

**The Hong Kong
Institute of
Trade Mark
Practitioners**
香港商標師公會

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BY EMAIL (AI_consultation@cedb.gov.hk) AND BY POST

Date: 16 September 2024

Division 3, Commerce and Economic Development Bureau
23/F, West Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Sirs,

Re: Consultation on Copyright and Artificial Intelligence

Background

1. This submission is made by The Hong Kong Institute of Trade Mark Practitioners Limited ("HKITMP"), the membership of which consists of solicitors, barristers, trade mark agents and patent agents, who are principally engaged in trade mark and other Intellectual Property practices. The HKITMP's aim is to protect the interests of trade mark and other Intellectual Property rights owners, for which purpose we are active and in regular liaison with the Intellectual Property Department and other relevant industry bodies.
2. This submission on behalf of the HKITMP has been prepared by the HKITMP Copyright Committee, consisting of Council members who have a particular interest and expertise in copyright. The views expressed are from a legal and policy perspective in our capacity as solicitors and Intellectual Property law practitioners, acting independently without regard to the views of any particular copyright body or organization.

Submission

3. The HKITMP welcomes the Government's proposals to update the provisions of the Copyright Ordinance ("CO") to address copyright issues that have emerged from the advancement of AI technologies. We set out our submissions below.

Copyright protection of AI-Generated Works

4. We agree with the Government's view that existing provisions in the CO relating to computer-generated works are broad enough to accommodate evolving technologies and would apply to AI-generated works.
5. The questions of subsistence of copyright in an AI-generated work, and authorship for such work should be determined on a case-by-case basis based on the factual circumstances surrounding the creation of such work. No enhancement or clarification is required at this stage, particularly



because the technology is still developing, and any changes to the legislation at this stage would be premature.

6. Players in the industry (i.e. developer of AI technology, deployer (operator) of AI technology and the user of AI technology) who wishes to have clarity or certainty over ownership of copyright in AI-generated works may achieve that through contractual arrangements.

Copyright Infringement Liability for AI-Generated Works

7. With regards to the liability for copyright infringement, the Government gave examples and illustrations on how liability for copyright infringement may be determined with focus on the person(s) who should be held liable for the infringement. We agree that this question needs to be determined on a case-by-case basis, having regard to the degree of individual role and involvement of each relevant party in the infringement.
8. Apart from the proximity of the relevant persons to the alleged infringement act, it is also crucial to understand the technology and examine the circumstances surrounding the creation of the AI-generated content to determine if the process is an “act restricted by copyright”. We caution against an approach of assuming “copying” without analysing the technology and how work is generated by AI.
9. In known litigation concerning AI-related copyright infringement cases, it has been put forward in defence that generative AI does not simply “copy” the works used in the training of the AI. For instance, in *Andersen v. Stability AI Ltd and Others* (US District Court for the Northern District of California, 23-cv-00201-WHO, October 30, 2023, it was suggested that the diffusion process described in the complaint did not involve copying of the original artwork, but instead uses “complicated mathematics, linear algebra, and a series of algorithm” to recognize underlying relationships in the data. The machine learns the underlying patterns and relationships in these data, and creates new and unique work from the its learning of these patterns.
10. The AI industry and technology is still developing, and we agree that it is at this stage, premature to make legislative amendments to existing provisions of the CO to apportion liability for infringement. This should be a matter to be determined by the judiciary based on the factual circumstances of each case.

Text and Data Mining Exception

11. The HKITMP supports the introduction of a new and specific copyright exception to allow reasonable use of copyright works for computational data analysis and processing, covering conventional text and data mining and the training of AI models (“**Proposed TDM Exception**”), which may cover non-commercial and commercial uses to foster the growth of the AI industry.
12. As a general statement, the HKITMP supports Proposed TDM Exception applying to both commercial and non-commercial use, so as to maximise the benefit of the Proposed TDM



Exception and the attractiveness of Hong Kong to those technology companies that stand to benefit the most from the Proposed TDM Exception. And we also believe the Proposed TDM Exception should include:

