

**Consultation on a Modern Copyright Framework for  
Artificial Intelligence and the Internet of Things  
September 2021**

**Introduction**

The Association of Canadian Publishers (ACP) represents 115 independent English-language book publishers. Our members are Canadian-owned and they operate in communities across Canada. Along with our francophone counterparts, we publish 80% of the new books published by Canadian writers each year. These books cross all genres in both print and digital formats. Copyright is essential to the work that we do and is a key pillar of the creative economy. Copyright supports the continued creation and publication of written works in all genres and for a variety of markets.

ACP is pleased to respond to the Government of Canada’s copyright consultation on Artificial Intelligence (AI) and the Internet of Things (IoT). We approach questions related to AI and the IoT as investors in and publishers of original content, and as rights holders to that content. We emphasize the importance of the second objective highlighted in the consultation paper, that is, that copyright measures relating to AI and the IoT must help “support Canada’s cultural industries and preserve the incentive to create and invest provided by the economic rights set out in the [*Copyright Act*]. Creators, innovators and rights holders should be adequately remunerated for their works or other copyright subject matter.”<sup>1</sup>

We note that the global publishing industry has been an active contributor to the deployment and development of AI based products, services and platforms, and of machine learning technologies. Technologies that might be included under a concept of AI cover multiple areas in the publishing industry, such as machine generated content (e.g. books, snippets), editing services (e.g. data checking), automated peer-review services to facilitate human peer-reviewing, and optimized search and delivery services (e.g. reader recommendations, enhanced search features, cross-references for research reliability).

As noted throughout the consultation paper, AI remains in its early stages of development. Use cases for the publishing industry continue to emerge, though the extent of the opportunity related to these is largely unknown at this time. Responsible innovation involving AI systems must take place in a regulatory environment that respects fundamental rights, including copyright, and creates the conditions for trust in the digital economy to flourish.

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<sup>1</sup> Innovation, Science and Economic Development Canada, “A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things,” 2021, p. 5.

### A. Text and data mining

The most apparent application of AI in the publishing industry is text and data mining (TDM), which the consultation paper identifies as being crucial for the development of AI technologies. ACP is supportive of measures that encourage innovation in AI technology, but not at the expense of rights holders or through the introduction of a new TDM exception. Indeed, the creators and publishers whose copyright-protected works contribute to the development of AI should benefit from the use of those works. Furthermore, a blanket exception for TDM would be inconsistent with the Berne Convention's three-step test and puts Canada's compliance with international treaties at risk.

AI developers in many jurisdictions, including Canada, argue that a copyright exception is needed to facilitate AI, a contention that seems to us to be opportunistic rather than necessary. We believe that the current *Copyright Act* is sufficiently flexible to address circumstances arising from the use of AI technology and do not see a need for new exceptions. Existing and developing markets for AI licensing should not be supplanted by a free regime.

Establishing a new TDM exception could dramatically limit the Canadian market for licensing and divert revenues from content creators and producers to those exploiting this content for profit or other purposes, including large, well-resourced, multinational technology giants. We are not aware of any evidence that suggests that an exception would be more effective at increasing Canada's competitiveness or fostering innovation than an economic model based on licensing. Indeed, even if Canada were to become a safe harbour for the free use of works for TDM as the result of an exception, a corresponding increase in jobs or investment in Canada would not necessarily follow. Foreign companies could easily establish local servers for the purpose of TDM, without any additional investment in our economy.

Given the emerging and rapidly evolving nature of AI and TDM, a blanket exception at this stage, where the precise application of the technology remains unclear, would be to the detriment of Canadian creators and publishers. Further, Canada should not adopt a fair use regime, which would result in significant and costly litigation. Though the consultation paper states that US courts have offered guidance about the extent to which copies made as part of TDM activity for commercial purposes constitutes fair use, this analysis oversimplifies the cases cited and is inaccurate.

