COPYRIGHT AND ARTIFICIAL INTELLIGENCE

LAW SOCIETY SUBMISSION

The Law Society makes this submission in response to the Consultation Paper on Copyright and Artificial Intelligence launched by the Commerce and Economic Development Bureau and the Intellectual Property Department on 8 July 2024 ("Consultation Paper").

We have reviewed the Consultation Paper and our responses to some of the questions raised in the Consultation Paper are set out below.

Background

1. It is an inevitable challenge but it is important to keep our laws, particularly intellectual property laws, abreast if not ahead of technological developments. Clearly, artificial intelligence ("AI") technology will continue to advance at a very fast pace, and we must address the accompanying challenges and issues as quickly as possible.

2. As AI becomes increasingly sophisticated, it can "create" and generate content autonomously, leading to questions about authorship, copyright subsistence, ownership and protection of these works. Additionally, AI can be used to infringe existing copyright works, such as through deepfakes or automated content creation. On the other hand, we wish to utilise AI to enhance creativity and productivity. Hence, we need to allow certain exceptions to assist in the training of AI's computational analysis, processing and creativity capability. Updating our copyright law is essential to ensure that creators' rights are protected, to address the ethical and legal implications of AI technology, and to encourage safe, healthy and responsible development and application of such technology.

3. Although the Consultation Paper has helpfully explained the AI-related copyright positions and developments in a number of jurisdictions, and points out that (1) "[t]he copyright issues associated with AI-generated works are recognised to be complex and evolving on a global scale"[1] and (2) "[a] leading, settled and unified legislative approach and norm has yet to emerge"[2], we strongly believe that Hong Kong does not have to sit and wait and can take a more robust view and approach based on our current copyright regime. We wish to remind that two decades ago, Hong Kong was the first in the world to try and convict BitTorrent infringement involving distribution of infringing copies of copyrighted movies on the internet which was reported even on *New York Times*.[3]

Response to Issues Raised

A. Copyright Protection of AI-Generated Works

4. *"Do you agree that the existing [Copyright Ordinance (Cap. 528) ("CO")] offers adequate protection to AI-generated works, thereby encouraging creativity and its investment, as well as the usage, development, and investment in AI technology? If you consider it necessary to introduce any statutory enhancement or clarification, please provide details with justifications."*[4]

(a) We take the view that Hong Kong can continue its current approach which is modelled on the UK Copyright, Designs and Patents Act 1988 ("CDPA") with modernisation. The current approach categories AI-generated work as computer-generated work. Putting aside the current definition, we consider that there are two types of AI-generated work: (i) where there is a human author who gives such prompts and instructions to the AI tool to produce works which manifest his "expression of an idea" and (ii) where the prompts and instructions given by the human user are general and generic and together represent merely ideas instead of an expression of an idea and the AI tool creates works which express those

[1] Para 2.35 of the Consultation Paper.
[2] Para 2.34(b) of the Consultation Paper.
[3] https://www.nytimes.com/2005/11/08/technology/in-hong-kong-a-jail-sentence-for-online-filesharing.html. See also https://www.scmp.com/article/522793/torrent-ruling-changes-little
[4] Para 2.36 of the Consultation Paper.

ideas. As the current definition of computer-generated work deals with such works where there is no human author, it deals with the second type (i.e. (ii)) of AI-generated works.

(b) While an author is the person who creates the work[5], the word "creates" is only used once in the CO and does not imply the work is a work which enjoys copyright.[6]

(c) We suggest that the definition of computer-generated work[7] should be revised along the following lines (changes are tracked for ease of reference): computer-generated, in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work ***or where the input of the human author is insufficient to make the resultant work his original copyright work.***

5. *"Have you relied on the CGWs provisions of the CO in the course of claiming copyright protection for AI-generated works? If so, in what circumstances, how and to what extent has human authorship featured in these works? Have you experienced any challenges or disputes during the process?"*[8]

(a) Yes, we received mostly general enquiries so far. Often the uncertainty lies with who is "the person by whom the arrangements necessary for the creation of the work are undertaken" ("necessary arranger").

