Hong Kong's Public Consultation on Copyright and Artificial Intelligence

In response to Hong Kong's Public Consultation on Copyright and Artificial Intelligence, the International Federation of Reproduction Rights Organisations (IFRRO) together with IFRRO member, Hong Kong Reprographic Rights Licensing Society (HKRRLS), present their views on the evolving intersection of copyright law and AI technology. The consultation addresses critical issues such as the copyrightability of AI-generated works, the adequacy of current contractual agreements, and the scope of proposed exceptions for text and data mining. This response explores the need to uphold human-centric principles in authorship and originality, evaluates the implications of current and proposed regulations, and discusses the role of transparency in managing AI's impact on copyright.

Copyrightability of AI generated outputs

The existing copyright laws in Hong Kong, as defined under the Copyright Ordinance (Cap. 528), already exhibit inherent flexibility in their terminology, particularly with provisions for computer-generated works. However, we advise against reforms that seek to create a more flexible regime for the protection of AI-generated outputs, and suggest that any such proposals should carefully consider the following points:

Authorship: Authorship should remain strictly with humans. Only human creators should be recognized as authors. This position aligns with several jurisdictions that are hubs of technological development, including the EU, Singapore, and the US, which stipulate that original works must have human authorship to qualify for copyright protection. The concept of a "necessary arranger" appears inferior to that of a human author, shifting the criterion of copyright protection from originality to one based on effort and investment and undermining the essence of copyright law.

Originality: The criterion of originality must remain human-centric. AI systems, regardless of their sophistication, do not possess the creative spark intrinsic to human creators. The consultation at hand erroneously suggests that creativity can flourish in AI systems. However, granting additional protections and safeguards to AI-generated outputs could adversely affect both the production and consumption of creative works, ultimately to the detriment of human authors and publishers, who invest significant effort and resources.

Hence, from our perspective, it is advised that Hong Kong aligns with international practices, the Berne Convention, and the UN Convention on Human Rights, maintaining both authorship and originality as human-centric principles, effectively preserving human creativity and authorship.

Contractual Agreements Liability and Ownership

We note that throughout the consultation paper there are mentions of market practices and current contractual agreements, such as Terms of Use and Terms of Service, portrayed as a sufficient way to regulate ownership of content and liability effectively. These contractual terms are problematic in several points: AI providers can unilaterally change these agreements without the consent of users; there is no standardization across different platforms, leading to

inconsistency and confusion; the enforceability of these agreements is often uncertain; and these agreements apply only between the parties involved.

TDM exception

Hong Kong is considering the introduction of a new Text and Data Mining (TDM) exception "*for the purposes of computational analysis and processing of text, images, data, and other types of information. This proposed exception would cover (a) conventional text and data mining, and (b) computational data analysis and processing for enhancing the performance of computer programs, such as the development, training, and enhancement of AI models*".

The proposed TDM exception is inappropriately broad, potentially encompassing generative AI models. TDM enables the extraction, recombination, and processing of knowledge from large datasets, identifying patterns and associations of seemingly unrelated information. Indubitably, these processes play a crucial role in advancing AI applications. However, when data incorporated in copyright works and other protected subject matter is used, TDM activities become relevant under copyright and related rights. Given the nature of TDM activities and the accompanying risks to the copyright ecosystem, the following considerations are essential:

Legislators should avoid introducing changes that could disrupt current or future market dynamics. New exceptions and limitations for TDM and AI uses weaken rightsholders' ability to license their works. Instead, policy efforts should focus on ensuring that rightsholders can properly license and enforce their rights. The three-step test, as outlined in the Berne Convention and TRIPS Agreement, should continue to guide lawmakers in shaping exceptions and limitations, especially in the context of AI.

