Generative AI and Copyright (Canada)

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This Practice Note considers copyright issues arising when generative AI (GenAI) generates content. This Note covers subsistence of copyright in AI-generated content (AIGC), copyright ownership, and potential copyright infringement issues arising when either training a GenAI model or generating AIGC. It also explores strategies to address these issues. This Note is part of a global suite of jurisdiction-specific resources helping in-house lawyers and private practice attorneys to navigate each jurisdiction's legal framework for copyright and GenAI.

Where a person uses a generative AI (GenAI) GenAI model to generate AI-generated content (AIGC), there are questions over whether copyright can subsist in that AIGC. Some jurisdictions have express human authorship requirements. There may be questions over whether the AIGC can be original if it is derived from a model trained on earlier works.

The training of GenAI models and their use to generate AIGC raises complex copyright issues, particularly regarding subsistence, ownership, and infringement.

Depending on the circumstances, each step of the process of training and using a GenAI model could involve copyright infringement:

- Collating copyright works for training.
- Ingesting the copyright works in a particular jurisdiction.
- Training the GenAI model in a particular jurisdiction.
- Making available in this jurisdiction a product that uses the model.
- Entering prompts into that product.
- The model generating AIGC and providing it to the user of the product.

Given the numbers of copyright works typically used for training purposes, the potential scale of infringement is considerable. However, in some jurisdictions, there may be defences to allegations of copyright infringement.

This Note considers these questions and possible answers, considering that case law and legislation in this area is still developing. It then discusses strategies for managing the associated risks relating to copyright infringement and subsistence.

This Note is part of a Global suite covering these issues in different jurisdictions. This Note focuses on copyright and does not consider database rights, performers' rights, moral rights, patents, or trademarks.

Given the rapidly changing global landscape for this area of law, where this Note contains links to other Practical Law assets, including glossary terms, their jurisdictional focus is indicated either in the title or with a parenthetical, such as "(UK)" or "(US)."

AI and GenAI

The meaning and scope of AI and GenAI vary across fields and jurisdictions:

- The Council on Artificial Intelligence of the Organisation for Economic Co-operation and Development (OECD) adopted a recommendation including a definition of "AI system" (Recommendation of the Council on Artificial Intelligence OECD/LEGAL/0449, adopted 22 May 2019, amended on 8 November 2023).
- The EU AI Act contains its own definition of an AI system which has been supplemented by guidelines on the definition of an AI system, see Practice notes, EU AI Act: AI system and EU AI Act guidelines for AI systems: AI system definition guidelines.

For general information on AI and relevant jargon, see:

- Practice Note, Demystifying artificial intelligence (AI): AI: convergence of machine processing, learning, perception and control.
- Practice Note, AI jargon buster (UK).
- Article, AI Glossary.

AI

Defining AI is complex, as there is no single definition with universal acceptance. The scope of technological products that qualify as AI continues to evolve as the field advances. New innovations emerge, while older technological products may no longer be classified as AI.

Different Canadian institutions define AI in slightly different ways:

- The proposed Artificial Intelligence and Data Act (Bill C-27) (AIDA) (proposed in 2022, but ultimately not passed; see GenAI) defined "artificial intelligence system" as "a technological system that, autonomously or partly autonomously, processes data related to human activities through the use of a genetic algorithm, a neural network, machine learning or another technique in order to generate content or make decisions, recommendations or predictions." A genetic algorithm is an algorithm (US) that mimics biological evolution by using mechanisms that resemble natural selection. For more information, see Neural Network (US) and Machine Learning (ML) (US).

- The Government of Canada's Directive on Automated Decision-Making defines AI as "information technology that performs tasks that would ordinarily require biological brainpower to accomplish, such as making sense of spoken language, learning behaviours or solving problems."

- The Department of National Defence, in The Department of National Defence and Canadian Armed Forces Artificial Intelligence Strategy, defines AI as "the capability of a computer to do things that are normally associated with human cognition, such as reasoning, learning, and self-improvement."

- Ontario's Responsible Use of Artificial Intelligence Directive defines an "artificial intelligence system" as "a machine-based system that, for explicit or implicit objectives, makes inferences, from the input it receives, in order to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments," and other systems as may be prescribed.

- The Canadian Bar Association, in its Practice Tools, Ethics of AI for the Legal Practitioner, defines AI as computer systems able to complete tasks independently that would otherwise require human intelligence and intervention.

GenAI

GenAI is a subset of AI focused on creating new content. According to Canada's Directive on Automated Decision Making, GenAI refers to AI systems that generate outputs such as text, audio, code, videos and images based on user-provided inputs known as prompts. The Canadian Bar Association, in its Practice Tools, Ethics of AI for the Legal Practitioner, defines GenAI as technology that not only analyses or categorizes existing information but also uses patterns and data it has learned from existing content to generate new content that is similar in style and structure to the original data but entirely new.

Some examples of GenAI tools include well-known large language models (US, LLMs), tools that produce code based on text prompts, and tools that produce images from text or image prompts.

These models are typically trained on vast datasets, including publicly available content. They generate responses by predicting statistically likely outputs based on the prompt. For example, they may predict the next word in a sentence. Techniques like human feedback and reinforcement learning are often used to refine and improve the quality of the generated content. As a result, GenAI can produce outputs that closely resemble human-created work.

In June 2022, the Government of Canada tabled the AIDA, becoming one of the first countries in the world to propose a law to regulate AI. It provided the public with a companion document that provided further information on how these regulations would be developed (see Government of Canada: The Artificial Intelligence and Data Act (AIDA) – Companion Document). After extensive consultation, including on what is a "high-impact" system subject to additional regulatory scrutiny, the legislation was not enacted when the government changed. As a result, there is currently no national legislation either proposed or in force.

