



香港工業總會
Federation of Hong Kong Industries

香港九龍長沙灣長裕街8號
億京廣場31樓
31/F, Billion Plaza, 8 Cheung Yue Street
Cheung Sha Wan, Kowloon, Hong Kong
電話 Tel +852 2732 3188 傳真 Fax +852 2721 3494
電郵 Email fnki@fnki.org.hk

Our Ref: PRCD/2024/020

7 October 2024

The Honourable Algernon Yau, JP
Secretary for Commerce and Economic Development
Commerce and Economic Development Bureau
The Government of the HKSAR

Dear *Algernon*,

Re: Public Consultation for Copyright and Artificial Intelligence

We refer to your Consultation Paper on Copyright and Artificial Intelligence (AI) published on 8 July 2024.

Further to our discussions with our members, including relevant professional parties, we submit the attached paper covering our views on various matters mentioned in the Consultation Paper. The Federation of Hong Kong Industries (FHKI) fully recognised the importance of striking the balance between the interests of copyright owners and users (i.e. copyright protection and the reasonable use of copyright works), so as to maintain Hong Kong's position as an international innovation and technology centre, a regional intellectual property trading centre, as well as the East-meets-West centre for international cultural exchange.

If you have any questions on our submission, please directly contact our Director-General

Yours sincerely,

A handwritten signature in black ink that reads 'Steve Chuang'.

Steve Chuang
Chairman
Federation of Hong Kong Industries

A handwritten signature in black ink that reads 'Peter Shum'.

Peter Shum
Deputy Chairman,
Chairman, Group 25 (Hong Kong
Information Technology Industry
Council)
Federation of Hong Kong Industries

Encl.



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Appendix

FHKI Submission on the Public Consultation for Copyright and Artificial Intelligence

Copyright issues surrounding artificial intelligence (AI) are relatively new for governments, and responses are still evolving. The Federation of Hong Kong Industries (FHKI) advocates for a flexible approach to AI-related copyright constraints. This approach would foster the growth of AI technologies and stimulate economic activities connected to intellectual property (IP).

2. The development of AI represents a global phenomenon, with far-reaching positive impacts on various industries and society as a whole. It has enhanced business productivity and provided solutions to complex challenges that were previously unaddressed. According to the “Hong Kong AI Industry Development Study” published by the Hong Kong Productivity Council last year, approximately one-third of the surveyed companies have already implemented AI technologies in their marketing, operations, and internal management. Furthermore, AI has proven itself invaluable in advancing scientific discoveries, particularly the AI-driven drug discovery work, which has resulted in significant market impacts. Notably, a local biotechnology company successfully employed AI to accelerate drug development and attracted a substantive investment of nearly HK\$10 billion from a major global pharmaceutical company for collaborative drug discovery efforts.

3. Despite the numerous advantages observed, it is crucial for the Government to adapt swiftly to the rapidly evolving AI landscape. In light of this, we recommend that the Government carefully monitor regulations in different jurisdictions and evaluate the necessity to regulate it from time to time.

Copyright Protection

4. Copyright protection is paramount in encouraging innovation and creativity, as it bestows creative works with economic values. Comprehensive protection of IP has laid the foundation of the IP Database, thereby facilitating the development of the regional IP trading centre.

5. FHKI appreciates the non-interventionist approach proposed by the Consultation Paper in Chapter 2 and believes that the **Copyright Ordinance (Cap. 528)** (CO) provides sufficient protection for AI-generated works. The general expression “computer-generated” in the CO still stands despite the



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evolving technological landscape and could apply to AI-generated works, indicating that no legislative proposals are necessary.

6. While statutory laws provide a more standardised and codified set of rules, common law allows for a nuanced approach to legal issues. It empowers judges to consider the unique circumstances of each case and make decisions that are tailored to the specific facts at hand. This flexibility is particularly crucial in navigating the intricate landscape of AI-generated works, where the extent of human authorship varies across different AI systems.

7. By relying on court judgments based on objective facts and evidence, rather than hasty legislative amendments, the Government can ensure that CO remain adaptable to the ever-evolving technological landscape. Ultimately, a case-by-case determination can strike a balance between providing sufficient protection to creators of AI-generated works and fostering innovation within this emerging field. It is imperative that we acknowledge and harness the strength of common laws within the existing legal framework of Hong Kong.

8. The Digital Policy Office has introduced the Ethical AI Framework to help bureaux and departments integrate AI and big data analytics into their IT projects or services while considering ethical aspects. The framework covers principles, practices, and assessment of AI applications. It can also serve as a general reference for other organizations. To ensure responsible use of AI and avoid copyright infringement, it is recommended that the Government actively promote this framework to the private sector. By doing so, private organisations will become aware of the copyright issues associated with AI-generated works. Furthermore, the Government should stay updated on technological advancements in AI applications to assess the need for regulatory intervention.

