Writers Guild of Canada

January 23, 2024

The Honourable François-Philippe Champagne
Minister of Innovation, Science and Industry
235 Queen St
Ottawa, ON K1A 0H5

The Honourable Pascale St-Onge
Minister of Canadian Heritage
15 Eddy Street
Gatineau, QC K1A 0M5

Dear Mr. Champagne and Ms. St-Onge:

Re: Comments of the Writers Guild of Canada regarding the Government of Canada's Consultation on Copyright in the Age of Generative Artificial Intelligence, January 15, 2024

I am writing to provide the comments of the Writers Guild of Canada (WGC) on the Government of Canada's Consultation on Copyright in the Age of Generative Artificial Intelligence, January 15, 2024.

The WGC has also submitted these comments via the Government of Canada portal at https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-copyright-age-generative-artificial-intelligence. This letter provides the same comments as submitted there in letter format.

We thank you for the opportunity to comment on this vitally important topic, and would be pleased to discuss this issue further at your convenience.

TECHNICAL EVIDENCE

In your area of knowledge or organization, what measures are taken to mitigate liability risks regarding AI-generated content infringing existing copyright-protected works?

Pursuant to section 13(1) of the *Copyright Act* of Canada (the Act), the general rule under the Act is that the "author" of a work is the first owner of the copyright therein.

Screenwriters are the authors and first owners of the copyright in their scripts. This is expressly recognized in the current Independent Production Agreement (IPA), which is the collective agreement currently in force between the Writers Guild of Canada (WGC) and the Canadian Media Producers

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Association (CMPA). (Please see: https://www.wgc.ca/screenwriters/resources/agreements/search_agreements/index)

Specifically, Article A701 of the IPA states: "All rights negotiated under this Agreement or in any individual contract between a Writer and a Producer shall be in the form of a license from the Writer to the Producer for a specific use during a specified term of whatever right is in question. The Writer's copyright shall not be assigned. The copyright herein referred to is the copyright in the Writer's Script Material, which is separate and distinct from the copyright in the Feature Film or program."

In this context, the IPA includes the following warranties and indemnities.

Article A709(a): "The Writer or Story Editor warrants that, to the best of his/her knowledge, information and belief the Script Materials to be provided by him/her hereunder: i) are original to the Writer or Story Editor; ii) do not infringe the copyright of any person; iii) do not defame any person; and iv) do not invade the right to privacy of any person. The foregoing warranty does not apply to material included in the Script Materials supplied to the Writer or Story Editor by the Producer, or in respect to any claim or action that arises from any change made in the Script Materials delivered by the Writer or Story Editor to the Producer after such delivery."

Article A709(b): "The Producer warrants that, to the best of the Producer's knowledge, information and belief, any material supplied to the Writer by the Producer for the Writer or Story Editor to incorporate in the Script Materials to be provided by the Writer or Story Editor hereunder: i) do not infringe the copyright of any person; ii) do not defame any person; and iii) do not invade the right to privacy of any person; and covenants that no Script Material supplied by the Writer or Story Editor to the Producer shall be used by, or with the approval of, the Producer in such a manner as to defame any person or to invade the right to privacy of any person or to violate the provisions of the Criminal Code of Canada in with respect to child pornography, or obscenity or any like offenses."

While these provisions predate the emergence of generative AI as a viable source of script materials, the WGC takes the view that Articles A709(a)(i) and (ii), and Article A709(b)(i) are applicable in this context. Subject to the state of the law of copyright in Canada, these articles limit or prevent the use of AI-generated materials by both screenwriters and producers under the IPA.

As of the date of this submission, the WGC is in the process of bargaining the terms of the next IPA, and is naturally aware of the potential impacts of recent developments of generative AI in this context.

TEXT AND DATA MINING

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

Broadly speaking, TDM sits at the front end of a pipeline in which valuable human-created material is extracted, used to train generative AI systems, and then those systems are used to create value for their developers and users. In other words, it is a process that extracts something of value from the work of human creators as "inputs", often for little or no compensation, and then conveys that value to developers and users in the form of generative AI "outputs". Value is transferred from one entity or

entities to another entity or entities, often without the knowledge, consent, credit, or compensation of the former.

In this sense, the "M" in "TDM"—i.e. the "mining"—is a deeply misleading term. In traditional mining, mineral wealth exists in the ground due entirely to natural processes, and not in any way due to human effort. Nobody "made" the iron ore in an iron mine, it existed there long before humans did, and the human effort in the iron value chain begins with its discovery and extraction from the earth.

