

Canada Launches Consultation on Copyright in the Age of Generative Artificial Intelligence

Casey Chisick, Eric Mayzel, Jessica Zagar, Saad Rajper

October 17, 2023

Overview of the Consultation

On October 12, 2023, the federal government launched a [Consultation on Copyright in the Age of Generative Artificial Intelligence](#). The Consultation calls for comments and technical evidence from stakeholders, including those in the creative and technology industries, on copyright policy issues relating to generative AI. It revisits the government's 2021 *Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things*,¹ following the proliferation of generative AI systems that has occurred since that time.

The deadline to submit comments is **December 4, 2023**. The government also plans to hold a series of roundtables with a variety of stakeholders. An update on the consultation findings will be posted online in 2024.

The Consultation focuses on AI systems that use machine learning models and copyright policy questions. It addresses three main topics:

- Text and data mining (TDM) and the training of machine learning models;
- Authorship and ownership of copyright in AI-generated and AI-assisted works; and
- The commercialisation of AI systems and the liability for any infringement that occurs.

The Consultation states that, in considering possible copyright policy options relating to AI, the government will aim to balance two main objectives:

- To **support innovation and investment in AI** and other digital and emerging technologies in all sectors in Canada. AI has tremendous potential for society if used ethically and responsibly, and could also drive productivity growth across the economy.
- To **support Canada's creative industries and preserve the incentive to create and invest** provided by the rights set out in the Canadian *Copyright Act*, including to be adequately remunerated for the use of their works or other copyright subject matter.

The Consultation is an important opportunity for stakeholders to provide their feedback on these issues to

Cassels

the federal government. The government has indicated that it “continues to work toward amending the *Copyright Act*, and that the comments collected “will contribute to copyright policy development.”²

Text and Data Mining

The Consultation’s main policy question regarding TDM is “whether amendments should be introduced in the *Copyright Act* to clarify how the copyright framework applies to TDM activities and, if so, what those amendments should be.” The government seeks to better understand how the *Copyright Act* could or should address concerns raised by creators, while ensuring it does not represent a significant hurdle for AI innovation.

The Consultation notes that two existing exceptions to copyright infringement — the fair dealing exception for research in section 29 of the *Copyright Act*, and the exception for temporary reproductions for technological processes in section 30.71 — could potentially apply to TDM activities, but that their potential application is uncertain. The Consultation further contemplates whether AI developers ought to be required to disclose what content is used in AI training processes and considers the approaches to TDM taken in other jurisdictions.

The government is seeking information on the nature of TDM activities in Canada and comments on how to address TDM activities in the copyright framework. The Consultation asks the following questions:

- What would more clarity around copyright and TDM in Canada mean for the AI industry and the creative industry?
- Are TDM activities being conducted in Canada? Why is it the case or not?
- Are rights holders facing challenges in licensing their works for TDM activities? If so, what is the nature and extent of those challenges?
- What kind of copyright licenses for TDM activities are available, and do these licenses meet the needs of those conducting TDM activities?
- If the government were to amend the *Copyright 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?
- 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?
- What level of remuneration would be appropriate for the use of a given work in TDM activities?
- Are there TDM approaches in other jurisdictions that could inform a Canadian consideration of this issue?

Authorship and Ownership of AI-Generated Works

Cassels

The government is considering whether the *Copyright Act* is suited to address questions of authorship and ownership of AI-generated or AI-assisted works—and, even if so, whether additional clarity could be provided to create more certainty in the marketplace.

The Consultation notes that authorship and first ownership of copyright might be affected by the degree of human input involved in the creation of a work. For example, under the existing jurisprudence, a human might qualify as the author of a work created with the assistance of AI technology. However, this is “far less probable” for works produced by generative AI systems based solely on short instructions by human users, “such as ChatGPT and DALL-E.”

The Consultation notes that first ownership could be clarified by reconsidering how to define an author, or even without relying on authorship. However, identifying an appropriate author and first owner remains an open question (e.g., the AI developer, deployer, or user).

The Consultation invites comments and evidence in response to the following questions:

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

Infringement and Liability

The Consultation seeks evidence and comments on whether and how to clarify Canada’s copyright framework to address infringement and liability issues relating to generative AI. The Consultation focuses on the potential for AI to generate works that infringe the copyright in other works or for an AI application to be found to infringe copyright.

The Consultation notes that AI might pose challenges to the traditional infringement and liability analysis, including for both primary and secondary copyright infringement. One such challenge is the potential difficulty in identifying those responsible for an alleged infringement, particularly as the level of human involvement decreases and AI’s capacity to independently create works increases. Another potential challenge is difficulty in proving who had access to a plaintiff’s work — and whether access by one person can be imputed to another — and to establish that a substantial part of the plaintiff’s work has been reproduced.

The government invites responses to the following questions:

Cassels

- 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)?
- What are the barriers to determining whether an AI system accessed or copied a specific copyright-protected content when generating an infringing output?
- When commercialising AI applications, what measures are businesses taking to mitigate risks of liability for infringing AI-generated works?
- Should there be greater clarity on where liability lies when AI-generated works infringe existing copyright-protected works?
- Are there approaches in other jurisdictions that could inform a Canadian consideration of this issue?

Conclusion

The Consultation is an important opportunity for stakeholders to participate in the shaping of a Canadian copyright policy framework for generative AI. The government has indicated its intention to consider the comments collected through the Consultation, hold a series of roundtables with a variety of stakeholders, and to continue to work toward amending the *Copyright Act* in accordance with a mandate commitment. Interested stakeholders are therefore encouraged to submit comments by the deadline of December 4, 2023.

The Cassels copyright team is a leader in copyright policy and reform matters. We would be pleased to speak with you if you would like to discuss the Consultation in further detail.

¹ [A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things \(canada.ca\)](#) (2021)

² [Government of Canada launches consultation on the implications of generative artificial intelligence for copyright - Canada.ca](#) (2023)