

CANADIAN COPYRIGHT INSTITUTE

Established to promote a better understanding of copyright and to encourage its use in the public interest

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The Canadian Copyright Institute's Response to the Consultation on Copyright in the Age of Generative Artificial Intelligence

We are responding to this consultation on behalf of the **Canadian Copyright Institute** ("CCI"), a non-profit association of organizations and individuals comprising creators, publishers and distributors of copyright works with an interest in copyright law.

Technical Evidence

- How do businesses and consumers use AI systems and AI-assisted and AI-generated content in your area of knowledge, work or organization?

AI is currently in use by authors and publishers in the book and periodical industry for research and review and for routine tasks such as checking spelling and grammar in a manuscript for publication or tracking inventory and sales. AI is used by some authors for generating scenarios or drafts, and by some non-author users to generate full texts. It is used by some publishers for generating marketing copy, or for drafting alternative text descriptions of images for use in accessible ebook publishing.

Text and Data Mining

- What would more clarity around copyright and TDM in Canada mean for the AI industry and the creative industry?

Clarification is needed for both understanding and compliance. TDM without authorization from copyright owners and holders whose works are used is a misappropriation of copyright content created by authors. An exception in the *Copyright Act* for TDM or for works made by AI in reliance on TDM will lead to a flooding of the market for books, magazines and images of works of art by a massive number of machine-generated works that will compete with original works created by human authors and their publishers, reduce their incomes, put some of them out of business and cause others to leave their profession.

- Are rightsholders facing challenges in licensing their works for TDM activities? If so, what is the nature and extent of those challenges?

As an organization, CCI has no direct or specific knowledge of the pirated content of the datasets being used in the process of making publications that will compete with the original works of human authors, but we do know that many rightsholders do not want to license their works for this purpose or to be complicit in encouraging AI developers and platforms that may

simply want rightsholder licences as an insurance policy to reduce the risks of making models that spew out machine-made works in reliance on the published copyright works of human authors. Such works without the intellectual involvement of humans exercising their skill and judgment do not have the “originality” required for copyright protection (as delineated by the Supreme Court of Canada) and will impair the market for original works. If the rights of copyright owners and holders and author’s moral rights are apparently infringed by such AI-generated works, there will likely be little they can do to establish anyone’s liability, quite apart from being deterred by formidable costs of endeavouring to do so.

It should be the responsibility of AI developers to develop AI tools that will not allow prompts by users of their systems that could recreate copyright works used as input, whether or not those input works have been licensed for use in TDM.

- If the Government were to amend the Act to clarify the scope of permissible TDM activities, what should be its scope and safeguards? What would be the expected impact of such an exception on your industry and activities.

There should not be a legislated exception to copyright specifically for TDM. Regulations for setting limits on TDM as fair dealing would be premature, but at some point they may be needed.

TDM for AI development should be permitted only if specifically licensed by rightsholders under direct or collective licences. In the absence of negotiated licences, rightsholders should have the option to apply through the Copyright Board for mandatory tariffs that are subject to arbitration by the Board.

AI developers should be required to develop AI tools prohibiting prompts by users of their models that might recreate copyright material used as input for their AI systems, and AI developers as well as AI platforms, any credited publisher and any persons to whom authorship is attributed should be liable or share liability for infringing output.

Although many members and affiliates of collective societies will likely prefer their rights with respect to TDM to be handled by a collective society, a licence from a collective society should not preclude the possibility of direct licensing by an individual copyright owner or holder.

As a safeguard against inaccurate, misleading, manipulative or false information and deep fakes, all published AI-generated content should be labelled as “machine-generated” or “generated by artificial intelligence”. Section 30.71 of the *Copyright Act* permitting temporary reproductions for technological processes should be amended to specifically exclude TDM if not ruled out earlier by court decisions.

- Should there be any obligations on AI developers to keep records of or disclose what copyright-protected content was used in the training of AI systems?

AI developers should be required to keep records of all works used to produce or “train” generative-AI models and to release this information promptly to allow public inspection in addition to monitoring by copyright owners or holders, whether or not alleging infringement.

Lack of transparency around what works are used to train generative-AI models also increases the likelihood of infringing authors' moral right of attribution.

- What level of remuneration would be appropriate for the use of a given work in TDM activities?

Fees should be negotiated by the AI platforms and copyright owners or holders or by collective societies which they have voluntarily joined or with which they have voluntarily affiliated. In the absence of negotiated licences, rightsholders should have the option to apply to the Copyright Board for mandatory tariffs that are subject to arbitration by the Board.

Criminal penalties for copyright infringement and the statutory damages for plaintiffs that are available if opted for by a copyright owner or holder, need to be increased as the infringers or enablers of infringement are most likely to be very large international technological corporations.

Authorship and Ownership of Works Generated by AI

- Is the uncertainty surrounding authorship and ownership of AI-assisted and AI-generated works and other subject matter impacting the development and adoption of AI technologies?

Neither the user of a generative-AI model nor its AI owner should be treated as an author protected by copyright because a machine-made work lacks the originality without which there is no copyright work.

