

Comments of the Canadian Association of Broadcasters

with respect to

Innovation, Science and Economic Development Canada's

Consultation on Copyright in the Age of Generative Artificial Intelligence

As the national voice of small, medium and large, Canadian privately-owned and controlled radio, television and discretionary broadcasters, both independent and vertically integrated, including services operating under 9.1(1)(h) distribution orders, the Canadian Association of Broadcasters (CAB) is pleased to make these comments in response to the ISED issued consultation paper entitled *Consultation on Copyright in the Age of Generative Artificial Intelligence*.¹ In this consultation, the Government is calling for information and evidence relating to the use and adoption of generative AI systems by Canadians and Canadian businesses and is seeking comments on potential copyright policy options, with an eye to preserving the balance between protection and access in the broader context of supporting innovation.

The CAB's members are meaningful players in the Canadian cultural economy and are uniquely situated as both users and creators of creative content. This dual perspective enables the CAB to appreciate the motivation of the Government to encourage innovation in generative AI as a means to increasing efficiency and economic growth while also ensuring that creators receive the necessary protections for their underlying works that is essential to incentivizing creativity and the cultural economy in this country. In large part, the CAB's members are in exploratory and experimental phases of engagement with generative AI.

¹ <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-paper-consultation-copyright-age-generative-artificial-intelligence#s11>

Copyright Policy Questions

Text and Data Mining – is the underlying content used to train AI systems subject to copyright protection?

Text and data mining (TDM) consists of the reproduction and analysis of large quantities of data and information, including those extracted from copyright-protected content, to identify patterns and make predictions. TDM is an essential step in the training of machine learning models. This technique enables the model to 'learn' to recognize and reproduce patterns that will enable it to accomplish certain tasks, including generating poetry, music, or artwork. Beyond generative AI, TDM can also advance science, and help businesses solve problems, innovate, and create more value.

The CAB supports the retention of copyright protection in works that would be otherwise subject to such protection, and does not support a general exception for TDM. The mere existence of generative AI systems does not support the removal of the copyright protection that automatically arises in Canada when original works are created and fixed in a material form. Copyright is a creature of statute, and the *Copyright Act* states at section 27(1) that “[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.” Accordingly, the question is whether these generative AI systems are doing anything that only the copyright owner has the right to do.

The technological methods employed to undertake text and data mining in a given situation must be considered in answering the question of whether the use of copyright protected works by generative AI systems is infringing. There may be activities in connection with TDM that, based on the technological methods employed, do not infringe copyright. For example, generative AI systems that engage processes akin to reading the underlying works, much the same way search algorithms read underlying content in order to produce meaningful search results, may not result in copyright infringement. To be clear, this concept of “reading” has to be fully evaluated to determine whether it in fact triggers liability. If generative AI systems are engaged in making reproductions, it may be possible that such reproductions are subject to existing copyright exceptions such as fair dealing at section 29 or the technical process exemption at section 30.71. The answers to these questions lie with the creators of AI systems and are not readily available to the end-users.

If creative works are being engaged in a manner that triggers copyright protection, the owners of the copyright in those works should be entitled to compensation for that use. The existing neighbouring rights regime in the *Copyright Act* provides an operational example of how copyright owners can be paid for the use of their works even in situations where it may not be possible for them to deny access to their works. Performers and sound recording makers are entitled to be paid equitable remuneration when published sound recordings containing performances are performed in public or communicated to the public via telecommunication. This payment is made to the designated copyright collecting society in the case of sound recordings of performances. The amount of the payment is determined either by way of direct negotiation between the user and the rights holder and/or the collecting society or, in many

cases, through the administrative process carried out by the Copyright Board of Canada. If it is determined that generative AI systems are engaging the copyrights of the underlying works being used to train those systems, payment could be made to the underlying rights holders via a system of equitable remuneration similar that already in place for published sound recordings.

Authorship and ownership of works generated by AI – is the content produced by AI systems subject to copyright protection? And if yes, who is the owner of the copyright?

Rapid developments in AI technology, combined with its burgeoning application across various sectors of the economy, lead the Government to consider whether the Act is suited to address questions of authorship and ownership of AI-generated works or AI-assisted works. Moreover, the Government is considering whether, even if the Act is suited to address these issues, additional clarity regarding the authorship and ownership of such works could be provided to create more certainty in the marketplace. In considering these questions, the Government aims to ensure the Act supports creators and the creative industries in Canada, while also fostering Canada's competitiveness in AI, innovation and access to creative content.

