



The Writers' Union of Canada

Consultation on Copyright in the Age of Generative Artificial Intelligence (December 2023)

Summary Position

New Exceptions would Damage Existing and Emergent Markets

The Writers' Union of Canada (TWUC) believes that creative content uses required by AI must be negotiated within a market for licensing rather than through a damaging new exception (or exceptions) to copyright protection. To be clear, TDM activities involving copyright works infringe the rights of copyright-holders under the Copyright Act unless they are specifically permitted by the rightsholder. Any call for a new exception for TDM and AI activities is in fact a request to excuse infringements that have already happened and continue to happen in TDM and AI training.

TWUC is concerned that with each new technologically driven "use" of creative content comes a call for a new exception to the exclusive rights of those who create that content. This exception-focus throws the traditional purpose of copyright completely out of balance and privileges the desires of industrial users over the rights of creators. The end-result is what has been described as a Copyright Act "like a pasta strainer"; legislation so full of exceptions and loopholes that there remains simply no motivation on the part of users to seek permission or pay for the content they use.

The reflex to create ever greater exceptions is a market destroyer, as has been amply proven over the last decade by Canada's ill-advised adoption of education as a fair dealing category. That change to the Act has done nothing to provide students or their instructors with more affordable access, but it has transferred hundreds of millions of dollars of earned income away from the cultural sector.

The content uses required by developers of artificial intelligence must be negotiated in the context of a respectful market for licensing. Though they often hide their motivation behind claims of serving the public interest, these are enormously powerful and wealthy corporate entities primarily driven by a profit motive. They can and should be expected to operate in a licensing environment.

Licensing is not a barrier to innovation. Innovation does not mean free riding on the work of others, nor should it; yet it would under new exception. Licensing preserves the integrity of copyright by giving creators an element of control over when and how their works are used. Licensing also provides legal

certainty to good faith users, and keeps disagreements at the bargaining table where they belong, and not in court.

Answers to Specific Questions in the Consultation

SECTION 1: TEXT AND DATA MINING (TDM)

Question 1: What would more clarity around copyright and TDM in Canada mean for the AI industry and for the creative industry?

Clarity in the Act around the responsibilities of industrial users of professionally created content is essential for the maintenance of existing markets and the creation of valuable new ones.

We have seen how lack of clarity around education as a category of fair dealing has led only to over-reach, costly litigation, greater confusion, and a broken market for published work in educational settings.

Text and Data Mining (TDM) activity requires industrial scale copying of created works. It must be regulated by strong and clear guidelines stemming from the Copyright Act.

Question 2: Are TDM activities being conducted in Canada? Why is it the case or not?

It is very difficult to answer this question authoritatively, because as we've seen from the prominent TDM activities resulting in AI services, much of that TDM and training work is done unadvertised and quietly without engaging with or even informing the creators whose work is being used.

That said, we are reasonably sure TDM activities do take place in Canada as Large Language Model research has been happening at Canadian universities for a very long time.

Question 3: Are rights holders facing challenges in licensing their works for TDM activities? If so, what is the nature and extent of those challenges?

The main challenge facing rightsholders around licensing of work for TDM is that there is simply no initiative from within the TDM sector to engage in licensing, or even to inform the creative sector about their work. The Books3 dataset was revealed by an investigative report in the press, but otherwise the training and datasets used for the training are essentially behind a curtain.

Creative professionals can be reasonably sure their work is being used because the outputs of AI Chat services show clear and deep familiarity with the work, but the lack of transparency in TDM does not indicate good faith engagement.

There are mechanisms in place that could have been used by TDM companies to engage with and seek permission from professional creators. Licensing collectives and the Copyright Board have become too easy to avoid or circumvent through vague and bad faith claims of fair dealing. This points to a fundamental weakness in Canada's Copyright Act. The fence that is supposed to define and protect our intellectual property has been so riddled with exceptions, it no longer functions as a fence.

Over a decade of undermining the Canadian market for rights under copyright has created the impression that there is no marketplace for rights, and that they can simply be ignored.

Question 4: What kind of copyright licenses for TDM activities are available, and do these licenses meet the needs of those conducting TDM activities?

There are both direct and collective licensing models already in existence, and the potential for TDM-specific licenses to emerge. The Writers' Union of Canada has developed new contract terms to ensure our members reserve their rights around TDM and Artificial Intelligence. The creative sector is nimble and able to adapt to new technology and new uses of our work, and we are willing participants in most functioning markets. With good faith negotiation and bargaining, there is a zero percent chance a licensing structure that works for all parties would *not* emerge.

Question 5: 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 the expected impact of such an exception on your industry and activities?

Any new exception for TDM and/or AI training will have a negative impact on creative professionals. Such an exception would further undermine exclusive rights conferred by the Act, would remove any potential for emerging markets, and would damage existing models for monetization and control of cultural work.

TWUC opposes any amendment to the Copyright Act that introduces new exceptions to the exclusive rights conferred by the Act. TDM and AI activities using creative work are acts of copying, and as such fall under the exclusive right of creators. There exists an evolving market for these rights, and an exception would disrupt that natural evolution and destroy a market.

Furthermore, TWUC believes the Copyright Act must now take on the question of AI outputs that directly compete with the work of human creative professionals. We believe the Act should privilege the original work of human creators in all instances of conflict with AI outputs.

