Submission in response to the Digital Technology Taskforce’s Automated Decision Making and AI Regulation
Issues Paper

Submission by the Australian Digital Alliance

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# Introduction

The [Australian Digital Alliance](https://digital.org.au/) (ADA) welcomes the opportunity to make a submission in response to the issues paper on automated decision making (ADM) and artificial intelligence (AI) regulation[[1]](#footnote-0) released by the Department of the Prime Minister and Cabinet (the Department) in March 2022. Consultation on the issues surrounding the regulation of ADM and AI are timely and complex, and we thank the Department for the opportunity to comment on them.

The potential of AI to enhance all aspects of Australia – the economy, community and people’s individual lives – is tremendous. Health and medicine, policing and public safety, emergency and disaster management, online shopping, the arts and creativity, the courts and even online dating are all examples where AI has already been incorporated. New developments in machine-enabled processes continue to push the boundaries of what is possible. In and out of the workplace, scenarios where collaboration between technology systems and people occur seamlessly is fast becoming reality. The ADA supports and encourages AI development in Australia. We cannot afford to fall behind in the development of AI-based innovations.

The ADA does not claim to be experts with respect to the development of AI and related technologies, however we recognise the regulation of AI is an important issue that impacts upon the entire community. While a number of important matters are flagged in the issues paper, it is unclear what role, if any, the Department sees copyright playing in relation to AI. We are concerned that Australia’s current copyright system is likely to impede the development of AI – a fact that is not identified or explored in the issues paper.

The large amount of data typically required for machine learning (ML) – a subset of AI that enables a computer system to learn from data rather than through human programming – may see AI developers turn to third-party materials to ‘teach’ their ML systems. In many situations, much of that third-party material will be protected by copyright. ML will typically make many copies of material as part of its processes. Generally, a permission from a copyright owner to use material protected by copyright is required

Beyond input data, questions also arise as to whom the author of outputs of AI systems are, and the ownership of those outputs. And moral rights obligations – such as attributing the creator of material – can be difficult to comply with when using third-party materials in AI systems. The potential impact of copyright on AI development puts AI developers in Australia at a significant competitive disadvantage compared to peers in other AI-focused jurisdictions, such as the United States of America (USA), the European Union (EU), the United Kingdom (UK) and Japan.

The ADA recommends that the future discussion paper that will be released by the Department should address the omission of copyright in the issues paper. It should seek to inform stakeholders of the copyright issues for AI development, as well as explore and seek feedback on possible solutions to those issues.

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 Copyright Officer, Elliott Bledsoe, who can be reached at elliott@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 different 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](https://digital.org.au/about/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](https://digital.org.au/about).

# Third-party copyright in AI systems

As Dr Rita Matulionyte from Macquarie Law School said, “The relevance of copyright in machine learning process should not be underestimated.”[[2]](#footnote-1) ML enables a computer system to learn from data rather than human programming. To do so requires large amounts of data which are ingested into the ML process iteratively to improve the algorithms, describe the data and predict outcomes. The more data, the more accurate the output of ML will be.

In many AI projects, some of that input data will be protected by copyright. Where the input data ingested into the ML process is material not owned by the AI developer themselves, then third-party copyright material will be needed. Under the *Copyright Act 1968* (Cth) (the Act), a copyright owner’s reproduction right is infringed where the entire content or a substantial part of the content is reproduced in a material form,[[3]](#footnote-2) including digitisation of material.[[4]](#footnote-3)

Copyright protected material included in the input data may be infringed in the input and output stages of an AI system. Infringements may occur when preparing data for ingestion, as this often involves making digital copies of material and/or extracting data from a database. Infringement will also occur when data is ingested, as the data “will be copied thousands of times during the machine learning process.”[[5]](#footnote-4) Also, where an output of an AI system contains the entire or substantial parts of content that were ingested into the system an infringement is likely to occur. This is likely:

* At early training stages – where outputs are similar to inputs;
* Where low amounts of content is inputted – where outputs are similar to or contain substantial parts of inputted material because of the small amount of data inputted.
* Where the AI system is intended to result in outputs identical or very similar to the input data – such face recognition technology or some artistic uses.