Canadian provinces are also pursuing legislation on the use of AI. For example, Ontario introduced Ontario's Trustworthy Artificial Intelligence Framework, which includes a Responsible Use of Artificial Intelligence Directive that aims to guide the Government of Ontario's use of AI. It also enacted legislation requiring the disclosure of AI in the employment context.

Common AIGC Applications

Across Canada, as in other developed countries, AIGC is increasingly being used for a wide range of commercial applications.

Subsistence of Copyright in AIGC

General Test for Subsistence

In Canada, copyright subsistence is governed by the *Copyright Act*, R.S.C., 1985, c. C-42.

Section 5 of the *Copyright Act* provides that copyright subsists "in every original literary, dramatic, musical and artistic work" (LDMA work). Copyright arises automatically for works that meet the required conditions without registration. However, registration can serve as useful evidence of ownership in legal proceedings.

Case law has further clarified the scope of requirements for copyright subsistence. According to the Supreme Court of Canada, the key elements that must be satisfied for copyright to subsist include:

- Proper Subject Matter. The work must fall within one of the categories listed in the *Copyright Act*, including LDMA works.
- Originality. The work must be original, meaning it must:
    - not be copied; and
    - result from the author's exercise of skill and judgement.

    In this context "skill" refers to the use of one's knowledge, developed aptitude or practised ability to produce the work, while "judgment" refers to one's ability to form an opinion or evaluation by comparing different possible options in producing the work. Together these criteria distinguish from "sweat of the brow" or merely mechanical effort in producing the work.
- Fixation. The work must be fixed in a tangible form, such as being written, recorded, or otherwise captured in a material form.

(*CCH Canadian Ltd v Law Society of Upper Canada, 2004 CarswellNat 446 (S.C.C.)*; see Box, CCH Canadian v Law Society of Upper Canada.)

Application of General Test for Subsistence to AIGC

Under Canadian copyright law, a work must meet an originality threshold for copyright to subsist (see General Test for Subsistence). This requires that the work must be the product of an author's skill and judgement. While the *Copyright Act* does not explicitly state that the author must be human, courts and policymakers have generally interpreted the law to assume human authorship and human contribution of skill and judgement.

However, the effect of AIGC remains a novel and evolving area within Canadian law. To date, there have been no substantive judicial decisions directly addressing the status of authorship in the context of AIGC. There are no legislative provisions addressing authorship of computer-generated works.

A notable case that may clarify subsistence of copyright in AIGC involves a painting called Suryast, which was created using the RAGHAV Artificial Intelligence Painting App. For discussion of this case, see Box, Suryast.

For a discussion of the contrasting cases in other jurisdictions, see:

- Practice Note, AI-Generated Content and Copyright (China): Copyrightability: Application of General Test to AIGC.
- Practice Note, Generative AI and Copyright: Protection Limited to Human Contributions (US).

Suryast

A notable pending case in Canada that may clarify subsistence of copyright in AIGC involves a painting called *Suryast*, which was created using the RAGHAV Artificial Intelligence Painting App. The human creator, Ankit Sahni, prompted the AI to blend Vincent Van Gogh's *The Starry Night* painting with a sunset photograph he had taken. The work was registered through an automated system of the Canadian Intellectual Property Office (CIPO), listing both Sahni and the AI as co-authors.

In 2024 the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) filed an application under section 57(4) of the *Copyright Act*, seeking to have *Suryast* removed from the copyright registry on the basis that:

- *Suryast* does not meet the originality requirement.
- An AI system cannot be an author under the *Copyright Act*.

For more information on the case, see Canadian Copyright Database, Reg. no. 1188619 and Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic v Ankit Sahni, (8 July 2024), Ottawa, FCC T-1717-24 (notice of application).

For information on how the Copyright Review Board in the US denied copyright registration to *Suryast* because it did not contain sufficient original human authorship to be registrable, see Practice Note, Generative AI and Copyright: Protection Limited to Human Contributions.

There is significant debate as to the relative roles of AI and humans required to protect a work under copyright. Uncertainty will remain in Canada until there is a judicial decision or legislative clarity.

Subsistence in AI-Assisted Content

There have been no court decisions that specifically address copyright in works generated with AI assistance.

However, the views of stakeholders as summarised in the Government of Canada: Consultation on Copyright in the Age of Generative Artificial Intelligence: What we heard report (Consultation Report), following the government's 2023 consultation Copyright in the Age of Generative Artificial Intelligence (Public Consultation), suggest the possibility a human could contribute sufficient skill and judgement to a piece of AI-assisted content to be considered the author of that work. For more information on the consultation, see Box, Consultation: Copyright in the Age of GenAI.

Consultation: Copyright in the Age of GenAI

In response to growing legal uncertainty, the Canadian government conducted a public consultation titled Copyright in the Age of Generative Artificial Intelligence in late 2023 (Public Consultation). The consultation resulted in the preparation of the Government of Canada: Consultation on Copyright in the Age of Generative Artificial Intelligence: What we heard report (Consultation Report).

The views of stakeholders as summarised in the Consultation Report as part of "Observation 4" suggested the possibility a human could contribute sufficient skill and judgement to a piece of AI-assisted content to be considered the author of that work. The report suggested that a common perspective is that "current copyright laws are flexible enough to address authorship and ownership questions relating to AI".

Effect of Subsequent Human Enhancement on Subsistence

Additional human enhancement of AIGC after its initial generation can likely affect whether copyright subsists in either the final work or the aspect of the work directly arising from the human enhancement. The key issue is likely to be whether the human enhancements demonstrate sufficient skill and judgement to meet the originality threshold (see General Test for Subsistence). Canadian courts and legislation have not addressed this specific scenario.

