Australian Digital Alliance

Submission to the Senate Select Committee on Adopting Artificial Intelligence (AI)

Submission by the Australian Digital Alliance

Submitted Friday 10 May 2024

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Introduction

The Australian Digital Alliance (ADA) appreciates the opportunity to make a submission to the Senate's Select Committee on Adopting Artificial Intelligence (AI), in particular in relation to the Select Committee's Terms of Reference. Conversations about the issues related to AI are timely and complex. The ADA thanks the Select Committee for the opportunity to comment on some of them.

There is no question that the recent rapid development of, investment in and release of new AI technologies, applications and services to the public brings with it significant potential to enhance all aspects of Australia – the economy, community and people's individual lives. Since late 2022 we have witnessed the release of dozens of new generative AI models that can create text, images, sound and video content in a range of contexts and for a range of purposes. We are already seeing these technologies incorporated into many sectors and use cases, including banking and finance, manufacturing, supply chain management and logistics, health and medicine, social media, video on demand (VOD) content streaming, content creation and more. There is almost no industry where AI cannot be integrated.

As these technologies proliferate, public awareness of AI increases, bringing with it a range of expectations and anxieties. Opportunities abound, but so does the potential for harm. This makes for difficult regulatory terrain.

The ADA does not claim to be experts with respect to AI and related technologies, however we recognise that balancing the encouragement of AI uptake against the desire to minimise the potential for harm these same technologies can cause may not always be easy to reconcile. One such nexus point we wish to draw to the attention of the Select Committee sits between innovation and copyright policy. It is important that Australia take full advantage of the affordances that come with AI development. It is equally important that we respect copyright and its role in incentivising creativity.

In this submission we will outline some of the key issues related to copyright and AI. Our thoughts here are informed by our ongoing copyright advocacy, including our participation in the Attorney-General's Department's Copyright and AI Reference Group (CAIRG) (our Executive Officer, Sarah Powell, was recently selected to join the CAIRG Steering Committee).

Should the Committee require additional information, particularly in relation to copyright and AI, the ADA would welcome the opportunity to make further comments. Our principal contact with respect to this submission is Sarah Powell, who can be reached at sarah@digital.org.au or on 02 6262 1118.

While this submission focuses on the relationship between copyright and AI, the ADA recognises the need to consult widely with stakeholders in relation to the many other issues relevant to AI.

About the Australian Digital Alliance

The Australian Digital Alliance (ADA) provides a voice for the public interest in access to knowledge, information and culture in copyright reform debates. We are a broad nonprofit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. The ADA was founded following a meeting of interested parties in Canberra in July 1998, with our first patron being retired Chief Justice Sir Anthony Mason AC KBE KC. More than 20 years later, the ADA continues to be a respected and active participant in the Australian copyright reform debates, regarded for its depth of copyright expertise and advocacy efforts on behalf of a diverse membership.

ADA members span various sectors, and include universities, schools, disability groups, libraries, archives, galleries, museums, research organisations, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

Committed to copyright reform that enables fair access to content and encourages innovation and growth, the ADA provides policy advice to government and its members, supports research and publications on new copyright law and policy, monitors international trade and IP developments, and facilitates forums to discuss topical copyright issues and progressive reform.

More information about the ADA is available at digital.org.au/about.

AI development in Australia is uncertain

AI technologies, applications and services rely on machine learning (ML) models which are trained on significant amounts of data. This training data may include material outside of copyright protection, but is just as likely to include text, artworks, photographs and other images, music and audio, computer code and metadata, as well as other material that falls within the scope of copyright protection. This material can be gathered from a range of sources. Where the AI developer is not the copyright owner of all the content included in the training data they will typically need the permission of each rightsholder or feel confident that a copyright exception applies. Without either, AI developers would need to restrict their training data to legitimate sources (such as Creative Commons-licensed material or material in the public domain) or be willing to expose themselves to the potential of legal risk. When a ML process occurring in Australia includes copyright-protected third-party material that is not owned or licensed by the AI developer the potential for copyright infringement exists.

Concerns of creators

Australia artists and other creators have a range of concerns about AI. Some of those relate to the application of the copyright system in relation to AI. Many artists are concerned their copyright material has been used to train AI systems without their consent or knowledge. Looking firstly at consent: typically, under copyright law, permission to use copyright protected material (for uses outside the scope of an exception to copyright) is granted by way of a copyright licence between the copyright owner and the user of the copyright. For Australian artists direct licensing in this way is the only mechanism through which they can really control the reuse of their material individually. However, for reasons we will outline in the next section, this is unlikely to be a viable solution in practice given the volume of data involved in most AI projects.

Returning to the notion of knowledge, many creators have also raised the issue of transparency related to the use of content in training data. It is difficult for artists to know if their content has been used to train an AI system. In relation to both permission and transparency, we note that some community-led projects such as Spawning AI's Do Not Train Registry and Have I Been Trained have emerged to make it easier for creators to 'opt out' of AI training by indicating their desire for their content to not be used to train AI by marking it with machine-readable code and helping them find out if their content is included in training data used for existing AI products.

Artists and creators are also concerned about job displacement and the ability of AI tools to replicate aspects of their creativity in a more efficient and cost-effective manner. Relatedly, some fear that substitution of human creativity with AI-generated outputs may lead to a decline in the perceived value of human-created content.

Ethical concerns about AI are also important for some creators. Issues include:

- the inclusion of bias in training data and how that manifests in AI outputs
- the potential for AI and automated decision-making to inequitably impact some groups in society, leading to unfair outcomes, economic inequality and the potential to further exacerbate existing social injustices
- the implications of AI tools on privacy and as a tool for surveillance through AI-powered technologies such as facial recognition and predictive analytics
- risks to safety and security such as the use of AI by malicious actors to exploit vulnerabilities in AI systems for nefarious purposes, such as spam and scams, spreading disinformation or conducting cyberattacks, and
- existential threats tied to AI alignment, and what happens where an AI's goals diverge from those of humanity.