If this work to clarify the Copyright Act is not done, Canada is inviting yet another round of costly, time-consuming, and ultimately inconclusive litigation similar to what we've seen around educational copying. As was shown with the SCC decision in *Access Copyright v. York University*, the Copyright Act must be clear and unequivocal in its definitions, and regulators such as the Copyright Board must be given functional authority, or the whole rights market breaks down under legal challenge.

Question 6: 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?

It is essential for transparency both from a market perspective and a moral rights perspective that TDM and AI developers be obligated to keep comprehensive records and disclose their use of copyright-protected materials.

We are already seeing allegations that infringed work was accessed from pirate sites in some cases of AI training. To not require complete transparency only encourages further infringing activities.

A functioning market for TDM and AI licensing depends on the tracking of use and value. Given the technological complexity and sophistication of such operations it would be disingenuous to argue that comprehensive record-keeping and disclosure are burdensome requirements.

Question 7: What level of remuneration would be appropriate for the use of a given work in TDM activities?

Fair and reasonable price points evolve through market functionality. Without fully understanding the details of the use of a work and the value generated by that use, it is impossible to place an accurate price. A level-playing field with effective regulation will foster negotiation and bargaining that will arrive at price points, and allow for the evolution of those price points as uses change.

What is inappropriate is allowing undeclared, unpermitted, and uncompensated use of intellectual property at industrial scale.

Question 8: Are there TDM approaches in other jurisdictions that could inform a Canadian consideration of this issue?

As with educational copying, TWUC considers the UK model for TDM licensing and permissions to be a workable example when building a framework in Canada. The UK model allows for growth of a rights market around TDM and AI, and has shown no signs of inhibiting the growth of AI development.

SECTION 2: AUTHORSHIP AND OWNERSHIP OF WORKS GENERATED BY AI

Question 1: Is the uncertainty surrounding authorship or ownership of AI-assisted and AI-generated works and other subject matter impacting the development and adoption of AI technologies? If so, how?

We do not see any inhibition on the rapid development and growth of AI systems. It would appear that questions of copyright and ownership of intellectual property are not of a high priority for AI developers.

Should they be a high priority? Absolutely. Market considerations around AI inputs and outputs are not restricted to the provision of the service. A market for AI cannot be allowed to develop without consideration for the IP used in both inputs and outputs.

Question 2: Should the Government propose any clarification or modification of the copyright ownership and authorship regimes in light of AI-assisted or AI-generated works? If so, how?

TWUC believes it is a foundational principle of copyright protection that it be granted to works demonstrating individual human judgement and skill. Allowing for copyright protection to AI outputs with minimal to no human creativity involved would quickly concentrate market power for content in the hands of the few largest AI firms, much in the same way advertising revenue was concentrated in just a few tech platforms due to a lack of effective regulation around the sharing of news content.

Governments are now in the position of trying to pull back revenue and control for media rightsholders from an intransigent tech sector. We must learn from that lesson and place proper guardrails and regulations that privilege human creation.

Question 3: Are there approaches in other jurisdictions that could inform a Canadian consideration of this issue?

Professionally created Canadian cultural works play an outsized role in defining Canadian reality and values to the world. To safeguard that work, and keep it from being obscured by an avalanche of AI-generated content that purports to define this country, Canada should put in the work to develop our own strong policy. Conversations in the US and UK around privileging human creation are instructive but only a starting point, and suffer from having to be reactive against a starting point at which AI-generated content may be considered equal to human-made content. TWUC believes this conversation should start from an agreement that human-generated content is the intended target for rights under Copyright.

SECTION 3: INFRINGEMENT AND LIABILITY REGARDING AI

Question 1: Are there concerns about existing legal tests for demonstrating that an AI-generated work infringes copyright (e.g., AI-generated works including complete reproductions or a substantial part of the works that were used in TDM, licensed or otherwise)?

TWUC is concerned that any Canadian test for infringement is inadequate without complete transparency in the TDM or AI process. TDM and AI developers must be subject to transparency requirements, and providers must be required to keep comprehensive records of inputs and outputs for any rightsholder or court to have a reasonable chance of determining infringement.

Without transparency requirements and discoverable source records, original creators are disadvantaged in protecting and exploiting their rights. One can anticipate the creation of a book series that is radically similar to a human-created series, and that then competes for market share without ever revealing that it is explicitly derivative from the human work. Under copyright as humans have designed it, that scenario is an actionable infringement, but if the infringing input cannot be proven the human rightsholder is unfairly disadvantaged.

Question 2: 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 transparency. Lack of record-keeping.

Question 3: When commercialising AI applications, what measures are businesses taking to mitigate risks of liability for infringing AI-generated works?

TWUC cannot comment on other business practices, but we are recommending that all authors insist on AI-specific rights definition and reservation in author contracts and agreements.

Question 4: Should there be greater clarity on where liability lies when AI-generated works infringe existing copyright-protected works?

TWUC believes infringement in AI process would take many forms throughout both input and output stages. We believe rightsholders should be able to seek joint and several liability between all actors in the AI process, from LLM creator, the AI platform, the application provider, and end user of AI generated content. This scenario should be no different than the various liabilities at any stage of any other instance of copyright infringement.

Question 5: Are there approaches in other jurisdictions that could inform a Canadian consideration of this issue?

As above, Canada should put in the work to develop our own strong policy. Conversations in the US and UK around privileging human creation are instructive but only a starting point, and suffer from having to be reactive against a starting point at which AI-generated content may be considered equal to human-made content. TWUC believes this conversation should start from an agreement that human-generated content is the intended target for rights under Copyright.

Respectfully submitted,

The Writers' Union of Canada