ARTICLE

AI AT THE EASEL OR AT THE PHOTOCOPIER?
THE APPLICATION OF CANADIAN COPYRIGHT LAW TO AI GENERATED IMAGES

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ABSTRACT

The rapid development and proliferation of generative artificial intelligence ("AI") has drastically impacted the art industry in just a few years. Generative AI's reliance on the consumption and processing of protected works without authorization raises significant copyright concerns that remain unresolved. This article analyses Canadian copyright law and argues that the use of copyrighted works by generative AI companies, as well AI's production of images substantially similar to unique elements of an artist's style, constitutes copyright infringement. Given the unprecedented nature of generative AI and copyright infringement in the Canadian legal context, this article also reviews relevant case law from the United States, where several lawsuits against AI companies for copyright infringement are already underway. Finally, the article proposes three recommendations to balance AI innovation with the protection of artists' rights: regulating text and data mining, requiring transparency from AI companies, and establishing licensing models to ensure proper artist remuneration.

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INTRODUCTION

The past two years have been revolutionary for artificial intelligence ("AI") image generators. Work that would have usually required commissioning an artist or purchasing a licence is now available for cheaper and faster through the development of text-to-image AI models. By simply typing in a prompt on a generative AI platform, users are able to generate images in less than a minute.[1] These prompts can be as descriptive and imaginative as the user wants and gives them the option to adjust the output image based on the style, medium, and content to their liking.[2]

Through this rapid advancement, a major copyright issue is whether generative AI companies infringe on artists' copyrights. It is essential that as technology evolves, it continues to follow copyright laws as such laws are in place to balance the encouragement of the dissemination and progress of the arts and intellect with ensuring a fair reward for creators.[3] If AI companies are infringing on artists' copyrights, they are restricting artists from maintaining control of their works and their ability to derive financial benefits from their art.

In this paper, I argue that downloading and using copyright protected works and reproducing unique expressions of those works likely infringes artists' copyrights. This paper also makes three recommendations to ensure artists' rights are not overlooked for innovation, and that such rights are not a hindrance to artistic and intellectual development.

I.   COPYRIGHT INFRINGEMENT IN CANADA

In Canada, the *Copyright Act* (the "*Act*") grants owners the exclusive and legal right to produce, reproduce, sell, licence, publish, or perform their original work or a substantial part of it.[4] As long as the owner holds the copyright, any copying or reproducing their work infringes their copyright (aside from certain statutory exceptions, such as fair dealing).[5] For an artist to prove that their copyright was infringed through unauthorized reproduction of their work, there needs to be *substantial similarity* between the artist's work and the alleged reproduction and *proof of access* to the original work.[6]

A. Substantial Similarity

Reproduction does not need to be an identical replication of the original work. If the reproduced work is substantially similar to the original, it can still be considered an infringement as non-literal copying.[7] In Canada, the foundational case for this concept is

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1   Stability AI, "Image Models" (last visited 20 February 2025), online: <stability.ai/stable-image> [perma.cc/3EBN-GXEK].

2   Runway, "Text to Image Generation" (last visited 20 February 2025), online: <runwayml.com/ai-tools/text-to-image/> [perma.cc/3B44-WJEE].

3   *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 CanLII 45 at para 40 (SCC) [*SOCAN*].

4   *Copyright Act*, RSC 1985, c C-42, s 3(1) [*Copyright Act*].

5   *Ibid* at ss 3 and 29.

6   *Cinar Corporation v Robinson*, 2013 SCC 73 [*Cinar*].

7   *Ibid* at para 25.

Cinar Corporation v Robinson ("*Cinar*"), where the Supreme Court of Canada ("SCC") ruled that enough material was copied from the plaintiff's work to be considered an infringement while also noting that "the Act does not protect every 'particle' of an original work."[8]

Instead of examining how much of the reproduced work is made up of the original work, the courts assess whether the amount of the original work *taken* is substantial enough to warrant an infringement.[9] A modified copy that is "notably different from a plaintiff's work" does not eliminate the possibility that a substantial part of their work was copied.[10]

Canadian courts take a holistic approach to determine substantiality by examining the work's qualitative aspects through an intuitive analysis.[11] Instead of a technical approach that breaks the work into segments, the "look and feel" of the entire work is analysed. This is done "from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects."[12] Certain cases require expert witnesses to aid the judge in assessing the situation from the point of view of "someone reasonably versed in the relevant art."[13]

In *Cinar*, the SCC agreed with the trial judge's finding that the plaintiff's work, a submission for a children's television show inspired by Daniel Defoe's novel *Robinson Crusoe*, was substantially copied. The courts found that the defendant had copied the appearance and personalities of the plaintiff's characters, as well as the visuals of the village where the characters resided.[14] The defendants argued that only the *idea* of the plaintiff's show was copied and not the *expression* of the idea, as copyright law only protects expression.[15] The courts rejected this argument and held that the defendants copied more than the abstract idea of a children's show based on *Robinson Crusoe*, but instead had copied the very way the plaintiff *expressed* this idea.[16]

In *CCH Canadian Ltd v Law Society of Upper Canada* ("*CCH*"), another fundamental SCC case on copyright, original expression is defined as an idea that is expressed through skill and judgement that is more than a "purely mechanical exercise."[17] In her judgement of the Court, Chief Justice McLachlin described skill as "the use of one's knowledge, developed aptitude or practised ability in producing the work" and judgement as "the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work."[18] As long as it is not a copy of another work and involves a level of intellectual effort, the expression does not have to be novel or unique to be granted protection.[19]

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8   *Ibid* at para 25.
9   *Ibid*.
10   *Ibid*.
11   *Ibid* at para 35.
12   *Ibid* at para 51.
13   *Ibid*, citing David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed (Toronto: Irwin Law, 2011) at 187.
14   *Ibid* at para 43.
15   *Ibid*.
16   *Ibid*.
17   *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 16 [*CCH*].
18   *Ibid*.
19   *Ibid*.