However, the US Copyright Office stated in a report that copyright "does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements" (US Copyright Office: Report, Copyright and Artificial Intelligence, Part 2: Copyrightability). However, any US Copyright Office analysis is likely to be fact-specific, as the registration decision for the comic book *Zarya of the Dawn* illustrates (see Practice Note, Generative AI and Copyright: Protection Limited to Human Contributions (US)). A similar result in Canada could mean that human enhancements, such as compiling, compositing, or adding elements that involve human skill and judgement could be protected (see General Test for Subsistence), even if the AI-generated original is not.

Subsistence: AIGC Infringes Third-Party Copyright

Under Canadian law, whether AIGC infringes or may infringe third-party copyright work is likely unrelated to a determination that the AIGC is protectable by copyright. If AIGC incorporates substantial parts of a third-party copyright work without authorisation and no fair dealing exception applies, this could be considered copyright infringement. However, a work can incorporate a substantial part of a third-party work (that is, infringe copyright) and still benefit from its own copyright protection.

Copyright subsists automatically in all works that meet the key elements (see General Test for Subsistence), whether they infringe another work or not (section 5(1) Copyright Act; see also AIGC and Copyright Infringement).

Subsistence: Dedicated Regime for Computer-Generated Works

There is currently no law in Canada providing for copyright to subsist in computer-generated works or AIGC where there is no human author or creator. Proposed reforms in this area are under discussion, but no specific legislative framework has been enacted that would extend copyright in this manner.

This contrasts with the UK, where there is a dedicated regime for copyright subsistence in computer-generated works (see section 9, UK Copyright, Designs and Patents Act 1988 and Practice Note, AI and copyright: Special provisions: computer-generated literary, dramatic, musical or artistic works (UK)).

Some of the key questions in the Public Consultation (see Box, Consultation: Copyright in the Age of GenAI) addressed whether the *Copyright Act* should:

- Clarify that protection applies only to works with sufficient human originality.
- Provide greater certainty around computer-generated works.

No legislative amendments creating a dedicated regime have been introduced.

Application of General Test for Subsistence to Prompts

Under Canadian copyright law, the subsistence of copyright in a human's prompts to a GenAI model is a novel and unsettled issue. There is neither explicit guidance nor case law specifically addressing copyright subsistence in prompts.

A prompt may satisfy the fixation requirement for copyright subsistence (see General Test for Subsistence). A prompt that is highly detailed and reflects significant human skill and judgement could potentially meet the originality requirement. However, short or functional prompts are unlikely to be protected.

However, insights from the summary of stakeholder positions included in the Public Consultation (see Box, Consultation: Copyright in the Age of GenAI) suggest that prompts, on their own, are generally not considered to meet the originality requirement for copyright protection.

This remains the prevailing view.

Prompts are often seen as functional or directive in nature, rather than expressions: making them not likely to benefit from copyright protection as standalone works, particularly for short or purely functional prompts. However, a prompt that is highly detailed and reflects significant skill and judgement could potentially meet the originality requirement.

While the law could develop such that the nature of prompts may influence the questions of copyright subsistence and authorship of AIGC (see Application of General Test for Subsistence to AIGC), the prompts themselves are not likely to benefit from copyright protection.

Ownership of Copyright in AIGC

General Test for Ownership

In Canada, the general test for ownership of copyright is governed by the *Copyright Act*.

Section 13(1) of the *Copyright Act* establishes that the author of a work (the person who provides the skill and judgement to create it; see General Test for Subsistence) is the first owner of the copyright, subject to certain exceptions. Ownership is, therefore, initially tied to authorship. It follows that the author is generally the first owner. However, section 13(3) provides an important exception to this rule. If a copyright work is created in the course of employment, the employer is the first owner of the copyright, unless there is an agreement stating otherwise.

Application of General Test for Ownership to AIGC

Canada does not currently have specific statutory or judicial guidance addressing the ownership of any copyright subsisting in AIGC. Under Canadian copyright law, which requires skill and judgement for authorship, AIGC created without meaningful human input is unlikely to qualify for copyright protection (for more information on this point, see Application of General Test for Subsistence to AIGC).

Various typical scenarios in relation to AIGC and who might own it are as follows:

- AIGC Created Following Prompts.
- AI-Assisted Content.
- Effect of Subsequent Human Enhancement on Ownership.

For more information on the ability of parties to assign ownership of copyright in AIGC, see Assignment of Copyright in AIGC.

AIGC Created Following Prompts

If a person enters prompts that demonstrate sufficient skill and judgement so as to influence the output, they may have a stronger claim to authorship of the resulting AIGC produced by the GenAI system and ownership of any copyright.

However, AIGC that is purely from GenAI systems is likely not protected by copyright. The GenAI model itself likely cannot own copyright, as Canadian law has not yet recognised non-human entities as authors.

As this area of law continues to evolve, future legislative or judicial developments may provide clearer guidance on the treatment of ownership of copyright in AIGC.

AI-Assisted Content

The position regarding copyright ownership may differ when the content is AI-assisted rather than fully AI-generated. When an AI tool is used as a tool for a human user, if that human user meaningfully guides or shapes the output, they may be more likely to be recognised as the author, making them the copyright owner (see General Test for Ownership).

In response to the Public Consultation (see Box, Consultation: Copyright in the Age of GenAI), as discussed in the Consultation Report, some participants suggested that AIGC used in the creative process may still qualify for copyright protection if the human contribution involves sufficient skill and judgement.

However, the Public Consultation and Consultation Report reaffirmed that human authorship is a fundamental requirement for copyright to subsist. While this is an evolving area of law, current Canadian copyright legislation does not yet provide explicit guidance on the ownership of any copyright in AIGC or AI-assisted content.