Licensing preserves the integrity of copyright by ensuring that rights holders can control how their works are used, provides legal certainty to users, and is not a meaningful barrier to doing business. A global marketplace for TDM licensing already exists, facilitating the licensing of text-based works through direct licensing by publishers and on a collective basis in cases when obtaining permission on a work-by-work basis is impractical. We note that the Copyright Clearance Center (CCC) already issues collective licences for TDM in the United States, which could serve as a model for the Canadian market.

We emphasize that AI developers' use of copyright-protected works must be discoverable and compensable. In order to maintain high-level investments required for content production and delivery in the digital age, publishers must be able to recoup their investments, in part through the income generated by licensing. Any policy that would replace licensing with exceptions and limitations as a means to develop AI would undermine the development of new markets and prevent future investments, in addition to distorting market competition, particularly if the growth of AI is achieved at the expense of degrading the protection and value of copyrighted content.

In short, compensated use of content in a functioning marketplace is preferable to permitting mass ingestion of works through use of exceptions, and leads to greater balance between users and copyright holders. A targeted exception for TDM in the *Copyright Act* is neither necessary nor desirable.

#### **B. Authorship and ownership of works generated by AI**

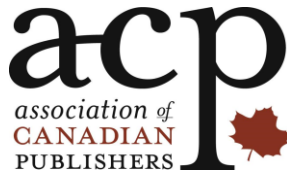
The consultation paper provides an overview of some of the current challenges in determining authorship of AI-generated works, and suggests areas for further study. At this stage, ACP is not in a position to offer an opinion on authorship and ownership of works generated by AI. We caution that further evidence of how AI is used to generate new works is needed before a legislative framework related to authorship and ownership can be developed, and stress that any regime that is intended to recognize authorship and ownership of AI-generated works must ensure that appropriate rights, including moral rights, are granted to the authors or copyright owners of works used as inputs by the AI technology.

#### **C. Infringement and liability regarding AI**

Like the question of authorship, further evidence of how AI is used in practice will be needed before a legislative framework for infringement and liability can be developed. We note that it remains uncertain whether maintaining existing infringement mechanisms in the *Copyright Act* would hamper the development of a market for AI-generated works; however, carving out exceptions for liability for infringement conducted using AI technology would almost certainly impact copyright owners negatively.

#### **D. Internet of Things**

In developing measures to facilitate the use of copyright-protected works by the IoT, ACP reinforces the need for strong technical protection measures (TPMs) in order to protect creative content. TPMs are essential tools that help facilitate remuneration to creators and publishers for use of their work, protect against piracy, and protect financial investment in new works. Any amendments to the *Copyright Act* should preserve TPMs for creative content.



### E. Other recommendations

The consultation paper makes clear that AI and the IoT are in their early days of development. There are, understandably, more questions than answers surrounding these technologies, and further study will be needed in order to make informed, evidence-based copyright policy decisions that take into account the rights of both users and copyright holders, and are in keeping with Canada's international treaty obligations.

While appreciating the Government of Canada's interest in consulting on these topics at this very early stage, we underscore the urgent need for copyright reform in areas that are well-established as having a detrimental impact on Canadian rights holders. Over the last decade we have presented factual evidence and made the case that changes to the *Copyright Act* in 2012 have resulted in significant economic damage to the writing and publishing sector, evidence that has withstood the scrutiny of the courts. During this time, Canadian creators and publishers have lost more than \$150M in direct licensing revenue alone, along with an unknown amount in primary book sales. The recent decision by the Supreme Court of Canada (SCC) in *Access Copyright v. York University* reinforces that our copyright framework is broken. Without a strong copyright framework in place to govern existing use of our work, it is difficult to imagine how independent publishers will have the capacity to participate in emerging markets and opportunities that stem from AI and the IoT.

ACP reiterates its call to the Government of Canada to restore fair compensation to creators and publishers for the educational use of their works. We join colleagues across our sector in urging the government to implement measures that are consistent with recommendations 18, 20, and 21 from the Standing Committee on Canadian Heritage's *Shifting Paradigms* report:

1. Fair dealing for education must only apply to educational institutions where a work is not commercially available under licence by the owner or a collective.
2. Tariffs set by the Copyright Board must be enforceable.
3. Statutory damages must be available to all collectives.

For more information:

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