Additional infringements may also occur in some circumstances. Making an infringing output available online or electronically transmitting it will infringe the copyright owner’s communication right, for example. Or publishing an infringing output may infringe the copyright owner’s publishing right.

For a detailed explanation of the copyright implications of ML the ADA recommends that the Department see Dr Matulionyte’s article ‘Australian Copyright Law Impedes the Development of Artificial Intelligence: What Are the Options?’ in *IIC International Review of Intellectual Property and Competition Law* (see note 2 above).

# Authorship and ownership of AI outputs

In recent years debates have arisen about whether the creations of non-humans should be legally protected, and if they are to be protected, whether copyright is the right mechanism to protect them. Technological advances have increased the capability of AI systems to generate content that falls into the categories of material protected under the Act.[[6]](#footnote-5) This capability raises important policy questions for copyright and technology, while projects such as [The Next Rembrandt](https://www.nextrembrandt.com/)[[7]](#footnote-6) and court cases such as the [‘Monkey selfie case’](https://en.wikipedia.org/wiki/Monkey_selfie_copyright_dispute)[[8]](#footnote-7) have catalysed public discourse about authorship and ownership of the outputs of AI systems.

The question of whether AI-generated material should be protected by copyright goes to the heart of philosophical issues associated with copyright policy and copyright’s jurisprudential purpose. Copyright’s close tie to human creativity, and incentivising it, can be used as justification for keeping AI-created content outside of copyright protection. Such a position ‘... [encourages and favours] the dignity of human creativity over machine creativity.”[[9]](#footnote-8) The [Creative Commons](https://creativecommons.org/) organisation, for example, holds that, “Direct human involvement should remain a precondition to determining whether [copyright material] is worthy of protection and whether copyright can be claimed.”[[10]](#footnote-9) CC cites the lack of a human author and the lack of originality as reasons to not extend copyright protection to AI-generated material.

Human authorship is required here in Australia by virtue of the requirement that protected material must have been made by a ‘qualified person.’[[11]](#footnote-10) A ‘qualified person’ is taken to be “an Australian citizen or a person resident in Australia.”[[12]](#footnote-11) In 2010 the Full Federal Court of Australia[[13]](#footnote-12) clarified that copyright content should originate with an author who exerts ‘independent intellectual effort’ in the creation of the copyright-protected material.

However, protecting AI outputs is an incentive for, and encourages AI development. If AI-generated outputs are not protected (whether by copyright or some other mechanism) it may be difficult for AI developers to justify their investment.

Applying a single rule that protects or doesn’t protect AI outputs may not be able to accommodate all AI projects given that specific projects include differing levels of human intervention and oversight of the AI system. Some countries, such as the UK, Ireland, Hong Kong, India and New Zealand, have sought to clarify authorship in relation to computer generated material. The UK for example, specifies that the author of a literary, dramatic, musical or artistic work which is computer-generated is “the person by whom the arrangements necessary for the creation of the work are undertaken.”[[14]](#footnote-13) Such an approach can accommodate AI developers or users of AI systems as the creator of the AI output, depending on the situation.

The ADA does not endorse one perspective on the question of authorship of AI outputs over another, and encourages the Department to consult widely on the topic.

# Moral rights and AI

In addition to the economic rights copyright owners enjoy, the individual creators of literary, dramatic, musical and artistic works and films also enjoy separate moral rights in respect of the work or film. Two of the three three moral rights in Australia may create barriers for AI development: namely, the right of attribution of authorship[[15]](#footnote-14) and the right to integrity of authorship of a work.[[16]](#footnote-15) This section will examine the implications of these moral rights on AI development.