An AI-generated work should not be protected by copyright. Nor should an AI-assisted work be protected by copyright unless under effective and verifiable human control by a named author and publisher. An AI-assisted work may have a copyright notice, but if published anonymously, pseudonymously or under a pen name, it should be published under an identifiable publisher's imprint or under the name of an identifiable individual or entity prepared to accept liability if there is an infringement of copyright or if another issue arises, such as libel, invasion of privacy, breach of personality rights or unjust enrichment. Imitating or mimicking the distinctive style of another writer could be viewed as an appropriation of personality rights.

Regulations should include an obligation to name or identify – and publish on every AI-generated publication – a responsible person or entity if liability should fall to anyone other than or in addition to a named author and publisher of the publication.

Infringement and Liability regarding AI

- What are the barriers to determining whether an AI system accessed or copied a specific copyright-protected content when generating an infringing output?

Lack of information on the input of copyright works into an AI system is a huge barrier to establishing the access considered necessary by courts to prove the infringement of a work in addition to necessarily subjective assessment of observable substantial similarity between it and infringing AI-generated material – whether there was an actual reproduction of the copyright work or whether the order of words or images in the AI-generated work was predicted by an algorithm. There should be an obligation to keep records of input into an AI system and to make

them available promptly for public inspection and for monitoring by rightsholders. These obligations could be required by regulations, which should ideally also state that knowledge or intent to cause harm may be presumed if AI developers or users of their AI tools fail to comply with the regulations.

- Should there be greater clarity on where liability lies when AI-generated works infringe existing copyright-protected works?

AI developers and platforms and those claiming to be authors and publishers of an AI-generated work should be liable and bear liability for infringing copyright works.

Comments and Suggestions

The Canadian Copyright Institute (“CCI”), founded in 1965, a non-profit association of organizations and individuals comprising creators, publishers and distributors of copyright works with an interest in copyright law, observes and submits as follows:

Technology related to artificial intelligence worldwide will likely continue to develop at an astonishing speed. Consequently it is the view of CCI that it is premature to pass any new copyright legislation with respect to AI systems.

No legislation or regulation is needed to clarify that authorization from rightsholders is required prior to any scanning of works into an AI system, except that it may become necessary to put regulatory parameters on “fair dealing” for TDM.

Instead of copyright law continuing, as it has historically since the enactment of the Statute of Anne in 1709, in the British Parliament, to reward human authors for their work and provide an incentive for them to create more works, recognition of copyright in AI-generated works without effective and verifiable human control would disrespect human authors and their publishers and demean their professions as well as reduce incomes in the book and periodical sector of the Canadian economy and put some workers out of work. To legislate change to this basic assumption of human authorship of copyright works would bring a huge cultural shift. AI output of text and images that do not result from authors exercising human skill and judgment should never be protected by copyright.

What is needed right now – prior to eventual amendments to the *Copyright Act* – is much more information and transparency about any AI systems being used to generate materials including the sources of the data relied on for content. This information must be easily available, not just in case of alleged copyright infringement but in any case. There should be no exceptions now to copyright to accommodate developers of AI and generative-AI platforms. Any legislated exception would encourage more use of entirely AI-generated works that would substitute for, compete with and impair the market for original copyright works created by the skill and judgment of human authors, as well as their creativity and labour, including AI-assisted works.

Parliament should not jump prematurely to enact copyright legislation on AI, before there is certainty that it will be compatible, to the extent reasonably possible, with the copyright laws of

Canada's main trading partners, particularly the United States, Europe, the United Kingdom, as well as former colonies of countries with compatible laws.

Regulations – and any eventual copyright legislation – should require users of AI systems to state on their publications that all or part of the content has been generated by AI and that authorization has been obtained from rightsholders for input material obtained by TDM. In case an author who has made some use of AI wants to be in a good position to defend, as fair dealing, a potential claim of copyright infringement, they may be well-advised to include on their published work any relevant source and, if in the source, the name of the author.

In this continuing extraordinarily disruptive period as Canadian society gets accustomed to generative AI, and as the book and periodical industry accustoms itself to modified practices within the book and periodical sector, it should be remembered that the *Copyright Act* is based on human authorship including the sole rights vested in authors set out in Section 3.

Article 9(1) of the *Berne Convention for the Protection of Literary and Artistic Works* states that authors “shall have the exclusive right of authorizing reproduction of their works in any manner or form.” Any exception must pass the 3-step test in Article 9(2) for exceptions and, certainly, any exception allowing use of generated-AI material derived from authors' works without authorization will “unreasonably prejudice the legitimate interests of the author” and violate that test for exceptions. The 3-step test is also included in the *WIPO Copyright Treaty* and in the *Canada-US-Mexico Agreement*.

We should not lose sight of the potentially devastating impact of generative AI on the creative community comprising authors, their publishers and other workers in the book and periodical industry and of how authors' works benefit those who enjoy, learn from or rely on those works in any way – nor lose sight of how the consumers of some AI-generated materials may be misinformed, misled, deceived, manipulated or otherwise adversely affected. While we marvel at the text and images that can be produced by generative AI and recognize that AI-generated material can have great value if used responsibly in appropriate contexts, let's not allow use of AI to encroach on respect for human authorship – as expressed in paragraph 2 of Article 27 of the *Universal Declaration of Human Rights*: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Marian Hebb, Vice Chair

