

September 8, 2024

Commerce and Economic Development Bureau
Intellectual Property Department
22/F-23/F, West Wing, Central Government Offices,
2 Tim Mei Avenue, Tamar, Hong Kong

RE: Public Consultation on Enhancing Copyright Ordinance Regarding Protection For Artificial Intelligence Technology Development

ACT | The App Association (the App Association) provides this response to the Commerce and Economic Development Bureau, Intellectual Property Department (the Agency) request for comments on enhancing Copyright Ordinance regarding protection for artificial intelligence (AI) technology development.

I. Introduction and Statement of Interest

The App Association is a policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. App developers like our members also play a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property protections. The value of the ecosystem the App Association represents—which we call the app ecosystem—is approximately ¥ 6,540,095,390,000 globally and is responsible for millions of jobs.

The small business community that the App Association represents relies on intellectual property (IP) to grow and create jobs, and the App Association urges the Agency to recognize that its approach to AI should prioritize both providing reasonable and technology-neutral protections and enabling AI tools to prevent and address IP infringement. App Association members are at the forefront of the development of AI across consumer and enterprise use cases and have a strong interest in the policies that impact the development of AI solutions, including those in the context of IP. We recognize that the rise of AI holds great promise, yet also generates many legal and policy questions, and those around IP are no exception.

For software developers, including App Association members, generative AI platforms are advanced technical tools that are invaluable to creative and innovative processes by reducing wasted resources (i.e., cost and time), streamlining repeatable tasks, and optimizing solutions. Software developers have been using AI tools that heavily rely on human cognition to deliver a desired output for years, but generative AI tools reduce the need for human instruction. AI tools generally improve the software coding process and further help train a new generation of strong software developers. Machine learning (ML) AI systems can complete repeatable tasks and detect common mistakes, issues, and risks in the software development process that would otherwise require manual interventions. Software developers use AI to run quality assurance checks that reduce the chance of human bias and error and the potential for disrupting production timelines because a critical mistake was not diagnosed early enough.

Generative AI tools are unique from traditional AI tools in that they have an independent process that mimics human cognition to develop new outputs. For software developers, generative AI platforms not only seamlessly predict and complete lines of code, but they produce outcomes by training on public-facing data that was not initially provided by the platform owner. While generative AI platforms bring new efficiencies to software development, the use of such technology comes with growing pains. This area of law and policy is being contemplated and litigated and has invoked fear around how AI might infringe IP-protected data and expose proprietary information. The potential for generative AI platforms to train on and output data that is covered by IP protections has become more than theoretical.

II. ACT | The App Association Provides Feedback on Copyright Protections and AI

A. Copyright protection of AI-generated works

While works entirely produced by generative AI should not be protected by copyright law, an individual or entity using a generative AI system should be able to own copyright in the yielded output. The ability for copyright to vest in a generative AI platform's user should depend on the amount of human authorship contributed to the work. Copyright extended to a work that generative AI helped create should not extend to the AI system's internal algorithm or data that it was trained on. It is important that the Agency continues to recognize that generative AI systems, when used as a tool to output its user's original intellectual conception, should not diminish the ability to secure copyright protection over the conceived output outside a proper analysis for copyright protection. As technology evolves, it is important for copyright law to continue to balance the incentive for intellectual and creative expression in humans with the efficiency provided by tools that can perform tasks more autonomously.

When AI-generated material meets the elements of copyrightability, including having sufficient human authorship, it should be given copyright protection. While there are fears around the use of generative AI platforms, they provide significant efficiencies to industries, including software development. The Agency should consider implementing guidance for its stakeholders on the use of generative AI platforms to develop copyright protectable work that is balanced and should contemplate how burdensome laws, policies, and licensing requirements would dissuade people from using advanced AI technologies. Today, many small business software developers cannot compete without the use of AI systems. While well-resourced businesses may be able to remain competitive without generative AI platforms, small businesses and startups rely on its efficiencies.