- (a) conventional text and data mining, which extracts and conducts computational analysis of extensive collections of data for generating results and useful information (such as insights, patterns, trends and correlations) which would likely be unattainable through manual efforts alone; and
 - (b) computational analysis and processing of a large collection of data for enhancing the performance of a computer program, including development, training and enhancement of AI models, particularly generative AI models.
13. The Government suggests that the Proposed TDM Exception should be accompanied with conditions, including:
- (a) Requiring lawful access to copyright works;
 - (b) Rendering TDM activities unauthorised if licensing schemes are available
 - (c) Rendering TMM activities unauthorised if copyright owners have expressly reserved their rights (an opt-out option)
 - (d) Imposing restrictions on further communication/distribution/dealing of the copy made under the Proposed TDM Exception.
14. The imposition of conditions such as those in paragraph 13 (b) and (c) above would make it very easy for copyright owners to negate the application of the TDM Exception. The effect of such conditions would be to make development and training of an AI system more costly as AI developers will have to expend the time and effort to negotiate multiple licenses with different data sources, and pay license fees to such data sources for the use of data. This would curtail the development of AI industry in Hong Kong. As noted by the Government, enriching the availability of datasets for training AI models will bring about large productivity gains, as that increases the quality and accuracy of an AI output. Having a limited data source for training of the AI models as a result of costs reduction measures will affect the quality of AI models developed in Hong Kong.
15. Further, it is our understanding that the requirement to have “lawful access” to the work under section 244(d) of Singapore’s Copyright Act 2021 is intended to cover circumvention of technological measures and does not refer to breach of contractual terms drafted to exclude or restrict application of the TDM Exception. See below:

(d) X has lawful access to the material (called in this section the first copy) from which the copy is made;

Illustrations

- (a) X does not have lawful access to the first copy if X accessed the first copy by circumventing paywalls.*



(b) *X does not have lawful access to the first copy if X accessed the first copy in breach of the terms of use of a database (ignoring any terms that are void by virtue of section 187).*

16. It should be noted that in April this year, Singapore government commenced a public consultation to seek feedback on situations in which users should be permitted to circumvent technological measures that control access to copyright works or protected performances. See https://www.mlaw.gov.sg/files/2024_Public_Consultation_on_Prescribed_Exceptions_in_Part_6_Division_1_of_the_Copyright_Regulations_2021.pdf. The Singapore government is looking to further expand the prescribed exemptions allowing circumvention of technological measures, and has invited feedback on how the prohibition on circumventing access control measures has impaired or adversely affected any other dealings that would be non-infringing by virtue of any permitted use in the Copyright Act 2021 not specifically listed in the consultation. There may be further relaxation to Singapore's TDM Exception if as a result of this consultation, the Singapore Government prescribes an exemption that allows circumvention of technological measures for the purposes of the TDM Exemption.
17. In respect of the condition in paragraph 13(d) above, a restriction on further dealing in the copyright work will similarly render the Proposed TDM Exemption ineffective, as the AI tool, in generating content, will necessarily rely on the model trained with copyright work used pursuant to a TDM Exemption and will necessarily involve "further dealing" of the copy of the work.
18. The extent to which conditions should be imposed to the Proposed TDM Exemption would largely depend on the legislative intention, and what the Government wants to achieve. If the Government's objectives is to allow AI industry to develop rapidly, then the TDM Exemptions should not be accompanied with too many conditions.

Other Issues

19. The Government analysed comprehensively, other legal issues that come about from the emergence of AI technologies. We note that the Government has commissioned a local research centre specialised in generative AI to help examine and suggest appropriate rules and guidelines on the accuracy, transparency and information security of generative AI technology and its applications, and will determine appropriate follow up actions based on development of the society and legislations formulated by other jurisdictions. We look forward to proposals on this front.

Conclusion

20. Whilst the Government observes that AI internationally is in the early stage of development of laws around AI and AI-generated works, there is no clear direction internationally as to how various aspects should be handled, and the CO as drafted is arguably not in urgent need of broad updating, those are not valid reasons to do the minimum. In reality, there may never be any clear universal international approach to AI, as there are clearly divergencies of approach even with TDM exceptions adopted in the countries identified in the Consultation Paper.

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21. Nevertheless, Hong Kong can become a leader in this regard, adopting broad, innovative and embracing laws relating to AI, rather than a follower, and could showcase itself as a leading destination for technology growth.

We can be available to address any queries that the Government may have on the response above.

Yours faithfully,

Jacqueline Chu
President
The Hong Kong Institute of Trade Mark Practitioners