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Rebalancing Rights: how Generative AI forces a rethink of fair use/ fair dealing under Canadian and USA law

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Abstract

The rapid emergence of generative artificial intelligence has unsettled longstanding assumptions in copyright law, challenging both the United States' flexible fair use doctrine and Canada's more structured fair dealing framework. As AI systems rely on large-scale ingestion and reproduction of copyrighted material for model training, they expose doctrinal gaps in how each jurisdiction conceptualizes reproduction, transformation, substantiality, and user rights. This article examines how generative AI disrupts traditional copyright norms by blurring the boundaries between analytical computation and derivative expression. Through a comparative analysis of U.S. and Canadian law, it highlights the contrasting flexibility of fair use and the purpose-based constraints of fair dealing, showing how both regimes struggle to accommodate large-scale machine learning processes. The article argues that neither framework designed for human-centered creativity adequately addresses the economic, moral, and control interests of creators in the AI era. It proposes a recalibration of copyright exceptions and recommends the adoption of a statutory AI Training Exception incorporating transparency, auditing, and compensation mechanisms. Such reform, it contends, is essential to rebalancing the rights of creators, users, and innovators while preserving technological progress and legal certainty in the age of generative AI.

Keywords: Generative AI; Fair Use; Fair Dealing; Copyright Law; Intellectual Property

1. Introduction

The rapid evolution of generative artificial intelligence (AI) has unsettled long-standing assumptions within copyright law, compelling courts, scholars, and policymakers to confront fundamental questions about how creative works may be used in the development of machine-learning systems. In both Canada and the United States jurisdictions with closely related but doctrinally distinct copyright frameworks, the legality of using copyrighted material to train generative AI models has emerged as a defining issue of the contemporary digital era. While U.S. law relies on the flexible and open-ended doctrine of fair use, Canadian law structures its exceptions under a more defined fair dealing regime tied to specific enumerated purposes. Neither system, however, was designed with the scale, automation, and transformative computational processes of AI in mind. As generative models increasingly replicate, synthesize, and even simulate human creativity, they expose the limits of traditional copyright exceptions and intensify debates about the proper balance between users' rights, technological innovation, and the economic and moral interests of creators. This article examines how generative AI disrupts established legal doctrines and argues that both jurisdictions may need to rethink and potentially recalibrate their fair use and fair dealing frameworks to address the complexities of AI-driven creativity.

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2. Conceptual foundations

2.1. Overview of Generative AI Technologies

Generative artificial intelligence refers to a class of machine-learning systems capable of producing novel content such as text, images, audio, video, software code, or data structures based on patterns learned from large volumes of existing material. Thus, it is a technological breakthrough with collates data from various sources into computer-based intelligence to be produced upon demand depending on the prompts of the user.

The distinguishing feature of generative AI is its capacity to simulate forms of human creativity at unprecedented scale. Unlike traditional computational tools that follow explicit rules or predefined instructions, generative models learn autonomously from examples and reproduce stylistic, structural, or conceptual features embedded in the training data. This approach has greatly revolutionized the idea of data computation and how it is produced on demand challenging the hitherto traditional data input and output model

Consequently, understanding how generative AI model function is essential to assessing whether fair use (in the U.S.) or fair dealing (in Canada) adequately addresses the novel forms of copyright issues which are inherent in AI development. This conceptual foundation sets the stage for analyzing how generative AI pressures both jurisdictions to recalibrate the balance between innovation and copyright protection.

2.2. Copyright Principles Relevant to AI Training

It's no doubt that the succinct description of the generative AI above already shows an actual tension between it and the concept of Intellectual property. Generative AI creates a platform for a machine to learn and process several information which their Intellectual property belongs to certain persons. This invariably means the training and use of such AI run in contrary to the IP rights of the creators of such information which are being processed. Copyright Law as an IP right is the legal right of a creator to determine who may publish or redistribute his intellectual property. Thus, Law being a system of social order came up with certain principles of copyright which directly impacts on AI Training.