Effect of Subsequent Human Enhancement on Ownership

Under Canadian copyright law, the ownership of AIGC may be clearer where there is meaningful human enhancement involving skill and judgement. According to the Consultation Report (see Box, Consultation: Copyright in the Age of GenAI), copyright protection may be available for works that incorporate AIGC if a human contributes sufficient skill and judgement in shaping the final output by enhancing or modifying it. If so, that human may potentially be recognised as the author and therefore (subject to any exceptions) the first owner of the resulting work (that is: the author and first owner of copyright in the resulting enhanced AIGC).

However, the Consultation Report also identified stakeholder positions that human authorship remains a core requirement for copyright to subsist. While the framework is still evolving and lacks explicit statutory guidance, the prevailing interpretation suggests that human enhancement may establish authorship (and, therefore, ownership) if it demonstrates originality through skill and judgement.

Application of General Test for Ownership to Prompts

Canada's current approach to ownership of copyright subsisting in prompts is still developing, and there is no explicit guidance. Ownership of copyright (if any) subsisting in a prompt depends primarily on human authorship and subsistence (see Application of General Test for Subsistence to Prompts).

The prevailing view is that a prompt as a standalone work generally does not meet the originality requirement for copyright protection, but if it did, the human author of the prompt would be the first owner, subject to the usual exception (employment) that applies to any copyright work (see General Test for Ownership).

AIGC and Copyright Infringement

General Test for Infringement

Copyright infringement in Canada is governed by the *Copyright Act* and case law:

- Under section 27(1) of the *Copyright Act*, it is an infringement to use a copyright work without the owner's permission in a way that breaches the exclusive rights of the owner.

- Section 27(2) of the *Copyright Act* addresses secondary infringement, which occurs when a person who knows, or who should have known, that a work is infringing the right of a copyright owner, engages in activities such as selling, distributing, or importing that work.

A foundational Canadian case regarding copyright infringement, *CCH Canadian Ltd v Law Society of Upper Canada, 2004 CarswellNat 446 (S.C.C.)*, sets out the key principles regarding infringement. See Box, CCH Canadian v Law Society of Upper Canada.

There are various defences (see Defenses to Infringement).

CCH Canadian v Law Society of Upper Canada

This is a foundational Canadian case regarding copyright infringement. The Supreme Court of Canada:

- Clarified the scope of requirements for copyright subsistence (see General Test for Subsistence).
- Held that copyright infringement requires copying of a "substantial part" of the work without permission.
- Held that an assessment of what constitutes a "substantial part" is primarily qualitative rather than quantitative.
- Stressed the need to balance the rights of copyright owners with user's rights, particularly through the doctrine of fair dealing, which is codified in sections 29 to 29.2 of the *Copyright Act*. These provisions permit certain dealings with copyright material, such as research, private study, or parody if those dealings are deemed fair (see Fair Use or Fair Dealing).
- Established a set of six factors to determine fairness:
  - the purpose of the dealing;
  - the character of the dealing;
  - the amount of the work used;
  - alternatives to the dealing;
  - the nature of the work; and
  - the effect of the dealing on the market for the actual copyright work.

- Stressed that:
  - these factors must be applied in a flexible and contextual manner; and
  - fair dealing should be interpreted liberally to avoid undue constraint of users' rights.

(*CCH Canadian Ltd v Law Society of Upper Canada, 2004 CarswellNat 446 (S.C.C.)*.)

Notably, the courts have avoided defining substantial part, therefore, questions of copying and infringement remain highly dependent on the specific facts.

The ways copyright infringement issues may arise in relation to GenAI include:

- Collating or transferring copies of works in which copyright subsists before training (see Collating, Scraping, or Transferring Copies of Works for Training).
- The training of a GenAI model by ingesting works in which copyright subsists (see Training a GenAI Model).
- The model being a copy of the copyright works it was trained on (see GenAI Model as a Copy of Copyright Works).
- The entering of prompts (see Drafting and Entering Prompts).
- The generation of AIGC (see Generation of AIGC).

Defenses to Infringement

Text and Data Mining

Canada does not currently have a dedicated statutory exception for text and data mining (TDM). However, there has been active discussion of this exception in recent policy decisions, particularly in the Consultation Report (see Box, Consultation: Copyright in the Age of GenAI). This report revealed growing interest in clarifying the legal status of TDM, particularly as it relates to the use of copyright works to train AI systems. Many stakeholders from the technology sector advocated for a clear TDM exception to support innovation and reduce legal uncertainty. Meanwhile, rightsholders expressed concerns about the unlicensed use of their copyright works and called for safeguards, such as opt-out mechanisms and compensation models.

While there is no formal opt-out system, rights holders may use contractual terms, industry standards, or technological protection measures to restrict TDM. The Consultation Report highlighted the need for a balanced approach that supports both innovation and the rights of creators, suggesting that legislative reform may be on the horizon.

Currently, TDM activities may be defensible under Canada's fair dealing provisions, particularly for purposes like research or private study, but this defence is limited (see Fair Use or Fair Dealing). Courts assess fairness based on six factors such as

purpose, character, and market impact (see Box, CCH Canadian v Law Society of Upper Canada). They are less likely to find fair dealing where TDM is commercial.

There may also be an exception if the TDM is considered to be a temporary reproduction for technological processes, as permitted under section 30.71 of the *Copyright Act* (see Transient or Incidental Copies).

Fair Use or Fair Dealing

In Canada, the fair dealing exception is a statutory user right under the *Copyright Act*. It provides a defence to copyright infringement under specific circumstances. Sections 29, 29.1, and 29.2 of the *Copyright Act* explain circumstances where fair dealing may apply, which are:

- Research.
- Private study.
- Education.
- Parody.
- Satire.
- Criticism.
- Review.
- News reporting.

