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STM response to Hong Kong Commerce and Economic Development Bureau Intellectual Property Department on Copyright and Artificial Intelligence

At STM we support our members in their mission to advance trusted research worldwide. Our over 140 members based in over 20 countries around the world collectively publish 66% of all journal articles and tens of thousands of monographs and reference works. As academic and professional publishers, learned societies, university presses, start-ups and established players, we work together to serve society by developing standards and technology to ensure research is of high quality, trustworthy and easy to access. We promote the contribution that publishers make to innovation, openness and the sharing of knowledge and embrace change to support the growth and sustainability of the research ecosystem. As a common good, we provide data and analysis for all involved in the global activity of research. We are committed to ensuring that the great discoveries of our time are communicated with pinpoint accuracy, clarity and integrity. We champion innovation across academic research, stimulating the development of new technologies and guidance on universal standards.

We respond below to many, but not all, of the questions included in the Consultation document. As an overarching description of our orientation on these issues, we underscore that STM can see exciting potential in generative AI models and our members are starting to use the technology in a variety of interesting and productive ways. That said, the development of AI systems should not come at the expense of intellectual property rights, transparency, and the reliability of the scientific record. Research integrity and trust in science are paramount to STM's mission and this requires that existing guardrails be respected and bolstered, not set aside.

Chapter 2 Copyright Protection of AI-generated Works

Do you agree that the existing 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.

Existing law is sufficient at this time. All jurisdictions are struggling, and will continue to struggle, with the question of sufficient human authorship with respect to AI-assisted works. These determinations are made on a case-by-case basis. At this time, STM does not believe legislative intervention could clarify the state of the law in Hong Kong or elsewhere.

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?

(No response)

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.

Licensing and contractual arrangements provide clarity between and among parties and are central to STM's members' business models. Direct licensing and voluntary collective licensing are the best means by which all parties can ensure predictability and clarity with respect to the issues that most concern them, including acceptable scope of use, attribution requirements, use of training data sets, and disposition of any AI-generated outputs.

Chapter 3 Copyright Infringement Liability for AI-generated Works

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.

While STM is not specifically aware of any case law in Hong Kong that has squarely addressed issues of infringement for AI-generated works, existing law seems to be adequate to decide issues based on circumstances. The reproduction and ingestion of copyrighted works for purposes of training generative AI systems, absent licensing, permission, compensation, or attribution, is copyright infringement and STM's understanding of existing law is that this conclusion is already supported. Existing law includes theories of direct and secondary liability and infringement can be found via both avenues.

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?

(No response)

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?

Yes, as noted above, STM believes that licensing provides the salutary benefits of clarity and precision for all parties with respect to respective expectations, responsibilities, and circumstances under which liability will arise.

Chapter 4 Possible Introduction of Specific Copyright Exception

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?

STM agrees there are attractive potential benefits of generative AI technologies, but there are also serious negative potential consequences that are well-documented in a variety of jurisdictions. As a result, AI innovation must take place hand-in-hand with legal and ethical guard rails. At this time, we perceive no documented need for a specific copyright exception for TDM. In the European Union, for example, where a TDM exception exists under certain circumstances (see Arts. 3-4 of The Digital Single Market (DSM) directive (2019/790), “DSM Directive”), subject to lawful access to protected content, the exception was introduced and finalized prior to the broad public introduction and use of generative AI and the contours of the TDM exception are unclear. To STM’s knowledge, no EU Member State court has ruled on the contours of the TDM exception with respect to generative AI, and Member States’ implementation of the DSM Directive is varied. Regardless, the existing international standard for exceptions to copyright remains intact and in force; that is the three-step test as enshrined in the Berne Convention (Art. 9(2)), and the TRIPS Agreement (Art. 13).

STM believes that any additional TDM or generative AI-oriented exception to copyright in Hong Kong would deeply frustrate incentives for publishers to continue investing in the business of the curation, digitization, metadata enrichment, tagging, linking, monitoring, quality control, and other activities required for the high quality publication of corpora of works that are imperative for TDM activities and/or responsible training of generative AI models.

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?

N/A.

Is copyright licensing commonly available for TDM activities? If so, in respect of which fields/industries do these licensing schemes accommodate?

STM publishers are entering into licensing agreements with a variety of TDM actors and have been doing so for several years. Examples abound TDM licensing continues to grow.¹ Indeed, given the expanding and evolving nature of the market across jurisdictions, STM believes it is not a good time to consider legislative intervention in this space. STM publishers and their clients are best placed to design and conclude licenses that are tailored to client needs while taking into account evolving technologies and user preferences. The growing demand for more high-quality data for TDM and AI training incentivizes publishers to organize their content and data in such a way that it is most easily usable by these technologies, while maintaining fidelity to the original material. These efforts require that existing exclusive rights in copyright law are stable.

Do you find the licensing solution effective?

Yes, please see our response immediately above.

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?

As described above, STM does not support a TDM exception. Should a TDM exception nonetheless be introduced, it would be vital to include a lawful access requirement, as exists in Europe's DSM Directive. The EU DSM Directive also helpfully differentiates TDM activities for commercial versus non-commercial purposes, and we would recommend that the government make this distinction as well along with associated and appropriate rights and obligations in the event it further considers the introduction of an exception.

¹ See e.g., ACS, *Text and Data Mining*, ACS, <https://solutions.acs.org/solutions/text-and-data-mining/>; Elsevier *Text and Data Mining (TDM) License*, ELSEVIER, <https://beta.elsevier.com/about/policies-and-standards/text-and-data-mining/license?trial=true>; Sage Journals *Text and Data Mining License Agreement*, SAGE JOURNALS, <https://journals.sagepub.com/page/policies/text-and-data-mining-license>; *Text and Data Mining at Springer Nature*, SPRINGER NATURE, <https://www.springernature.com/gp/researchers/text-and-data-mining>; *Text Data and Mining*, TAYLOR & FRANCIS, [Text and Data Mining - Taylor & Francis \(taylorandfrancis.com\)](https://www.tandfonline.com/journals/text-and-data-mining); *Text Data and Mining*, WILEY, <https://onlinelibrary.wiley.com/library-info/resources/text-and-datamining>.