# Hong Kong Bar Association - Committee on Intellectual Property

## Response to the Copyright and Artificial Intelligence Public Consultation Paper

1. Reference is made to the Copyright and Artificial Intelligence Public Consultation Paper (**"Copyright & AI Paper"**) issued by the Commerce and Economic Development Bureau (**"CEDB"**) – Intellectual Property Department.

2. The Committee on Intellectual Property of the Hong Kong Bar Association (**"CIP"**) has considered and discussed the Copyright & AI Paper. In particular, the CIP has noted that the CEDB has called for views and supporting evidence on various issues set out at paragraphs 2.36, 3.20 and 4.18 of the Copyright & AI Paper ("the CEDB Queries") to which the CIP now responds.

3. The CIP is approaching the CEDB Queries from a legal perspective and will leave the business related queries to be addressed by other interested parties.

### Copyright Protection of AI-generated works – 2.36

4. The first query posed at 2.36 was as follows:

   *"Do you agree that the existing CO (i.e. Copyright Ordinance, Cap.52) 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."*

5. In relation to this, the following is noted:

   (a) The existing law governing the copyright protection to AI generated works is the Copyright Ordinance (Cap 528) (**"CO"**). Under the CO, copyright subsists in four types of original works (namely literary, dramatic, musical and artistic works ("**LDMA works**")) as well as sound recordings, films, broadcasts, cable programmes and the typographical arrangement of published editions ("**non-LDMA works**"). Under the CO, computer generated LDMA works are protected for 50 years from which the work was made, as opposed to the duration of the Author's life plus 50 years

after death for ordinary LDMA works.[1] Computer generated LDMA works must satisfy the originality requirement in order to be protected by copyright. There is no separate provision for computer generated non-LDMA works, which means that the protection afforded to non-LDMA works created by humans will apply to computer generated non-LDMA works as well.

(b) 'Computer generated' means that 'the work is generated by computer in circumstances such that there is no human author of the work'.[2] 'In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author is taken to be the person by whom the arrangements necessary for the creation of the work are undertaken'.[3]

(c) The CIP is in agreement that human creativity and human expense of labour should be rewarded, including if this manifests itself in the context of AI-generated works. Indeed, for AI-generated works, it must be such human creativity and expense of labour behind the work which should be given copyright protection. However, an issue to be considered is the extent to which prompt engineering should be considered to impart sufficient 'originality', creativity and expense of labour warrant protection by copyright. Due to the absence of leading case authority on this point in Hong Kong, we look to the situations / cases in different jurisdictions to analyse this issue.

## 6. Type 1 – Jurisdictions without CGW provisions

(a) In these jurisdictions, original LDMA works or works of a similar nature must have human authorship to qualify for copyright protection. The degree of human involvement required for works generated by AI systems is assessed on a case-by-case basis to determine their entitlement to copyright protection.

United States:

*Kashtanova – Zarya of the Dawn*[4].

(b) Facts: Kashtanova was the author of the comic book Zarya of the Dawn. Whilst the storyline was human-generated, Kashtanova utilised

[1] CO S.17(6)
[2] CO S.198(1)
[3] CO S.11(3)
[4] https://copyright.gov/docs/zarya-of-the-dawn.pdf

Midjourney[5] – a form of generative AI to produce the series of images which featured alongside her human-generated storyline. The issue to be determined by the Review Board of the US Copyright Office ("USCO")[6] was whether Kashtanova's interactions with Midjourney were sufficient to constitute an independent, creative work by her, and hence subject to copyright protection. The US courts and USCO apply the *"Feist test"*[7] in such cases. Under the US Copyright Act, a work may be registered if it qualifies as an 'original work of authorship fixed in any tangible medium of expression'. The two limbs of 'original' include (i) independent creation and (ii) sufficient creativity. The threshold for creativity is low – creativity only has to be more than *de minimis.* However, USCO and the US courts only recognise creativity of human creators.

(c) Considerations: The text of the work is protected by copyright. USCO also concluded that since the selection and arrangement of images and text was done entirely by Kashtanova, and 'is the product of creative choices with respect to the selection of the images that make up the work and the placement and arrangement of the images and text on each of the work's pages',[8] it was therefore the product of human authorship and was protected by copyright. However, USCO fell short of concluding that the individual images generated by Midjourney were protected by copyright. In coming to this conclusion, USCO analysed the process through which the images are generated. The process is briefly described as follows: (1) Users enter prompts, describing what Midjourney should generate; (2) the technology will then generate four images in response to this; (3) users can then request that Midjourney (i) provide a higher-resolution version of an image; (ii) create new variations of an image or; (iii) to generate four new images from scratch.