## Attribution and AI

As the Australian copyright law currently stands, AI developers have an obligation under the Act to honour the right of attribution in relation to any attributable acts done with a work or film,[[17]](#footnote-16) including copying and communicating the material. The person undertaking an attributable act may identify the author “by any reasonable form of identification”[[18]](#footnote-17) in a manner that is “clear and reasonably prominent”[[19]](#footnote-18) “... in such a way that a person acquiring the reproduction or copy will have notice of the author’s identity.”[[20]](#footnote-19)

When material is used in ML processes providing attribution is very difficult, if not impossible. For many uses of content in ML the use occurs as part of a technical internal process that is not visible when the output of the AI application is made available to the end user. In relation to such uses, AI developers are left to determine how and where sufficient identification of the relevant authors could be made.

Where a potential infringement of the moral right of attribution occurs in relation to an output of an AI system more opportunity may be present to identify the authors alongside the output. However ML processes have the potential to infringe the attribution rights of thousands, if not hundreds of thousands, of creators. In the case of dynamic ML modules where data is continuously inputted, the number of creators may be constantly increasing. The issue of ‘attribution stacking’ is very real when attempting to display such a list of creators; a large list of creators can be practically difficult to achieve, not to mention this potentially undermines the jurisprudential rationale for requiring attribution in the first place. A long list of creators can make it difficult to associate a creator with their copyright content.

## Derogatory treatment and AI

Rights holders also have a right not to have their work subjected to derogatory treatment. This includes “anything that results in a material distortion of, the mutilation of, or a material alteration to” a work or film[[21]](#footnote-20) or doing anything else in relation to the work or film that is prejudicial to the author’s [or filmmaker’s] honour or reputation”.[[22]](#footnote-21) Input data is altered during the ML process, but whether that alteration is prejudicial to the creator’s honour or reputation is more difficult to determine. Any decision in relation to whether the modifications made by a ML process would rely heavily on the circumstances of the matter and the context of the use.

The exact scope of how the outputs of an AI application may constitute a derogatory treatment is also difficult to determine, and is largely speculative at the moment. Dr Matulionyte for example, has suggested that some controversial AI projects – such as where AI is used for military purposes, facial recognition or surveillance – may be deemed prejudicial to the creator’s honour or reputation if the creator might be seen as supporting such controversial uses of AI and they do not. With limited case law on the integrity right, and none specifically looking at derogatory treatments resulting from the use of a work or film in an AI system, it remains to be seen to what extent the moral right of integrity will impact AI development.

## Acts that do not infringe moral rights

In situations where moral rights apply, there are scenarios where moral rights will not be infringed. One scenario in which moral rights are not infringed is where the creator has consented in writing to an act or omission that would otherwise infringe their moral rights. The ability to secure written consent from creators in relation to their moral rights would likely prove as difficult and time consuming as securing permissions to use the material. In fact, securing a moral rights consent may be more difficult given that moral rights remain with the creator, regardless of any licence or assignment of rights to another party. If the material has been transferred to another party an AI developer may need to secure a licence from the current copyright owner to use the material, as well as a moral rights consent from the original creator.

Another scenario in which moral rights are not infringed is where the defence of reasonableness or a copyright exception applies. In relation to a potential infringement of the moral right of attribution and the moral right of integrity, a person may nevertheless be held to not have breached the author’s or filmmaker’s moral rights of attribution or integrity if “it was reasonable in all the circumstances” not to identify the author or filmmaker or to subject a work or film to a derogatory treatment.[[23]](#footnote-22)

A range of matters to be taken into account in determining if it was reasonable not to identify the author or filmmaker, or to subject a work or film to a derogatory treatment, in particular circumstances are outlined in the Act.[[24]](#footnote-23) Each of the matters may be relevant to a use of a work or film in an AI process, with the nature of the work, the purpose, the manner and the context in which it is used, and industry practices and codes of practice all likely to be particularly relevant.