(b) While we agree that the identity of the necessary arranger is "*ultimately fact-specific to be determined on a case-by-case basis*", we strongly urge that guidelines should be provided on how to determine the necessary arranger. The Consultation Paper suggests that the developer/programmer/trainer of the AI model, the operator of the AI

[5] Section 11(1) of the CO
[6] Section 13 of the CO provides "the author of a work is the first owner of <u>any</u> copyright in it [underlined added], subject to sections 14 [employee works], 15 [commissioned works] and 16 [Government copyright, etc.]". Hence it is submitted that there is no presumption of copyright subsistence in an author's work.
[7] Section 198 of the CO
[8] Para 2.36 of the Consultation Paper

system, or the user who inputs prompts to the AI system to create the subject CG LDMA work) would be qualified as the necessary arranger.[9]

(c) We wish to remind that in the 1990s, the Law Reform Commission of Hong Kong was asked *"to review the law of Hong Kong relating to copyright and to make recommendations for a Hong Kong Ordinance dealing comprehensively with the law of copyright"*. The sub-committee formed studied the UK 1988 Act in detail and proposed the Report on Reform of the Law Relating to Copyright (Topic 22) November 1993. The sub-committee recommended:

"*while we appreciate that difficulties may arise with the approach followed by the 1988 Act, we believe it provides a satisfactory model for Hong Kong's legislation and we recommend the adoption of sections 9(3)* [now section 11(3) of our Ordinance] *and 178* [now section 198 of our Ordinance] *of that Act [those sections relate to the deeming author of computer-generated works and the definition of computer-generated works], We think it sensible that the rights in computer generated work should fall to the program user rather than the program maker. It is the application of the former's abilities to the program which results in the computer generated result."*[10]

(d) The only case law on the necessary arranger under section 9(3) of the CDPA, *Nova Productions Ltd v Mazooma Games*[11], determined that the person who made the "arrangements necessary" for the work was the person who contributed "skill or labour of an artistic kind". At the time this case was decided in 2006, the standard of originality in the UK was not the "authorial intellectual creation" test, but rather the "skill or labour of an artistic kind" test, as established in *Interlego v Tyco*[12]. Accordingly, the *Nova* decision interpreted the "arrangements

[9] Para 2.24 of the Consultation Paper. cf The UK Department of Trade and Industry's White Paper on Intellectual Property and Innovation in 1986 considered three potential "authors" of computer-generated works: (1) the program creator, (2) the data originator, and (3) the person operating the computer. It concluded that determining authorship for such works should rely on identifying who contributed essential skill and labour to create the work.
[10] Para 13.61 of the Report of the Law Reform Commission of Hong Kong on Reform of the Law Relating to Copyright (Topic 22) November 1993.
[11] [2006] EWHC 24 (Ch) (para 106)
[12] [1988] RPC 343, 371

necessary" requirement as being synonymous with the originality requirement. This interpretation suggests that the threshold for originality plays a significant role in determining the rightful owner of a work.

(e) Hence, we take the view that in the absence of evidence to the contrary, the author of an AI-generated work should be deemed the user of the AI model who gives instructions which reflect a sufficient degree of his own original expression for the resulting AI-generated work to be considered his copyrighted creation.

6. *"Do you agree that the contractual arrangements in the market provide a practical solution for addressing copyright issues concerning AI-generated works? Please elaborate on your views with supporting facts and justifications."*[13]

(a) The Government says, "*in practice, contractual arrangements may readily offer a pragmatic market solution as to which contracting party ends up holding the copyright ownership of AI-generated works*", and depending on the AI systems, the system owners, the users or paid subscribers may be the owner.[14] The Government further says, "*there is so far no discernable market failure in such contractual arrangements, which are built on the foundation of a free and open market*".[15]

(b) We have serious reservations if contractual arrangements in the market is a practical solution given the usual inequality of bargaining power between AI technology provider and users and the fact that users seldom read the fine prints of terms and conditions of use and even if they do, the choice will be "take it or leave it".