(d) USCO, where the use of Midjourney hiring a visual artist whose work a patron could not claim as their own, held that there is a 'significant distance between what a user may direct Midjourney to create and the visual material Midjourney actually produces', Midjourney users lack sufficient control over generated images to be treated as the "master mind" behind them. The fact that Midjourney's specific output cannot be predicted by users makes Midjourney different for copyright purposes than other tools

[5] https://www.midjourney.com/home
[6] https://www.copyright.gov/rulings-filings/review-board/
[7] https://supreme.justia.com/cases/federal/us/499/340/
[8] https://copyright.gov/docs/zarya-of-the-dawn.pdf P.5 Section C

used by artists. Therefore, Kashtanova was not the 'author' of such images generated by Midjourney for copyright purposes. [9]

(e) USCO and the courts did not consider the amount of time, effort, or expense required to create the work as a relevant basis for copyright protection, as this had no bearing on whether the work possesses the minimum requirement of creativity.[10] USCO also found that the edits made by Kashtanova to the images were too minor to contain a 'sufficient amount of original authorship' and hence did not qualify for copyright protection.[11]

*Théâtre D'opéra Spatial*[12]

(f) Facts: The decision was similar to *Kashtanova*, where the artwork created with the aid of Midjourney was held not to be protected by copyright despite the numerous prompts (hundreds of rounds of image generation) that were inputted into Midjourney. USCO rejected the argument that there was evidence of human authorship due to the creative inputs that went into each round, as the author's sole contribution was inputting the text prompt that created the image.[13]

*Thaler v Perlmutter*[14]

(g) Facts: Thaler used an AI system (the 'Creativity machine[15]') that he developed and owned to produce the work at issue[16]. The issue was whether there was sufficient human authorship for this work to be protected under copyright. The legal question was whether a work generated autonomously by a computer falls under the protection of copyright law upon its creation.

(h) Considerations: The court confirmed that US copyright law protects only works of human creation. However, the court acknowledged that this idea is malleable and adaptable – 'underlying that adaptability, however, has been a consistent understanding that human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is channelled through new tools or into new media.'

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[9] https://copyright.gov/docs/zarya-of-the-dawn.pdf P.9 Middle

[10] https://copyright.gov/docs/zarya-of-the-dawn.pdf P.10 Middle

[11] https://copyright.gov/docs/zarya-of-the-dawn.pdf P.11 Middle

[12] https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf

[13] https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf P.6

[14] https://www.copyright.gov/ai/docs/district-court-decision-affirming-refusal-of-registration.pdf

[15] https://creativitymachine.net/

[16] A recently publicized news article: https://www.dazeddigital.com/art-photography/article/60654/1/can-ai-ever-be-creative-new-court-case-law-creativity-machine-stephen-thaler

(i) Nonetheless, copyright has not stretched as far 'to protect works generated by new forms of technology operating absent any guiding human hand'. As such, since the work was created autonomously by the machine, there was insufficient human authorship, hence the work was not protected under copyright.

*Suryast*[17]

(j) Facts: This was a case that was litigated in different jurisdictions. The work in issue was created using RAGHAV ('Robust Artificially Intelligent Graphics and Art Visualizer'), a style transfer tool, which generates a new image from a base image, applying the 'style' of a chosen picture. The issue was whether this new image generated by RAGHAV was protected by copyright. 'When analysing AI-generated material, the Office must determine when a human user can be considered the 'creator' of AI-generated output.' USCO quoted the guidance issued by the Copyright Office, which explained that, in considering an application for registration, the Office will ask[18]: *'[W]hether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine.'*

(k) This is to be done on a case-by-case basis, taking into account all the circumstances, in particular how the AI tool operates and how it is used to create the final work.

(l) Considerations: USCO held that the work was not the product of human authorship as the expressive elements of pictorial authorship were not provided by Sahni (the applicant who applied to register the work). Sahni merely provided the base image (a photo taken by him), a style image (Van Gogh's "Starry Night") and a numerical value which determined the strength of the style transfer. As a result, the work was not protected by copyright.