This definition of "original expression" is applied in the context of visual arts in *Rains v Molena* ("*Rains*"), an Ontario Superior Court of Justice case from 2013.[20] The plaintiff claimed that the defendant had infringed the plaintiff's copyright in his still-life oil paintings depicting crumpled paper against a dark backdrop. The defendant had also painted still-lifes of crumpled paper, but argued that the plaintiff's crumpled paper paintings were not unique since the plaintiff used common "tropes" (such as lighting and shading) that other painters had been using for centuries.[21] Justice Chiappetta ultimately ruled that despite sharing the same ideas, the paintings' expressions were different given their varied creative process, motives, and the skill and judgement exercised by both parties in each of their paintings.[22] However, Justice Chiappetta explained that if there are sufficient similarities between an original work and its alleged copy after omitting any commonly used techniques, substantial copying would likely be found.[23] If the similarities are not "commonplace, unoriginal, or consist[ing] of general ideas" and the combination of these techniques are original, then the work may be protected by copyright.[24]

A more recent case is *Pyrrha Design Inc v Plum and Posey Inc* ("*Pyrrha*"), a 2019 Federal Court case on the infringement of copyrighted jewellery designs.[25] The plaintiff claimed that the defendant infringed the plaintiff's copyright in wax seal jewellery designs, where jewellery is made by impressing pre-existing wax seals into metal. Justices Berger and Schutz held that since the method and idea of creating jewellery by casting wax seal designs are public domain and not inventions of the plaintiff's, they cannot be copyrighted.[26] Instead, the plaintiff's individual designs were copyrightable, as the wax seal impressions were expressed in a unique way through the skill and judgement in selecting and conducting the particular process of oxidation and polishing.[27]

B. Access

In addition to substantial similarity, infringement requires proof of *access* to the original work.[28] The onus is on the plaintiff to demonstrate that the defendant had access to their work.[29] This evidence can be circumstantial, such as through blatantly clear similarity, or direct, like a witness or confession. Therefore, infringement is difficult to establish unless the plaintiff is able to demonstrate strong circumstantial evidence that the defendant had direct access to their work. In *Grignon v Roussel*, the burden was on the plaintiff to prove that the defendant had access to the music score or other forms of reproduction like a cassette tape.[30]

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20   *Rains v Molea*, 2013 ONSC 5016 [*Rains*].

21   *Ibid* at para 13.

22   *Ibid* at para 99.

23   *Ibid* at para 40.

24   *Ibid* at paras 38, citing *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, (2000) 1 WLR 2416 (HL), and 40.

25   *Pyrrha Design Inc v Plum and Posey Inc*, 2019 FC 129, aff'd 2022 FCA 7 [*Pyrrha*].

26   *Ibid* at para 94.

27   *Ibid* at paras 107 and 109.

28   *Grignon v Roussel*, 1991 CanLII 6894 at 5 (FC).

29   *Ibid*.

30   *Ibid*.

Through witness testimony, the plaintiff proved that the defendant had access as he had heard the song and had possessed a cassette recording of it for some time.[31]

II. POSSIBLE COPYRIGHT INFRINGEMENTS BY AI

A. How AI Works

To accurately assess how AI companies could infringe on creator rights, the technological process and composition of generative AI should be understood. As the overall system of generative AI is immensely intricate and complex, this paper only explores the relevant sections of the process in a simplified and condensed overview.

Generative AI uses machine learning models that have been trained on an enormous amount of data to complete a task.[32] In the context of AI images, these models are trained on millions of images online to generate pictures based on the content they have ingested. This training process is different from the traditional method of programming, in which a programmer manually inputs instructions for the computer to follow in order to produce the desired output. For AI, the programmer trains the model to program itself on massive volumes of data, also known as datasets. This method is called machine learning.[33] Machine learning is heavily reliant on data since the model's output is entirely dependent on what is extracted from the dataset. The more extensive the dataset, the more information the model has with which to train itself, resulting in a higher performing model.[34] Such enormous extraction and processing of data is possible through text and data mining ("TDM"), the computational analysis of digital material to identify patterns, extract data, and identify other information.[35]

B. Copyright Infringement: AI Training

A copyright owner's exclusive right to reproduce their work is likely infringed when datasets containing their images are downloaded to train an AI model. Assigning liability of such infringement is complicated as AI companies generally do not collect and gather the data themselves; rather, the creation of these datasets is typically done by third parties. One such third party is the Large-Scale Artificial Intelligence Open Network ("LAION"), a non-profit organization that creates and releases large-scale machine learning models and open datasets to the public for free.[36] Their datasets are used by many AI companies such as Stability AI, Runway, and Midjourney Inc.[37]

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31   *Ibid*.

32   Andrej Karpathy et al, "Generative Models" (16 June 2016), online: <openai.com/research/generative-models> [perma.cc/7LUX-G5A4].

33   Sara Brown, "Machine learning, explained" (21 April 2021), online: <mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained> [perma.cc/PM28-ZPM6].

34   *Ibid*.

35   University of Waterloo Library, "Text and Data Mining (TDM): Overview" (11 August 2023), online: <subjectguides.uwaterloo.ca/text-and-data-mining> [perma.cc/LQ23-P3Z6].

36   LAION, "About" (last visited 20 February 2025), online: <laion.ai/about/> [perma.cc/35PL-XT69].

37   Stability AI, "Stable Diffusion 2.0 Release" (24 November 2022), online: <stability.ai/news/stable-diffusion-v2-release> [perma.cc/FTD8-KEMK]; Christoph Schuhmann & Peter Bevan, "LAION POP: 600,000 High-Resolution Images With Detailed Descriptions" (17 November 2023), online: <laion.ai/blog/laion-pop/> [perma.cc/R3HF-LFMG].

LAION's most recent and extensive dataset to date is LAION-5B, a collection of over 5.8 billion images.[38] It is crucial to note that this mega dataset does not contain any actual copies of the images. Instead, the dataset includes the online address of the image (the "URL"), any caption describing the image, and other information, like the image's dimensions.[39] This would mean that anyone wanting to use the data for training purposes would need to download the images themselves, thus creating their own copies of copyright protected images. This process is made easy through LAION's free software program called "img2dataset," which downloads the images from the URLs, resizes them, and stores them along with any associated information.[40] By downloading copies of protected works to train and commercially distribute their programs using LAION-5B's dataset, AI companies have very likely infringed on the copyright owner's exclusive right to reproduce their work.

One of the greatest obstacles for artists in establishing infringement in the context of AI is access. It will likely be incredibly difficult for artists to provide direct evidence that their works were, in fact, amongst the billions of images used in AI training datasets. The sheer number of images used as sources for training data separates issues raised by AI from past Canadian case law, where defendants were typically accused of copying from a single plaintiff, not tens of thousands. Still, substantial similarity and access can be very strongly inferred.

