

# **Submission in response to the Department of Industry, Science and Resources' Safe and Responsible AI in Australia Discussion Paper**


Submission by the Australian Digital Alliance

Submitted Friday 4 August 2023



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# Introduction

The [Australian Digital Alliance](#) (ADA) thanks the Department of Industry, Science and Resources (the Department) for the opportunity to make a submission in response to the [discussion paper on safe and responsible artificial intelligence \(AI\) in Australia](#). Conversations about the issues related to AI are timely and complex. The ADA thanks the Department for the opportunity to comment on some of them.

The rapid development of, investment in and release of AI technologies, applications and services to the public is taking place alongside increased public awareness of AI, which brings with it expectations and anxieties. Opportunities and risks abound for AI. The ADA does not claim to be experts with respect to AI and related technologies, however we recognise the regulation of AI is an important issue with wide-ranging impacts. Undoubtedly, there is immense potential for AI to enhance the Australian economy and community, and the individual lives of Australians. However, we are also seeing examples of the potential for harm as well. This makes for difficult regulatory terrain.

Copyright butts up against AI in a range of situations. The training of models for AI challenges many long standing norms in copyright law. This uncertainty and complexity is the cause of anxiety for Australian artists and creators, as well as Australian-based AI developers.

Importantly, copyright may be implicated differently at different stages of AI. There remains considerable debate about what role copyright plays in relation to the outputs of AI systems. This is particularly so when considering the concepts of authorship and ownership in relation to AI outputs. Copyright considerations for outputs of AI are far from settled. We note that this topic is being taken up in other fora, including the [Ministerial Roundtables on Copyright](#) being chaired by the Hon Mark Dreyfus KC, MP.<sup>1</sup> We strongly encourage the Department to work closely with the Attorney-General's Department in developing Australia's AI framework to ensure an optimum regulatory framework for AI that takes into account these complex copyright questions.

Given the contested nature of copyright protection of AI outputs, we have focused this submission on actions occurring at the training stage – when AI is in development – rather than those that occur after a machine learning (ML) module is developed and an AI system is deployed. The use of copyright material in training data makes the legal status of AI in Australia uncertain. Without a mechanism to reduce that unpredictability, Australia remains out of step with jurisdictions with more favourable to AI development. If Australia wants to be an attractive and competitive place for AI innovation the risks for AI developers needs to be addressed.

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<sup>1</sup> AI was identified as an issue by the organisations involved in the [inaugural Ministerial Roundtable on Copyright](#) held on Thursday 23 February 2023 by the Attorney-General's Department. The topic has been tabled for discussion by participants at a roundtable to take place on Monday 28 and Tuesday 29 August this year. The ADA will participate in that roundtable. It was also a participant in the first roundtable and anticipates participating in future roundtables.

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Should the Department require additional information, the ADA would welcome the opportunity to make further comments. Our principal contact with respect to this submission is our Executive Officer, Sarah Powell, who can be reached at [sarah@digital.org.au](mailto: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 QC. 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](http://digital.org.au/about).

## AI development in Australia is uncertain

Before an AI application can be deployed, the system needs to be trained using data. This process requires significant amounts of data to be ingested to improve the algorithms, describe the data and predict outcomes.

Training data can consist of material outside of copyright protection, but it may also include text, artworks, photographs and other images, music and audio, computer code and metadata, as well as other material that fall within the scope of copyright protection. This material can be gathered from a range of sources including, but not limited to, data purchased through data as a service (DaaS) vendors, government data made available to the public (e.g. statistics data and analysis published by the Australian Bureau of Statistics (ABS)), copyright material released by the copyright owner for reuse under an open content licence (OCL) such as [Creative Commons](#) (CC), material in the public domain, as well as copyright protected material from public websites, including blogs and social media platforms.

In many instances the AI developer will not be the copyright owner of all the content included in the training data. As such, third-party material will form all or part of the training data. 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. Generally, reproducing or copying copyright-protected material in Australia requires permission from the copyright owner, unless a copyright exception applies. Although it is not always clear that the activities involved in training an AI system would represent an act of copying for the purposes of copyright law, 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.

## 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. While some material for training data could be drawn from the public domain or CC-licensed content, the reality is that AI developers will train on data that is copyright-protected and not openly licensed. Such content may require a permission be granted for each intended use by each copyright owner in relation to each instance of copyright material used. ML processes necessarily involve large and varied sets of data. The ADA does not believe that direct licensing is a viable option because securing permissions to the large volume of data at play 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, collective licensing schemes have been put forward as an alternative. The ADA has serious concerns with this option. The regulation and oversight of collective management organisations (CMOs) such as collecting societies is insufficient to overcome anti-competitive risks associated with such schemes. 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.

## An exception will create certainty

Australia's copyright system urgently needs to be updated to add much needed flexibility to support innovative uses of copyright-protected material such as in AI. Current copyright exceptions are not appropriate to facilitate such use. The solution is to introduce a copyright exception that facilitates the use of copyright material in AI projects in Australia. 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.<sup>2</sup>

While conversations about AI have ramped up recently, 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,<sup>3</sup> as well as the Productivity Commission in their IP arrangements inquiry report in 2016.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>2</sup> AI-supportive copyright jurisdictions include the United States of America (USA), Japan, Singapore, the European Union countries (where a pair of exceptions to copyright make any copies made for text and data mining not an infringement as long as their requirements are met), the United Kingdom (UK) and South Korea.

<sup>3</sup> ALRC (2013) 'Copyright In the Digital Economy Final Report', available at <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122>.

<sup>4</sup> Productivity Commission (2016) 'Intellectual Property Arrangements, Inquiry Report No. 78', Canberra, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>.

<sup>5</sup> ALRC (2013), p 21.

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or standards is generally more flexible than prescriptive rules, and can adapt to new technologies and services.”<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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.

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<sup>6</sup> ALRC (2013), p 22.

<sup>7</sup> Productivity Commission (2016), p 33.

<sup>8</sup> Productivity Commission (2016), pp 143–6.