A central issue is the definition of reproduction. Most copyright statutes, including the U.S. Copyright Act (17 U.S.C. § 106) and Canada's Copyright Act, define reproduction broadly enough to include temporary or digital copies even those created incidentally as part of a technological process. AI training typically requires the ingestion, copying, storage, and transformation of vast amounts of copyrighted material into machine-readable datasets. These acts, although non-expressive and computational, technically fall within the scope of reproduction. This raises questions about whether unlicensed copying for machine learning infringes copyright in the absence of an applicable exception.

Another key principle is originality, which determines whether the outputs of generative AI can themselves be protected. Both Canadian and U.S. law require human authorship for copyright subsistence, meaning AI-generated works generally fall outside copyright protection. While this issue relates primarily to the status of AI outputs, it also influences how courts conceptualize the "transformative" nature of AI processes when applying exceptions: if the system's output lacks human authorship, are the underlying training uses more akin to computational analysis than to creative adaptation?

The principle of substantiality also plays a major role. Copyright infringement occurs not merely through literal copying but through the reproduction of a substantial part of a work. Because generative AI models absorb statistical patterns rather than storing works verbatim, the extent to which they reproduce "substantial parts" is contested. Some argue that creating internal model weights does not amount to reproduction of expressive elements, while others point to documented cases of models outputting near-identical text, images, or musical compositions as evidence of potential infringement.

Finally, copyright exceptions form the critical lens through which AI training is evaluated. U.S. fair use with its flexible, open-ended four-factor test has historically accommodated new technologies, such as search engines and data mining, when the uses were deemed non-expressive and transformative. By contrast, the Canadian fair dealing regime restricts permissible uses to specific enumerated purposes, requiring both a valid purpose and fairness analysis. Since AI training does not neatly fit within traditional categories like research, private study, or criticism, its legality is less certain in Canada absent judicial expansion or legislative reform.

Together, these concepts frame the legal uncertainties surrounding AI training. They show that current copyright frameworks were not intended for automated mass data input, but rather for human-centered creation and discrete

copying. In order to balance innovation with strong protection for authors' rights, the fundamental theories of replication, originality, substantiality, and exceptions must be reinterpreted or maybe restructured as generative AI continues to increase in capacity and economic relevance.

3. The doctrine of fair use in U.S law

The most important statutory restriction on copyright protection in the US is the doctrine of fair use, which offers a flexible way to strike a balance between authors' exclusive rights and the demands of users, tech developers, educators, and the general public. Its formal basis is contained in §107 of the U.S. Copyright Act (17 U.S.C. §107), which codifies a notion that originated in judicial precedent dating back to the eighteenth century. The statute expressly provides that "the fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching, scholarship, or research" shall not constitute infringement. Importantly, the listed purposes are illustrative, not exhaustive allowing courts significant discretion to recognize new socially valuable uses, including those arising from emerging technologies such as generative AI. Fair use is evaluated through a fact-specific, case-by-case analysis of four statutory factors:

- Purpose and Character of the use: This factor considers whether the use is non-commercial, educational, or transformative. The transformative use doctrine, as developed in cases such as *Campbell v. Acuff-Rose Music, Inc.* (1994), examines whether the secondary use adds new expression, meaning, or purpose rather than merely superseding the original. In technology cases such as *Authors Guild v. Google* (Google Books) and *Perfect 10 v. Amazon* courts have found that uses involving data indexing, search, or computational analysis can be transformative even when not producing new expressive works. This interpretation is directly relevant to generative AI, as developers argue that AI training uses copyrighted material for a fundamentally different analytical purpose rather than as a substitute for the original.
- Nature of the Copyrighted Work: Courts assess whether the work used is creative or factual, published or unpublished. Creative works receive stronger protection, while factual or publicly available materials weigh more heavily in favour of fair use. Because AI training datasets often include highly creative works music, art, literature this factor may weigh against fair use. However, courts have traditionally given this factor less significance where the secondary use is strongly transformative or functional, as in search-engine and data-mining cases.
- Amount and Substantiality of the Portion Used: This factor evaluates both the *quantity* and *quality* of what is copied. Although AI training typically involves copying entire works, U.S. courts have held that even "complete copying" can be fair where necessary to achieve a transformative purpose (as in *Sony v. Universal City Studios* and *Google Books*). The question is not simply whether the whole work was used, but whether the use took more than was reasonably required to achieve its transformative function. Generative AI complicates this analysis because full-text ingestion is integral to model training, raising the issue of whether such wholesale copying is justified within a fair use framework.
- Effect of the Use on the Potential Market: Often considered the most crucial consideration, this investigation investigates whether the secondary usage hurts the present or potential market for the original work or its derivatives. Courts take into account whether the use competes with markets that the copyright owner would fairly exploit or replaces the original. In the AI context, rights holders believe that generative models can develop outputs that substitute for the original works, so weakening licensing markets. On the other hand, AI developers contend that computational analysis is a separate market that copyright was never meant to regulate and that training usage do not take the place of the original works.

