



2019 Study Question

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Copyright in artificially generated works

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I. Current law and practice

Please answer all questions in Part I on the basis of your Group's current law and practice.

To answer questions 1 to 11, please base your answers on the Working Example in the full text of the Study Guidelines. If you believe that reference to other scenarios/examples is useful, please raise such scenarios/examples and their relevance to the questions presented.

1 Does your current law / practice contain laws, rules, regulations or case law decisions specifically relating to Copyright and/or Related Rights in artificially-generated works?

No

Please Explain

A. Application of general Copyright criteria to artificially-generated works

Authorship

2 Does your current law / practice require that a work has to be created by an *identified author* (natural or legal person) to be protected by Copyright?
* By answering this question, don't take into consideration anonymous works and pseudonym works. Please also note that this question is independent from the question of the rights holder.

Yes

Please Explain

The Canadian Copyright Act, R.S.C., c. C-43 (the "*Copyright Act*") provides:

"[s]ubject to this Act, the author of a work shall be the first owner of the copyright therein." [[*Copyright Act*, s.13(1)]]

The *Copyright Act* does not explicitly require an author to be identified. However, identification is implicit as the term of copyright is measured from the death of the author [*Copyright Act*, s.6.1], unless the identity of the author is unknown [*Copyright Act*, s.6.2]. Identification of the author is also required for registration [*Copyright Act*, s. 54(1)].

3 Does your current law / practice require that a work has to be created by a human to be protected by Copyright?
* Please note that this question is independent from the question of the rights holder.

Yes

Please Explain

The Copyright Act (s. 5(1)(a)) provides

"copyright shall subsist in Canada...in every original...work if...the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a [a Berne Convention country, a Universal Copyright Convention country or a World Trade Organization member]".

Thus, although the word "human" is not used, the terms citizen, subject, or person ordinarily resident would suggest that human authorship is ordinarily required. An argument exists that "person" may include a legal person. However, other provisions of the *Copyright Act* explicitly contemplate non-human (i.e. corporate) authorship.

For example, for cinematographic works non-human (corporate) authorship is explicitly contemplated. To that end, the *Copyright Act* (s. 5(1)(b)) provides:

(b) in the case of a cinematographic work, whether published or unpublished, the maker, at the date of the making of the cinematographic work,

(i) if a corporation, had its headquarters in a treaty country, or

(ii) if a natural person, was a citizen or subject of, or a person ordinarily resident in, a treaty country; or

Curiously, for works first published in convention countries (Berne, WCT or WTO countries), the residence, citizenship, etc. is irrelevant in order for copyright to subsist. As such, non-human authorship for such works is theoretically possible. [see *Copyright Act*, s. 5(1)(c)].

Notwithstanding the theoretical, the *Copyright Act* contains many other provisions that imply an author must be human. For example, the term of copyright is measured based on the "life" of the author [*Copyright Act* s. 6]. Posthumous works are protected [*Copyright Act* s. 7]. Rules of copyright ownership for employee authors is contemplated [*Copyright Act* s. 13(1)]. And, post author death reversion of assignments is contemplated [*Copyright Act* s. 14(1)]. Case law relating to originality also requires the work to be created by a human (see below).

4 Could one or more of the natural persons involved in the process of the following Working Examples be qualified as authors of the resulting work in your jurisdiction?

4.a The authors of the program or code that defines the AI entities?
* As noted in Paragraph 2 of the Discussion developed in the full text of the Study Guidelines, "AI entities" refers to the system(s) that creates the AI-created work and does not refer to a legal or juridical entity.

No

Please Explain

The *Copyright Act* is silent on defining what constitutes authorship. Case law has clarified that copyright protects the expression of ideas, and not the ideas themselves. Further, Case law has held the author is a person who fixes the ideas into a concrete expression (that becomes the work). However, mere fixation is not sufficient condition for authorship, where the person recording the work is a mere amanuensis. *Donoghue v. Allied Newspapers Ltd*, [1937] 3 All ER 503; [Gould Estate v. Stoddart Publishing Co. Ltd](#).

[1998 CanLII 5513](#)

Likely not, as these authors are too far removed, and are not involved of the fixation of an idea into the concrete expression that is the Working Example. However if the program must produce a defined work according to the software code created, then the author of the program would be the author but this would likely not then be a work created by an AI entity.

4.b A human who defines the particular goal or objective to be achieved by the AI entities?

No

Please Explain

Again, likely not as the human is not involved of the fixation of the idea into the concrete expression that becomes the Working Example

4.c A human who selects the data or the data selection criteria (inputs)?

Yes

Please Explain

Possibly, if the AI entities are viewed as a tool (akin to a camera), operated by the human.

4.d A human who selects a particular artificially-generated work from multiple works generated by the AI entities?