To qualify as fair dealing, the dealing must fall under one of these purposes and be assessed for fairness based on a set of six factors (see Box, CCH Canadian v Law Society of Upper Canada). There is no particular definition for the research purpose or express limit on what this includes (there is no requirement that research must be non-commercial to fall under this purpose).

Fair dealing is not a blanket exemption. It does not apply if the use falls outside the listed purposes or fails the fairness test.

Comparing fair dealing in Canada to similar rules in other common law jurisdictions:

- Australia, Hong Kong, and the UK also feature a fair dealing defence to copyright infringement. Each fair dealing defence applies only to its own closed list of narrow purposes specified in legislation. There are distinctions between these closed lists and other aspects of fair dealing in each jurisdiction:
    - Practice Note, AI and copyright: Copyright works input into an AI system (for training) and copyright infringement (Australia);
    - Practice Note, Generative AI and Copyright (Hong Kong): Fair Use or Fair Dealing; and

    - Practice Note, AI and copyright: Key law: permitted acts of potential relevance in AI context.

- Singapore and the US feature a broader fair use defence rather than fair dealing, as the use does not have to be within a closed list of narrow purposes:
    - Practice Note, Generative AI and Copyright (Singapore): Fair Use or Fair Dealing; and
    - Practice Note, Generative AI and Copyright: Fair Use Defense (US).

- Fair use in the US requires the court to weigh four statutory factors (see Practice Note, Copyright Fair Use: Fair Use Factors (US)). There are parallels between these four statutory factors and the six factors to determine whether dealing is fair in Canada (see Box, CCH Canadian v Law Society of Upper Canada). This is a material difference between Canada and other jurisdictions.

Transient or Incidental Copies

Canada's *Copyright Act* provides a specific exception for transient or incidental copies under section 30.71. This section states that it is not an infringement of copyright to make a reproduction of a work or other subject-matter if:

- The reproduction forms an essential part of a technological process.
- The reproduction's only purpose is to facilitate a use that is not an infringement of a copyright.
- The reproduction exists only for the duration of the technological process.

This section may apply in some circumstances as it relates to AI TDM, but the exception is narrow and may not apply to AI training (see Training a GenAI Model).

Parody or Pastiche

The *Copyright Act* includes a specific fair dealing exception (Fair Use or Fair Dealing) for parody and satire under section 29. This provision states that use of a work for parody or satire does not infringe copyright if the use is fair.

However, this defence is subject to limitations:

- The dealing must genuinely qualify as parody or satire, meaning it must involve some form of commentary, critique, or humorous imitation.
- The dealing must be deemed fair when assessed against the six fairness factors (see Box, CCH Canadian v Law Society of Upper Canada).

The case of *United Airlines, Inc. v. Cooperstock, 2017 CarswellNat 2975 (F.C.)* *(Cooperstock)* illustrates limitations to the parody defence (see Box, United Airlines v Cooperstock).

United Airlines v Cooperstock

This case illustrates limitations to the parody defence. A consumer complaint website was created that mimicked the official website of United Airlines.

Although the court acknowledged that the site could be considered a parody, it held that it did not qualify as fair dealing (see Fair Use or Fair Dealing). The court found two factors undermined the fairness of the dealing:

- The site's primary purpose was to defame the airline.
- The close resemblance to the official website risked misleading the public.

This case underscores that while fair dealing offers a potential defence for parody and satire, it is not a guarantee.

United Airlines, Inc. v. Cooperstock, 2017 CarswellNat 2975 (F.C.) (Cooperstock)]

Collating, Scraping, or Transferring Copies of Works for Training

Collating or transferring copies of the whole or a substantial part of copyright works in Canada to train GenAI models without the copyright owners' permission (whether that training occurs in Canada or another jurisdiction) raises significant legal risks, particularly relating to unauthorized reproduction and potential copyright infringement as a result.

Each unauthorised copy of a copyright work, or a substantial part of a copyright work, created for training could be considered an infringement, whether the purpose is to build:

- An internal training library for a GenAI model.
- A database made available to third party developers to train their GenAI models.

There is also the risk that the copying could mean that the trained GenAI model itself is a copy of the works it trained on (for discussion of this point, see GenAI Model as a Copy of Copyright Works).

Collating or transferring copies of the whole or substantial parts of copyright works in Canada to train GenAI models (whether that training occurs in Canada or another jurisdiction) therefore raises significant legal risks, particularly relating to unauthorized reproduction and potential copyright infringement as a result.

These issues are being tested in two major lawsuits (see Box, Toronto Star Newspapers v OpenAI and Box, CanLII v Caseway AI).

Collating, Scraping, or Transferring Copyright Works for Training: Defences

An alleged infringer could raise several legal defences against allegations of copyright infringement arising from the collation or transfer of copies of works for training purposes. However, each defence has limitations. The courts are yet to confirm whether any defence applies.

The most prominent potential defence is the fair dealing exception (see Fair Use or Fair Dealing). Some argue that AI training for research or innovation could fall within fair dealing and that this exception would also cover the collation of copyright works for that training. However, uncertainty remains over the applicability and scope of fair dealing in this context.

Canada's copyright framework does not include a dedicated TDM exception, although the Consultation Report (see Box, Consultation: Copyright in the Age of GenAI) revealed strong interest in introducing one similar to those in the EU and UK (see Text and Data Mining).

Other potential defences include the defence that permits transient copies to be made as part of a technological process under section 30.71 of the *Copyright Act* (for information on the requirements to meet this defence, which is narrow, see Transient or Incidental Copies). However, it is not clear that the requirement s for this exception, which is narrow, would apply.

Overall, these defences are unlikely to prevent allegations of copyright infringement for collating or transferring copies of works for training purposes. Ongoing cases (see Box, Toronto Star Newspapers v OpenAI and Box, CanLII v Caseway AI) and policy reform may clarify their application in the future.