[13] Para 2.36 of the Consultation Paper
[14] Para 2.27 of the Consultation Paper
[15] Para 2.33 of the Consultation Paper

B. Copyright Infringement Liability for AI-generated Works

7. *"Do you agree that the existing law is broad and general enough for addressing the liability issues on copyright infringement arising from AI-generated works based on the individual circumstances? If you consider it necessary to introduce any statutory enhancement or clarification, please provide details with justifications."*[16]

We consider that in theory, the same principles of infringement should apply to human and AI-generated works. Fairness and accountability are important to ensure responsible AI application. In the context of AI-generated works, the principles regarding "authorisation" of infringement would be of particular relevance. The person who ultimately provides the relevant instructions resulting in an infringing work is the infringer.

8. *"Do you agree that the availability of contractual terms between AI system owners and end-users for governing AI-generated works also offers a concrete and practical basis for resolving disputes over copyright infringements in relation to these works? If not, could you share your own experience?"*[17]

These click-wrap, browse-wrap or shrink-wrap agreements are designed to be as extensive as possible. Typically, they include wide disclaimers, exclusion or limitation of liability and indemnity clauses in favour of the AI tool provider. The enforceability of these agreements depends on notice and incorporation of the relevant terms forming the contract and the conscionability of the terms.

C. Possible Introduction of Specific Copyright Exception

9. *"What conditions do you think the Proposed TDM Exception should be accompanied with, for the objective of striking a proper balance between the legitimate interests of copyright owners and copyright users, and serving the best interest of Hong Kong? Are there any practical difficulties in complying with the conditions?"*

[16] Para 3.20 of the Consultation Paper
[17] Para 3.20 of the Consultation Paper

(a) As the policy objective is to promote and protect the development of AI[18], we support the Government's position that the Proposed TDM Exception should not be restricted to non-commercial research and study.[19]Further, in copyright and particularly the internet world, the distinction between "commercial" and "non-commercial" can become blurred.

(b) We take the view that the exception should only allow the use of freely accessible information or data to train, build and deploy AI.

(c) In principle, we support the availability of an "opt out" option to copyright owners to enable them to reserve their rights if this could be effectively implemented. In this regard, we are aware that there are reservations about the practicality of such option from the perspective of AI development[20] and some rightholders advocate for an "opt in" option instead[21]. In formulating its policy in this regard, the Government should take into serious consideration the prevalent international trend.

D. Legal Context of Deepfakes and Transparency in AI

10. Deepfakes is a very serious problem[22]. While both IP and non-IP laws may apply against the misuse of a person's indicia of identity in deepfakes and the

[18] Para 3.16 of the Consultation Paper
[19] Para 4.15 and 4.16 of the Consultation Paper
[20] See this article *"The text and data mining opt-out in Article 4(3) CDSMD: Adequate veto right for rightholders or a suffocating blanket for European artificial intelligence innovations?"* - Journal of Intellectual Property Law & Practice, Volume 19, Issue 5, May 2024 by Gina Maria Ziaja - https://academic.oup.com/jiplp/article/19/5/453/7614898, where the practical feasibility of opting out is considered "challenging". The author also points out *"At the moment, there are no generally accepted protocols or standards for the machine-readable expression of opting out. Even if there are various emerging approaches to this issue developed by different players on the market, it is unclear which will be supported by the major AI model providers. This uncertainty complicates the effective reservation of rights by the respective rightholders."* Instead of opting out, the author prefers the transparency obligation about how the AI provider should handle training data that is protected by copyright.
[21] See for example – Response to USCO Inquiry on Artificial Intelligence and Copyright – Getty Images – October 30, 2023 - https://www.google.com/search?q=getty+images+response+to+usco+inquiry&rlz=1C1GCEU_enHK1068HK1068&oq=gett&gs_lcrp=EgZjaHJvbWUqBggAEEUYOzIGCAAQRRg7MgYIARBFGDkyGAgCEC4YQxiDARjHARixAxjRAxiABBiKBTISCAMQLhhDGK8BGMcBGIAEGIoFMgwIBBAAGEMYgAQYigUyEggFEC4YQxivARjHARiABBiKBTIMCAYQABhDGIAEGIoFMgwIBxAAGEMYgAQYigUyBwgIEC4YgATSAQgyMDkzajBqN6gCALACAA&sourceid=chrome&ie=UTF-8.
[22] Press Release of the Government dated 26 June 2024 on "LCQ9: Combating frauds involving deepfake" (https://www.info.gov.hk/gia/general/202406/26/P2024062600192.htm?fontSize=1): "A study

