

Australian Copyright Council response to the Safe and responsible AI in Australia: Discussion Paper

11 August 2023

The Australian Copyright Council acknowledges the Traditional Owners and Custodians of the lands on which our office is located, the Gadigal people of the Eora nation, and all Traditional Owners of Country throughout Australia. We pay our respects to all Elders past, present and emerging and recognise their continuing great, creative and cultural expressions.

1. The [Australian Copyright Council](#) (the **ACC**) is grateful for the opportunity to make a submission on the [Department of Industry, Science and Resources Discussion Paper on Safe and Responsible AI](#) (the **Discussion Paper**).

About the Australian Copyright Council

2. The ACC is a small, independent, not-for-profit organisation dedicated to promoting understanding of copyright law and its application. The ACC works to foster collaboration between content creators and consumers, representing the peak bodies for professional artists and content creators working in Australia's creative industries.
3. The ACC is a unique organisation:
 - it is the only dedicated copyright expert organisation in Australia
 - its focus is on copyright as it applies to all art forms
 - it provides advocacy, advice and information on copyright issues, and
 - it is a membership-based organisation, representing over a million creators.
4. The ACC has [24 affiliate member organisations](#),¹ several of which are making separate submissions to this consultation. These affiliate members represent over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries.

¹ See Appendix 1.

5. As part of its services, the ACC provides [information, education, training](#) and free, [written legal advice](#) to those who fall within its guidelines including the staff of libraries, galleries, museums and educational institutions.²

Background and context

6. This Discussion Paper comes at a time of other investigations into artificial intelligence (AI) including:
 - the [House Standing Committee on Employment, Education and Training](#) inquiry into the use of generative artificial intelligence in the Australian education system (to which the ACC made a submission)³
 - the [Inquiry into Artificial Intelligence \(AI\) in New South Wales](#) (to which the ACC will make a submission), and
 - the Commonwealth Attorney General's [Ministerial Round Tables](#) in which AI is part of the discussions.⁴
7. We note that the Discussion Paper does not seek to consider the implications of artificial intelligence (AI) on intellectual property law.⁵ However, it is the ACC's position that any identification of 'potential gaps in the existing domestic governance landscape'⁶ of AI must be considered in the broader copyright context. This submission addresses copyright-related aspects, only, of AI.
8. Responding to technological advances (and AI may be seen as the latest of these), has always been a significant part of the evolution and development of copyright legislation. '[T]he origins of modern copyright laws are directly linked to the invention of printing'⁷ and the impact of that invention on the ease with which information could be disseminated.
9. Australian copyright law is based on the *Copyright Act 1968* (Cth) (**Copyright Act**) and the decisions of the courts that have applied and interpreted that legislation. The Copyright Act has been amended many times since it first came into operation (on 1 May 1969) with some of those amendments introduced to address new technologies. These include:⁸
 - 1984 – copyright protection introduced for computer programs⁹
 - 1999 – non-infringing uses of computer programs, including decompilation to produce an interoperable product¹⁰
 - 2000 – establishment of the right of communication to the public; educational institutions and libraries permitted to make certain uses of digitised material; new prohibition against circumvention of technological protection measures and encrypted broadcasts; new prohibitions against tampering with rights management information; regulation of internet service provider liability for infringements by their clients¹¹

² See Appendix 2.

³ See [Submissions – Parliament of Australia \(aph.gov.au\)](#) Submission 69.

⁴ AI is due to be discussed on 28 August 2023.

⁵ [Department of Industry, Science and Resources Discussion Paper on Safe and Responsible AI](#) (the **Discussion Paper**), p 4 <<https://consult.industry.gov.au/supporting-responsible-ai/>>.

⁶ Discussion Paper, p 4.

⁷ S Ricketson, M Richardson and M Davison, *Intellectual Property: Cases, Materials & Commentary* (LexisNexis Butterworths, 4th ed, 2009) 39.