(m) Conversely, the Indian Copyright Office accepted an application to make both Sahni and the AI (RAGHAV) as the co-authors of the work.[19] Additionally, the approach taken by the Canadian Intellectual Property

[17] https://www.copyright.gov/rulings-filings/review-board/docs/SURYAST.pdf

[18] https://www.federalregister.gov/documents/2023/03/16/2023-05321/copyright-registration-guidance-works-containing-material-generated-by-artificial-intelligence

[19] https://www.managingip.com/article/2a5czmpwixyj23wyqct1c/exclusive-india-recognises-ai-as-co-author-of-copyrighted-artwork

Office was that, for the first time, the Canadian Intellectual Property Office[20] recognized the AI (RAGHAV) and Sahni as the co-authors in the work.[21]

Mainland China:

*Li vs Liu*[22]

(n) Facts: Li filed a copyright lawsuit alleging that Liu, by using an AI-generated picture (generated by Li), had violated his copyright. The pictures were generated by Stable Diffusion[23] (a US-based text to picture AI service). The court considered (i) whether the AI-generated picture constituted a work capable of copyright and hence subject to copyright protection; (ii) if so, who is the copyright owner of the AI-generated picture.

(o) Considerations: According to Article 3 of the Copyright Law of the People's Republic of China, when examining whether something should be protected by copyright, the following should be considered: (1) whether it fell under the realm of literature, art, or science; (2) whether it was original; (3) whether it was expressed in a certain form; (4) whether it was an intellectual achievement. The court found elements (1) and (3) satisfied.[24]

(p) With regard to 'intellectual creations', the court found that by reason of the provided intellectual input in choosing the preferred AI system, inputting prompts and setting various technical parameters, the work satisfied the criteria of 'intellectual creations'.[25] Originality 'requires that the work be completed independently by the author and reflect the author's personalised expression' [26] The court held that despite not physically drawing the lines, there was sufficient originality in Li designing the character styles, arranging the composition of the picture through entering different prompts and setting different parameters. As a result of these aesthetic choices and personal judgement, the court found that there was sufficient originality.[27]

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[20] https://cms.cippic.ca/uploads/Notice_of_Application_CIPPIC_v_Sahni_Fed_Ct_No_T_1717_24_e3c1d14b95.PDF

[21] https://www.ic.gc.ca/app/opic-cipo/cpyrghts/dtls.do?fileNum=1188619&type=1&lang=eng&wbdisable=true

[22] https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf

[23] https://stablediffusionweb.com/

[24] https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf P.10 bottom

[25] https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf P.11 top and middle

[26] https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf P.11 bottom

[27] https://english.bjinternetcourt.gov.cn/pdf/BeijingInternetCourtCivilJudgment112792023.pdf P.12 top and middle

(q) The court ultimately concluded that the picture was protected under copyright, and that Li was the owner of the copyright subsisting in the picture.

(r) The court made a distinction between a solely computer-generated output versus output where there is creative involvement on the part of the human author. In contrast, the USCO adopts a different approach as to what will constitute 'human authorship' and often holds in cases which involve AI generated works, that there is lack of authorship for the work to be protected by copyright.

## 7. Type 2 – Jurisdictions with CGWs provisions

(a) In these jurisdictions, original LDMA works or works of a similar nature must have human authorship to qualify for copyright protection. The degree of human involvement required for works generated by AI systems is assessed on a case-by-case basis to determine their entitlement to copyright protection.

UK:

*Nova Productions Ltd v Mazooma Games Ltd & Ors*[28]

(b) Facts: Nova claimed that Mazooma (and others) infringed its copyright in its computer game (called 'Pocket Money') based on pool.

(c) Considerations: The court held that a person playing a computer game was not the author of screenshots taken while playing the game and had not undertaken any of the arrangements necessary for the creation of the images. Instead, the persons who made the arrangements necessary for the creation of the screenshots were the game's developers.

*Thaler v Comptroller General of Patents Trademarks and Designs.*[29]

(d) The UK Supreme Court ruled that AI cannot be named inventors of patents. Although this is not a matter directly related to copyright, this case may be used as a reference point.

[28] https://www.bailii.org/ew/cases/EWCA/Civ/2007/219.html

[29] https://www.bailii.org/ew/cases/EWCA/2021/1374.html

(e) As an aside, the Copyright, Designs and Patents Act 1988[30] has the same definitions for 'computer generated' [31] and 'author' [32] for computer generated works as are in the CO.

(f) The UK government's response to AI is now undertaken by the Office for Artificial Intelligence[33] and its response for the interrelationship between copyright and AI[34] was that as part of the consultation, a voluntary code of practice was developed in June 2023[35]. However, as of February 2024, the Department for Science, Innovation & Technology issued a government response[36]. Recent reports indicate that the voluntary code has now largely been put on pause for various reasons including that the government required greater transparency from AI developers.