Infringement Liability

9. The Consultation Paper thoroughly addresses the issue of infringement liability involving AI-generated works. It recognises that determining the necessary arrangements and parties involved in causing copyright infringement by AI-generated works is complex, considering factors such as different AI systems, the nature of the generated works, and the individuals responsible for those arrangements.

10. Rather than implementing broad legislative amendments, FHKI believes that, again, assessing infringement liability on a case-by-case basis is more appropriate. In our common law practices, judges can consider the specific circumstances of each infringement claim and make decisions based on the principles and reasoning from previous cases involving similar issues can help



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develop rules through the accumulation of cases. By accumulating cases and establishing a body of precedent, common law gradually develops guidelines and principles that can shape and inform future rulings. This flexibility allows the law to adapt to changing technologies and circumstances, providing a more nuanced and contextual approach to copyright infringement liability in the context of AI-generated works.

11. Given the existence of current market practices that provide solutions for addressing infringement liability concerns, such as IBM's inclusion of IP indemnity in its service descriptions to protect clients against third-party claims of copyright infringement, it is evident that commercial contracts play a crucial role in determining infringement liability. We believe that the Government should adopt a more observational approach, allowing the evolving relationship between AI-powered application providers and users to drive the development of laws related to this area. Instead of legislating detailed rules upfront, it is important to rely on case law for guidance on resolving copyright infringement disputes, as these commercial contracts continue to shape the landscape.

Specific Copyright Exception

12. FHKI acknowledges the consideration given by the Consultation Paper to introduce a text and data mining exception (TDM exception) with a compulsory "opt-out" option for copyright owners. Although the proposed TDM exception will undoubtedly boost the advancement of AI language models, we suggest approaching this move in a cautious manner due to the existing conflicts between copyright owners and AI application developers.

13. Currently, using large amounts of data, often in terabytes, is common and necessary when training AI language models. Instead of simply reproducing mined text and data, AI language models are designed to extract and analyse vast amounts of data in order to uncover significant insights and patterns, such as word relationships. This training process involves using a vast amount of data, including copyrighted materials. It allows researchers and data scientists to learn from unstructured data and extract valuable information that would be impossible to do manually.

14. Given the condition that AI systems do not reproduce copyrighted works as output, it can be argued that the use of copyrighted works for training AI language models falls under the provision of "fair dealing" under Section 38 of the CO. AI models derive knowledge from these works to produce transformative content, similar to how humans use various references to learn and create their own distinct works. While the existing CO can address cases of plagiarism or determine if the usage qualifies as "fair dealing", it is important



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to note that the act of “learning” itself should be exempt from copyright claims, provided that the materials used for learning have been acquired through legal means.

15. However, given ongoing court cases and the ongoing discussions surrounding the TDM exception, it may be premature to provide a specific copyright exception now. We have observed a rise in claims against data mining activities, exemplified by lawsuits filed by the Recording Industry Association of America (RIAA) on behalf of major recording companies including Universal Music Group, Sony Music Entertainment, and Warner Music Group. The suits have been filed against AI music generation companies Suno and Udio, citing their unauthorised use of copyrighted materials, arguing that the AI-generated works bear too much resemblance to the original copyrighted works.

16. These ongoing cases highlight the growing resistance within the creative industry towards data mining processes. Consequently, implementing the proposed TDM exception at this stage might be too contentious. We recommend that the Government carefully examine relevant court cases and actions taken by other jurisdictions to determine whether a TDM exception is necessary.

17. FHKI recognises that the Government may encounter various practical challenges in implementing the proposed TDM exception, particularly due to the absence of immediate mechanisms for creators to opt out of utilising their data for training AI models. As Hong Kong aspires to become a regional hub for IP trading, it would be wise for the Government to refrain from put forward any initiatives that could disrupt the delicate balance between stakeholders and potentially undermine the interests of copyright owners.

18. In order to take proactive measures for preventing disputes and promoting transparency in the utilisation of copyrighted works during AI language model training, the Government can establish guidelines that encourage the adoption of industry best practices. These guidelines can encompass various aspects, such as the curation and preprocessing of datasets, as well as implementing measures to prevent the usage of pirated content. It is also essential for the guidelines to define the specific scope of data developers and operators of AI systems should collect and maintain so that stakeholders could easily understand the learning process of AI models and what data is being utilised.



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Capacity of Legal Sector to Handle Disputes

19. In conclusion, the issue of copyright in relation to AI is a rapidly evolving field. FHKI supports a flexible approach to AI-related copyright constraints to promote innovation and economic activities. With the rapid advancement of AI technologies, there is a likelihood of an increase in IP-related disputes in the future. FHKI urges the Government to strengthen the capacity of the legal sector to effectively handle these disputes. It is important to note that without comprehensive legislation, the rules governing copyright and AI will be shaped by emerging court cases in common law jurisdictions. Once a clearer picture emerges from these cases, a thorough examination can be conducted to determine if specific legislation is necessary to strike the best balance between AI development and copyright protection in Hong Kong.

The Federation of Hong Kong Industries
September 2024