# Current copyright exceptions and AI

Copyright law allows for certain uses of material without the need to obtain the copyright owner’s consent. These uses are referred to as copyright ‘exceptions’. A use of copyright material that falls within the scope of a copyright exception is deemed not to be an infringement, which begs the question whether use of material in a ML process falls within the scope of an exception in the Act. There are many copyright exceptions, however the most relevant to uses of material in AI are the fair dealing exceptions and the temporary reproduction exceptions.[[25]](#footnote-24)

## Fair dealing exceptions and AI

‘Fair dealing’ exceptions allow copyright material to be used without the copyright owner’s permission in certain specific circumstances. The Act contains fair dealing provisions for a number of purposes, including for research or study,[[26]](#footnote-25) criticism or review,[[27]](#footnote-26) parody or satire[[28]](#footnote-27) and reporting news.[[29]](#footnote-28)

It could be argued that the fair dealing for research or study exceptions may cover uses of content in AI applications, but the likelihood that this is the case is far from certain. The Act outlines a number of matters to be considered in determining whether a dealing with a work or audio‑visual item[[30]](#footnote-29) constitutes a fair dealing with the material for the purpose of research or study.[[31]](#footnote-30) It is difficult to apply these matters outside of the context of a particular dealing, meaning it is difficult to speculate if a particular use of material in an AI system would be within the scope of the fair dealing for research or study exceptions. A lack of case law in this area adds to the uncertainty.

As Dr Matulionyte notes, the final matter related to the amount and substantiality of the part of the work or audio-visual item copied could weigh against uses of material in AI. While the Act does not explicitly state copying the whole of the material would not constitute a fair dealing, other provisions specify that a reproduction for the purpose of research or study of not more than a ‘reasonable portion’ is taken to be a fair dealing with a work,[[32]](#footnote-31) which seems to suggest that copying of the entire work is less likely to be considered a fair dealing. If this is the case, this will weigh against use in AI being deemed a fair dealing given that most ML processes copy works in their entirety.

It must also be noted that the limited scope of the fair dealing – uses for research or study purposes – limits the types of users who can rely on it. Certainly, commercial players and/or commercial AI systems would not be able to rely on the exception.

Finally, there may be AI projects that could be deemed to be a fair dealing for the purpose of criticism or review, parody or satire and reporting news where the AI outputs are related to one of those purposes. Even so, uncertainty persists; namely because it is unclear how a court would interpret the purpose of each of the provisions and the extent to which the court would consider a particular AI project meeting the requirements of the relevant provision.

## Temporary reproduction exceptions and AI

The Act includes provisions that state that temporary reproductions (e.g. ‘cached copies’) of a work or audio-visual item “as part of the technical process of making or receiving a communication” is not an infringement.[[33]](#footnote-32) ‘Communicate’ in this context means making copyright material available online or transmitting the material electronically.[[34]](#footnote-33) Some ML processes don’t include communication of copies of material[[35]](#footnote-34) and would not be covered by the provisions. Additionally, for the provisions to apply, the communication must have been authorised,[[36]](#footnote-35) adding to the need to secure permission from each copyright owner involved.

Similar to the ‘cached copies’ exceptions, provisions are also included that mean that temporary reproductions “incidentally made as a necessary part of a technical process of using a copy of the work” (e.g. ‘Random Access Memory (RAM) copies’) are also not an infringement.[[37]](#footnote-36) However if the RAM copy is made from an infringing copy of material the provisions do not apply. As such, if the material ingested in the ML process was done without obtaining permission from the relevant creators, the RAM copies would not be covered by the provisions.

Perhaps even more significant is the fact that all of these provisions would only cover a small subset of uses in relation to AI. Collectively they would not cover the entire process or outputs produced by an AI system.

# Potential copyright solutions to support AI development

Copyright licensing or copyright exceptions have been suggested as solutions to support AI development within the copyright system. The ADA is not convinced that licences are the solution, for reasons outlined below. This section also provides an explanation of the possible options if an exception to copyright was introduced to ensure AI projects were easier to undertake under copyright law.

