

September 17, 2021

## **Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things**

We appreciate the opportunity to respond to the Government's document, "A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things". The creators, publishers and distributors who participate in the work of the Canadian Copyright Institute support implementation of new measures in the *Copyright Act* that will both protect original copyright works and encourage their use in the constantly evolving and expanding digital environment including use of artificial intelligence. While we acknowledge the increasingly critical role of artificial intelligence and its important implications for copyright, we have more urgent concerns: the licensing and distribution of copyright literary and artistic works has declined and the income of rights holders and others working in the book and periodical sector has substantially declined.

Our immediate concerns particularly involve the need for revisions to the *Act* to address the following issues:

- (i) lack of parameters for "fair dealing", especially for "education", a purpose added specifically to the *Act* in 2012 that led to massive systemic uncompensated copying of published works;
- (ii) weakened collective administration and enforcement mechanisms, as the Supreme Court of Canada recently ruled that tariffs approved by the Copyright Board are not mandatory;
- (iii) unlicensed wide dissemination of "non-commercial user-generated content" (created using existing copyright works or other copyright subject-matter) on social media and otherwise, if the user/creator themselves has no commercial purpose and complies with other conditions of this exception from copyright infringement;
- (iv) lack of meaningful statutory damages for both rights holders and their collective societies, including bars to claiming awards of statutory damages for infringements for non-commercial purposes;
- (v) a definition of "publication" in the *Act* that does not include the communication of works to the public by telecommunication, although electronic books and other digital material are "published" in the ordinary meaning of "publication"; and
- (vi) whether or not Big Tech are currently breaching copyright owners' rights to communicate to the public, the drastic diversion of advertising revenue from news media to Big Tech.

While these issues remain unaddressed by legislation, serious damage affecting Canadian creators, publishers, distributors and others in our sector will continue, with more job losses, declining sales and fewer publications and, as very clear from this Consultation paper, increasing use of AI will complicate some of these issues and will be a distraction likely to further delay revisions urgently needed now.

The issues already on the table, most of them resulting from or aggravated by the coming into force of the *Copyright Modernization Act* on July 1, 2012, need to be dealt with immediately. That revision mandated a review of the *Copyright Act* at 5-year intervals, the first such review began in 2018 and the 10-year mark is approaching without any revisions obviously needed by the creators and publishers of books and periodicals having been made. We desperately need legislation to stop needless continuing damage to this important sector of the Canadian economy before Government tackles the complications of “a modern copyright framework for artificial intelligence....”

We will nevertheless make a few comments on several questions raised by this Consultation.

As AI develops further, there will be an increased number of Internet-based service providers or other agencies using AI with less and less distinguishable significant human control and, possibly, eventually even without any human involvement that can be identified or will be acknowledged. Nevertheless, the use of AI will make it increasingly important to broaden the sorts of knowledge that would make an online host or other intermediary ineligible for “safe harbour” protection, for example, awareness or deemed awareness of facts or circumstances it should reasonably know or, following receipt of a notice of claimed infringement, discover by its own prompt investigation.

Even if a service is apparently passive, neutral and technologically automatic, there should be no safe harbour protection when an intermediary receives a commercial benefit, for example, from text and data mining. It is our strong view that TDM of a copyright work should require a licence from the rights holder or a collective society representing the rights holder and not be subject to any exceptions (including the existing exception for temporary reproductions for technological processes), nor subject to fair dealing for research or any other purpose including proposed “informational analysis”.

If AI products without significant human involvement are potentially protectable by copyright, substantial similarity of works or other subject-matter produced by AI, even with evidence of access or impossibility of access to the work or other subject-matter allegedly infringed, might lead to numerous unresolvable copyright infringement actions.

We submit that robots should definitely not be treated as authors! The concept of “authorship” under the *Act* should remain tied to “originality” of literary or artistic expression in a work by a human, or at least in a work created by AI with significant human control or involvement requiring human skill and judgment. If protected by copyright, limitless AI output with little or no human involvement would trivialize the value of copyright works and the concept of “authorship”, reduce opportunities for human authors and perhaps eventually even reduce room for or block copyright protection of original works by human authors.

We may in future wish to support protection of literary and artistic products made by AI without significant human control or involvement, though not as “works” protected by copyright – that is, if the AI product is distinctly unique and, at least at the time of production, apparently produced without reliance on a prior AI product with different ownership and without infringement of copyright in works (including computer programs) or other subject-matter. In any case, we question why Canada would wish to take leadership now in defining

new forms of authorship and copyright in an AI context – in our view, a premature initiative that would be offside Canada’s current international intellectual property treaties. Prior to commenting further on possible legislation concerning AI products in the literary and artistic space, we want to wait and see how AI use in publishing continues to develop.

In conclusion, we want Government to concentrate on remedying the failure of the *Act* to place parameters on overly broad existing exceptions and limitations to copyright (most notably, fair dealing for education, unconscionably exploited by the education sector), and to provide rights holders with easier ways to enforce their rights by strengthening the currently weak enforcement tools for both rights holders and their collective societies, including both easily obtainable injunctions to stop online infringement and meaningful statutory damages (whether infringement is for commercial or non-commercial purposes). Without reasonable limits on fair dealing for education and without tariffs approved by the Copyright Board being mandatory and easily enforceable, we fear that the collective licensing regime of the *Act* will soon, for our sector, have little value – a serious loss for both the Canadian public and rights holders.

**We call on Government to proceed immediately and expeditiously with a Parliamentary bill to make long-overdue revisions to the *Copyright Act* to deal with urgent issues which, unresolved, continue to seriously harm rights holders of literary and artistic works – and not to delay by premature consultation on longer-term issues concerning Artificial Intelligence and the Internet of Things.**

Marian Hebb, Chair