Based on *Cinar,* substantial similarity is established through the substantial copying of a plaintiff's work by the defendant.[41] The question "focuses on whether the copied features constitute a substantial part *of the plaintiff's work*—not whether they amount to a substantial part *of the defendant's work.*"[42] Since the entirety of works are copied and stored into the training systems, a substantial part of an artist's work has indeed been copied. However, since AI-generated images are hybrids of numerous works used during the model's training, such large-scale copying would render it difficult to establish substantial similarity to the work of a single artist.

This concern may be alleviated by considering the intention behind AI image generation reflected by its users and creators. One of the appeals of AI is its ability to mimic the styles of popular modern artists. If the goal of AI image generation was to create a program that could simply generate images of any kind, AI companies could rely on the millions of artworks and images in the public domain or available for commercial use.[43] Instead, protected works are used despite the potential legal repercussions because a wider audience can be attracted from AI images that are highly similar to current and popular art styles. The reproduction of an artist's style would not be possible if their works were not contained in the training datasets.

Employees of AI companies themselves promote the creation of art in the distinct style of certain artists. An example of this is a post on X (formerly known as Twitter) by Katherine Crowson,

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38   LAION, "FAQ" (last visited 20 February 2025), online: <laion.ai/faq/> [perma.cc/89CV-PN3F].

39   Romain Beaumont, "LAION-5B: A New Era Of Open Large-Scale Multi-Modal Datasets" (31 March 2022), online: <laion.ai/blog/laion-5b/> [perma.cc/7N9J-W62E].

40   *Ibid*.

41   *Cinar*, *supra* note 6 at para 39.

42   *Ibid* [emphasis in original].

43   *Andersen v Stability AI Ltd*, ND Cal 2023, 3:23-cv-00201 [*Andersen*] (Amended complaint of 29 November 2023, Plaintiffs at para 55) [*Andersen Amended Complaint*].

a principal researcher at Stability AI, where she provided instructions on how to elicit output images similar to Greg Rutkowski's art, after Rutkowski's name was prohibited on Stability AI after a legal complaint.[44] She suggested using the names of artists with a similar style as Rutkowski and listed several artists as examples.[45] Since generative AI would require an artists' works in its dataset to imitate their art, there is an extremely strong inference that a substantial part of Rutkowski's works, along with the other artists listed in Crowson's X post, were taken.

C. Copyright Infringement: Copying an Artist's Style

Aside from unauthorized copying to train AI models, another argument of copyright infringement could be that the output images made by AI themselves are an unlawful reproduction of an artist's style. This is a challenging argument as currently, there is no precedent in Canadian case law that states that the copying of an artist's *style* is substantial enough to be considered a copyright infringement. Even if the objective viewer recognizes an image as replicating an artist's style, arguing for the copyright protection for style as a new legal right is difficult.

One challenge in protecting style through copyright law is the ambiguity in identifying when style crosses the line from being a series of *ideas* to an original *expression*. For instance, Claude Monet's impressionist style can be described as serene landscape oil paintings depicted through loose brushwork, hazy shapes, and dappled colours. The question is when and whether Monet's iconic and recognizable style itself, as opposed to the actual painting, becomes an original expression unique to him, given that these techniques are and have been used by other artists and should continue to remain available to the public.[46]

Despite the lack of explicit finding of style to be copyright protected, rulings in *Rains* and *Pyrrha* could be interpreted to suggest that certain aspects of style could be protected. In *Rains*, the court held that despite having the same idea of painting crumpled paper, it was each party's expression of the still-life through their individual skill and judgement that granted copyright protection.[47] In *Pyrrha*, the court held that since each jewellery piece had unique finishing techniques that required skill and judgement, this made the pieces original expressions that were protected by copyright.[48] For both cases, common artistic methods such as lighting and wax impressions were not protected by copyright, but original and distinct application of these methods through the creators' skill and judgement could be protected. In summary, both courts in *Rains* and *Pyrrha* focused on the unique way an idea had been expressed by examining specific, protectable elements in original art works that were copied.

Therefore, although an artist's overall, general style most likely cannot be copyrighted, it could be argued that specific elements of an artist's style that is unique to them and requires their skill and judgement could be considered expression. If an AI-generated image copies

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44   *Ibid* at para 226.

45   Katherine Crowson, "If Stable Diffusion 2.0 doesn't know your favorite artist…" (24 November 2022), online: <twitter.com/RiversHaveWings/status/1595945910785409026> [perma.cc/8JRS-UWVX].

46   *Rains*, *supra* note 20 at para 40.

47   *Ibid* at para 15.

48   *Pyrrha*, *supra* note 25 at paras 107 and 109.

these specific, original details or techniques that are substantially similar to the way the artist expresses them, it could be considered infringement. However, distinguishing between an idea and its expression is inherently ambiguous, making it difficult to determine when a stylistic element becomes an expression. It should also be noted that in *Rains*, the defendant's specific works were being assessed for copying against the plaintiff's specific works.[49] Even though general style itself most likely cannot be copyright protected, there could be an infringement of copyright if the unique techniques in one artwork are substantially copied in a particular AI generated image.[50]

Creating images highly resembling an artist's work is technologically possible with generative AI. For example, CLIP (Contrastive Language–Image Pre-training) models are used to connect prompts from AI users to images in datasets. In a simplified explanation, CLIP is an AI model that is trained to correlate images to words.[51] The model learns connections between words and pictures by processing a large quantity of images and their corresponding captions.[52] For artworks, captions often include the name of the artist.[53] Thus, when CLIP is trained on an artist's work, it learns to associate the work with the artist's name when the name is in the caption.[54] For instance, if a user inputs "Monet" in their prompt, CLIP would associate the word with images of Monet's art and nudge the model to produce an image using Monet's works. The CLIP model would have learned the association between Monet's artwork and his name by having processed numerous Monet art with captions that included his name.