Training a GenAI Model

Training GenAI models raises several unresolved issues around copyright infringement, particularly regarding the use of copyrighted works to train the models.

A core concern is that training GenAI typically involves reproducing large volumes of data, which is often scraped from the internet without the consent of rights holders. The use of scraped copyright works to train GenAI models raises significant legal risks, particularly relating to unauthorized reproduction of all or a substantial part of copyright works and potential copyright infringement as a result, if fair dealing or other defences cannot be argued to apply. For discussion of the scope of defences that may apply to training, see Training a GenAI Model: Defences. Key questions include whether: the large-scale copying of copyright works for AI training constitutes copyright infringement or avoids being infringing because of the fair dealing defence, or whether any other defences or exceptions may apply.

These issues are being tested in ongoing lawsuits (see Box, Toronto Star Newspapers v OpenAI and Box, CanLII v Caseway AI).

There is also no code of practice or industry-wide guidance specifically governing the use of copyrighted works for AI training. Industry stakeholders continue to call for clearer frameworks to balance innovation with copyright protection.

Toronto Star Newspapers v OpenAI

A group of Canadian news media organisations and publishers have filed a lawsuit against OpenAI in the Ontario Superior Court of Justice. They allege that OpenAI scraped and used their content without permission to train its AI models.

(Ontario Superior Court of Justice, CV-24-00732231-00CL, started November 2024.)

CanLII v Caseway AI

CanLII has brought an action against Caseway AI in the Supreme Court of British Columbia. CanLII claims that Caseway unlawfully scraped their legal database and repurposed it to develop a commercial AI-powered legal assistant.

(Supreme Court of British Columbia, No. VLC-S-S-247574.)

Territorial Issues

Copyright is a territorial right, so issues may arise depending on where the data scraping and training of the GenAI model occurred.

Territorial issues become particularly complex when different stages of GenAI development, such as data scraping, model training, and product deployment, occur across multiple jurisdictions. In Canada, copyright infringement can arise even if only part of the infringing activity occurs in Canada.

If data scraping takes place inside Canada, this may constitute copyright infringement under Canadian law (see Collating, Scraping, or Transferring Copies of Works for Training). This issue is central to an ongoing lawsuit against OpenAI (see Box, Toronto Star Newspapers v OpenAI).

However, the situation becomes more complex when the training occurs outside Canada and the resulting GenAI model is then made available in Canada. In these cases, Canadian courts may still assert jurisdiction if there is a sufficient connection to Canada.

While there is no definitive case law on these cross-border issues around AI training and deployment, future court decisions will likely provide some clarity.

Evidence of Infringement

Proving copyright infringement in GenAI may pose a challenge. It may be difficult to show that a developer scraped or copied specific works, especially if training datasets are not disclosed.

There are no legal transparency requirements for AI developers to reveal what data and copyright works were used for training, though the Public Consultation (see Box, Consultation: Copyright in the Age of GenAI) identified a consideration justifying these measures. The Consultation Report explains that stakeholders identified that a major barrier to demonstrating infringement was a lack of transparency surrounding AI inputs. Some stakeholders expressed a desire to see transparency requirements regarding inputs used to train AI. Demonstrated support for transparency could signal reform to Canada's AI framework.

Training a GenAI Model: Defences

Canadian courts have not yet ruled on whether large-scale data usage for GenAI training qualifies as fair dealing (see Fair Use or Fair Dealing) or falls under any other exception (see Defenses to Infringement):

- Fair dealing may apply if training qualifies as "research", or falls within another identified fair dealing exception, but it remains unclear whether large-scale data ingestion would be considered research or meet the fairness criteria. There has been no court ruling on this point.
- The exception for transient reproductions might potentially apply to temporary copies of copyright works made during the technical process of training, but this has not been tested in the Gen AI context.
- Parody and satire are recognized under fair dealing, but these defences are likely more relevant to GenAI outputs than to the training process itself.

Ongoing cases (see Box, Toronto Star Newspapers v OpenAI and Box, CanLII v Caseway AI) or policy reform may clarify the application of these exceptions to training in the future.

While there is currently no specific exception for TDM, the Public Consultation (see Box, Consultation: Copyright in the Age of GenAI) revealed strong interest in introducing one, like that in the EU, which provides a general TDM exception from which rights holders can opt out.

The UK provides for a TDM exception for non-commercial research, with the UK government also having consulted in December 2024 on introducing a general TDM exception like that in the EU. However, this consultation was hotly debated, and it is not clear whether there will be reform of the existing TDM exception. (See Practice Note, AI and copyright: Key law: permitted acts of potential relevance in AI context.)

While no formal guidance or legislation has been issued, particularly as these issues becomes clearer in other jurisdictions, industry stakeholders are likely to begin adopting best practices such as:

- Transparency about training data.
- Licensing where feasible.
- Safeguards against infringing outputs.

Licensing Copyright Works for Training GenAI Models

There are currently no formal licensing schemes specifically for the purposes of training AI systems. However, some commercial licensing arrangements have emerged that may allow use of copyright works for training AI systems.

For example, according to news reports (see, for example, Publishers Weekly: Agents, Authors Question HarperCollins AI Deal), in November 2024, Harper Collins entered into a licensing deal with an unnamed company. This deal will allow the use of nonfiction books for AI model training. The agreement:

- Gives authors an opportunity to "opt-in".
- Is limited to a three-year contract.
- Offers USD5,000 per title, to be split between the author and the publisher.
- Includes "guardrails," such as limiting AIGC outputs to no more than 200 consecutive words with a view to protecting the value of the author's books.