India:

(g) See the approach taken by the Indian Copyright Office with regard to the *Suryast* case mentioned at paragraph 5(j) to (m).

(h) Furthermore, the Parliament of India in its 161st Report – Review of the IP Rights Regime in India where the Committee recommended that a separate category of rights for AI and AI related inventions and solutions should be created for their protection as intellectual property rights ("IPRs"). It was further recommended that the Department Related Parliamentary Standing Committee on Commerce should make efforts in reviewing the existing legislation in The Patents Act, 1970 and Copyright Act, 1957 to incorporate the emerging technologies of AI and AI related inventions in their ambit.[37]

Canada:

(i) See the approach taken by the Canadian Intellectual Property Office with regard to the *Suryast* case mentioned at paragraph 5(j) to (m).

(j) Although Canadian copyright jurisprudence suggests that 'authorship' must be attributed to a natural person who exercises skill and judgement in creating the work and it recognizes that a human may contribute sufficient skill and judgement in a work produced with the assistance of AI

[30] https://www.legislation.gov.uk/ukpga/1988/48/contents
[31] https://www.legislation.gov.uk/ukpga/1988/48/section/178
[32] https://www.legislation.gov.uk/ukpga/1988/48/section/9
[33] https://www.gov.uk/government/organisations/office-for-artificial-intelligence
[34] https://www.gov.uk/guidance/the-governments-code-of-practice-on-copyright-and-ai
[35]
[36] https://assets.publishing.service.gov.uk/media/65c1e399c43191000d1a45f4/a-pro-innovation-approach-to-ai-regulation-amended-governement-response-web-ready.pdf
[37] https://drive.google.com/file/d/1L-9ugGmHIwFZTskpeillFE2yzYeippYu/view P.100-101 para. 16/8.5

technologies to be considered the author of the work, this criterion would be much harder to meet for works produced by generative AI systems, which are based solely on short instructions by human users.[38]

(k) The Canadian government has flagged three potential legislative options to address this, namely: (i) clarification that copyright extends only to human-created works; (ii) attribute authorship and copyright protection to AI-generated works, but only to the person(s) that used the AI to arrange for the work to be created; or (iii) implement a new and unique set of rights for AI-generated works.[39]

CIP position

8. As an overview, currently, Hong Kong (and the UK) has specific provisions for CGWs. However, the provisions governing this are vague and can be subject to wide interpretation. The absence of a leading Hong Kong case authority on this matter makes it more difficult to decipher and understand how AI generated works are protected.

9. Different jurisdictions have adopted different approaches. For example, the US has a strong view that there must be '*human* authorship' in order for a work to be protected by copyright. Despite this, there is flexibility as to whether AI is being aided by a human, or whether AI is the only author of the work. Mainland China, however, has a more lax approach in allowing copyright protection in cases where the human has done enough prompting of the AI.

10. The CIP does not find that the CO offers adequate protection to AI-generated works due to a lack of clarity in policy, statutory instruments and cases but this is clearly a struggle that affects multiple jurisdictions as already explained hereinabove.

11. The CIP recommends that Hong Kong's legislation should first clarify when there is human authorship (and hence when the work would be protected under the existing provisions). A decision needs to be made as to the proper approach to be taken. Secondly, Hong Kong needs to clarify the requirement of originality in cases where it is held that the work is a CGW under the CO since

[38] https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-paper-consultation-copyright-age-generative-artificial-intelligence#s22 para.2.2

[39] https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-paper-consultation-copyright-age-generative-artificial-intelligence#s22 para.2.2.3

only then will CGWs be protected by meeting the requirement of originality. Nonetheless, the aspect of "human authorship" as a whole is endorsed by the CIP.

12. The CIP strongly recommends a task force be established to consider the aforementioned issues akin to what is being carried out in multiple jurisdictions as already explained.

13. The second query posed at 2.36 was as follows:

*"Have you relied on the CGWs (i.e. computer generated works) 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?"*

CIP position

14. This is a business related matter that goes beyond the purview of the CIP.

15. The third query posed at 2.36 was as follows:

*"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."*

16. Contractual arrangements may appear to provide a practical solution for addressing copyright issues concerning AI CGWs but there may be an issue of an "imbalance of arms" and anti-competitive practices due to the strong if not nearly monopoly-based hold that that the biggest generative AI companies have in the market.

