THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: copyrightconsultations-consultationsdroitdauteur@ised-isde.gc.ca

Innovation, Science and Economic Development Canada
Strategic Policy Sector, Marketplace framework policy
235 Queen St,
Ottawa, ON K1A 0H5

Re: Consultation on Copyright in the Age of Generative Artificial Intelligence

I write on behalf of the Intellectual Property Section of the Canadian Bar Association (the CBA Section), in response to the Department of Innovation, Science and Economic Development Canada's (ISED) Consultation on Copyright in the Age of Generative Artificial Intelligence.

CBA is a national association of over 37,000 lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section deals with law and practice relating to all forms of ownership, licensing, transfer and protection of intellectual property and related property rights, including patents, trademarks, copyright, industrial designs, plant breeders' rights, as well as trade secrets.

The CBA Section has the following answers to the consultation's survey questions:

Text and data mining (TDM)

While some jurisdictions have proposed limited text and data mining (TDM) exceptions to copyright liability for artificial Intelligence (AI) training purposes, the CBA Section does not propose such an exception.

We note that following criticism from creative industries, the United Kingdom (UK) reconsidered a key outcome of its thorough consultation, to widen and replace its existing limited TDM exception that allows for reproduction of copyright works for the purpose of computational analysis for non-commercial research, with a broad TDM exception that allows reproduction for any purpose by anyone, and to database rights with a rightsholders' option to opt-out. The UK House of Lords Communications and Digital Committee's Report recommends that the UK Initial Public Offering (IPO) pause its proposed new TDM exception to conduct an impact assessment of the creative sector and if negative effects are found, to pursue alternative approaches. In its response to the Committee's Report, the UK Government confirmed that it would "not be proceeding with a broad copyright exception for TDM". Rather, the Government committed to "work with users and rights holders" to discuss "copyright licensing for inputs", with the hope of producing a "voluntary code of practice", and foster growth and partnership between the tech and creative sectors. The UK IPO set up a working group made up of representatives from the technical, creative and research sectors, with terms of reference published on its website.

The CBA Section suggests that any amendments to current legislation in Canada would be premature at this time, as the current regime appears more likely to strike a proper balance between copyright holders and users. Until there is clear evidence calling for legislative change, the CBA Section believes restraint is appropriate.

Sections 29 of the *Copyright Act* already prescribes sufficient exceptions for fair dealing for the purpose of research, private study, education, parody or satire.

Fair dealing in Canada differs from other jurisdictions such as the United States, in that the purpose of the fair dealing must first comply with S.29 of the *Copyright Act* before fairness of such dealing can be established. The Supreme Court of Canada in Law Society of Upper Canada v. CCH Canadian Limited[1] laid down 6-non-exhaustive factors for conducting a fair dealing analysis as contemplated by Section 29 of the *Copyright Act*, being "the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work." The Supreme Court of Canada further explained that fair dealing "must not be interpreted restrictively, and the word "research" must be given a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained and is not limited to non-commercial or private contexts." As such TDM, for the purpose of research, private study, or review, may fall within the definition of fair dealing under the *Copyright Act.*

Furthermore, Section 30.71 of the *Copyright Act* provides a suitable exception to infringement for the temporary reproduction of works that are essential parts of a technological process, for the duration of that process and where "the reproduction's only purpose is to facilitate a use that is not an infringement of copyright".

Should further advances to technology necessitate consideration of a TDM exception, the CBA proposes that there should be an in-depth study of approaches, and conditions/restrictions on the application of the section, which should be carefully studied and considered for Canada. Canada appears to be headed in the right direction, with the proposed Artificial Intelligence and Data Act (AIDA) and the Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems.[2]

The CBA Section proposes that any proposed text and data mining regulation should carefully address at least three categories of text and data: (1) personal information that can be linked to an individual that does not fall into category 3 (Personal Information); (2) works with copyright protection that do not fall into category 3; and (3) documents that are filed with a court, tribunal or other government entity that may have copyright protection:

1. Personal Information should not be collected from sources that are third parties to the collector, AI developer, and/or user, unless it is for a proscribed use or in a proscribed manner. The risk of misuse of AI in targeting human behaviour is high and this type of data collection should be highly regulated.

The CBA Section recommends additional study of the acceptable uses of Personal Information in AI models: in particular, the study of the types of personal information that is a risk of misuse in AI models.