The question of whether works created through generative AI systems should themselves be subject to copyright protection is directly tied to the concept of the author in the *Copyright Act*. The Act provides at section 13.1 that the author of a work is the first owner of copyright in that work. The Act does not define, author, *per se*, though it does indicate at section 5(1)(a) that copyright will only subsist in works if the author was “a person”. In addition, as highlighted in the Consultation paper, “Canadian copyright jurisprudence suggests that 'authorship' must be attributed to a natural person who exercises skill and judgment in creating the work, reflective of the fact that the Act ties the term of protection to the life and death of an author.” To date, Canadian copyright law appears to only provide protection for human-generated works.

In the case of works wholly produced by generative AI systems, that is those generated by a system that has received only cursory instructions from an AI user, there is no natural person who has exercised the necessary skill and judgment required to meet the preconditions of authorship and thereby give rise to copyright protection in the autogenerated work. The computer program will have made the creative decisions independent of any human interaction. Whereas, until recently, computers and software used to generate creative outputs have been viewed as a tool used by authors exercising considerable skill and judgment in connection with the creation of a work, new generative AI systems can be instructed without the exercise of skill and judgement that gives rise to copyright protection in Canada. Accordingly, AI work products that can result from basic instructions that lack a level of skill and judgment exercised by traditional authors should not receive the same protection afforded to human-generated works.

Moreover, it is essential that works wholly produced by generative AI systems do not benefit from compensation through existing royalty channels, as this would serve to undermine the existing system that compensates human rightsholders for their creative labours.

Infringement and Liability regarding AI

First, it could be difficult for a copyright owner who is alleging infringement in the AI application or AI-generated work to identify the person, or persons, responsible and to establish liability in a court. Determining liability and infringement may become increasingly complex as the level of human involvement in AI-generated works decreases and AI's capacity to independently create works increases. These uncertainties pertain both to primary infringement, as well as secondary infringement, which occurs when a person knows or should have known that a copy is infringing copyright and undertakes a secondary act in relation to that infringing copy that contravenes the Act. In the context of AI, secondary infringement might arise when users distribute content they asked an AI system to generate and that content infringes copyright.

If one starts with the proposition that the underlying works used to train AI systems are subject to copyright protection, it follows that, under existing copyright law, those works could be infringed by the AI systems themselves as well as by the end users of the AI-generated works. As the Consultation paper rightly points out, it will be near impossible for end-users to know which works were used by the AI systems and who the copyright owners of those works could be. Therefore, it would be unreasonable to put the onus on the end-user of the AI-generated works to avoid involuntary infringement. Only the providers of the AI systems that are inputting the underlying works into those systems have the potential to know what works are being used. In this way, only the creators of the AI systems should be liable for infringement that occurs as a result of the inputs they chose to rely upon and the way they manipulate those inputs.

At section 38.1(1)(a), the *Copyright Act* provides statutory damages of between \$500 and \$20,000 per work infringed for commercial purposes. The application of this provision to the underlying works used in generative AI systems could quickly lead to absurdly high damages for end users who have no knowledge of or ability to determine whether and to what extent copyright is engaged by the generative AI systems. If the Government accepts the end-users have no knowledge of the underlying copyrights that may be engaged by their use of generative AI systems, it will be important to clarify that statutory damages do not apply in the case of AI generated works for individual or commercial users and further to ensure that such users are statutorily indemnified by the generative AI system owner or licensor against any and all copyright claims.

Conclusion

The CAB's members are active participants in the Canadian cultural economy, as both creators of original content and as users of copyright protected works. The promise of generative AI in the context of broadcasting is nascent but may yield benefits for Canadian private broadcasters and their audiences. CAB members are currently exploring the potential of generative AI in their businesses and are keen to see how the Government shapes the rules surrounding this area of innovation.

The CAB advocates for continued copyright protection in the underlying works used to train AI systems. Where AI systems are infringing that copyright through the technological processes they employ, the owner of copyright in the underlying works deserves to be paid for that use. If

applicable the use of the protected materials may be subject to an exception under the Copyright Act, in which case the use would be permissible. The nature of generative AI is such that the end-user has no knowledge of the copyright protected works that may have been infringed by the AI systems in the production of these works, and therefore it is not reasonable or fair for the end-user to be liable for any copyright infringement that results from that use. The providers of the AI systems are uniquely positioned to know which works are engaged and to make the necessary payments. The statutory damages framework in the *Copyright Act* should therefore be amended to preclude its application to end users of works produced by generative AI and end users of generative AI should be protected by a statutory indemnity.