B. Copyright infringement liability for AI-generated works

Much like a human brain, AI systems train on data to understand patterns and create rules that help them make decisions. However, like a human brain, generative AI might output, in part or in whole, an image, writing, wordmark, or other IP protectable work that it was trained on. Where a generative AI system does produce an infringing work, App Association members are concerned about the liability of a platform user that unintentionally incorporates the infringing output in their final product. The law is still developing on this issue, and the outcome of current proceedings can impact the speed of innovation and liability of platform users, including software developers, that are likely unaware that they are using IP-protected, or otherwise proprietary information. For example, if it is revealed that generative AI platforms are, in some

cases, effectively copy-and-pasting data, the impact can be catastrophic because of the amount of code that has already been written, and continues to be written, using AI co-pilots. In practice, it is also nearly impossible to discern each line of code developed through generative AI. As another prime example, a platform's use of open-source software and the use of open-source AI platforms has copyright implications. While copyright law generally provides an author the exclusive rights to make, sell, or otherwise use their work, unless contractually assigned to another entity, the creator of open-source software dedicates their work to the public under licensing terms, that, when not complied with, constitutes as copyright infringement. A tenant of open-source licensing is that the source code is available to the public. This collaborative approach to software innovation has accelerated efficiencies in developing secure, cost-efficient, and advanced solutions for businesses and their consumers. Notably, the Open Software Initiative (OSI) has developed the Open-Source Definition (OSD), which contains rules defining the boundaries of open-source licensing.

While some companies are developing open-source large language models (LLMs), there are widely used platforms, like OpenAI and GitHub, that use closed-source LLMs. These closed-source LLMs have been accused of scraping and training on open-source software without adhering to licensing terms, implicating their owners in copyright and contract law. This issue around closed-source LLMs using open-source software raises issues about liability for platform users as well as the erosion of the open-source model.

App Association members operate with minimal resources and are most acutely harmed by unpredictable copyright outcomes related to liability. The interdependent relationship between a generative AI platform and its users is important. Generative AI platforms are essential for software developers to compete because it provides significant efficiencies in the coding process. As this type of relationship grows, standards of practice implemented by the generative AI platforms and its users will be imperative to protecting against IP and proprietary data theft.

We appreciate the Agency's initiative to examine the copyright law and policy issues raised by AI technology, including issues related to generative AI tools. Since the law is developing, we urge the Agency to take a fact-finding and informative role for its stakeholders. Policy changes should not be driven by edge use cases or hypotheticals that exemplify possible uses and capabilities of AI outside what we presently understand. As the courts, legislators, and regulators assess and define the boundaries of using AI, we urge the Agency to seek industry input on an ongoing basis to inform the development of detailed and robust guidance on copyright implications of using generative AI platforms. We are happy to continue to work with the Agency to balance copyright liability with access to generative AI platforms for good faith creation and innovation.

C. Possible introduction of specific copyright exception

The App Association does not believe that legislation or the introduction of *sui generis* copyright protections are warranted at this time. We encourage the Agency to continue monitoring legal and policy developments and working with stakeholders in different industries to provide guidance on how to view copyright protections and liability as it relates to generative AI platforms. We caution that implementing early regulation or legislation would result in inflexible and inapplicable laws to the advancement of AI systems that we will see 10 years from now. Once the courts have made decisions on current disputes, and an evidence base has been established, it might be proper for the People's Republic of China to contemplate legislation that addresses copyright-related issues with generative AI. Such a legislative effort must be tackled

in tandem with guidance on other issue areas implicated by generative AI systems, including privacy, competition, and consumer protection laws and policies. New legislation should also not alter foundational and agreed upon understandings of the Chinese intellectual property system – namely, that AI systems in any form are advanced technical tools that cannot amount to an author of a copyrighted work.

D. Other issues relating to generative AI

We reiterate that established copyright laws in the People’s Republic of China are currently appropriate to answer concerns surrounding the use of generative AI in the development of a work. We encourage the Agency to continue surveying diverse stakeholders and providing guidance that clarifies the law. We also encourage the Agency to ensure that important instruments to balance copyright protections with public welfare, like a fair use exception, are protected from inflexible and new copyright and related protections.

III. Conclusion

The App Association appreciates the opportunity to provide perspectives from our community of software developers on the copyright implications of artificial intelligence. We look forward to continuing to work with the Agency to develop a workable legal and policy framework for using generative artificial intelligence to enhance creative and innovative expression.

Sincerely,



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