchased in Hong Kong, but the current offences under the CO do not seem to be applicable on all occasions, even with the newly added criminal sanctions against unauthorized communication of copyright works to the public. It is therefore necessary to include in the CO provisions similar to those under the Copyright Act in Singapore<sup>5</sup>, imposing liabilities on infringers who engage in commercial dealings with illicit streaming devices.
  - (2) There is no copyright-specific site blocking mechanism under the CO for rights holders to require online service providers to take steps to prevent or disable local subscribers or users from accessing infringing websites or online locations without permission. The remedy of general injunction available for copyright owners is deficient in a sense that it is not affordable to many private and small businesses, it may become futile in the long term given the possibility of circumvention of the blocked sites and its granting is solely at the court's discretion. Many other jurisdictions such as Malaysia and

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<sup>4</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92, art 3.

<sup>5</sup> Copyright Act (Singapore, 2021 rev ed) s 148(1).

Indonesia have adopted a statutory approach to administrative site blocking, which has been proven to be effective and cost efficient in combating online piracy. To contain online copyright infringement, it is our belief that Hong Kong should follow the well-trodden path of its neighbouring regions in protecting creators' rights by authorizing administrative bodies to block access to piracy websites.

21. In addition to these possible enhancements to the copyright framework, the Government should look to ensure there is a future mechanism put in place to enable content creators to establish what data have been used by developers for TDM. This would help copyright owners make informed decisions and exercise their rights effectively against unauthorized access. For instance, a mechanism that requires AI developers to keep records of the data used in the TDM process, which is accessible by rights holders, would be helpful. Greater transparency from technology companies in relation to data inputs and the attribution of outputs have a crucial role to play in protecting the fruits of productive labours of creators.
22. The Government's current focus on supporting innovation in AI rather than on optimizing limitations on the use of copyright content demonstrates a possible lack of understanding of the needs of the creative industries. To ensure an appropriate balance between innovation and creator rights, actions should be taken to provide better safeguards for the legitimate interests of rights holders before introducing legislative reforms that put rights holders at a disadvantage in the digital age.

## **Conclusion**

23. We are broadly supportive of the Government's aims to improve innovation and promote Hong Kong as an AI superpower. However, we take the view that such goals should not be pursued to the detriment of Hong Kong's current copyright framework and the successful creative industries who contribute considerably to the city's rich cultural heritage.
24. We hope the Government will consider our views and suggestions above on the impact of the proposed exception and review its proposals more carefully, as the goal of facilitating further AI developments in Hong Kong should not be pursued at all costs.

Television Broadcasts Limited  
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