This is fundamentally not the case with "text and data mining". In the case of TDM, the "T" and the "D" is only available for the "M" because human beings created the text and data in the first place. Moreover, they did so through expending effort, and often significant effort. Indeed, in complete contrast to the mining of minerals, the human effort involved in creating a given work under copyright is much more significant than that involved in scraping it from the Internet.

Simultaneously, there is an enormous asymmetry of information available to AI developers and the creators whose works are being "mined". In many cases, if not most, the asymmetry is total, with AI developers having ALL the knowledge available on what works are being mined, and how that information is being subsequently used, while creators have NONE of that knowledge. Many creators do not even know if or how their work has been used in TDM in the first place.

Given all this, there is an enormous need for transparency in TDM, and this is a place for copyright law and policy to start. AI developers must have certain basic obligations for disclosure and reporting, to holders of copyright, to the public, or both. AI platforms should be required to comply with transparency requirements, including, but not limited to, publishing records of the copyright-protected works that were ingested into the platform.

This clarity would allow creators and rights holders, once they know whether and how their work is being used, to advocate and/or negotiate for fair compensation for its use, or to consent to its use in the first place. As noted above, creators have made something of value to AI developers. We know it is valuable, because AI developers are using it through TDM, and generative AI is attracting significant financial investment and user activity. Greater clarity around TDM would allow that value chain to operate in a way that is beneficial to everybody on it, and not just those and the tail end.

Broadly speaking, the WGC believes that TDM activities should be subject to the "three C's" of consent, credit, and compensation for rightsholders and authors.

Further, the WGC believes that TDM for the purposes of training generative AI is not and should not constitute fair dealing, either now or in the future.

Are TDM activities being conducted in Canada? Why or why not?

As noted above, given the near-complete information asymmetry with respect to TDM, the WGC cannot say whether TDM activities are being conducted in Canada. Given the apparent ubiquity and pervasiveness of the practice, however, we would have every reason to believe that they are indeed being conducted in Canada.

See the WGC's further comments elsewhere here on the need for transparency on TDM activities.

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 be the expected impact of such an exception on your industry and activities?

Please see our comments above regarding transparency and information asymmetry in this context. In particular, AI platforms should be required to comply with transparency requirements, including, but not limited to, publishing records of the copyright-protected works that were ingested into the platform. Broadly speaking, the WGC believes that TDM activities should be subject to "the three C's" of consent, credit, and compensation for rightsholders and authors. Further, the WGC believes that TDM for the purposes of training generative AI generally does not and should not constitute fair dealing, either now or in the future.

Given the above, the WGC feels strongly that the Government should not create any new copyright exceptions to facilitate TDM, as a fair dealing exception or otherwise. Exceptions that allow AI companies to freely use copyrighted works for AI training purposes would erode the objectives of the "the three C's" of consent, credit, and compensation for rightsholders and authors. Such exceptions would eliminate completely the "consent" element, and would further undermine the other two, at the very least, by either not providing for compensation of any form, as a full fair-dealing exception, or through compelled licensing, which would undermine rightsholders' ability to negotiate compensation or withhold their rights if a deal cannot be struck. Removing the latter option from rightsholders naturally hobbles them in negotiations with AI companies. The price of a thing is grounded in the fact that the potential buyer doesn't get to have it if the seller doesn't agree to the price. Taking that away benefits the potential buyer and hurts the potential seller. Forcing rightsholders to make works available for TDM benefits AI companies and hurts rightsholders and authors.

The WGC also opposes an "opt-out system" for the use of copyrighted works in AI training. An opt-out model would place an enormous burden upon rightsholders, some of whom are individual creators with limited resources, requiring them to monitor multiple AI platforms—or all AI platforms—and then send notice to each advising that it has chosen to opt out of the exception. What happens with regard to any copying that took place before they opted out? This would be a significant burden to place on copyright owners—again, some of whom are individual artists—vis-à-vis typically much larger and powerful corporations, and is disproportionate to the problem and with respect to the bargaining power of the parties.

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?

Yes. Generative AI platforms should be required to comply with transparency requirements, including, but not limited to, publishing records of the copyright-protected works that were ingested into the platform.

The WGC is not currently in a position to provide further detail on exactly what that transparency would look like, given the current near-total information asymmetry discussed above. We presume that further details would be engaged in further steps in this or a subsequent government consultation process. But the principle of such transparency and the further development of how it would work is vital.