This high similarity between an artist's original work and an AI-generated image in that artist's style is confirmed, ironically, by AI. In 2023, Stephen Casper, a PhD student at Massachusetts Institute of Technology, and his team sought to test AI's capacity to mimic and recognize artists' style.[55] Their approach was to first generate works using the prompt "Artwork from <artist's name>."[56] The AI generated images were then encoded using a CLIP image encoder that converted the images into numbers.[57] Alongside the encoded images, text encoders consisting of the artist names were added in. CLIP was then tested to see if it was able to classify the encoded images with the encoded labels.[58] In simpler terms, the team was testing whether the AI tool was able to correspond the generated images (CLIP image encoder) to their imitated artists (encoded labels). The team conducted this experiment using 70 digital artists and found that CLIP correctly correlated the AI generated works to the right artist 81.0 percent of the time. This research demonstrates that not only can AI accurately generate

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49   *Rains*, *supra* note 20 at para 32.

50   *Ibid* at para 40.

51   Alec Radford et al, "CLIP: Connecting text and images" (5 January 2021), online: <openai.com/research/clip> [perma.cc/N2HE-6NGN].

52   *Ibid*.

53   *Andersen Amended Complaint*, *supra* note 43 at para 106.

54   *Ibid* at para 109.

55   Stephen Casper et al, "Measuring the Success of Diffusion Models at Imitating Human Artists" (2023) arXiv 2307.04028, online: <doi.org/10.48550/arXiv.2307.04028 >.

56   *Ibid* at 1.

57   *Ibid*.

58   *Ibid*.

images closely resembling the requested artist's works, but also that the images generated were similar enough for an AI model to classify them with the artist's name.

Given the direct use of an artist's work to train a model to imitate their style and this ability being one of the promotional elements of AI image generators, substantial similarity may be inferred.

D. Proving Access

Even if substantial similarity is proven, plaintiffs still need to prove that the defendant's had access to their work. Access is likely difficult for plaintiffs to prove directly, as it is the defendants who know what works they used and how they obtained them.

There are certain ways for artists to see if their works are being used. Websites like "https://haveibeentrained.com" allow artists to search their art and see if it had been included in LAION-5B.[59] Karla Ortiz, a prominent digital artist from the United States, was able to confirm that her works had been taken and included in the LAION dataset through a similar website, which retrieved a copy of her work along with the exact captions that accompanies that artwork on her website.[60] Although such websites are not direct proof that AI companies themselves accessed the work, it does establish a strong inference of access, as AI companies must download images from datasets, such as LAION-5B, to train their models.

Furthermore, AI companies could argue that they did not download all 5.8 billion pictures from the dataset and that the plaintiff must prove that their works were specifically downloaded. Of course, this would be an incredibly difficult task, given the billions of images used as data and the overall lack of transparency from the companies. Nevertheless, given that certain outputs are so substantially similar to an artist's style that it is not recognizable by AI, and that AI works are reproductions from the training dataset, it is highly likely that copyright protected works were accessed and used. Therefore, AI generated images have a strong possibility of infringing owner's rights through reproduction.

E. Current Cases on AI and Copyright Infringement

Due to the novelty of generative AI, there are few legal precedents on copyright infringement by AI companies. Several notable cases are currently in progress, including a lawsuit in the United States directly related to generative AI images and other legal actions in the United States and Canada from major media companies claiming copyright infringement of their protected works.

i. *Andersen v Stability AI Ltd et al*

These potential copyright infringement issues are at the centre of *Andersen v Stability AI Ltd*, an ongoing case in the United States.[61] In 2023, three artists in the United States filed a class action against three AI companies: Stability AI Ltd., DeviantArt Inc., and Midjourney Inc. The artists allege that their artworks were used without licence to train AI programs,

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59   Have I Been Trained, "About" (last visited 20 February 2025), online: <haveibeentrained.com/about> [perma.cc/V2T7-M2R5].
60   *Andersen Amended Complaint*, *supra* note 43 at paras 74–76.
61   *Andersen*, *supra* note 43.

resulting in AI generated images in their art styles.[62] They argued that downloading, storing, and creating derivatives of their works were direct infringements of their copyrights.[63]

All but one of the claims were dismissed with leave to amend.[64] The one exception was a claim against Stability AI for direct copyright infringement by downloading, storing, and using images for AI training without permission.[65] The court found that the plaintiffs presented enough evidence to reasonably infer that their copyrighted works had been downloaded and included in datasets used by Stability AI.[66] Although the allegations of the output images being derivatives of protected works were dismissed for lack of substantial similarity, the court stated that the argument could be reintroduced with "clarified theories and plausible facts."[67]

An amended complaint with seven additional plaintiffs was filed on November 29, 2023. On August 12, 2024, the defendants' motions to dismiss copyright infringement claims were denied.[68] The court held that the plaintiffs had sufficiently alleged that their works were included in Stable AI's model, Stable Diffusion. The works being in a different form than their original medium, such as in an algorithmic or mathematical figure, was determined to not be a hindrance to the claim.[69]

The court's orders on the motion to dismiss is not indicative of the final decision as the case is still ongoing. It does, however, underline the unprecedented nature of AI compared to other technological tools in the context of copyright law. The outcome of this case will be instrumental in establishing the scope of creators' copyrights and other associated legal concepts in the United States, such as fair use, in light of the rapid development and pervasiveness of generative AI. Although this is an American case and its impacts in Canadian law are unknown, it is nevertheless likely to be very influential in Canada as it is one of the first lawsuits against AI companies for breaching artists' copyright.

ii.   *New York Times v Open AI and Microsoft*

Another recent and ongoing case is *New York Times v Open AI and Microsoft*, where the New York Times ("NYT") alleges in their Complaint that the defendants copied and processed NYT's copyright protected material to produce content that commercially competes with NYT.[70] These allegations are evidenced through Open AI's program, ChatGPT, producing text that either closely summarizes or copies NYT articles, imitates NYT's writing style, and attributes incorrect information to NYT.[71] Microsoft has also been named in the Complaint

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62   *Andersen Amended Complaint*, *supra* note 43 at paras 2–5.

63   *Ibid.*

64   *Ibid* at 28.

65   *Ibid* at 7.

66   *Ibid* at 6–7.

67   *Ibid* at 13.

68   *Andersen*, *supra* note 43 (Order of 12 August 2024).

69   *Ibid* at 17.

70   *The New York Times Company v Microsoft Corporation*, SDNY 2023, 1:23-cv-11195 (Complaint of 27 December 2023, Plaintiff).