17. Competition authorities are facing the challenge of enabling consumers to experience the benefits of emerging AI markets whilst at the same time minimising associated risks of potentially anti-competitive behaviour and practices. To demonstrate the potential monopoly that the biggest generative AI companies have in the market, we have to look to the current AI related investigations globally and then consider the different regulatory approaches

which have been adopted to minimise the risk of anti-competitive behaviour in order to suggest a path forward for Hong Kong.

Known current AI-related investigations:

United States:

18. The Federal Trade Commission ("US FTC") issued orders to five companies (Alphabet, Inc., Amazon.com, Inc., Anthropic PBC, Microsoft Corp., and OpenAI, Inc.) requiring them to provide information regarding recent investments and partnerships involving generative AI companies and major clouds service providers. The aim is to scrutinize corporate partnerships and investments with AI providers to build a better internal understanding of these relationships and their impact on the competitive landscape.[40]

19. Following these enquiries, the FTC and Department of Justice ("US DOJ") will perform subsequent investigations into some of the biggest players in the generative AI space for potential anti-competitive conduct. This includes Nvidia and its leading position in supplying the high-end semiconductors underpinning AI computing, and Microsoft and OpenAI's strong position with the rapidly evolving AI technology, particularly around the technology used for large language models.

European Union ("EU"):

20. The EU AI Office's Commission on Digital Strategy [41] ("the EU Commission") formally sent requests on March 2024 for information under the Digital Services Act[42] to Bing and Google Search, as well as to Facebook, Instagram, Snapchat, TikTok, YouTube, and X. The EU Commission requested information on their respective mitigation measures for risks linked to generative AI, and the dissemination and the creation of generative AI content.[43]

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[40] https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships

[41] https://digital-strategy.ec.europa.eu/en

[42] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en

[43] https://digital-strategy.ec.europa.eu/en/news/commission-sends-requests-information-generative-ai-risks-6-very-large-online-platforms-and-2-very#:~:text=The%20Commission%20is%20requesting%20these,manipulation%20of%20services%20that%20can

21. EU member states such as Germany and France have also displayed an increasing interest in generative AI and antitrust issues. Germany has investigated Microsoft's involvement and cooperation with OpenAI[44], whilst France has launched a public consultation into how large technology companies approach AI. Separately, the French competition watchdog fined Google €250 million in March 2024 for "content scraping" from online news websites without permission to train its Gemini generative AI chatbot.[45]

UK:

22. In April 2024, the Competition and Markets Authority (CMA) launched enquiries into whether commercial partnerships and hiring practices involving Amazon and Anthropic PBC, Microsoft and Inflection AI, and Microsoft and Mistral AI were anticompetitive[46]. It also invited comments on Microsoft's investment in OpenAI, and a decision on whether to launch a formal investigation into whether this investment amounted to a notifiable merger under UK competition law is expected.

Known current AI-related regulation:

EU:

*Digital Markets Act ("DMA")*[47]

23. The DMA aims to ensure contestable and fair markets in the digital sector. It regulates gatekeepers, which are large digital platforms that provide an important gateway between business users and consumers whose position can grant them the power to create a bottleneck in the digital economy.

24. The EU Commission has formally brought six companies (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft) within the scope of the DMA by designating them as gatekeepers[48].

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[44] https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2023/B6-34-23.pdf?__blob=publicationFile&v=6

[45] https://www.reuters.com/technology/french-competition-watchdog-hits-google-with-250-mln-euro-fine-2024-03-20/

[46] https://www.gov.uk/government/news/cma-seeks-views-on-ai-partnerships-and-other-arrangements

[47] https://digital-markets-act.ec.europa.eu/index_en

[48] https://digital-markets-act.ec.europa.eu/gatekeepers_en

*Artificial Intelligence Act ("AI Act")*[49]

25. The AI Act, which came into force on 1 August 2024[50] [51], will have an impact on competition enforcement across the EU. For example, the broad procedural powers provided to the relevant supervisory agencies, can be transferred to national competition authorities. In addition, the enhanced transparency of AI systems necessitates the sharing of important information between companies.

UK:

*Digital Markets, Competition and Consumers Act ("the Act")*[52]

26. The Act introduces the Strategic Market Status ("SMS") regime[53], allowing the Competition & Markets Authority[54] ("CMA") Digital Markets Unit[55] to designate firms as having SMS if they have *"substantial and entrenched market power"* and *"a position of strategic significance"* in relation to digital activities linked to the UK. If a firm is designated as having SMS, then they will have to comply with a series of obligations, including codes of conduct, mandatory merger reporting requirements and pro-competition interventions.