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

Given the information asymmetry discussed above, the WGC cannot effectively answer this question, as we lack the information upon which to do so. We do not know which copyright-protected works may have been used in the training of a given AI system, and we do not have quantitative data on the value generated by the AI system based on the use of those works. In addition, see our comments above that the Government should not create any new copyright exceptions to facilitate TDM. Exceptions that allow AI companies to freely use copyrighted works for AI training purposes would presumably upend the objective of the "the three C's" of consent, credit, and compensation for rightsholders and authors or, at the very least, the "consent" element.

Further, we question the premise of the question that the Government should set, or be involved in setting, the level of remuneration that would be appropriate for the use of a given work in TDM activities in the first place. Consistent with "the three C's", and in conjunction with robust transparency obligations, it should be up to rightsholders and authors to negotiate with AI developers on whether, how, and for what remuneration their works can be used to train AI systems. In this sense, we submit that the Government should be empowering creators to engage with AI developers on a level playing field, rather than setting the price itself, or compelling the transaction in the first place.

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

The WGC is not in the position at this time to provide a comprehensive review of the approaches in other jurisdictions on this issue. Broadly speaking, inter-jurisdictional comparisons of law and policy are highly complex and, to be done properly, involve a deep understanding of the economic, social, and political contexts of those jurisdictions and how they compare to those of Canada. Ideally, they would also consider what the outcomes of those approaches have been. In the case of generative AI, it is very early in the process and such outcomes are unlikely to be well understood, or known at all.

AUTHORSHIP AND OWNERSHIP OF WORKS GENERATED BY AI

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?

As stated in the Government's 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."

The WGC believes that this is correct, both as an expression of the jurisprudence and that the jurisprudence has reached the correct conclusion. It is entirely consistent with the words of the Act, as well as the policy rationales for the existence of copyright in the first place, for authorship to be attributed to natural persons—to human beings—alone, and not to generative AI, nor to any other type of non-human source.

There are two generally accepted policy rationales for the existence of copyright. One sees copyright from the perspective of users, as a means to incentivize and promote the creation of works that ultimately benefit societies at large. The other sees copyright from the perspective of authors, as a

natural right of a person to the fruits of their labours in the exercise of their skill and judgement. In both cases, these rationales are underpinned by the word used to describe what is copyrightable under the Act, namely, "works". "Works" naturally involve work—human effort, without which such works don't exist. This is fundamental to any reasonable policy rationale for copyright.

Neither of copyright's rationales justify copyrightability being vested in AI-generated "works". Importantly, AI-generated outputs involve virtually no effort on the part of the user to create. Currently, a user simply enters basic text prompts into the generative AI and receives back complex text, visual, audio, or audiovisual outputs in return. Other types of non-text inputs may exist now or in the future, but the crucial fact remains that these inputs represent the tiniest fraction of the effort that would be required to create a similar copyrightable work by non-AI-generated means. For example, a complete novel that might require a year or more for a human to write can be spat out by a generative AI in mere minutes, or even seconds. The difference is one of orders of magnitude.

Given this, there is no reason for copyright law to protect such outputs for the benefit of the user, either based on the rationale for the incentivizing of creation for the benefit of society, or the rationale for protect the right of a person to the fruits of their labour. In the latter case, there is no meaningful "labour" to protect, and in the former case, there is no shortage of AI-generated works in need of incentivizing.

Similarly, as it pertains to the developers of generative AI, there is clearly no need to incentivize their work under copyright either, as demonstrated by the existing fact that copyright is currently not ascribable to AI-generated works in key jurisdictions like the United States, yet billions have poured in to AI development already, and not from any reasonable expectation that copyrightability of resulting outputs is somehow on the horizon.

Given this, there is an opportunity for the Government to amend the Copyright Act to make it crystal clear that an "author" is, indeed, a natural person—a human being—and not a machine. We recommend that the Government do so. (This will be particularly important if the Government chooses to clarify that performers are human beings, as it will then be inconsistent for the Act to make that clarification, but not clarify the same issue with respect to authors.) To reiterate, however, the WGC believes it is clear that the Act as currently drafted already requires that authors are human beings, and AI cannot be an author.

In addition, as stated in the Consultation Paper, "A human may contribute sufficient skill and judgment in a work produced with the assistance of AI technologies to be considered the author of the work." We submit that the Government should amend the Act to specify the standard that such contribution of "sufficient skill and judgement" in the context of AI would be, and that this should be a high standard—or, at the very least, a higher standard—for a significant contribution of human input.