⁸ A comprehensive list of major changes in copyright law are set out in the ACC's publication, *Copyright Essentials*, available on the ACC website <<https://www.copyright.org.au/>>.

⁹ *Copyright Amendment Act 1984* (Cth).

¹⁰ *Copyright Amendment (Computer Programs) Act 1999* (Cth).

¹¹ *Copyright Amendment (Digital Agenda) Act 2000* (Cth) and *Copyright Amendment Act 2006* (Cth).

- 2015 –provisions for site-blocking of overseas websites that have the primary purpose of infringing copyright¹²
 - 2017 – exceptions for disability access, libraries and archives; new framework for educational statutory licensing¹³.
10. The impact of technological developments was also an important aspect of the Australian Government's 2022-2023 [Copyright Enforcement Review Issues Paper](#).¹⁴
 11. The public policy considerations underpinning copyright protection (the protection of the 'fruits' of human creative effort) are often described as a 'social contract' between creators and society – authors/creators are given a time-limited monopoly over their creations in return for making that work available to the public.¹⁵
 12. Copyright law aims to balance the legitimate interests of creators and copyright owners with the benefits that the public may gain through access to cultural material. It does this by including provisions that outline circumstances where, for public policy reasons, the use of copyright material without permission from the copyright owner will not be an infringement. These provisions take the form of sector-specific statutory licensing schemes or, exceptions that serve certain public policy purposes.¹⁶
 13. There are two broad categories of material which may be protected by copyright – 'works'¹⁷ and 'subject matter other than works'. 'Works' include literary works (e.g. books and other text based material), artistic works (e.g. visual arts such as photographs, painting and illustrations) and musical works. 'Subject matter other than works'¹⁸ includes sound recordings and films. Note that the Copyright Act defines a 'literary work' to include 'a computer program or compilation of computer programs'.¹⁹
 14. The first copyright owner is generally the creator or the 'author' of copyright material²⁰ (e.g. the author of a novel, artist of a painting). For films, it is the 'maker'²¹. There are, however, some exceptions to that general rule as to ownership including for materials created in the course of employment; employers generally own copyright in the creations of their employees unless this position is altered by agreement.²² Copyright ownership may be transferred or assigned by a written agreement signed by the copyright owner or through a copyright owner's will.²³
 15. Under the Copyright Act, the copyright owner has certain exclusive rights over their material including the right to make copies of, and 'communicate to the public' (make available online or electronically transmit e.g. via the internet), their copyright material.²⁴ The copyright owner also has the right to grant permission (also known as a licence) to others, to exercise the same rights.²⁵ Charging fees or receiving royalties in exchange for permission is the most common way that copyright owners derive income from their creative material.

¹² *Copyright Amendment (Online Infringement) Act 2015* (Cth).

¹³ *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth).

¹⁴ See The ACC's submission in response to that paper available at 'Copyright Enforcement Review, Published responses' Attorney-General's Department (Web Page, 12 July 2023) <https://consultations.ag.gov.au/rights-and-protections/copyright-enforcement-review/consultation/published_select_respondent?_b_index=60>.

¹⁵ *IceTV Pty Limited v Nine Network Australia Pty Limited* [2009] HCA 14 (*IceTV*), [24]-[25].

¹⁶ For example, the statutory licences for educational institutions and the 'fair dealing' exceptions.

¹⁷ *Copyright Act 1968* (Cth) (**Copyright Act**), Part III.

¹⁸ *Copyright Act*, Part IV.

¹⁹ *Copyright Act*, section 10(1).

²⁰ *Copyright Act*, sections 35(2), 97(2), 98(2), 99.

²¹ *Copyright Act* sections 22(4) and 98. Note too that under *Copyright Act* section 189, the 'maker' is defined as the director, the producer and the screenwriter of the film, in relation to moral rights.

²² *Copyright Act*, sections 35(6), 98(5).