Unauthorized use of copyrighted works to train or generate outputs for LLMs and other TDM applications, like generative AI, contradicts the three-step test. This broad use disregards the legitimate interests of authors and publishers, undermining their ability to license and monetize their works. This test states that exceptions and limitations are permitted only if they (i) apply to certain special cases, (ii) do not conflict with the normal exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the rightsholder. These elements must be considered both cumulatively and sequentially. As per the World Intellectual Property Organization's 2003 Guide to Copyright and Related Rights, the first element of the test, 'certain special cases', should be interpreted to permit exceptions and limitations that are limited in scope, precisely defined, and serve distinct public or cultural policy objectives.

The second part of the three-step test states that exceptions must not interfere with the regular commercial use of a work. However, introducing a broad exception for TDM in Hong Kong would undermine rightsholders' ability to license their works, a key revenue stream for future industries. This would result in immediate financial losses and long-term damage, as licensing revenues are crucial for sustaining investment in creative work. Furthermore, unlicensed use of copyrighted material could lead to mass production of AI-generated content that unfairly competes with original works. Essentially, such an exception would erode both existing and emerging licensing markets, preventing rightsholders from benefiting from their creations while enabling the unregulated production of competing content. Additionally, there would be no effective legal mechanisms to limit or control unauthorized uses of the works.

The third requirement of the test dictates that exceptions must not cause unreasonable harm to the legitimate interests of authors. A broad TDM exception would wipe out current and potential licensing opportunities, seriously damaging rightsholders. This would enable companies to profit from unlicensed content, depriving creators of revenue and allowing unauthorized reuse of their works, including without attribution or in derivative forms. The influx of AI-generated content would oversaturate the market, devaluing human-created works. Contrary to claims of fairness, such an exception would deepen the imbalance between tech companies and creators, as vast amounts of unlicensed material are used by AI models. Rather than creating equity, the exception would disproportionately benefit large tech firms at the expense of authors and publishers.

In light of the above, we respectfully contend that the proposed exception could be inconsistent with international law and the copyright protection principles outlined in the WIPO Copyright Treaties and the WTO TRIPS Agreement.

Transparency

Another topic closely interlinked with the entirety of the discussion above is that of transparency. Transparency is crucial for balancing the interests of rightsholders with the advancement of AI technologies. A transparency obligation should be two-fold, relating both to the training phase of AI and the labelling of outputs from generative AI systems.

On the one hand, AI developers should be required to publicly disclose detailed summaries of the content used during the training phases of their models, as exemplified by the EU AI Act's Article 53(1)(d), accompanied by Recital 107, which underlines that this provision serves to increase transparency regarding the copyrighted works and other subject matter used in the pre-training and training of general-purpose AI models. This disclosure should include information about the sources of data, the nature of the content, and the methods used for data selection and preprocessing. Making this information available, makes the first step in supporting rightsholders in identifying and asserting their rights.

On the other hand, outputs generated by AI systems should be clearly labelled to indicate their origin. This labelling should include information about the use of AI in generating the content and any relevant data sources. Such transparency in labelling helps rightsholders track the use of their protected works and facilitates the enforcement of their rights.

We strongly believe that to foster responsible and trustworthy AI systems, clear and direct communication between stakeholders is essential. In fact, several jurisdictions, including Mainland China and the EU, have already implemented transparency obligations to safeguard inter alia their copyright ecosystems.

In Summary

IFRRO, representing Collective Management Organisations (CMOs) from over 85 countries, including HKRRLS, urges Hong Kong to exercise caution in reforming its copyright regime to accommodate the development of the AI industry. Developing AI is important, but it should not be pursued at all costs. It is crucial to ensure that authorship remains human-centric and that stringent criteria for originality in copyright protection are upheld. We underline that the proposed TDM exception is excessively broad and risks undermining rightsholders' ability to license and monetize their works, contrary to the principles of the Berne Convention and TRIPS

Agreement. Additionally, transparency obligations should require detailed disclosure of training data and clear labelling of AI-generated outputs to support the enforcement of copyright rights. These measures will help balance the interests of creators with technological advancement, align with international practices, and safeguard the integrity of the copyright ecosystem.

Anita HUSS-EKERHULT
CEO and Secretary General