4. The doctrine of fair dealing in Canadian law

Fair dealing is the major statutory exception to copyright infringement under Canadian law and plays a key role in balancing creators' rights with users' interests in supporting education, innovation, and democratic engagement. Unlike the open-ended U.S. fair use concept, Canadian fair dealing is a purpose-based exception, predicated in the principle that certain socially beneficial uses of copyrighted works should not require permission or payment. Its statutory basis lies in sections 29, 29.1, and 29.2 of the Canadian Copyright Act, which jointly allows fair dealing for specific stated purposes: research, private study, criticism, review, and news reporting. Additional goals, such as satire, parody, and education, have been added by later revisions;

- The Two-Step Framework: Purpose and Fairness: The Supreme Court of Canada, through a series of landmark cases most notably *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004), *SOCAN v. Bell Canada* (2012), and *Alberta (Education) v. Access Copyright* (2012) has articulated a structured, two-part test for evaluating fair dealing:

o The dealing must fall within one of the statutorily enumerated purposes; and

o The dealing must be "fair", as determined by a contextual, multi-factor analysis.

This two-step approach sets the Canadian regime apart from the more flexible U.S. system. The first step is determinative: if the use does not fit within an enumerated category, it cannot be considered under fair dealing at all. However, the Supreme Court has adopted a generous and liberal interpretive approach to these purposes, emphasizing that fair dealing is a "user's right," not a narrow defense.

- The Fairness Factors: Drawing from CCH, Canadian courts assess fairness using six judicially developed factors:

o The purpose of the dealing

o The character of the dealing

o The amount of work taken

o Alternatives to the dealing

o The nature of the work

o Effect of the dealing on the work or potential market

- Fair Dealing and Technological Uses: Canadian jurisprudence has progressively recognized that fair dealing must accommodate new technologies. Cases involving photocopying, digital previews, educational copying, and internet-based communication have reinforced that user rights evolve with technological change. Nonetheless, the statutory restriction to fixed purposes limits the doctrine's adaptability compared to U.S. fair use.

- The User Rights Philosophy: A defining aspect of Canadian fair dealing is the Supreme Court's insistence that it is a "user's right" vital to maintaining the Act's balance. In CCH, the Court stressed that copyright is not just a creator-centered system and rejected limited interpretations. However, the Court has never explicitly addressed fair dealing in the context of bulk data input or machine learning algorithms. As generative AI becomes increasingly integrated into knowledge creation, courts will undoubtedly be required to evaluate whether fair dealing can allow such technologically intensive uses.

5. Comparative analysis

The contrast between U.S. fair use and Canadian fair dealing becomes especially sharp in the context of generative AI. U.S. fair use is deliberately flexible, allowing courts to consider almost any purpose within the four-factor analysis, whereas Canadian fair dealing operates within a closed list of statutory purposes. This structural difference means that AI developers in the United States can more easily argue that machine-learning ingestion serves a permissible analytical or innovative purpose, while in Canada the threshold question whether AI training even qualifies as "research" or another enumerated purpose—creates an immediate barrier. The openness of the U.S. system therefore offers more doctrinal room to accommodate technologies that lawmakers could not have foreseen.

These differences are amplified by the two systems' attitudes toward "transformative use." In U.S. law, transformation sits at the heart of fair use and has been key to judicial acceptance of data mining, search engines, and other computational processes. Courts emphasize whether the secondary use serves a new and different function. Canadian law, however, does not treat transformation as a distinct or decisive criterion. Fairness is assessed holistically, and while innovative uses can be considered fair, they gain no special preference. Thus, what U.S. courts may view as transformative, Canadian courts may simply weigh as one contextual factor among many, providing less doctrinal leverage for AI developers.