71   *Ibid* at para 4.

as its AI search engine, Copilot, is based on Open AI's GPT model. Notably, NYT's content is behind a paywall, which gives readers access upon payment but requires separate licenses for commercial use of NYT's content.[72] NYT alleges that although numerous licensing agreements are available, Open AI did not obtain them. Negotiations between the parties were unsuccessful, as the defendants claimed that their unlicensed use was transformative enough to be protected under fair use.[73]

In addition to illegally copying content and attributing incorrect information to NYT, users can also ask ChatGPT to produce articles that readers would normally need a NYT subscription to access. NYT is asking for statutory and compensatory damages, as well as the destruction of all models created from NYT's content. If NYT is successful, this case could set a precedent in the United States where all learning models based on infringed works are destroyed. In such a case, AI companies would likely have to start from scratch using only original, licensed, or public-domain works.

iii. *Toronto Star Newspapers Limited et al v Open AI Inc et al*

In a new Canadian case, major Canadian media outlets allege copyright infringement by Open AI's use of generative AI.[74] The plaintiffs, including Toronto Star Newspapers Limited, Canadian Broadcasting Corporation, and the Globe and Mail Inc., filed a statement of claim in the Ontario Superior Court of Justice on November 28, 2024.[75] Among other claims, the plaintiffs allege that the defendant AI companies are jointly and severally liable for infringing, authorizing, and/or inducing the infringement of the plaintiffs' copyright protected works contrary to section 3 of the *Act*.[76]

The lawsuit claims that copyright protected works were accessed and copied to develop generative AI models without obtaining appropriate licenses from the plaintiffs and without regard to the works' terms of use.[77] The challenge rights holders face when proving access is reflected in this lawsuit as the statement of claim states, "[t]he full particulars of when, from where, and exactly how, the Works were accessed, scraped, and/or copied is within the knowledge of OpenAI and not the News Media Companies."[78]

The plaintiffs are requesting a permanent injunction to restrain the defendants from infringing on their protected works.[79] Additionally, they are seeking an order for damages and a share of the defendants' profits.[80] Although this Canadian lawsuit comes quite late compared to the other legal action in the United States and other countries, it is still significant for Canadian law and its application to the rapidly evolving technology.

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72   *Ibid* at para 156.
73   *Ibid* at para 8.
74   *Toronto Star Newspapers Limited v OpenAI, Inc*, Toronto, ONSC 24-00732231-00CL (Statement of claim of 28 November 2024, Plaintiffs) [*Toronto Star*].
75   *Ibid*.
76   *Ibid*.
77   *Ibid*.
78   *Ibid* at para 46.
79   *Ibid*.
80   *Ibid*.

III. DEFENCES BY AI COMPANIES

Fair use is a defence that is relied on by many AI companies in the United States as demonstrated in Stability AI's statement to Toronto Star: "anyone that believes that this isn't fair use does not understand the technology and misunderstands the law." In Canada, this doctrine is referred to as "fair dealing."[81] Despite the similarity in name, the conditions for fair use in the United States and fair dealing in Canada are quite distinct.

Another defence that AI companies could use is the opt-out feature that they offer to copyright holders.[82] AI companies could argue that they have made reasonable efforts to accommodate the rights of copyright holders by providing a way for protected works to be excluded from AI training data sets.

A. Fair Dealing

Copyright law in Canada aims to balance the public interest in promoting artistic and intellectual progress with creators' rights to receive rewards from their original works through benefits such as copyright protection.[83] Fair dealing is an exception to copyright law under section 29 of the *Act*. The doctrine serves to prevent excessive copyright from restricting the public domain's ability to "incorporate creative innovation in the long-term interests of society as a whole."[84] Its purpose can be interpreted as granting users the right to stand on the shoulders of pre-existing copyrighted works for the intention of innovation. In *CCH*, the SCC emphasizes that like other exceptions in the *Act*, fair dealing is more than a defence but a user right.[85] Since both the author's right and the user's interest need to be evaluated, the doctrine is interpreted broadly so that both rights are fully assessed.[86]

Fair dealing requires the defendant to prove that their "purpose" falls under the statutorily-enumerated categories of research, private study, education, parody, satire, criticism, review, or news reporting.[87] As the name states, the defendant must also demonstrate that their dealing was fair.[88] There is no set test to determine fairness, but the following factors are used in the assessment: the dealing's purpose, its character, amount of the dealing, non-copyrightable alternatives, the nature of the work, and its effect on the original work.[89] If AI companies' uses fall under the exception of fair dealing, they would not be infringing.

AI companies may have difficulties relying on fair dealing for several reasons. The first is the question of whether AI tools fall under a category required by the *Act*. The most fitting

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81   *Copyright Act*, *supra* note 4, s 29.

82   Melissa Heikkilä, "Artists can now opt out of the next version of Stable Diffusion" MIT Technology Review (16 December 2022), online: <technologyreview.com/2022/12/16/1065247/artists-can-now-opt-out-of-the-next-version-of-stable-diffusion/> [perma.cc/PRA5-7PKP].

83   *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 30.

84   *Ibid* at para 32.

85   *CCH*, *supra* note 17 at para 48.

86   *Ibid*.

87   *Copyright Act*, *supra* note 4, ss 29–29.2.

88   *CCH*, *supra* note 17 at para 50.

89   *Ibid* at para 53.

category for AI is likely research. Is the development of AI that generates pictures actually research or is it a commercial tool that streamlines the creation of "art"? This categorization of research can be strutinized alongside the first stage of the *CCH* factors for determining fair dealing: the purpose of the dealing.

Purpose is decided from the perspective of the *user* of the copy, not the copier.[90] This distinction in perspective is discussed in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* ("*Alberta Education*"), a case where teachers making copies of textbooks to distribute to students was considered fair dealing. The SCC found that although it was the teachers who made the copies, the *students* were the *users* of the copies. Since the students were using the textbook copies for private study, it was considered fair dealing under section 29 of the *Act*. For generative AI, it can be argued that the copiers are the AI companies and the users are individuals or businesses who prompt the program to generate images. Unless the generated images are used for the purposes of research, private study, education, parody, satire, criticism, review, or news reporting, the purpose cannot be considered fair dealing.

