

CFLA Statement: AI and Copyright and its application in Cultural Heritage Institutions

Issue:

Copyright protection of artificial intelligence (AI) outputs would be disruptive to the complex and nuanced balance in the Copyright Act. The Act protects works created by **human authors**, including the computer programs underlying AI. The computational outputs of AI are not protected, although there are global stakeholder (industry and lobbyists) pressures to change this.

AI processes can be trained to create works in a faster and more systematic way than human authors. The mass output that AI makes possible displaces human creativity and can threaten economic disruption that disadvantages human authors and privileges rapid machine outputs over human creations. Any protection of works generated by AI has the potential to radically enclose a great swath of the public domain, further diminishing human creativity.

Background

Copyright in Canada protects the expression of human creativity that includes skill and judgment. The outputs of computation from processes that are mechanical and routine may not reach the originality bar set out in the Supreme Court of Canada's unanimous *CCH*¹ decision. Without expressive agency, and without underlying intellectual effort, AI process outputs should not be afforded the same level of protection that copyright affords the works of human creators. As Prof. Carys Craig points out, "authorship entails expressive agency... that AI simply cannot possess."² Machines should not become rightsholders.

The outputs of AI processes are mechanical exercises that do not include skill and judgment; the development of an algorithm is an exercise of skill and judgment. As such, the computer program that creates a work that has copyright protection and the copyright regime retains its inherent incentive to create. Unlike human authors, AI processes do not need the incentives afforded by copyright to create new works.³ AI is already protected by trade secrets and the expansion of this protection into IP rights would unbalance the scope of IP protection and disincentivize other stakeholders.

One intent of copyright is to "maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information."⁴ The mass output that AI makes possible can cause economic disruption by disadvantaging human authors and

¹ *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339.

² Carys J. Craig "AI and Copyright," in Florian Martin-Bariteau & Teresa Scassa, eds., *Artificial Intelligence and the Law in Canada*. Toronto: LexisNexis Canada, 2021.

³ Daniel Gervais. "The Machine as Author." *Iowa Law Review* 105 (2020). 2062.

⁴ World Intellectual Property Organization. *WIPO Copyright Treaty*. Geneva, 1996.

privileging machine outputs over human creations. If covered by the full range of copyright protections, this kind of volume-based “autoship” would crowd out human authors and strip society’s right to access information associated with computational outputs that would otherwise reside in the public domain.⁵

On the important and complex issue of authorship, CFLA currently takes the position that the outputs of AI processes should remain unenclosed and in the public domain. As Craig and others warn, providing full copyright protection for AI outputs threatens copyright balance, and the value Canada places on human expression.^{6 7}

Analysis

AI brings with it many questions that remain to be answered including how to deal with the potential for misuse and exploitation around issues such as privacy intrusions, large-scale copyright infringement, and illegal collection of data, as well as how both liability and the autonomy threshold will be determined for AI processes and outputs. As Daniel Gervais pointedly states “No copyright should be granted to an author who is not also responsible for the work’s meaning and content, whether it be libel or copyright infringement.”⁸

Whatever regime is adopted for the recognition of AI creations will affect creators and society, and its significance must be addressed as a matter of important public policy with potentially disruptive unintended consequences. Equating human and machine creation would have a deleterious effect on creators and how society values their work and their contribution to the public good. It would negatively affect the incentive to create: society’s conception of the author will be affected in direct relation to the degree and type of recognition that is accorded to AI authorship.

If the outputs of AI processes have any protection at all, they should have less protection than human authors currently hold under the *Copyright Act*. While AI outputs may not achieve originality, the exploration of computation, intellectual labour, and exchange value invites consideration of a thinner protection, as illustrated in *sui generis*⁹ rights in other jurisdictions for database protection, with short non-renewable terms of protection. The parameters of “thinner copyright”¹⁰ remain to be determined, and should be the subject of thorough consultation and deliberation. Granting full protection to AI output would have deleterious effects on creator incentive.

⁵ Obeebo Inc. “Comments on Intellectual Property Protection for Artificial Intelligence Innovation,” submitted to USPTO Request for Comments on Intellectual Property Protection for Artificial Intelligence Innovation. 2019. https://www.uspto.gov/sites/default/files/documents/Obeebo-Inc_RFC-84-FR-58141.pdf

⁶ Carys J. Craig, “AI and Copyright,” in Florian Martin-Bariteau & Teresa Scassa, eds., *Artificial Intelligence and the Law in Canada*. Toronto: LexisNexis Canada, 2021.

⁷ There was a recent refusal to register the copyright claim in the work of an AI machine in the U.S., as human authorship is seen by law as necessary for such protection. See: Copyright Review Board, United States Copyright Office. “Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071),” February 14th, 2022. <https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf>

⁸ Gervais, *supra* 15, 2087.

⁹ *Sui generis* definition: of its own kind; unique; in a class by itself. Steven H Gifis, *Dictionary of Legal Terms : A Simplified Guide to the Language of Law*. Barron’s, 1998.

¹⁰ For example see *Feist Pubs., Inc. v Rural Tel. Svc. Co., Inc.*, 499 US 340 (1991)

Recommendations

1. Artificial intelligence authored works should not be protected by copyright.
2. Should any protection be contemplated, it should be weaker protection, what is called “thinner copyright”.¹¹

¹¹ Ibid.