6. Key rights and interests to rebalance

A central right implicated in the debate over generative AI is the right of creators and copyright holders to control the use of their works, a cornerstone of both U.S. and Canadian copyright regimes. Generative AI systems rely on large-scale ingestion, copying, and analysis of copyrighted material without individual consent, raising concerns that creators are losing meaningful control over how their works are accessed, reused, and monetized. Copyright was designed to give authors the exclusive ability to authorize reproduction, create adaptations, and benefit economically from derivative uses, yet AI training bypasses these prerogatives by treating creative works as raw data. Many rights holders argue that this undermines both the economic value and moral integrity of their creations, especially as AI outputs can mimic artistic styles or substitute for original works in the marketplace. The challenge, therefore, is not to halt technological progress but to recalibrate copyright exceptions so that innovation does not eclipse the legitimate interests of creators.

Rebalancing these rights requires re-examining where the boundaries of fair use and fair dealing should lie, ensuring that permissive AI training does not erode the incentives and control that copyright law is meant to secure for authors.

On the other side of the equation are the rights and legitimate interests of users, innovators, and AI developers, who rely on access to information and flexible copyright exceptions to build new technologies, facilitate research, and advance knowledge. Generative AI systems depend on broad datasets that reflect the diversity of human expression, and overly restrictive copyright rules could stifle innovation, entrench barriers to entry, and slow technological progress. Fair use and fair dealing have historically ensured that socially beneficial, non-expressive, or analytical uses of copyrighted works remain permissible without excessive licensing burdens. As AI becomes a foundational tool for creativity, research, accessibility, and economic development, rebalancing rights requires preserving space for experimentation and computational analysis. The task is to ensure that copyright law does not evolve into a mechanism that locks up data or impedes innovation, but instead continues to foster technological advancement in a way that complements, rather than undermines, the rights of creators.

7. Rethinking fair dealing and fair use in the ai era and policy recommendation

Rethinking fair use and fair dealing for the AI era requires confronting the reality that existing copyright exceptions were not designed for technologies that rely on large-scale, automated ingestion of creative works. Generative AI blurs the line between transformative analysis and derivative expression, testing the limits of doctrines built around human-centered creativity. In the United States, this may mean refining the concept of "transformative use" to distinguish between legitimate computational analysis and uses that risk substituting for original works. In Canada, it may require expanding the enumerated fair dealing purposes or creating new exceptions for data mining and machine learning. Across both jurisdictions, the challenge is to recalibrate copyright exceptions so that they continue to protect creators while ensuring that innovation, research, and technological progress are not hindered by legal frameworks rooted in a pre-AI world.

A major policy recommendation is the creation of a statutory "AI Training Exception" with mandatory transparency and compensation safeguards. Both Canada and the United States should introduce a clear legislative carve out that allows the use of copyrighted works for AI model training *only* where developers meet legally required standards of disclosure, dataset auditing, and provenance reporting, while also contributing to a compulsory licensing or remuneration mechanism for creators. This approach would remove current legal uncertainty, prevent over-expansive interpretations of fair use/fair dealing, and rebalance the interests of creators, users, and innovators by ensuring that AI development proceeds ethically, transparently, and with fair economic returns to copyright owners.

8. Conclusion

The rise of generative AI has exposed the limitations of traditional copyright exceptions, forcing a reassessment of how fair use in the U.S. and fair dealing in Canada balance the rights of creators with the needs of innovators. While U.S. law offers flexibility through its transformative use doctrine, and Canadian law emphasizes fairness within enumerated purposes, neither system was designed for large-scale, automated data-driven creativity. Rebalancing these rights requires careful recalibration of legal doctrines or targeted legislative reform to accommodate AI training, protect creators' economic and moral interests, and preserve space for technological innovation. By confronting these challenges now, both jurisdictions can ensure that copyright law remains relevant and equitable in the AI era.

Compliance with ethical standards

Disclosure of conflict of interest

No conflict of interest to be disclosed.

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