²³ *Copyright Act*, section 196.

²⁴ *Copyright Act*, see definition of 'communicate' in section 10. See also sections 21, 31(1), 85(1), 86-88.

²⁵ *Copyright Act*, section 13(2).

16. The period of copyright protection (the duration of copyright) is largely dependent on the type of copyright material.²⁶ It is usually calculated from either the author's death, or the year that the copyright material was made available to the public, or was made. For instance, copyright in:
 - artistic works generally lasts until 70 years after the author's death²⁷ e.g. Salvador Dali passed away on 23 January 1989.²⁸ Under Australian law, copyright in his paintings will expire after 31 December 2059.
 - sound recordings and cinematograph films expires 70 years after the sound recording or film was first made public or made.²⁹
17. Once copyright has expired, the material is said to be in the 'public domain'. Anyone may use public domain material without seeking permission. One of the common misconceptions, in queries received by the ACC, is that anything that is publicly accessible on the internet is 'public domain'. 'Public domain' has a specific meaning for copyright purposes, limited to material in which the copyright period has expired.
18. Generally, anyone other than the copyright owner who wishes to reproduce a 'substantial part' of copyright material must seek permission to do so unless they are able to rely on one of the exceptions to copyright infringement contained in the Copyright Act. Reproduction of the whole, or a substantial part of, copyright material without permission and where no exception applies, will amount to an infringement of copyright.

Potential gaps in approaches

2. **What potential risks from AI are not covered by Australia's existing regulatory approaches? Do you have suggestions for possible regulatory action to mitigate these risks?**

19. As noted above (paragraph 13), a computer program is protected by copyright as a literary work. Where a computer code underpinning an AI system reproduces all or a substantial part of computer code written by others, that may constitute an infringement of copyright. In 2022, a class action was commenced in the US in relation to the reproduction of open-source computer code.³⁰ One of the primary allegations made in those proceedings is that the licence terms accompanying that open-source code included a term requiring some form of attribution and that that term was breached.³¹
20. Apart from copyright infringement arising from the reproduction of computer code, there are three main issues concerning copyright and AI. The first potentially arises in all types of AI, specifically where AI is trained using materials that are protected by copyright. In many instances, this training involves the copying and/or communication of substantial parts of those materials without the permission of the copyright owners. On 28 June 2023, two authors filed a complaint in a US court against OpenAI (the developers of the AI chatbot, ChatGPT) alleging that their works had been used, without their consent, to train that AI system.³² Similarly, a

²⁶ Copyright Act, section 33. See also sections 93, 95-96.

²⁷ Copyright Act, section 33.

²⁸ 'Salvador Dali', *Encyclopaedia Britannica* (Biography, 8 May 2023) <www.britannica.com/biography0/Salvador-Dali>.

²⁹ Copyright Act, section 93.

³⁰ See filed complaint of *DOE 1 et al v GitHub Inc. et al* (N.D Cal, No. 3:23-cv-06823, 3 November 2022) (**Github case**) <https://githubcopilotlitigation.com/pdf/06823/1-0-github_complaint.pdf>.

³¹ Github case, paras 4 & 11.

³² See filed complaint of *Tremblay & Awad v OpenAI Inc. et al* (N.D Cal, Case 3:23-cv-03223, 28 June 2023) <<https://llmlitigation.com/pdf/03223/tremblay-openai-complaint.pdf>>.

group of artists has taken legal action against companies behind AI art generating technologies, alleging the use of their works, without permission, for the training of those AI systems.³³

21. The second and third issues mainly concern generative AI, namely:

- much of the content produced by generative AI is unlikely to be protected by copyright (because of the lack of a human author), and
- issues of copyright infringement and liability if the content generated by AI reproduces a 'substantial part' of existing material that is protected by copyright.