Yes

Please Explain

Selection of a single work is likely not enough to warrant authorship as no new work is created through this selection. Selection and arrangement of multiple works may result in a work that is protected as a "compilation" under div 2 of the *Copyright Act*, [Section 2 provides – "*compilation* means (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data; (compilation)"]. If the resulting work qualifies as a "compilation", the human would be the author

4.e Someone else?

No

Please Explain

It is not clear who that would be

Originality

5 If, in your jurisdiction, originality is a requirement for a work to be protected by Copyright, could an artificially-generated work qualify as an original work in your jurisdiction?

No

Please Explain

Originality is a requirement for copyright protection in Canada. Canada's Supreme Court has defined such "originality" to require that the work must (i) originate from an author, (ii) not be a mere copy, and (iii) be the product of an author's skill and judgement. [1] "Skill" in this context means the use of one's knowledge, developed aptitude or practised ability in producing the work and "judgment" means 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." [2] The exercise of skill and judgement required to produce the work cannot be trivial in a way that could be characterized as a purely mechanical exercise. [3]

The Copyright Act does not itself address artificially-generated works and no Canadian court has yet determined that an artificially-generated work has sufficient originality to attract copyright. However, the first and third requirements for originality in Canada as articulated by the Supreme Court as discussed above may pose a challenge to an attempt to claim copyright in an artificially-generated work.

First, an artificially generated work may have no "author" under Canadian law. The Copyright Act contemplates that an author is "a citizen or subject of, or a person ordinarily resident in, a treaty country in order for copyright to subsist. [4] The fact that the term of copyright is fixed in relation to the "life of the author" [5] also implies that an "author" is a natural person. While the Copyright Act explicitly contemplates that a corporation may create a copyrightable cinematographic work, this is a definition restricted to such works.

In addition, an artificially-generated work may not be the product of the exercise of skill and judgement under Canadian law. Rather, because an artificially-generated work results from the working of an algorithm, it may be considered a mechanical exercise, not "skill and judgment".

Just as a photographer is the author of the work created by his or her camera because the photographer set up the instrument and guided its operation, an argument can be made that the author of an artificially-generated work is the programmer of the computer which itself generates the work. Canadian courts may consider the intellectual efforts and choices of the software developer who wrote the code for the computer program to determine whether an artificially-generated work is the product of an author's skill and judgment. This argument would be even more attractive if the programmer also provided the inputs to the system that lead to the creation of the work. However, this area of Canadian law is not settled

Footnotes

1. [^](#) *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 25, 1 SCR 339 [CCH Canadian].
2. [^](#) *Ibid.*
3. [^](#) *Ibid* at para 16.
4. [^](#) *Copyright Act, RSC 1985, c C-42, s 5.*
5. [^](#) *Copyright Act, RSC 1985, c C-42, s.6.*

Supplementary criteria

6

If there are supplementary or other requirements for a work to be protected by Copyright in your current law / practice, can an artificially-generated work in accordance with the Working Example fulfill them?

No

Please Explain

No other requirements

Original ownership

7 Assuming that, under your current law / practice, an artificially-generated work is protectable by Copyright, who would be the “first owner” of the Copyright, i.e. the person defined by the law as the *original owner* ?

The current law/practice does not specifically address artificially-generated works. Under div 13 of the Copyright Act, the author of a work “shall be the first owner of the copyright therein”, except where the author was employed by some other person and the work was made in the course of the employment. In the latter case, in the absence of any agreement to the contrary, the other person is the first owner of the copyright. Thus, for example, the employer of the author could be the first owner in some circumstances.

Setting aside who the author of an artificially-generated work would be (discussed in relation to questions 2) through 4)), div 13 applies to artificially-generated works such as an artwork, music or literature as outlined in the Working Example. Other provisions of the Copyright Act would apply in the case of other works, such as a performance, a sound recording, or a communication signal

8 Under your current law / practice, could an AI system or machine be qualified as a juridical entity capable of holding Copyright or Related Rights?

No

Please Explain

Likely not. To our knowledge, no legislation or jurisprudence has deemed an AI system or machine as a legal entity capable of being assigned or holding rights, including copyright.

9 Does your current law / practice allow non-humans and/or non-juridical entities to hold Copyright?

No

Please Explain

Non-human, juridical entities, such as corporations, academic institutions, etc. may hold copyright, for example where it has been assigned to them by the author(s) or where the non-human entity was designated the owner of copyright in the specific circumstances listed in the Copyright Act (e.g. as maker of a sound recording).

However, non-juridical entities likely cannot hold copyright. While the Copyright Act does not specify that the holder of copyright must be a juridical entity, the only examples of copyright holders are either authors (i.e. human persons – see *Setana Sport Ltd. v. 2049630 Ontario Inc.* (2007 FC 899 at para. 4) or other legal entities, such as corporations (e.g. in the case of a broadcaster of a communication signal or a maker of a sound recording (see Section 24 of the Copyright Act)).