dissemination and use of untrue or inappropriate information created by means of deepfakes in Hong Kong, none of those laws has been particularly effective.

11. Considering the introduction of the Proposed TDM Exception, it is proposed that it will send the right message to the public and may be a quick deterrent if the proposed exception will disallow the texting and mining of personal data, particularly biometric data, in the absence of express consent of the individual whose image, voice or other data is recognisable. Any deepfake images, films or recordings should be presumed, unless otherwise proven, to be infringement of the copyright of the materials from which they are "derived" or "adapted". As many responsible online platforms have dedicated copyright complaint units, we believe the rebuttable presumption can help affected individuals to request online service providers to quickly take down deepfake materials by filing a copyright complaint.

12. The US Copyright Office has just issued the first part of its Report on Copyright and Artificial Intelligence addressing the topic of digital replicas (voice impersonation and image replicas)[23]. While the Copyright Office agrees that the topic of digital replicas does not fall neatly under any one area of existing law, it relates to copyright in a number of ways: *"creators such as artists and performers are particularly affected; copyrighted works are often used to produce digital replicas; and the replicas are often disseminated as part of larger copyrighted works. Moreover, the non-commercial harms that may be caused are similar to violations of moral rights protected in part through the copyright system."*[24]

13. Briefly, the Copyright Office recommends that:

    (a) protection should not be given only to celebrities, public figures or those whose identities have commercial value, but all individuals against digital

---

has reportedly found that the number of scams involving deepfake in Hong Kong in the first quarter of this year has scored a 10-fold increase year-on-year, which is among the highest in the Asia-Pacific region, and the rate of deepfake identity fraud involving the fintech industry in Hong Kong is the highest in the Asia-Pacific region. On the other hand, some members of the public are worried that there is no way to guard against law-breakers who have in recent years successfully committed frauds by making use of deepfake technology to create highly realistic faces and voices."

[23] US Copyright Office – Copyright and Artificial Intelligence, Part 1" Digital Replicas – July 2024. In the Report, "digital replica" refers to a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual. US copyright protects original works of authorship, including the material - photographs or audio or video recordings—from which a digital replica might be constructed.

[24] Page 6 of the Report.

replicas, whether generated by AI or otherwise, that are so realistic that they are difficult to distinguish from authentic depictions;

(b) protection should be narrower than, and distinct from, the broader "name, image and likeness" protections offered by many US states;

(c) protection should last for at least the lifetime of the individual;

(d) liability should arise from the distribution or making available of an unauthorized digital replica and not just the act of creation alone; and

(e) there should be both injunctive and monetary relief and in some circumstances, criminal liability would be appropriate.

14. We also suggest watching closely the development of a guidance for content authentication and watermarking to label AI-generated content by the US Department of Commerce[25].

The Law Society of Hong Kong

September 2024

[25] https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/. The AI Act, formally adopted by the EU in March 2024, also requires providers of AI systems to mark their output as AI-generated content. This labelling requirement allows users to detect when they are interacting with content generated by AI systems to address concerns like deepfakes and misinformation. See https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/757583/EPRS_BRI(2023)757583_EN.pdf - Generative AI and Watermarking.