Training of AI and use of copyright material

22. All AI technologies are predicated on the use of training data. In this context, training refers to the processes that expose AI to examples to calibrate it by 'learn[ing] the correct parameters'³⁴ resulting in an increasingly sophisticated AI tool. While not all methods of training AI raise issues of copyright infringement,³⁵ there is a real risk of infringement whenever third-party copyright material is used in AI training.
23. As noted at paragraph 15 above, the exclusive rights of copyright owners include the right to reproduce, and communicate to the public, their material.³⁶ The right to make reproductions applies regardless of whether the new copy is in hard copy or digital format.³⁷ Copyright infringement occurs where a substantial part of the material is reproduced without the copyright owner's permission and no exception to infringement applies.
24. It is outside the ACC's expertise to comment on any differences that may exist between the process of AI training (at the development stage of the AI system) and ongoing machine learning. However, to the extent that such processes depend on the use of textual material, images or other copyright material, the copyright issues raised are likely to be the same.
25. By way of illustration, the CAPTCHA verification system utilises photographs (and other artistic works) that are copied and uploaded to that system. A user of that system is presented with several photographs (or a segmented photo) and must select appropriate responses (to prove that they are a human as opposed to a spam-bot)³⁸. Users of the CAPTCHA system, albeit they are ostensibly using that technology for the purpose of authentication associated with the provision of services or goods, are also assisting in the ongoing training of that AI technology in recognising different objects³⁹.
26. In the CAPTCHA screenshots (below), each photograph is likely to be separately protected by copyright, with copyright owned by the relevant photographer (subject to any agreement to the

³³ See filed complaint of *Andersen, McKernan & Ortiz v Stability AI Ltd. et al* (N.D Cal, Case 3:23-cv-00201, 13 January 2023) <<chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://stablediffusionlitigation.com/pdf/00201/1-1-stable-diffusion-complaint.pdf>>.

³⁴ Stefano Baruffaldi et al, 'Identifying and measuring developments in artificial intelligence: Making the impossible possible' (Working Paper No 2020/5, Organisation for Economic Co-operation and Development, 1 May 2020) 10. <<https://read.oecd.org/10.1787/5f65ff7e-en>>.

³⁵ For instance, where a human trains AI by posing as both the user and the AI chat bot enabling the AI to emulate human-like responses: see Funmi Looi Somoye, 'How is Chat GPT trained?' *PC Guide* (online, 20 April 2023) <www.pcguides.com/apps/chat-gpt-trained/>. Under such circumstances, there is unlikely to be any copyright issues as the series of text prompts and responses would not be protected by copyright if they are too short, trivial or unoriginal. Even if it were protected by copyright (as a literary work), the copyright owner would generally be the AI company as the employer of the trainer (unless there is an agreement that says otherwise).

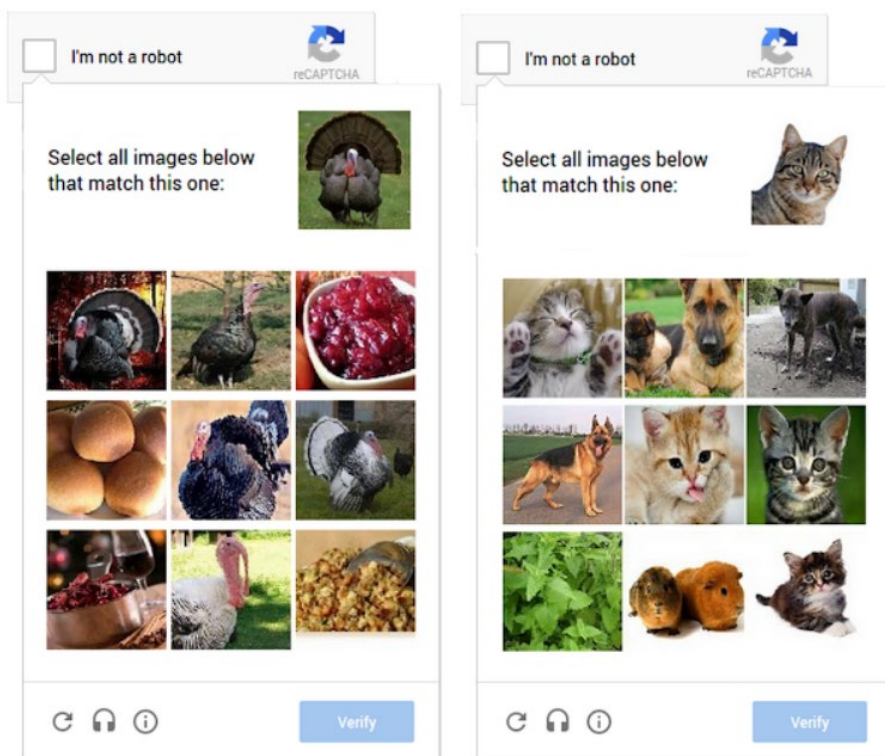
³⁶ Copyright Act, section 10 definition of 'communicate'; sections 21, 31(1), 85(1), 86-88.