However, this user-focused analysis does not render the copier's reasons for copying irrelevant. Their ulterior motives, especially if they are commercial, can make a dealing unfair.[91] For AI platforms, these motives are difficult to generalize as each company has a different model plan. Midjourney Inc. employs a monthly subscription based model where more expensive plans generate images faster and in greater quantities.[92] Runway AI offers various paid plans with increased access to benefits like watermark removal and higher resolution images.[93] Stability AI offers free models for non-commercial purposes, like personal and research use, while charging a monthly fee for enterprises, depending on their annual revenue.[94] Unlike Runway AI where the services available are much more limited for the free subscription, Stability AI's free plan offers almost the same benefits as their paid plan. Based on these various models, it can be argued that fair dealing may apply to the free plans used by individuals for personal purposes. It is unlikely that fair dealing applies to paid subscriptions for businesses, as this demonstrates a commercial motive for both user and copier.

To make the purpose analysis more complicated and equivocal, the SCC in *CCH* has expressed that a research purpose is not restricted to just non-commercial and private contexts.[95] *CCH* involved a library providing copies of legal material like decisions and statutes for their patrons, such as lawyers conducting legal research for their business of law.[96]

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90   *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 [*Alberta Education*].

91   *Ibid* at paras 20–21.

92   Midjourney, "Subscription Plans" (last visited 20 February 2025), online: <docs.midjourney.com/docs/plans> [perma.cc/W2FY-QBA7].

93   Runway, "Choose the Best Plan for You" (last visited 20 February 2025), online: <runwayml.com/pricing/> [perma.cc/UCG7-P9AB].

94   Stability AI, "Stability AI Membership" (last visited 20 February 2025), online: <stability.ai/membership> [perma.cc/P8L7-RTZ8].

95   *CCH*, *supra* note 17 at para 51.

96   *Ibid*.

One distinction between lawyers and AI companies is that a law business' model is not entirely founded on using copyrighted materials for profit. Although lawyers' research is essential to provide professional legal services, using copyright protected materials is not the profit-driving element of their business.

Despite the lingering question of "purpose," other factors likely prevent fair dealing from applying. The character and amount of copying is likely not fair since millions to billions of images are copied and stored in their entirety.[97] If only the essential portions of the work were taken, or the copies destroyed after use, the dealing may have leaned more towards being considered fair.[98] It is also key to consider the factual differences between case law and AI contexts. In *Alberta Education*, a limited number of copies were made for the students in the class from a textbook written and distributed for educational purposes. In an AI context, billions of images were copied, a vast majority of them with the intention of being used to train AI models.

Another crucial element to take into account are the alternative options AI companies can take that do not involve using copyrighted works.[99] Such options include paying for licenses, asking for permission before copying, or using images available in the public domain.[100]

The final factor is the "effect of dealing on the work."[101] AI has already had a detrimental impact on artists. Since it is much cheaper and quicker to produce, there is an incentive for prospective clients to use AI tools rather than commission artists. This impact is already being felt in the art community, as Wacom, a company that sells tablets used by artists to digitally draw, recently used an AI-generated image for promotional purposes.[102]

B. Fair Use

In the American fair use doctrine, the defendant does not need to prove their "use" falls within a statutorily-enumerated category, unlike the Canadian doctrine of fair dealing.[103] To determine if the use of a work is a fair use, the following factors are assessed: the purpose and character of the use, the nature of the original work, the amount and substantiality of the original work used, and the impact of the use on the original work's market value.[104] Of these four factors, the first, purpose and character of the use, is extensively evaluated in *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* ("*Warhol*"), a 2023 Supreme Court of the United States ("SCOTUS") case.[105]

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97   *Ibid* at para 55–56.
98   *Ibid*.
99   *Ibid* at para 57.
100 This is not to suggest that paying artists to use their work is not an alternative or solution to overlook their economic and moral rights to the work.
101 *CCH*, *supra* note 17 at 59.
102 Jess Weatherbed, "Artists are making creative companies apologise for using AI" *The Verge* (9 January 2024), online: <theverge.com/2024/1/9/24031468/wacom-wizards-of-the-coast-mtg-artists-against-generative-ai> [perma.cc/8FXC-4Z2S].
103 17 USCS §107.
104 *Ibid*.
105 *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith*, 598 US 508 (2023) [*Warhol*].

The first factor considers whether the use is transformative.[106] If the new work's purpose is sufficiently distinct from the original, it may qualify as fair use, even if it is in a commercial context.[107] In *Authors Guild v Google* ("*Google Books*"), Judge Leval of the Second Circuit ruled that fair use applied, despite the defendant scanning millions of books and uploading them online.[108] The purpose of the copying was found to be transformative, as the defendant had search functions that allowed users to search up specific snippets of a text.[109] The defendant's commercial motives did not rule out the applicability of fair use given the established transformative purpose and the copies not significantly competing with the original books in the market.[110]

In contrast, fair use was found not to apply in *Warhol.* In this case, the defendant took the plaintiff's photograph of Prince, a musician, and altered it.[111] The modifications included colourizing, cropping, drawing, and overlaying silkscreens onto the photo. The altered work was then sold and licensed. SCOTUS ruled that the defendant's work was not transformative enough as it substantially shared the same purpose as the original photograph. Justice Sotomayor, writing for the majority, stated both the original and derivative portraits of Prince had the same purpose of being used in magazine features of the celebrity.[112]

These precedents are influential in determining whether fair use applies to generative AI despite the differences in circumstances. In *Warhol* and *Google Books*, the secondary works were exact copies of specific original works that were modified to various degrees. In the context of AI, it is difficult to pinpoint the precise work used to create an AI generated image. However, if the law is applied on a case-by-case basis, a specific AI image that is substantially similar to the work it was trained on and serves the same purpose as the original could be considered non-transformative, thus not falling under the conditions of fair use.

C. Opt-Out Feature

A feature offered by many AI companies, to supposedly reflect their consideration of artists, is the opt-out feature.[113] Although this option may seem positive, it is a controversial feature as it requires artists to take positive actions to protect their rights rather than AI companies practising due diligence as to not infringe on protected rights. This is an onerous task for artists as there are numerous AI platforms, with new ones emerging as generative AI becomes more prevalent. Rightsholders would also need to continuously monitor AI activity to ensure

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106   *Campbell v Acuff-Rose Music, Inc*, 510 US 569 (1994) [*Campbell*]. Additionally, Justice Abella stated in *SOCAN v Bell Canada*, 2012 SCC 36 at para 24: that although transformative use is a factor (albeit not "absolutely necessary") in determining fairness, Canadian courts have cautioned against using American copyright concepts "given the 'fundamental differences' in legislative schemes."