Term of protection

10 Assuming that, under your current law / practice, an artificially-generated work is protectable by Copyright, what is the term of protection?

In cases where the work is a literary, artistic or musical work as outlined in the Working Example, div 6 of the Copyright Act states that the term of protection for copyright in Canada is from the moment of creation until 50 years after the death of the creator. It makes no specific consideration for artificially created works.

The Copyright Act, also makes provisions for cases where the identity of all the authors of a work are not known (see div 6.2). In such cases, the term of copyright begins with either the publication or making of the work and ends 50 or 75 years later, respectively

B. Application of Related Rights criteria to artificially-generated works

11 Could a work created with the process of the Working Example be protected by any type of Related Rights?

If YES, please answer the following sub-questions:

Yes

Please Explain

Yes. For the types of works for which copyright might arise as described above, related rights would be available just as for any other work in copyright

1.a What type(s) of Related Rights would be applicable?

In Canada the principle related right is the moral right which includes the following:

- i. the right to the integrity of the work -i.e. the right to prevent the distortion, mutilation or modification of the work or use in association with a product, service cause of institution, but only if this is prejudicial to the honour or reputation of the author
- ii. the right to be associated with the work as its author by name or under a pseudonym or to remain anonymous

(subject to some exceptions for steps taken to restore or preserve a work or to change its location)

Canada is also a signatory to the WIPO Performers and Phonograms Treaty (WPPT) which grants moral rights to performers in their performances and as well the following rights:

As far as performers are concerned, the Canada grants performers economic rights in their performances fixed in sound recordings (not in audiovisual fixations, such as motion pictures): (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available.

As to unfixed (live) performances, the Canada grants performers: (i) the right of performance in public; (ii) the right of communication to the public; and (iii) the right of fixation..

As far as producers (makers) of sound recordings are concerned, the WPPT grants them economic rights in their sound recordings: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available.

The WPPT provides that performers and producers of sound recordings have the right to a single equitable remuneration for the direct or indirect use of sound recordings, published for commercial purposes, broadcasting or communication to the public.

Canada also grants copyright to broadcasters in their communication signals.

1.b What would be the requirements for protection by Related Rights?

For ordinary works (such as literary, artistic or dramatic works) the author has moral rights automatically upon the creation of the work. Performers have moral rights in live aural performances or when a performance is fixed in a sound recording.

1.c Who would be the original owner of the Related Rights?

The author or the performer as the case may be or in the case of sound recordings, the maker.

1.c What would be the term of the protection?

The same term as the copyright in a literary, dramatic, musical or artistic work or in the case of a performer's performance or a sound recording various terms from 50 to 100 years depending upon the date of fixation and publication.

II. Policy considerations and proposals for improvements of your Group's current law

12 Could any of the following aspects of your Group's current law or practice relating to artificially-generated works be improved?

2.a Requirements for artificially-generated works to be protected by Copyright and/or Related Rights?

Yes

Please Explain

Definition of Work should be expanded to explicitly recognize artificially-generated works. The threshold for originality could also be defined.

Once defined, authorship for artificially generated works, as well as term and related rights can be explicitly set out in legislation.

There should be a clarification as to whom is the author of an ai generated work and if that clarification includes something such as deeming the author the person who made the arrangement necessary for the creation of the work or a *sui generis* protection for such work, then it follows that moral rights should **not** be granted to such deemed authors and deemed performers

2.b Ownership of artificially-generated works?

Yes

please explain.

The determination of ownership should follow from the definition of authorship.

There should be clarity as to whom, if anyone, owns an AI generated work. Consideration should be given to whether the work should be in the public domain if insufficient skill and judgment is involved in its creation.

2.c Term of protection of artificially-generated works?

Yes

Please Explain

Likewise, a determination of term of protection should follow from the definition of authorship. If an author cannot be

identified, the concept of the "life of the author" becomes meaningless for such artificially-generated works.

If the author cannot be identified, there should be a fixed term of protection for an ai generated works from first publication or if not published from the date of making or fixation (such as the case with certain cinematographic works in Canada).

13 Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

No

Please Explain

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

To answer questions 14 to 32, please base your answers on the Working Example in the full text of the Study Guidelines. If you believe that reference to other scenarios/examples is useful, please explain such scenarios/examples and their relevance to the questions presented.

14 In your opinion, should Copyright protection and/or Related Rights protection for artificially-generated works be harmonized? For what reasons?

Yes

For what reasons?

please respond to the following questions without regard to your Group

Yes because there is considerable uncertainty within Canada but also among different countries and traditions about the issues raised as to authorship, term of protection, originality, and moral rights as set out above.