27. The Act introduces changes to the UK's existing merger control and antitrust investigations but most notable to the issue at hand is the impact on consumer protection. The CMA will be able to directly enforce consumer protection laws in the UK and sanction breaches, meaning that cases do not need to go through the courts. The Act also creates new, specific obligations in relation to subscription traps, obliging companies to make it easier for customers to provide informed consent before subscribing and related decision making on the part of consumers.

CIP position

28. There are various on-going (and concluded) AI related investigations globally which demonstrates a heightened attention to the potential of dominant companies engaging in anti-competitive behaviour in the AI sector. This

[49] https://artificialintelligenceact.eu/
[50] https://www.europarl.europa.eu/news/en/press-room/20240308IPR19015/artificial-intelligence-act-meps-adopt-landmark-law
[51] https://artificialintelligenceact.eu/the-act/
[52] https://bills.parliament.uk/bills/3453
[53] https://www.gov.uk/government/collections/digital-markets-unit
[54] https://www.gov.uk/government/organisations/competition-and-markets-authority
[55] https://www.gov.uk/government/collections/digital-markets-unit

monitoring is continuing, such as while the EU determined that the relationship between Microsoft and OpenAI is not considered a merger, it appears that the EU Commission is still monitoring big technology companies' AI partnerships and their effects on competition.

29. As there is potential anti-competitive behaviour related to AI, it is important to consider whether contractual arrangements in the market provide a practical solution for addressing copyright issues concerning AI-generated woks. If there is anti-competitive behaviour exhibited by dominant AI / AI-related companies, this may result in unfair contracts towards consumers. As a result, investigations and possibly more rigorous regulations need to be in place to ensure that consumers have a better understanding of the contracts they enter into with dominant AI / AI-related companies with more transparency.

30. The CIP would recommend consideration by the Competition Commission as to whether there is any need to amend the Competition Ordinance to specifically address potential anti-competitive behavior relating to contractual arrangements relating to AI.

**Copyright Infringement Liability for AI-generated works – 3.20**

31. The first query posed at §3.20 was as follows:

*"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."*

CIP position

32. We would generally reply that the *"existing law"*, is *"broad and general enough"*. As such, the comments in §3.19 of the Copyright & AI Paper are agreed to.

33. The second query posed at §3.20 was as follows:

*"Have you experienced any difficulties or obstacles in pursuing or defending legal claims on copyright infringements arising from AI-generated works? If*

*so, what are such difficulties or obstacles?"*

CIP position

34. We refer to the foregoing parts of this response and would generally reply that due to the absence of a leading Hong Kong case authority on this matter, the CIP is unable to respond at present.

35. The third query posed at §3.20 was as follows:

*"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?"*

CIP position

36. We agree that agree "*the availability of contractual terms between AI system owners and end-users for governing AI-generated works*" appear generally to offer a concrete and practical basis for resolving disputes over civil liability[56] for copyright infringements as such, so long as there are on-going efforts to investigate and consider reform to address potential anti-competitive behavior of AI system owners related companies, at present, is sufficient.

37. However, for "criminal related"[57] CO cases, the CIP would note the following matters.

38. An issue which arises is whether there should be criminal liability if a person sells or distributes an AI-generated work for trade or business purposes, with knowledge that the work is an infringing copy of a copyright work.

39. Copyright infringement generally attracts civil liabilities in Hong Kong. However, certain circumstances as specified the CO, such as unauthorised communication of a copyright work to the public for or in the course of any trade or business consisting of communicating works to the public for profit or reward, will further attract criminal liabilities, including imprisonment

[56] https://www.hklii.hk/en/legis/ord/528/P2_D2

[57] https://www.hklii.hk/en/legis/ord/528/s118, https://www.hklii.hk/en/legis/ord/528/s119, https://www.hklii.hk/en/legis/ord/528/s119A, https://www.hklii.hk/en/legis/ord/528/s119B, https://www.hklii.hk/en/legis/ord/528/s120

and/or fine. Reference is made to sections 118 to 120A of the CO which details the offences which will entail criminal liability.

40. There are currently no known specific laws in any country that establish criminal liability solely for AI-related copyright infringement. However, in most countries, general copyright laws would apply if the AI-generated work has been recognised as a copyrighted work.