107   *Campbell*, *supra* note 106.

108   *Authors Guild v Google*, 804 F (3d) 202 (2nd Cir 2015) [*Google Books*].

109   *Ibid* at 23.

110   *Ibid* at 26.

111   *Ibid.*

112   *Ibid.*

113   Heikkilä, *supra* note 82.

compliance.[114] It is unfair for artists to have to request their protected works not be used, rather than AI companies seeking permission to use the works.

Not only do artists need to upload the artwork they want removed, but they also need to write a physical description for every piece. For rights holders with numerous artworks online, like the Georgia O'Keeffe Museum, this would be more than 2000 individual submissions for removal.[115] There is also no guarantee that the artist's works will be removed after requesting it. First, images are only removed after the company reviews the submission and verifies that the image is in their datasets.[116] Second, if the dataset belongs to a third party, the company is unable to remove it.[117] Third, this would require rights holders to request their artwork be removed from each AI company and dataset.

One example of this removal option being ineffective is Sam Yang's experience with Civit AI Inc (also known as "Civitai"), which allows users to share models and images.[118] Yang is a popular Canadian artist with more than two million followers on Instagram and has a recognizable and distinct art style.[119] By using his online artwork, users on Civitai created models to generate images in his style.[120] These models were then posted on Civitai to be shared and sometimes even sold.[121] The images generated by the models clearly imitated Yang's style and blatantly included Yang's name in their model names.[122] Despite this demonstration of his artwork being used in the training of AI models, images and models created from his works have not been removed by Civitai.[123]

It is worth noting that many generative AI platforms have expressed their respect and support for artists. Even Stability AI has stated on an official reddit post that they "are committed to supporting artists as AI develops."[124] They also declared that 70 percent of the "proceeds" generated from sales of the AI generated image in the artist's style will go to the artist and/or model creator, while the rest will be used to maintain the program; it should be emphasized

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114 Society of Composers, Authors and Music Publishers of Canada, "SOCAN AI Submission to Government of Canada" (last visited 20 February 2025), online: <socan.com/socan-ai-submission-to-government-of-canada/> [perma.cc/X2L9-CTRB].

115 Kali Hays, "OpenAI offers a way for creators to opt out of AI training data. It's so onerous that one artist called it 'enraging'" *Business Insider* (29 September 2023), online: <businessinsider.com/openai-dalle-opt-out-process-artists-enraging-2023-9> [perma.cc/8Y5S-3DDB].

116 Open AI, "Artist and Creative Content Owner Opt Out" (last visited 20 February 2025), online: <share.hsforms.com/1_OuT5tfFSpic89PqN6r1CQ4sk30> [perma.cc/FDG7-NDBH].

117 *Ibid*.

118 *Toronto Star*, *supra* note 74.

119 Instagram, "samdoesarts" (last visited 20 February 2025), online: <instagram.com/samdoesarts> [perma.cc/Q2F5-BBJD].

120 Lykon, "SamDoesArts (Sam Yang) Style LoRA" (6 May 2023), online: <civitai.com/models/6638/samdoesarts-sam-yang-style-lora> [perma.cc/3BXU-Q3GB].

121 *Toronto Star*, *supra* note 74.

122 *Ibid*.

123 *Ibid*.

124 Official Civitai AI, "Civitai: Artists and AI" (16 December 2022), online: <reddit.com/r/StableDiffusion/comments/znrzdb/civitai_artists_and_ai/> [perma.cc/XNC5-TC2N].

that *artist* and *model creator* are used synonymously, despite the fact that model creators primarily use unauthorized works to produce the models.[125]

Nevertheless, the onus should not be on artists to actively monitor these companies to ensure that their works are not being used without their consent. The opt-out feature is not only ineffective and laborious, but it also shifts artist autonomy and authority over their own rights to the AI companies.

IV. RECOMMENDATIONS

To maintain a copyright regime that supports the development of science while continuing to protect the rights of artists, I propose the following three suggestions:

1. Not creating AI exceptions for laws around TDM.

2. Requiring complete transparency and disclosure from AI companies on their data sources.

3. Using licensing models to ensure original creators are compensated.

These recommendations are primarily derived from the incorporation of various responses to the Government of Canada's 2021 consultation on matters related to AI for the purposes of developing policy and laws around copyright.[126] Responses were submitted by Canadian organizations and individual experts, sharing their perspectives and feedback on the subject.

A. No AI Exceptions to TDM

Given the novelty of generative AI, there are not many legal precedents or regulations surrounding copyright issues. However, one area that is relatively regulated is TDM.

To obtain certain information from source material, data mining may require the reproduction of copyrighted works.[127] Reproducing without a licence or permission from the creator would infringe copyright.[128] Since TDM involves accessing a vast number of materials, acquiring authorization from each of the right holders would be a serious hindrance to the process and pace.[129] TDM is a crucial stage in the training of AI as massive amounts of data is required to train the program. It is essential for Canada to establish clear laws on TDM, to ensure copyright exceptions to TDM support effective and efficient research rather than enabling for-profit exploitation.

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125 *Ibid.*

126 Government of Canada, "Consultation on Copyright in the Age of Generative Artificial Intelligence" (16 January 2024), online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/consultation-copyright-age-generative-artificial-intelligence> [perma.cc/KT8V-XVDP]. This paper's recommendations were most influenced by submissions from Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic; the Society of Composers, Authors and Music Publishers of Canada; The Writers' Union of Canada; and the Canadian Artists Representation/Le Front des artistes canadiens.

127 *Ibid.*

128 *Copyright Act*, *supra* note 4, s 3(1).