While many authors oppose the deal, the Writers' Union of Canada stated that it is "cautiously optimistic" about the licensing deal (see Writers' Union of Canada: Writers' Union Cautiously Optimistic About Emerging AI Licensing Market).

Good practices in this area include:

- Ensuring transparency about data sources.
- Obtaining consent.
- Offering fair compensation to copyright holders.
- Minimising the use of copyrighted material and maintaining records for accountability.

Although Canada has not yet implemented official licensing frameworks, the Public Consultation (see Box, Consultation: Copyright in the Age of GenAI) emphasised the need for clear rules.

GenAI Model as a Copy of Copyright Works

In Canada, there is a debate about whether a trained GenAI model could be considered a copy of the copyright works used for its training. A core argument is that, if a GenAI model can reproduce substantial parts of those copyright works as outputs in response to prompts, it may effectively function as an unauthorised reproduction.

If a GenAI model can replicate the content or style of copyright works, it may either:

- Cross the line from inspiration to infringement.

- Show that the training data (including copyright works) is inside the trained model.

As of 2025, there are currently no Canadian court decisions directly addressing whether a GenAI model is an infringing copy or article. Ongoing international cases are being watched closely and may influence Canadian jurisprudence. In the UK case of Getty Images (US) Inc v Stability AI Ltd [2025] EWHC 2863 (Ch) (04 November 2025), Getty argued that Stability AI had knowingly imported an article into the UK that was an infringing copy of Getty's copyright works (stock photos) through downloads in the UK of their Stable Diffusion model (secondary infringement of copyright). The court rejected this argument, but has given Getty permission to appeal on this issue. For more information, see Legal update: case report, Bulk of claims in Getty v Stability AI case rejected (High Court): Key findings on secondary infringement.

Generation of AIGC

A developer or operator of an AI model could potentially infringe copyright if their AI model generates AIGC that reproduces all or a substantial part of the copyrighted work used for training the model.

Even for models that do not store a copy of each ingested work, if the resulting output is a substantial copy of a work from the training data, then there is likely a basis for a claim for copyright infringement.

References, whether in prompts or input materials to a GenAI model, to the relevant copyright work, its author, or part of that copyright work may increase the likelihood that the AIGC output resembles the original and be considered infringing. These inputs could potentially serve as evidence and influence a court's assessment of whether:

- An AIGC output (or parts of it) amounts to a copy of the whole or a substantial part of a copyright work.
- There was access, and therefore whether the output has been copied from the original work.

(See Box, CCH Canadian v Law Society of Upper Canada.)

The Consultation Report (see Box, Consultation: Copyright in the Age of GenAI) acknowledges these concerns and proposes clearer rules on liability. Specifically, stakeholders supported greater transparency regarding AI inputs. While no guidance or legislation has been enacted yet, this discussion could shape future reforms.

Generation of AIGC: Defences

Several defences could potentially apply to the use of copyright works in training a GenAI model, although the scope for these to apply is unclear (see Training a GenAI Model: Defences), and the law remains unsettled. The issues are further complicated where an AI model generates AIGC that reproduces all or a substantial part of the copyrighted work used for training the model regarding the interplay between:

- Whether the training of a GenAI model is not infringing due to a specific defence applying.
- Whether the use of that trained GenAI model to generate AIGC infringes.

The fair dealing exceptions for parody and satire (see Parody or Pastiche) are likely more relevant to AIGC outputs than to the training process itself.

While there is currently no specific exception for TDM, the Public Consultation revealed strong interest in introducing one like those in the EU and UK (see Training a GenAI Model: Defences). Even if a defence did apply to training of the GenAI system on the copyright work reproduced in whole or in part (which would need to be assessed on the particular facts), it is not clear that this would also apply where a GenAI model generates AIGC that reproduces all or a substantial part of the copyrighted work used for training. Alternatively, a court might decide a defence regarding training (for example, the defence regarding transient copies) could not apply if AIGC reproduced all or a substantial part of the works used for training.

The Consultation Report (see Box, Consultation: Copyright in the Age of GenAI) highlighted the need for clearer rules and proposed reforms.

User Liability for AIGC

Drafting and Entering Prompts

Users of GenAI models may face copyright infringement issues depending on how they craft prompts and what AIGC the GenAI model generates in response.

If a user copies and pastes a literary work or a substantial part of a literary work into a GenAI system as a prompt to generate a summary, adaptation, or derivative work, this reproduction could potentially constitute infringement, both in relation to the prompt itself and insofar as the output may amount to a copy of the whole or a substantial part of the work used as a prompt.

Similarly, including a third party's photograph as part of an image prompt could infringe copyright if the image is used without permission. Even if the AI model transforms the image, the AIGC may still be considered a derivative work, particularly if it retains identifiable elements of the copyright work so as to involve a reproduction of a substantial part of the copyright work.

Prompts that request the use of the style of a specific artist or author could also lead to copyright infringement issues. While copyright does not necessarily protect a style, outputs that are substantially similar to protected works may still attract liability, especially if they:

- Cause market confusion or economic harm to the original creator.
- Involve the use of identifiable trade marks.

In addition to economic rights, Canadian copyright law also protects moral rights if a GenAI output distorts or otherwise modifies a copyright work in a way that harms the author's reputation.

Drafting and Entering Prompts: Defences

In Canada, a user who drafts and enters prompts into GenAI systems may be able to rely on certain copyright defences, most notably fair dealing (Fair Use or Fair Dealing), but this defence is relatively narrow.

Fair dealing allows dealing with copyright works for specific purposes. For example, if a user includes a portion of a copyrighted work in a prompt to generate an analysis or a summary, they might be able to argue that this dealing qualifies as private research

or study. However, to successfully invoke fair dealing, the use must also pass the fairness test (Box, CCH Canadian v Law Society of Upper Canada).