The WGC is particularly concerned about the threat of a practice we call "copyright laundering". Copyright laundering may be a particular risk for creators such as screenwriters, who work in an expensive and highly commercialized medium—in our case, film and television—and who collaborate with producers and others within an intermediary stage in the larger creative process towards a final production.

In film and television production, screenwriters work with producers and/or content commissioners like broadcasters or streamers. The process begins with an original idea or existing source material, like a novel, and which is then developed into a script which ultimately goes into production to become a film or television show. This development process is a creative process in and of itself, attracting both remuneration for the work done by the screenwriter and recognition for the creativity involved, including in the form of credit on the production and critical acclaim.

Copyright laundering would occur when a producer or content commission approaches a screenwriter with material from a generative AI and asks the screenwriter to rework that material to such a degree that it becomes copyrightable. Under a legal framework like the current one, the producer or content commissioner would likely know that simply producing the script generated by AI without sufficient skill and judgement from a human writer would put them at significant risk of not having a copyrightable film or television show in the end, and therefore not being able to effectively commercialize a significant investment in its production. But if the standard for "sufficient skill and judgement" from a human screenwriter is low enough, the producer or content commissioner could generate a script using AI for extremely low or no cost, and have a human writer "launder" the script, seeking to pay the screenwriter significantly less, based on the (specious) argument that they "didn't do as much work" as if they were working from an original idea. (And without having to benefit other human artists or rightsholders through the purchase the rights to human-created source material, such as a novel.)

Such a practice would not necessarily eliminate the role of human screenwriters altogether, but it could reduce the amount which screenwriters are paid, threatening the economic viability of screenwriting as a profession. At the same time, it could also diminish the creative status of human screenwriters, as audiences and others may question just how much the screenwriter—or any other artists working on the production involving AI, for that matter—actually contributed to the final work. Indeed, whether accurate or not, producers, content commissioners, and/or audiences could come to see screenwriters not as artists and creators, but mere formalistic legal requirements for copyrightable production whose skill and ideas are worth less than their existence as human beings.

The issue of the economic and creative status of screenwriters and other artists must also be considered in light of the development and maintenance of a talent pool. It is possible that encroachment of generative AI into creative fields would not eliminate all relevant creative roles immediately. Many senior, established artists may remain in demand for a number of reasons, such as their name recognition, track record, and/or unique individual style. But what about more junior and mid-level creators who are trying to establish themselves? Creative skill and talent are rarely things that artists are simply born with, fully formed. They are developed over the course of a career. Like any skill, creative work needs to be practiced and honed. A unique creative voice is something that an artist often finds within themselves after significant effort to unearth it. That is a process that takes years, and is often only possible if and when the artist can financially sustain themselves while it happens, through the process of making art itself. Established creative industries provide incubators for talent, and a pipeline for younger or newer artists to earn a living through creativity while they hone their craft.

If generative AI is allowed to disrupt that pipeline by rendering less experienced creators unnecessary, the short-term impacts may only be felt by those creators. But the long-term impacts will be felt by

everybody, as the conveyor belt that develops and delivers talent into more senior roles shuts down. And then we will all be worse off as a result.

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

Broadly speaking, inter-jurisdictional comparisons of law and policy are highly complex and, to be done properly, involve a deep understanding of the economic, social, and political contexts of those jurisdictions and how they compare to those of Canada. Ideally, they would also consider what the outcomes of those approaches have been. In the case of generative AI, it is very early in the process and such outcomes are unlikely to be well understand, or known at all.

That said, while it may be considered at first glance to be a comparable jurisdiction, the approach to authorship and ownership to AI-generated works taken in the UK represents a global outlier position, is comparable to the UK approach for authorship of cinematographic works that is also a global outlier, is inconsistent with Canadian copyright law, and should not be followed in Canada.

INFRINGEMENT AND LIABILITY REGARDING AI

What are the barriers to determining whether an AI system accessed or copied a specific copyright-protected content when generating an infringing output?

Please see our comments elsewhere in this consultation regarding transparency and information asymmetry in this context. This asymmetry is virtually total, with AI developers having ALL the knowledge available on what works are being mined, and how that information is being subsequently used, while creators have NONE of that knowledge. Many creators do not even know if or how their work has been used in TDM in the first place. This is a significant barrier.

Yours very truly,

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