Licensing is not the answer

Some stakeholders have suggested that copyright licensing can be a solution to the problems of copyright-protected material in training data. Direct licensing – where a copyright owner gives a user permission to use their content – is not a viable option. Securing permissions to the large volume of data at play when training ML modules is impractical. The time, labour costs, the need for expert knowledge in handling rights management processes, and the potential licensing fees that may be incurred in exchange for the grant of a permission mean that licensing is not a solution for AI developers.

Given the limitations of direct licensing, mandatory or voluntary collective licensing schemes have been put forward as an alternative. A mandatory model such as a statutory licence removes creators' ability to decide if their material is available for the purposes of training AI. This is because the decision is delegated to an administering body (most likely a collective management organisation (CMO) such as a collecting society) who strive to increase the royalty pool and, by virtue of nondiscriminatory licensing, will give permission to anyone who wants it (as long as they are paying).

A voluntary model would fail to adequately address the impracticalities of direct licensing. A collecting society can only give permission to use with certainty what they are able to provide a licence to. Australia's CMOs largely represent musicians, writers, visual artists or other specific groups of creators. AI training data often requires a significant volume of content across a broad range of content types. Without a sufficiently large and diverse body of material to blanket licence to AI developers, AI developers would need to secure permissions from a number of organisations. Further, CMOs do not exist for some content types that are attractive to AI developers and some groups of copyright owners are not members of existing CMOs. Another solution is needed.

Beyond what we have already outlined, the ADA has other serious concerns with both options. In particular, we are concerned that the current collecting society governance regime in Australia:

- does not impose adequate transparency and accountability obligations on CMOs
- grants CMOs an inappropriate degree of discretion
- has insufficient measures for effective oversight, including sanctions for noncompliance and independent mechanisms for external review and amendment.

Given the concentration of market power in CMOs there is a need for greater oversight of their operations. Too much of what they do is regulated by little more than an assumption that they are acting in good faith, they are not squandering royalties through inefficiencies and poor investment decisions and that they are not inappropriately wielding their market power. We also have concerns that, even with increased transparency, it is difficult for individual members of collecting societies to understand how their royalties are calculated and whether the amount they are paid is correct.

Risk of over-regulation

In addition to our concerns about direct or blanket licensing to facilitate the use of copyright material in training data, we also caution that if Australia takes a too heavy handed approach to regulating AI, developers may choose to base themselves in AI-supportive copyright jurisdictions such as the USA, Japan, Singapore and the UK over operating in Australia. Over-regulation may see Australian copyright-protected relegated to the 'too hard' basket and avoided, running the risk that the 'Australian voice' ends up omitted from AI training data in favour of 'easier' content.

Even where local AI developers persevere with Australian content, Australian AI developers will be disadvantaged compared to developers in AI-friendly countries if they need to jump through licensing hoops to use AI material. Such an approach likely won't stop international AI developers using Australian content, but it might stop Australian AI developers from doing so.

An exception will create certainty

Australia's copyright system has needed modernisation for a long time. AI presents another reason why our copyright law needs to be updated to add much needed flexibility to support innovative uses of copyright-protected material. Current copyright exceptions are not appropriate to facilitate AI. The longer we wait to introduce such an exception, the longer we keep Australia out of step with more

technology-friendly jurisdictions: countries where a 'fair use'-style exception or specific exceptions such as a text and data mining (TDM) exceptions apply.

Calls for modernisation of the Copyright Act to support innovation have been taking place in Australia for over a decade, especially in relation to non-consumptive uses. The introduction of a broad, flexible, technology-neutral exception was canvassed by the Australian Law Reform Commission (ALRC) in 2013 in its investigation into copyright in the digital economy, as well as the Productivity Commission in their IP arrangements inquiry report in 2016. The ALRC suggested that a shift to fair use would future proof our copyright system and make it more fit-for-purpose in the digital environment. Further, it would reduce lengthy delays to the introduction of new exceptions while positioning the Australian market for technology investment and innovation. On this point they said:

> "Fair use differs from most current exceptions to copyright in that it is a broad standard that incorporates principles, rather than a detailed prescriptive rule. Law that incorporates principles or standards is generally more flexible than prescriptive rules, and can adapt to new technologies and services."

In its final report the Productivity Commission recommended that the Australian Government implement the ALRC's recommendation to introduce a flexible fair use exception to Australian copyright law. In its consideration of the matter, the Productivity Commission advanced a number of economic arguments supporting the introduction of fair use, including the high transaction costs of licensing and growing content-dependent industries locally. To enable the use of third-party copyright material in ML locally, we need a flexible and technology neutral copyright exception that can support the large-scale, non-consumptive use of material. Introducing such an exception will level the playing field for Australian AI developers competing against developers in countries with more favourable regimes.

AI development in Australia

Importantly, regardless of the copyright issues related to AI, these are unlikely to stop the development of AI in Australia. Many AI developers may not be aware of the copyright considerations, and so will continue to pursue their AI projects regardless. Doing so exposes them to unknown risk. Where developers know the risks, it may slow down Australian AI industries or divert investments to markets with more favourable legal regimes (e.g. the US, China, Japan, Europe). This is why the ADA encourages the Committee to include copyright as part of its regulatory response to stimulate AI development in Australia.

Other options for remunerating creators

The complexities of reconciling copyright licensing and the use of copyright material for training AI systems are difficult. Copyright may not be the right mechanism for addressing the potential impact of AI on creators incomes or for remunerating artists. The ADA encourages the government to consider other ways to ensure creators are remunerated for their work.