US:[58]

41. S.506 of Title 17 of the United States Code[59] sets out the copyright offences which will attract criminal liability. Criminal copyright infringement requires that an infringer act 'wilfully' to be liable.[60] However, the definition of 'wilful' has been loosely defined. *Cheek v United States*[61] sets out the government's burden of proof, which is to show that the defendant 'voluntarily and intentionally' violated a known legal duty.[62] A notion of a good faith belief that the conduct in question was innocent can be used to defeat the 'wilfulness' element.

UK:

42. S.107 of the Copyright, Designs and Patents Act 1988[63] sets out the situations where criminal liability will arise for copyright infringement. These mainly include infringing of copyright for commercial purposes.

Mainland China:

43. Articles 217 and 218 of the Criminal Law of the People's Republic of China[64] sets out the situations[65] where criminal liability will arise for copyright infringement.

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[58] https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1849&context=hastings_comm_ent_law_journal

[59] https://www.govinfo.gov/content/pkg/USCODE-2023-title17/pdf/USCODE-2023-title17-chap5-sec506.pdf

[60] U.S.C. S.17(506)(a)(1), (2)

[61] https://supreme.justia.com/cases/federal/us/498/192/

[62] *Cheek v United States* at 201

[63] https://www.legislation.gov.uk/ukpga/1988/48/section/107

[64] http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384075.htm

[65] *Article 217 Whoever, for the purpose of making profits, commits any of the following acts of infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined :*

CIP position

44. There should be criminal liability if a person sells or distributes an AI-generated work for trade or business purposes, with knowledge that the work is an infringing copy of a copyright work but the issue of whether copyright is established is an issue that remains somewhat unresolved as already explained as per the earlier parts of this response. However, given the uncertainty as to whether the AI-generated works in question are copyright protectable in the first place (as commented above), there is uncertainty to the user as to when he/she will be exposed to risk of being criminally liable for the act.

45. Furthermore, the CIP would advise that conditions should be put into statutory law with aspects reflecting the necessity of showing "willfulness" via a defence of good faith, as found under US law. The CIP considers this to be sensible and fair under criminal copyright cases.

**Possible Introduction of Specific Copyright Exception – 4.18**

46. The first query posed at §4.18 was as follows:

*"What further justifications and information can be adduced to support (or roll back) the idea of introducing the Proposed TDM Exception into the CO with a view to incentivising the use and development of AI technology and pursuing overall benefits?"*

CIP position

47. The CIP has considered the position as per Chapter 4 of the Copyright & AI Paper and has no further comments on the same.

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*(1) reproducing and distributing a written work, musical work, motion picture, television programme or other visual works, computer software or other works without permission of the copyright owner;*
*(2) publishing a book of which the exclusive right of publication is enjoyed by another person;*
*(3) reproducing and distributing an audio or video recording produced by another person without permission of the producer; or*
*(4) producing or selling a work of fine art with forged signature of another painter.*
*Article 218 Whoever, for the purpose of making profits, knowingly sells works reproduced by infringing on the copyright of the owners as mentioned in Article 217 of this Law shall, if the amount of illegal gains is huge,, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.*

48. The second query posed at §4.18 was as follows:

*"How would the Proposed TDM Exception overcome the obstacles/limitations you have experienced in conducting TDM activities and facilitate the development of your business and industry?*

CIP position

49. The CIP has considered the position as per Chapter 4 of the Copyright & AI Paper and has no further comments on the same. Furthermore, this appears to be more of a business related matter that goes beyond the purview of the CIP.

50. The third query posed at §4.18 was as follows:

*"Is copyright licensing commonly available for TDM activities? If so, in respect of which fields/industries do these licensing schemes accommodate? Do you find the licensing solution effective?"*

51. Whilst there are several licensing bodies[66] that represent copyright owners[67], the CIP is not aware that currently, any of them offer a specific option to obtain permission to use the licensed material for TDM purposes. If a licence for TDM purposes is required, it is likely that one will have to contact the relevant licensing body(s) directly to discuss the application of such a license.

Some examples of TDM in the public non-governmental sector

52. The Hong Kong University of Science and Technology Library ("HKUST Library") Research Support Services did a study on the TDM policies of some of the databases used by the HKUST Library.[68]

53. The study involved 13 full-text databases and found that 3 of them did not permit TDM at all whereas the majority of the publishers that support TDM offer the service free-of-charge subject to certain terms and conditions. It was also found that the data mining and data delivery methods may also be quite

[66] https://www.hklii.hk/en/legis/ord/528/s145
[67] https://www.ipd.gov.hk/en/copyright/copyright-licensing-bodies-registry/registered-licensing-bodies/index.html
[68] https://library.hkust.edu.hk/sc/tdm-databases/

different. Examples of the specific requirements and services offered by some of the publishers can be found at https://libguides.hkust.edu.hk/tdm.