While these principles are well established in Canadian copyright law, courts have not yet ruled on them in the context of entering prompts, leaving the application of this defence uncertain.

Liability of Model Developer

In Canada, the liability of a GenAI model developer when a user drafts and enters prompts (see Drafting and Entering Prompts) is still an emerging issue. While Canadian copyright law does not yet provide explicit rules for this scenario, several factors may influence potential liability.

In typical use cases, users may draft prompts that include copyright-protected text, images, or video as input (or expressly refer to these copyright works) to:

- Generate summaries or adaptations.
- Request AIGC in the style of a known author or creator.

If the resulting AIGC reproduces a substantial part of the protected work, the user may be directly liable for infringement. However, there is no clear direction on whether the model developer would also be held responsible.

A key consideration could be whether the developer is authorising or encouraging a user to infringe. Under Canadian law, a party may be liable for secondary infringement if they knowingly enable or authorise infringing content. It could be argued that, by allowing infringing content to be generated using their model, a developer is thereby authorising infringement. However, this would depend on the facts of each case. It is likely that the developer would have to do more than merely providing a general-purpose system that a user can use to infringe copyright (analogous to a photocopier) for a court to find the developer authorised a user's infringement.

If a user generates infringing AIGC in breach of the terms of service of a model or platform, the developer may be able to limit their liability. These terms could include:

- Disclaimers of warranties stating that the developer does not warrant the legality or originality of any outputs.
- Indemnity clauses that shift liability to the user for any resulting claims.

The Consultation Report (Box, Consultation: Copyright in the Age of GenAI) acknowledged the legal uncertainty in this area and noted that developers are increasingly drafting their own internal policies to manage risk. These typically set out actions like:

- Implementing features to detect potentially infringing prompts or prompts that are intended to or likely to result in infringing AIGC.
- Logging user activity.

- Providing transparency about training data.

However, without legislative reform, developers may face liability where user behaviour and model capabilities intersect.

Mitigation Strategies

Developers of GenAI models in Canada are increasingly adopting a range of risk mitigation strategies to address the legal uncertainties surrounding copyright infringement in AIGC.

One key approach is the use of contractual protections. Most GenAI platforms include detailed terms of service to:

- Helps shift liability away from the developer.
- Clarify the boundaries of acceptable use.

The terms of service prohibit users from inputting or generating infringing content and may also often contain:

- Indemnity clauses, requiring users to assume responsibility for any legal claims arising from misuse.
- Disclaimers stating that the developer does not guarantee the legality or originality of the outputs.

This helps shift liability away from the developer and clarifies the boundaries of acceptable use.

(See Liability of Model Developer.)

Another important strategy is improving transparency and documentation. Developers are increasingly maintaining audit trails and usage logs to support accountability and demonstrate compliance with internal policies.

Content moderation tools complement these strategies, for example:

- Prompt filters that can block prompts or input files referencing or including known copyright or trademarked works or creators.
- AIGC output filters that detect and suppress content that closely resembles copyright works.
- Logging and monitoring systems can track user behaviour and help prevent the generation of infringing AIGC before it occurs.

Developers are also engaging with policy and industry standards. With formal legislation still pending, many developers are participating in government consultations and supporting the development of voluntary codes of practice. These efforts aim to shape emerging norms and demonstrate a commitment to responsible AI development in the absence of clear legislation.

These strategies represent a layered approach to mitigating legal risks in the rapidly evolving GenAI landscape.

Commercial Dealings in AIGC

Assignment of Copyright in AIGC

The assignment of copyright in AIGC is currently limited by case law establishing that copyright only subsists in works created by human authors (see Application of General Test for Subsistence to AIGC). Purely machine-generated works are unlikely to receive copyright protection under current law.

However, in commercial practice, developers and users of GenAI systems often address ownership and copyright assignment through contractual agreements. These agreements typically:

- Specify that the user owns the outputs generated in response to their prompts, if these qualify for copyright protection under applicable law.
- Include disclaimers of warranties stating that:
    - AIGC outputs may not be eligible for copyright protection; and
    - the platform does not guarantee the originality or non-infringing nature of the content.

Some agreements go further by including indemnity clauses, requiring users to assume responsibility for any legal claims arising from their use of AIGC outputs. These practices reflect a cautious approach to the uncertain legal status of AIGC.

Licensing of Copyright in AIGC

Canada's approach to the licensing of copyright in AIGC is still evolving. The legislative framework is not definitive, and market practice has not settled. Similar considerations apply to licensing of copyright as to assignment (see Assignment of Copyright in AIGC).

Planned Legislation and Reforms

Canada is actively considering legislative reforms that could significantly impact how AIGC interacts with copyright law.

The most prominent initiative was the proposed AIDA (see GenAI). While the AIDA primarily focused on regulating high-impact AI systems, proposed amendments included provisions that would allow the government to:

- Regulate the data and works used to train AI systems.
- Require labelling of AIGC.

- Mandate that AI systems identify themselves when they could be mistaken for humans.

The AIDA is no longer being pursued, but other legislation is anticipated.

In parallel, the Government of Canada conducted the Public Consultation from October 2023 to January 2024 (Box, Consultation: Copyright in the Age of GenAI), exploring three key areas:

- The use of copyright works in AI training, especially TDM.
- Authorship and ownership of AIGC.
- Liability when AIGC infringes subsisting copyright.

While no new legislation has been passed, the findings from this consultation may inform future reforms to Canada's *Copyright Act*.

Additionally, Canada has introduced a Voluntary Code of Conduct for the responsible development of GenAI, which encourages transparency, safety, and respect for intellectual property; and sets out a table showing potential responsibilities of developers and managers for taking specific measures depending on whether the GenAI models are available for public use.

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