15 In your opinion, should artificially-generated works be protected by Copyright and/or Related Rights?

Yes

For what reasons?

Yes, because such works have value, can involve considerable ingenuity to create the conditions for their creation and should be encouraged within certain limits. There should be a balance between the scope and extent of protection so as to create an incentive to create the conditions for such works while still providing a right for others to use (including copying) of such works when appropriate.

A. Copyright protection of artificially-generated works

16 Should intervention by a human be a condition for Copyright protection of an artificially-generated work?

Yes

at which step or steps in the Working Example would human intervention be required?

Notwithstanding the answer above, there is no consensus among the Canadian group as to whether and to what extent intervention by a human should be a condition in the steps in the working example. A human is involved at some level in every one of the working example steps. The extent of human intervention might influence the term and/or authorship of artificially-generated works.

17 Should originality be a condition for Copyright protection of an artificially-generated work?

Yes

Please Explain

There are strong economic justifications for providing intellectual property protection for artificially generated works, but relaxing the "originality" standard in the Copyright Act to permit this protection should not be allowed. Skill and judgment should still be required to protect such works.

The purpose of the Copyright Act is not simply an economic one. Rather, according to the Supreme Court, "the purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.

"When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

To avoid modifying copyright law to a point unrecognizable from its origins, Canada might prefer to create a parallel regime, existing alongside and in cooperation with copyright legislation, such a *sui generis* protection to address emerging questions and determine ownership and use of outputs generated by AI. However there is no consensus in the Canadian group as to whether *sui generis* protection is necessary at this time.

18 What other requirements, if any, should be conditions for Copyright protection of an artificially-generated work?

No other requirements but works which are generated more or less "on their own" should be assessed for originality and some form of abstraction, filtration and analysis test should be applied so that pre-existing or non-original subject matter or common place set-pieces (such as scenes-a-faire) are discounted and therefore the scope of protection is narrowed. In other words, artificially-generated works should otherwise satisfy the same requirements of traditional "works" – e.g. originality; fixation; protection of expression, not idea; and type of work (e.g. literary, dramatic, musical or artistic).

19 Who should be the original owner of the Copyright on an artificially-generated work?

If an author is identified, first ownership should remain with author (or author's employer, where the work is made under a contract of employment). For computer generated works a test similar to UK test should be adopted to specify that the author of artificially-generated work is deemed to be the person "by whom the arrangements necessary for the creation of the work are undertaken".

If no author can be identified because it is unclear that a human made the arrangements necessary for the creation of the work, then the Copyright Act or some *sui generis* provisions might be needed to address situations where artificially generated works have no author or cannot be attributed to a juridical entity.

20 What should be the term of Copyright protection for an artificially-generated work?

It should be a set term from creation. Perhaps 50-70 years or possibly shorter. The life of a human author can be used where a human author can be determined. If not a set term of protection will need to be established.

21 **Should Economic Rights differ between artificially-generated works and regular works?**

No

Please Explain

No, economic rights should not differ, but moral rights should.

22 **Considering existing exceptions to Copyright, should any exceptions apply differently to artificially-generated works versus other works?**

Yes

Please Explain

It may be that works which have some similarity but are derived from a different underlying AI system should be given some exceptions from infringement where the similarity is entirely due to machine activity divorced from any human skill and judgment.

Consideration should be given to providing an exemption to allow use of another's work for the purpose of training an AI entity to produce new works.

23 **Should there be any new exceptions to Copyright specifically applicable to artificially-generated works?**

Yes

Please Explain

See above answer to question 22, also see below re moral rights

24 **Moral Rights**

24.a **Should moral rights be recognized in artificially-generated works?**

No

Please Explain

Should be personal to human authors.

24.b **If yes, what prerogatives should the moral rights include (for example, the right to claim authorship of the work, the right to object to any distortion, mutilation or other modification of the work)?**

not applicable

24.d If yes, who should exercise the prerogatives of moral rights?

not applicable

B. Related Rights protection of artificially-generated works

25 Considering existing Related Rights, should any Related Rights apply to artificially-generated works?

No

Please Explain

26 Should there be any new Related Rights specifically applicable to artificially-generated works?

No

27 If an existing or new Related Right is applicable to artificially-generated works, what requirements should be conditions for protection?

28 Which Related Rights' economic rights and moral rights should apply to artificially-generated works?

All existing economic rights, subject to comments above about the scope of protection.

29 Who should be the original owner of the Related Right?

not applicable

30 What should be the term of protection of the Related Right?

not applicable

31 Please comment on any additional issues concerning any aspect of Copyright protection and Related Rights protection for artificially-generated works you consider relevant to this Study Question.

32

Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.