CIP position

54. Apart from the licensing for TDM activities described in the study by the HKUST Library Research Support Services, the CIP is not aware of any other copyright licensing commonly available for TDM activities. CIP's research indicates that at present in Hong Kong, TDM CIP mainly covers the educational sector.

55. The fourth query posed at §4.18 was as follows:

*"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?*

56. CIP agrees with the imposition of the conditions set out in paragraph 4.17 of the Copyright & AI Paper. However as the CEDB has indicated, each jurisdiction crafts the exceptions differently as shown in the Appendix of the Copyright & AI Paper. In considering conditions the Proposed TDM Exceptions should be accompanied with, reference should be made to the conditions imposed in the different jurisdictions as discussed below.

57. A purpose limitation in a TDM exception is designed to restrict its application to non-commercial research and educational activities, balancing the interests of copyright holders and users. This restriction would be in line with current policies of the databases, which allow their data to be used for TDM purposes for non-commercial and educational purposes. This restriction can also be found in the TDM exception provisions from various countries. For instance, the European Union's Directive (EU) 2019/790[69] allows TDM for scientific research under Article 3, ensuring that researchers can access and analyse data without infringing copyrights, as long as it is for non-commercial purposes.

[69] https://eur-lex.europa.eu/eli/dir/2019/790/oj

Similarly, in Japan, the Copyright Act was amended to include Article 47-4[70], permitting TDM for data analysis, provided it is for non-profit purposes.

58. What constitutes "non-commercial" can be challenging, as collaborations between academic and commercial entities often blur these lines. The purpose limitation aims to prevent the exploitation of copyrighted works for profit without consent, ensuring that the original creators' rights are respected. By focusing on educational and research goals, jurisdictions encourage the growth of knowledge and technology while maintaining a fair environment for content creators. This approach helps foster innovation and research, crucial for societal advancement, while protecting intellectual property rights.

59. Access restrictions in a TDM exception ensure that TDM activities are conducted only on legally obtained content with the European Union's Directive (EU) 2019/790, Article 3, mandating that TDM is permissible only if researchers have lawful access to the works.

60. In the UK, the Copyright, Designs and Patents Act 1988, as amended under s.29A[71], allows TDM for non-commercial research if the content is lawfully accessed.

61. Monitoring and verifying the legality of access can be complex, especially with large data sets from multiple sources. Access restrictions balances the needs of researchers and creators, ensuring that TDM serves the public interest while respecting intellectual property rights.

62. Copyright owners may invoke an "opt-out limitation" to exclude their copyright works from TDM activities, providing a balance between innovation and control over intellectual property.

63. In the EU, the Directive on Copyright in the Digital Single Market (Directive 2019/790) allows rights holders to opt out of TDM for commercial purposes by reserving their rights through machine-readable means. Article 4(3) specifically states that rights holders must express their opt-out explicitly. Similarly, Japan's copyright law permits rights holders to opt out by clearly indicating restrictions, primarily to protect their commercial interests. In the United States, while there are no specific TDM exception, the fair use

[70] https://www.japaneselawtranslation.go.jp/en/laws/view/3379#je_ch2sc3sb5at28
[71] https://www.legislation.gov.uk/ukpga/1988/48/section/29A

doctrine[72] provides some flexibility, though copyright holders can still impose restrictions through licensing agreements.

64. An opt-out mechanism is a crucial tool for copyright holders, enabling them to maintain control over their works while allowing researchers and non-commercial entities to benefit from TDM exceptions.

CIP position

65. The CIP has considered the position as per Chapter 4 of the Copyright & AI Paper and would refer the CEDB to the relevant commentary hereinabove.

CONCLUSION

66. CIP looks forward to there being improved and growing use of AI in Hong Kong subject to such use being properly protected and regulated with clearer statutory provisions arrived at after further detailed consultations at all levels of business, governmental and quasi-governmental bodies.

3 October 2024

Committee on Intellectual Property

Hong Kong Bar Association

[72] https://www.copyright.gov/fair-use/#:~:text=About%20Fair%20Use&text=Section%20107%20of%20the%20Copyright,may%20qualify%20as%20fair%20use.