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1 [2004] 1 SCR 339, 2004 SCC 13

2 Innovation, Science and Economic Development Canada, Artificial Intelligence and Data Act – Voluntary Code (September 27, 2023), Artificial Intelligence and Data Act (canada.ca)

2. Content protected by copyright should be required to be licensed or explicit permission provided for the use of copyright material. The availability of copyrighted material on the internet should not be assumed to authorize its ingestion and reproduction for AI training models, and rights holders should not be required to affirmatively opt out of such uses. These protections are particularly important for works in the creative arts and software programming.

In the alternative or in addition, AI developers should keep records of or disclose what copyright-protected content was used in the training of AI systems. Such transparency and accountability measures are critical to rights holders, who are otherwise unable in practice to determine when and how their content has been accessed and reproduced for such purposes. While we do not propose an amendment to the *Copyright Act* to provide for such obligations, we note that Bill C-27, *The Artificial Intelligence and Data Act (AIDA)*, currently at consideration in committee in the House of Commons, gives the Governor in Council power to make regulations on topics such as transparency and record keeping obligations. The government has indicated that it intends to hold consultations on this topic, and we urge them to consider such obligations at that time. This aligns with the Bill's purpose of establishing Canadian requirements for the design, development, and use of AI systems.

3. Documents that are filed with a court, tribunal, or other government entity, even if they are subject to copyright protection, should be permitted to be collected for training AI models without the need for a license or explicit consent. The collection of this category of text and data will assist AI models in the legal field and will support access to justice. The costs of legal fees to clients could be reduced by allowing for the use of AI models on documents in this category.

Authorship and Ownership of Works Generated by AI

Although there is no explicit statutory requirement for human authorship in Canada, the provisions of the *Copyright Act*, coupled with Canadian jurisprudence clearly suggest that human authorship is a requirement for copyright. Therefore, works created entirely by AI will not qualify for copyright protection.

The Supreme Court of Canada explained the Canadian standard for originality in *Law Society of Upper Canada v. CCH Canadian Limited* [3] *as one that "originates from an author and is not copied from another work" and is "the product of an author's exercise of skill and judgment", such exercise not being "so trivial that it could be characterized as a purely mechanical exercise".*

This does not mean that AI cannot be used as a tool by a human author and use of such will not render a work uncopyrightable under Canadian law. Technological tools have been used for some time by creators in a variety of media.

Currently, there is no need for changes to the basic definitions and requirements for copyright to accommodate technological changes in the generative AI field. These should continue to apply to works created by human authors using AI as a tool in the creative process.[4]

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3 [2004] 1 SCR 339, 2004 SCC 13

4 The Canadian originality test differs from that of the US, which may lead to different outcomes when applied to AI-assisted works. For example, the US Copyright Office declined to register a comic book containing both human-authored text and images generated by the AI technology Midjourney as a compilation, instead registering only the text elements. US Copyright Office, Re: Zarya of the Dawn (Registration # VAu001480196), Feb. 21, 2023. Canadian courts may take a different approach to a claim that a work containing both human and AI-generated elements merits protection as a "compilation". In any event, amendments to Canadian copyright law are premature at this time.

Apart from works created by humans with the assistance of AI technology, it is possible for generative AI to produce content following prompts by its users. Users may also further modify works generated by the AI technology or adapt the AI technology itself to meet a specific creative use. With the advancement of AI systems, it is also possible for AI to independently generate creative works with little or no human involvement in producing output. The endless possibilities by which AI can be involved in the creative process with or without human involvement in the input and output process, has created inter-jurisdictional uncertainty as to how these works should be treated, whether they can be considered original or copyrightable, and how the authors and first owners of the work should be identified.

When registering works, the Canadian Intellectual Property Office (CIPO) currently requires disclosure of the human author who created the work. CIPO has also registered copyright in a work which listed a human and an AI painting application as co-authors of the artistic work, an approach which received international attention and some criticism. Although CIPO does not conduct a substantive examination of claims made in applications for copyright registration, it would be useful to require disclosure if any elements of the work were created entirely by AI, with no human intervention, in which case that particular element may not be copyrightable. We note that courts in Manitoba, Yukon and the Federal Court similarly require disclosure of when AI was employed in producing court documents, and more Canadian courts may follow suit.

The CBA Section does not believe that it is currently necessary to clarify that copyright protection applies only to works created by humans, about which the applicable language of the *Copyright Act* and case law is clear.

Because solely AI-generated works do not qualify for copyright, we do not support attributing authorship of AI-generated works to the person who arranged for the work to be created, which would require overturning the requirement of human creativity in copyrighted works. Such approach has been taken in countries like the UK, where the Copyright legislation allows for authorship of computer-generated works by the person who undertakes "the arrangements necessary for the creation of the work". [5] Recent consultation in the UK[6] supported no changes to the existing law for computer-generated works without a human author. In Canada, there is also no clear legislative intent or jurisprudence that allows for authorship by computer systems or AI, and this is not likely to change soon.

