

CARL response to the Consultation on Copyright in the Age of Generative AI

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Overview

On October 12, 2023, the government of Canada launched a consultation to gather Canadians' thoughts on generative AI tools and the implications for copyright holders to give consent and receive credit and compensation for the use of their works. The consultation paper presented series of questions to address each of the topics below. Our comments address only those questions that CARL wished to address on behalf of the research library community.

Technical aspects

Technical aspects of AI, particularly generative AI, are rapidly evolving. The Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems along with pending legislation will provide a framework for AI systems. Until communities of practice are established for the evolution and use of AI tools, guided by court decisions which will likely draw on the principle of technological neutrality, the research library community believes that the government should not restrict the use of AI, unintentionally or otherwise, as to do so would hamper innovation.

Authorship and ownership of AI generated works

Research libraries reflect the risk tolerance of their parent institutions, and the adoption of AI tools could be hampered by uncertainty surrounding ownership of AI works. For example, concerns about copyright infringement could deleteriously impact decisions about selecting and using AI tools to support teaching, research, and other library services.

AI generated works do not meet the threshold for copyright protection as they do not involve a human exercise of skill and judgment (e.g., *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339, paras 16, 24, etc.) and should not be protected by copyright. CARL supports the recommendation from [A Modern Copyright Framework for Artificial Intelligence: IP Scholars' Joint Submission to the Canadian Government Consultation](#) (September 26, 2021) that Sections 2 and 5 in the Copyright Act be changed to confirm that “author” is a natural person and that copyright does not subsist unless created by a human being.

AI assisted works are an inevitability. Responsible uses and best practices are emerging that take into consideration the difficulties in acknowledging the use of AI tools in a new creation. This is not an issue that should be addressed by the Copyright Act.

Text and data mining

Text and data mining (TDM) is not a new concept; post secondary students and researchers in Canada have long utilized non-generative AI systems that rely on TDM and also use TDM as a research practice. However, the legal status of TDM currently lacks clarity, and the absence of a specific TDM exception in the Canadian Copyright Act hinders researchers' efforts and impedes progress by requiring extensive copyright analysis to ensure compliance. A new statutory provision should be implemented to confirm that the use of a work or other subject matter for the purposes of TDM does not infringe copyright and is thus noncompensable (i.e., any remuneration would be separate from nonconsumptive TDM). The exception should apply to all users and allow commercial and non-commercial uses and allow retention and sharing of copies used for TDM.

In addition, to assist developers and users of AI more broadly, the fair dealing exception (Section 29) should be amended to make the list of purposes illustrative. It should also be made clear that fair dealing is not subject to contractual obligations, that authors and publishers cannot prevent the use of fair dealing (e.g. opting their works out of an LLM training set), and that TPMs can be circumvented for non-infringing purposes. These changes help maintain the Supreme Court of Canada's description of the provision in *CCH v LSUC*, that the “fair dealing exception is always available” (para 49) and that,

“the availability of a licence is not relevant to deciding whether a dealing has been fair” (para 70).

For context, research libraries typically license electronic resources with mostly non-negotiable terms of use that may prohibit activities including TDM. Publishers and their intermediaries hold the balance of power in this environment. It should not be necessary for users to obtain a secondary license for non-infringing activities, including TDM.

A number of Canada’s key trading partners already have a specific exception for TDM, including Japan, Singapore, United Kingdom, and the EU. In addition, research shows that providing copyright exceptions or other clarifications of the law to permit TDM is associated with increased publication of scientific research in the countries that make the change (Pijipvideo, [Empirical Study Pt 2: Impact of Research Exceptions on Scientific Output](#) Joan-Josep Vallbé, – May 23, YouTube (July 24, 2023), Michael Palmedo, The Impact of Copyright Exceptions for Researchers on Scholarly Output, 2 Efil Journal 114 (2017)). CARL supports an exception that applies to both commercial and non-commercial research, as legislated in Japan and described by the Canadian Federation of Library Association’s submission to the current consultation.

Infringement and liability

Current provisions in the Copyright Act already address infringement and liability related to copyright when a substantial portion of a work is reproduced as an AI-generated output. Before considering any amendments to the Act that pertain to the scope of permissible TDM activities, the courts should be provided an opportunity to consider any emerging issues, including those related to AI, and provide analysis and guidance for any legislative changes.

Copyright is one of multiple policy instruments that can provide appropriate controls related to AI systems, but not the most effective one for issues related to remuneration.

General

The potential uses of generative AI cross all areas of research library mission and operation. Libraries will play a critical role as AI continues to evolve and can offer supports related to data discovery, data management, and preservation (IFLA report, 2023), as well as AI literacy itself.

Research libraries support copyright literacy in universities and their staff understand how the balance between protecting creator rights and facilitating the exchange of ideas and promoting creativity benefits society as a whole. While consultation on AI and copyright is important and CARL is pleased to engage in this process, it is critical to point out that not all provided questions are related to the purpose and intent of copyright law. Issues related to author remuneration and record keeping should not be legislated or addressed in the Copyright Act. Any new copyright regulation of AI should not negatively impact the public's right and ability to access information, knowledge, and culture. In addition, any new copyright regulation of AI should maintain the appropriate balance of rights and interests in Canada's copyright system, consistent with a robust principle of technological neutrality.

CARL endorses the following submissions related to copyright and AI:

- 2023 CFLA Consultation on Copyright in the Age of Generative Artificial Intelligence
- 2021 Craig, Carys J. and Amani, Bitá and Bannerman, Sara and Castets-Renard, Céline and Chapdelaine, Pascale and Guibault, L. and Hagen, Gregory R. and Hutchison, Cameron J. and Katz, Ariel and Mogyros, Alexandra and Reynolds, Graham J. and Rosborough, Anthony D and Scassa, Teresa and Tawfik, Myra, [A Modern Copyright Framework for Artificial Intelligence: IP Scholars' Joint Submission to the Canadian Government Consultation](#),
- 2021 Keller, Liwah and Yuan Stevens. [Innovation and Balance. Submission to the Government of Canada's Consultation on Copyright, AI, and IoT](#).

Summary

In summary, Canadian research libraries posit that:

1. AI generated works do not meet the threshold for copyright protection.
2. A new TDM exception should be implemented and apply to both commercial and non-commercial uses.
3. Current provisions in the Copyright Act already address infringement and liability and provide a mechanism for claims related to an AI-generated output, when that output closely replicates an original work that is already protected by copyright.
4. The government should not restrict the use of AI, unintentionally or otherwise, until court decisions can guide legislative change. To do otherwise would hamper innovation and the emergence of responsible practices.