## Licensing is not the answer

Some stakeholders have suggested that copyright licensing can be a solution to the problem. As stated above, the ADA does not believe that direct licensing is a viable option for many AI projects. While securing licences from individual copyright owners may be possible in situations where the required input data can be sourced from a single copyright owner or a small number of copyright owners, given that many ML processes involve copyright material owned by a large number of copyright owners, the transaction costs to secure those permissions are too great.

Material licensed under [Creative Commons](https://creativecommons.org/) (CC) licences is potentially a source of data for which permission to use the material has been granted broadly to the public in advance. The ADA strongly endorses legitimate uses of CC-licensed material, but CC material can only contribute to an ML process where the required data is available to reuse under an appropriate licence. Given how ML processes work, licences in the CC suite that limit adaptation would not be eligible to be ingested. Further, a commercial AI project would not be able to input CC-licensed material that does not permit commercial use of the licensed material.

Orphan materials – copyright material whose owner is unknown or cannot be contacted – are another potential source of data for AI projects. Currently, the use of orphaned materials carries risks for users of the material,[[38]](#footnote-37) including AI developers. A scheme limiting remedies available when orphan materials are used was included as part of the proposed amendments outlined in the exposure draft of the Copyright Amendment (Access Reform) Bill 2021.[[39]](#footnote-38) In a joint submission in response to the exposure draft, the ADA (together with the [Australian Libraries and Archives Copyright Coalition](https://alacc.org.au/) (ALACC)) supported the deployment of the scheme as a crucial next step in freeing up productive and creative new uses of orphan materials, including AI.[[40]](#footnote-39)

Given the limitations of direct licensing, collective licensing schemes have been put forward as an alternative. The benefits and shortcomings of collective management organisations (CMOs) such as collecting societies aside, CMOs do not exist for some content types that AI developers want to use,[[41]](#footnote-40) and some groups of copyright owners are not members of existing CMOs.

It has been argued that a statutory licensing scheme could overcome problems related to other licensing options, however the ADA does not support such schemes. We have expressed our concerns that regulation and oversight of CMOs is insufficient to overcome anti-competitive risks associated with such schemes.[[42]](#footnote-41) Further, a statutory licensing scheme encroaches upon the exclusive rights of a copyright owner by forcing all right holders into a collective management system and removing the ability for content owners and AI developers to negotiate direct licences for the use of material. If opt out mechanisms are included in the scheme it would make the system more complicated.

## Introducing an exception for AI

A preferred solution would be for Australia to introduce a copyright exception that facilitates AI. A ‘fair use’-style exception is one possibility, as was canvassed by the Australian Law Reform Commission (ALRC) in its investigation into copyright in the digital economy[[43]](#footnote-42) and the Productivity Commission in their IP arrangements inquiry report.[[44]](#footnote-43) Two other options include adding a new type of fair dealing for incidental and technical use (that would cover ML) or a specific exception for ML. If either exception is considered, it must adequately address the issues presented by both economic and moral rights.[[45]](#footnote-44)

# AI development in Australia

A final point we would like to raise is that, 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 Department to include copyright as part of its regulatory response to stimulate AI development in Australia.

1. Department of the Prime Minister and Cabinet (2022) *Positioning Australia as a leader in digital economy regulation – Automated decision making and AI regulation*. Available at <https://www.pmc.gov.au/domestic-policy/digital-technology-taskforce/positioning-australia-leader-digital-economy-regulation-automated-decision-making-ai-regulation>. [↑](#footnote-ref-0)
2. Matulionyte, R (2021) ‘Australian Copyright Law Impedes the Development of Artificial Intelligence: What Are the Options?’ *IIC International Review of Intellectual Property and Competition Law*, vol. 52, no. 4, pp. 417–443. Available at <https://doi.org/10.1007/s40319-021-01039-9>. [↑](#footnote-ref-1)
3. See the Act, ss 14, 21, 36 and 101. [↑](#footnote-ref-2)
4. See the Act, subs 21(1A). [↑](#footnote-ref-3)
5. Matulionyte (2021), p 421. [↑](#footnote-ref-4)
6. Broadly, copyright protects literary works (books, magazine articles, etc), dramatic works (theatre and dance), music (songs, compositions, etc), artistic works (paintings, drawings, photographs, etc), sound recordings, films and broadcasts. For more information see https://alacc.org.au/material-protected-by-copyright/ [↑](#footnote-ref-5)
7. The New Rembrandt was a collaborative project that created an AI-generated 3D-printed painting informed by data drawn from Rembrandt’s body of work. Microsoft, one of the partners on the project, described the data aspects of the project:

“The final portrait was created through a highly detailed and complex process which took over 18 months and used 150 gigabytes of digitally rendered graphics. This started with the analysis of all 346 of Rembrandt’s paintings using high resolution 3D scans and digital files, which were upscaled using machine learning. It was possible to generate typical features and, using an algorithm that detects over 60 points in a painting, determine the distance between these on the subject’s face.”

For more about the project see Microsoft (2016) ‘The Next Rembrandt’. Available at <https://news.microsoft.com/europe/features/next-rembrandt>. [↑](#footnote-ref-6)
8. The ‘Monkey selfie case’ is a [series of court cases and filings related](https://en.wikipedia.org/wiki/Monkey_selfie_copyright_dispute#Naruto_v._David_Slater_et_al.) to the copyright status of ‘selfie’ photographs taken by Celebes crested macaques in Indonesia. The macaques had taken self portraits using camera equipment owned and set up by British nature photographer David J Slater.

In December 2014 Slater self-published a book entitled *Wildlife Personalities* which included a macaque selfie on the front cover, and others of the macaque photographs in the publication. On 22 September 2015, People for the Ethical Treatment of Animals (PETA) filed a lawsuit against Slater and Blurb (the self-publishing platform Slater used) in the United States District Court for the Northern District of California, requesting that the macaque (named Naruto by PETA), be assigned copyright and PETA be appointed to administer proceeds from the photos for the benefit of Naruto and other crested macaques in the reserve they live in on Sulawesi.

