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6 September 2024

Mr Algernon Yau, JP
Secretary for Commerce and Economic Development
Commerce and Economic Development Bureau
23/F, West Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Algernon,

Re: Public Consultation on Copyright and Artificial Intelligence

The Hong Kong General Chamber of Commerce welcomes the opportunity to comment on the subject consultation.

We generally concur with the Government's proposed amendments to the Copyright Ordinance (Cap 528), which are in tandem with Hong Kong's advancements as a leading hub in innovation, intellectual property trading and cultural exchange, amidst the global artificial intelligence (AI) growth landscape. A clear, proactive and balanced legal framework would be crucial to supporting the vibrant development of businesses in this respect.

Our response also addresses primarily the issue of the copyright protection of AI-generated original works, and the introduction of a new exemption to cover the use of copyrighted works for the purpose of computational data analysis and processing – reflecting at the same time a divergence of views on the concept of originality, and the rights of copyright owners and users. Further details are elaborated in the attached.

We hope you will find our comments useful.

Yours sincerely,

Patrick Yeung
CEO

Encl.

Commerce and Economic Development Bureau Consultation Paper *Copyright and Artificial Intelligence* (July 2024)

Submission by The Hong Kong General Chamber of Commerce (HKGCC)

Introduction

1. HKGCC welcomes this opportunity to comment on the views set out by the Bureau in the Consultation Paper (CP).

2. We agree that with the rapid development of artificial intelligence (AI), it is timely to examine whether any amendments to the Copyright Ordinance (Cap 528) (the CO) need to be made to reflect this development. We agree that this is a necessary part of the Government's strategy to enhance Hong Kong's role as a regional intellectual property trading centre, an international innovation and technology centre, and an East- meets-West centre for international cultural exchange under the National 14th Five-Year Plan.

3. As the CP indicates, there are broadly two aspects to consider: (a) whether the CO sufficiently protects original works created through the use of AI (or whether any amendments to the CO are necessary to achieve this); and (b) whether there should be a new exemption in the CO to cover the use of copyrighted works for purpose of computational data analysis and processing, including through the use of AI. We set out our views on these issues below.

Does the CO sufficiently protect original works created through the use of AI?

4. Chapters 2 and 3 of the CP conclude that the existing provisions of the CO give adequate copyright coverage to persons generating original work through AI, and give them adequate protection if their copyright is infringed. With one possible exception, we agree with these conclusions, and the analysis that justifies them. The CO provisions are largely flexible enough to deal with copyright in AI-generated works, and HKGCC believes that new regulation should only be introduced if there is a demonstrable need for such, which there does not appear to be in this case, with one exception.

5. The possible exception concerns the requirement that, for works to be covered by copyright, they have to be original. The CP notes that "The originality requirement has all along been understood as human-centric. The absence of leading case authority as to whether, and if so, how CG LDMA works could be sitting well with the traditional originality requirement leaves room for interpretation as to how these works would be evaluated for satisfying the originality requirement under the current law".[1]

6. The CP mentions two alternative "plausible and justifiable propositions" that have been put forward by jurists to determine originality in the case of Computer Generated (CG) literary, dramatic, musical and artistic works (LDMA) works, but recommends that it should be left to the courts to determine the appropriate test

[1] CP para 2.21.

through the case law.[2] However, having identified an issue as to the meaning of originality in the case of CG LDMA works, the predominant view amongst our members is that it is for the Government to propose to LegCo what the definition of originality should be in this context, and this definition should be in the legislation itself, not left to the courts to decide. This would give increased legal certainty to businesses, which is particularly important in a high-risk innovative sector such as this one, as well as avoiding potentially costly and time-consuming litigation. An alternative view, however, is that the generation of creative works using AI remains human-centric, and that therefore the existing legislation, as interpreted and applied by the courts, should be sufficient.

Should there be a new exemption in the CO to cover the use of copyrighted works for purpose of computational data analysis and processing, including through the use of AI?

7. We agree with the proposed new exemption. The reasons advanced in the CP for such an exemption, including promoting AI development and wider economic growth, [3] are particularly compelling in the Hong Kong context, given the Government's strategy to enhance Hong Kong's role as a regional intellectual property trading centre, an international innovation and technology centre, and an East- meets-West centre for international cultural exchange under the National 14th Five-Year Plan.

8. Such an exemption would also provide much-needed legal certainty and help avoid the legal disputes and protracted litigation which the CP points out has arisen in other jurisdictions. [4] It would also preserve Hong Kong's international competitiveness in this area by aligning itself with similar exceptions in other jurisdictions such as the EU, Japan and Singapore.

9. The predominant view amongst our members is that an opt-out provision for copyright owners, whereby they can expressly reserve their rights, should be included in the new legislation, and that this would provide an appropriate balance between the interests of copyright owners and copyright users. However, an alternative view is that such an opt-out provision or licensing schemes for copyrighted works, if widely-adopted, could hinder innovation and investment. If an opt-out provision is to be included, consideration should be given as to how the exercise of an opt-out should be publicised, i.e., brought to the attention of copyright users in a clear, standardized machine-readable manner, who might otherwise wish to rely on the exception.

Conclusion

10. The development of a clear, proactive and balanced legal framework to address copyright issues stemming from the advancement of AI is timely for Hong Kong, in light of existing regulatory trends across the globe. At the same time, we acknowledge that AI is a vast subject matter, and given the proliferation of

[2] CP para 2.22.
[3] CP para 4.13.
[4] CP para 4.11.

generative AI models, updates to the Copyright Ordinance alone would not suffice in dealing with ethical, transparency and data security issues, amongst others, which are interweaved into its developments. We look forward to contributing our views on other subject matters considered to be of importance to the Government as it continues to promote the "development and application of AI-related technology taking into account the prevailing laws as well as the actual circumstances of Hong Kong".[5]

HKGCC Secretariat
September 2024

[5] CP para 5.20.