129 *Ibid.*

There have been alternating approaches worldwide in response to the rising infringement concerns over data mining for purposes that are not entirely for research. In Japan and the Republic of Singapore, exceptions have already been established to allow TDM reproductions, mainly for the purposes of advancing AI development.[130] In the European Union, TDM for commercial purposes is allowed unless the rights holder expressly opts-out of the TDM process.[131] In the United Kingdom, there was a proposal to allow computational analysis, such as processing data for AI training, as a TDM exception as long as the company had lawful access to a dataset.[132] This proposal was withdrawn, leaving mining for non-commercial purposes as the only exception to TDM in the United Kingdom.[133] Had this proposal been implemented, the exemption would have allowed for a speedier and cheaper TDM process, while consequently restricting rights holders from charging additional licence fees for those who mine their data rather than merely accessing it.[134]

If such an exception was made in Canada, artists would no longer have control over their works once they post them online, such as on social media platforms like Instagram and X. This is highly disadvantageous to artists in the current digital era, many of whom rely on social media exposure to garner work and establish their standing in the art world. Moreover, under such exceptions, works posted behind a paywall could legally be extracted and used as long as there was payment for access. This would likely eliminate any need or demand for licensing, a system that allows artists to be paid if their content is being used.[135]

It is challenging to prove copyright infringement from TDM if generative AI does not substantially reproduce the data used.[136] This challenge continues in copyright infringement for generated images due to the lack of precedent in copyright and AI, a subjective element to substantial similarity in art styles, and difficulty in proving the defendants had access to the plaintiff's work. Therefore, safeguards should be established to protect artists' rights before the work is accessed. Artists should have autonomy over who can use their work and how it is used.

130   Rachel Montagnon & Sungmin Cho, "UK withdraws plans for broader Text and Data Mining (TDM) copyright and database right exception" (1 March 2023), online: <hsfnotes.com/ip/2023/03/01/uk-withdraws-plans-for-broader-text-and-data-mining-tdm-copyright-and-database-right-exception/> [perma.cc/X6GH-ZTKG].

131   European Union, *Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC*, [2019] OJ, L 130/92 at art 4.

132   *Ibid.*

133   *Ibid.*

134   James Marsden & Anna Copeman, "UK government announces new text and data mining copyright exception in response to AI and IP consultation" (14 July 2022), online: <dentons.com/en/insights/articles/2022/july/14/uk-government-announces-new-text-and-data-mining-copyright-exception> [perma.cc/8BPK-RD76].

135   Society of Composers, Authors and Music Publishers of Canada, *supra* note 114.

136   Jordan Geist, "Fair Use and AI: The Case for a Broad Text and Data Mining Exception" (25 February 2024), online: <cippic.ca/articles/fair-use-and-ai-the-case-for-a-broad-text-and-data-mining-exception> [perma.cc/HC5N-YKKE].

B. Transparency and Disclosure

The most significant impediment preventing artists from arguing for their rights or even simply negotiating with AI platforms are the platforms' lack of transparency and disclosure. Since AI companies do not publicly name the artists or sources used to train their programs, there is no concrete way to determine whether an AI company has accessed or used artwork.[137] Therefore, Canada should require transparency from AI companies from the start, rather than requiring disclosure once the company is called to the courtroom.

The current lack of transparency not only makes it difficult to prove access in court, but also takes away the foundation to negotiate licensing terms.[138] If there is no proof that AI companies are using works, then there is no reason for them to pay for licences. Instead of the artists having to investigate whether their art is being used, AI companies should be required to provide their artwork sources. If there are no copyright infringements, there should be no disincentive to releasing creators' names that are used in datasets. The excessive number of names the company would have to list should not be a valid excuse. Failure to properly document datasets and their origins should not be rewarded by being excused from accountability.

C. Licensing Models

Lastly, instead of finding ways to allow AI to develop with minimal restrictions to promote innovation, the focus should shift to a solution that remunerates artists while fostering scientific advancement. Licensing is likely the most feasible answer; it would require AI companies to seek permission and pay for usage and would allow artists to be aware of how their works are being used while also generating revenue. If permission is denied and the work is processed anyways, the AI developers should be liable for copyright infringement like any other defendant.[139] The progress of science should not come at the unfair expense of artists, as this would undermine the balance between promoting public interest and fairly rewarding creators.[140] In particular, corporations with commercial motives should not be allowed to operate without compensating the artists whose works helped train the models under the justification of public interest and technological advancements.[141]

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137 *Ibid*.

138 Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC), "CARFAC-RAAV's recommendations regarding AI and visual artists" (30 January 2024), online: <carfac.ca/news/2024/01/30/carfac-raavs-recommendations-regarding-ai-and-visual-artists/> [perma.cc/VVE8-2U4H].

139 Society of Composers, Authors and Music Publishers of Canada, *supra* note 114.

140 *SOCAN*, *supra* note 3 at para 40.

141 The Writers' Union of Canada, "Consultation on Copyright in the Age of Generative Artificial Intelligence- Summary Position" (December 2023), online (pdf): <writersunion.ca/sites/default/files/2024-02/TWUC%20Submission%20AI%20Final.pdf> [perma.cc/C5JQ-XU5H].

CONCLUSION

Despite there being no Canadian case law or legislation specific to AI and copyright, this paper concludes that there are strong factual and legal bases that generative AI does infringe on artists' rights. A copyright owner's exclusive right to reproduce is likely breached when their work is downloaded and stored from datasets in order to train AI models. This right may also be infringed through the production of an AI image if the image is substantially similar to the unique elements of an artist's style and previous work(s). This copying is even more likely to infringe copyright when an artist's works are used to train an AI model and when their names are used in the prompt to specifically request images in their style.

It is undeniable that AI's ability to take a text prompt and generate an image through correlation is an extraordinary and remarkable scientific achievement. Even so, it is important that generative AI is regulated for both legal and ethical reasons. Allowing AI to continue to advance could hinder innovation as generative AI is founded on the copying of human expression. If AI companies continue to freely infringe artists' rights, then there is no incentive for artists to continue creating new forms of art and posting them online as it would feed into the development of the very program that is negatively impacting their careers. If there is no new expression, there would be no growth in generative AI as there is no new material for the program to learn from. Since AI images are the reproduction of numerous original artwork without contributing any form of original expression, it would be recycling the same content with no advancements.

Copyright law must balance the ambition for innovation with the detrimental effects of overlooking creator rights. Regulations and policies should be established to compensate creators for their involuntary contributions to the creation of generative AI and ensure applicable legal repercussions are faced by AI companies like any other defendant violating copyright. As revolutionary as AI models are, it is crucial to not lose focus on one of copyright law's main purposes: to reward creators for their original expression by granting them exclusive rights and protection of their work.