The matter was dismissed at the initial hearing on the grounds that US copyright law does not extend its protection to material created by animals. PETA filed a notice of appeal to the Ninth Circuit Court of Appeals but later settled the matter out of court. Even though the appeal was not heard, the matter raised questions about the copyright status of material created by non-human animals in the legal profession, the media and the community. [↑](#footnote-ref-7)
9. WIPO (2020) ‘Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence’. Available at <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504>. [↑](#footnote-ref-8)
10. Vézina, B (2020) ‘Creative Commons’ statement on artificial intelligence and copyright’, Creative Commons: Mountain View. Available at <https://wiki.creativecommons.org/images/0/05/Creative_Commons_final_statement_on_AI_and_copyright_for_publication.pdf>. See also Vézina, B and Moran, B (2020) ‘Artificial Intelligence and Creativity: Why We’re Against Copyright Protection for AI-Generated Output’, Creative Commons: Mountain View. Available at <https://creativecommons.org/2020/08/10/no-copyright-protection-for-ai-generated-output/>. [↑](#footnote-ref-9)
11. The Act, ss 32, 89, 90 and 92. [↑](#footnote-ref-10)
12. The Act, subs 32(4) and s 84. [↑](#footnote-ref-11)
13. *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 194 FCR 142, [82]. [↑](#footnote-ref-12)
14. [*Copyright, Design and Patent Act* (UK)](https://www.legislation.gov.uk/ukpga/1988/48/contents), subs 9(3). It is worth noting that this wording is substantially similar to the wording in the Australian Copyright Act in relation to the protection of cinematographic films, which reads, “the maker of the cinematograph film is the person by whom the arrangements necessary for the making of the film were undertaken”: The Act, subpara 22(4)(b). [↑](#footnote-ref-13)
15. The Act, s 193. [↑](#footnote-ref-14)
16. The Act, s 195AI. [↑](#footnote-ref-15)
17. The Act, s 194. [↑](#footnote-ref-16)
18. The Act, subs 195(1). [↑](#footnote-ref-17)
19. The Act, s 195AA. [↑](#footnote-ref-18)
20. The Act, s 195AB. [↑](#footnote-ref-19)
21. The Act, subss 195AJ(a), 195AK(a) and 195AL(a). [↑](#footnote-ref-20)
22. The Act, subss 195AJ(b), 195AK(c) and 195AL(b). [↑](#footnote-ref-21)
23. The Act, ss 195AR and 195AS. [↑](#footnote-ref-22)
24. The Act, subss 195AR(2) and (3), 195AS(2) and (3). [↑](#footnote-ref-23)
25. The Act, ss 43A and 43B. [↑](#footnote-ref-24)
26. The Act, ss 40 and 103C. [↑](#footnote-ref-25)
27. The Act, ss 41 and 103A. [↑](#footnote-ref-26)
28. The Act, ss 41A and 103AA. [↑](#footnote-ref-27)
29. The Act, ss 42 and 103B. [↑](#footnote-ref-28)
30. For the purposes of Division 6 of Part IV of the Act, s 100A defines ‘audio-visual item’ as, “... a sound recording, a cinematograph film, a sound broadcast or a television broadcast”. [↑](#footnote-ref-29)
31. The Act, subss 40(2) and 103C(2). [↑](#footnote-ref-30)
32. See the table in subs 40(5). [↑](#footnote-ref-31)
33. The Act, ss 43A and 111A. [↑](#footnote-ref-32)
34. See the definition of ‘communication’ in s 10. [↑](#footnote-ref-33)
35. Some ML processes extract material from the internet or in some other way incorporate the internet or electronic transmission in the process. Where communication does not occur the provision would not apply. [↑](#footnote-ref-34)
36. The Act, subss 43A(2) and 111A(2). [↑](#footnote-ref-35)
37. The Act, ss 43B and 111B. [↑](#footnote-ref-36)
38. You cannot secure a permission if you do not know who the copyright owner is or you cannot contact them. You may not be able to determine the copyright duration for the material either. [↑](#footnote-ref-37)
39. Department of Infrastructure, Transport, Regional Development and Communications (2021) *Copyright Amendment (Access Reform) Bill 2021 Exposure Draft*. Available at <https://www.infrastructure.gov.au/department/media/publications/copyright-amendment-access-reforms-bill-2021>. [↑](#footnote-ref-38)
40. For a detailed explanation of orphan materials and the proposed scheme see ADA (2022) ‘Submission in response to an exposure draft of the Copyright Amendment (Access Reform) Bill 2021 and the review of technological protection measures (TPMs) exceptions’, pp 10–26. Available at <https://digital.org.au/resources/access-reforms-exposure-draft-joint-submission>. [↑](#footnote-ref-39)
41. Dr Matulionyte provides personal emails, blogs, social media posts and website content as examples of attractive data for AI developers that is not typically licensed by CMOs. [↑](#footnote-ref-40)
42. For a recent discussion by the ADA on the shortcomings of CMOs see ADA (2019) ‘Australasian Performing Right Association Ltd application for revocation of authorisations A91367–A91375 and substitution of new authorisation A1000433’. Available at <https://digital.org.au/resources/accc-apra-authorisation-a1000433-submission>. [↑](#footnote-ref-41)
43. ALRC (2013) ‘Copyright In the Digital Economy Final Report’, pp 264–6. Available at <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/>. [↑](#footnote-ref-42)
44. Productivity Commission (2016) ‘Intellectual Property Arrangements, Inquiry Report No. 78’, Canberra, pp 165–197. Available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report>. [↑](#footnote-ref-43)
45. An example of such a provision can be found in s 29A of the UK Act which requires sufficient acknowledgement of the creator “unless this would be impossible for reasons of practicality or otherwise”. Although it should be noted that this provision applies to noncommercial research only. [↑](#footnote-ref-44)