The CBA Section does not support creating a new and unique or *sui generis* right or set of rights for AI-generated works as there is insufficient evidence to suggest that such approach would fully address the presented issues or maintain the proper balance between the rights of owners and users and the public interest.

Infringement and Liability regarding AI

A. Existing laws are generally sufficient at this time to address AI liability, but developments should be monitored

The *Copyright Act* and existing Canadian case law provides the necessary legal tests for establishing infringement with respect to: 1) inputs, that is, ingestion and use of copyrighted materials by test data management (TDM) and training of machine learning models, and 2) outputs, where the AI-created work evidences infringement of a substantial part of a copyrighted material.

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5 Copyright, Designs, and Patents Act 1988, s 9(3)

6 Intellectual Property Office, "Consultation outcome Artificial Intelligence and Intellectual Property: copyright and patents: Government response to consultation" (28 June 2022), online.

With respect to inputs, TDM undertaken to feed training of machine learning models, at least in many cases, requires reproductions of the training material. If that training material includes copyright-protected works and other content, and if such reproductions are unauthorized, infringement is clear. Whether such use will be exempted from liability by the fair dealing exception is a case-by-case determination. It should be noted that where the ultimate use is commercial and such use may compete with the ingested content, the application of the fair dealing exception to such activity becomes less tenable.

B. Canadian common law solutions are for the most part preferable for now

Because AI is an evolving technology, the ramifications of which remain to be seen, common law application of existing fair dealing provisions provides the most flexible and resilient approach, which can evolve if needed to accommodate economic and technological developments. The established body of existing Canadian case law also bodes in favour of not replacing Canada's existing fair dealing provision with an alternative untested and completely undeveloped in Canada, such as the US fair use doctrine. For this reason, we believe the existing fair dealing exception is also preferable to attempts to legislate a statutory TDM exception.

With respect to outputs, that is, AI-created works, in at least some scenarios, there will be strong evidence of liability, such as where an output is substantially similar to existing content, and it could likely be demonstrated that the AI system was trained on the pre-existing content. Similarly, where users' prompts to AI systems result in AI-generated outputs that contain substantial parts of existing content, it could likely be determined that: i) reproductions of existing content has occurred at the input stage, and ii) the output is likely infringing. Where there is strong evidence of AI creations borrowing from a particular creator's catalogue (if the output bears an uncanny resemblance to the music of Drake, for example), it would be more likely to establish that it was trained on the creator's catalogue (thereby likely infringing at the input stage), but whether the output infringes a particular work may be more difficult to establish. In this space, it will be useful to closely follow development of case law to see whether the common law, applying interpretive principles such as technological neutrality, continues to adequately protect copyrighted content, or whether statutory adjustments are necessary.

For now, the CBA Section finds that the flexibility and resilience of the common law appears to be a more prudent approach than trying to legislate what may be static and quickly outdated solutions for a rapidly evolving field.

Outside of the copyright field, the government may want to consider codifying a federal tort of appropriation of personality, or in the case of commercial artists, a federal right of publicity, to protect artists whose likeness or voice is commercially exploited through AI "deepfakes" that, although not necessarily infringing a particular work or song, can exploit the artist's entire professional catalogue of work. This will also assist because copyright infringement may be difficult to prove in cases where training data has not been copied in the traditional or copyright sense; however, the works of an author have still been used to train the AI. AI platforms should not benefit financially from a prompt that says, "Write me a song in the style of Drake," for example, where the AI has been trained on the catalogue of Drake, regardless of whether the catalogue itself has been copied within the meaning of the *Copyright Act*, and whether or not the resulting AI output infringes a specific work.

C. Transparency and accountability requirements can address barriers to barriers to determining whether an AI system accessed or copied a copyright-protected content

With respect to both inputs and outputs, it can be difficult to determine whether an AI system accessed or copied specific copyright-protected content. For this reason, it would be useful for the government to consider rules establishing transparency and accountability for the use of copyrighted content in AI

training. As noted above, we do not propose amendments to the *Copyright Act*, but in the context of rulemaking on *The Artificial Intelligence and Data Act (AIDA)*, the government should consider whether AI Developers and creators of training datasets should maintain records of which content they have ingested, how it was procured, and how it is used in development of AI-generated content, and disclose such information when requested by rightsholders.

The CBA Section is eager to work with ISED to share constructive feedback throughout the consultation process.

Best regards,

(original letter signed by Julie Terrien for Amrita V. Singh)

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