³⁷ Copyright Act, sections 21(1A), 21(6).

³⁸ Vinay Shet, 'Are you a robot? Introducing "No CAPTCHA reCAPTCHA"', *Google Search Central Blog* (Webpage, 3 December 2014) <<https://developers.google.com/search/blog/2014/12/are-you-robot-introducing-no-captcha>>.

³⁹ James O'Malley, 'Captcha if you can: how you've been training AI for years without realising it', *Techradar* (online, 12 January 2018) <www.techradar.com/news/captcha-if-you-can-how-youve-been-training-ai-for-years-without-realising-it>.

contrary). The copying and uploading of those photographs would generally require each copyright owner's permission.⁴⁰ The ACC is not suggesting that the proprietors of CATCHA have not obtained that permission.



Left: Vinay Shet, Screenshots of reCAPTCHA (description, accessible here). Licensed under CC-BY 4.0.

27. The same concerns apply to generative AI if it is trained on copyright-protected material; the issue of infringement must be assessed on a case-by-case basis. For instance, a generative AI project known as 'The Next Rembrandt',⁴¹ that was trained by using the paintings of the Dutch painter, Rembrandt Harmenszoon van Rijn, does not raise copyright infringement concerns as the copyright protection for Rembrandt's works has expired, Rembrandt having died over 350 years ago. In contrast, a generative AI tool trained on modern materials protected by copyright does raise copyright infringement concerns. There are pending cases in the United States where the plaintiff copyright owners have alleged that the AI developers infringed their copyright by copying artistic works without permission and without paying the copyright owners for that use.⁴²
28. Under Australian copyright law, there are exceptions to copyright infringement such as the fair dealing provisions.⁴³ Those provisions are unlikely to be of assistance to AI developers who seek to use copyright material without the prior permission of relevant copyright owners.
29. A user seeking to rely on a fair dealing provision must be able to establish both that their use is primarily for the purpose specified in that provision of the Copyright Act and that the use is fair in all the circumstances.

⁴⁰ It is unlikely that the fair dealing or other exceptions to copyright infringement set out in the Copyright Act would apply to the use of copyright material by systems such as the CAPTCHA system.

⁴¹ The Next Rembrandt <www.nextrembrandt.com>.

⁴² See filed complaints of *Andersen et al v Stability AI Ltd* (N.D Cal, No. 3:23-cv-00201, 13 January 2023) paras 1-3, 25-26, 28-30, 57-58, 109 <https://ipwatchdog.com/wp-content/uploads/2023/02/Andersen_et_al_v_Stability_AI.pdf>; *Getty Images Inc v Stability AI Inc* (D. Del, No. 1:23-cv-00135-UNA, 3 February 2023) paras 1, 3, 8, 13, 36, 40 <<https://stablediffusionlitigation.com/pdf/00201/1-1-stable-diffusion-complaint.pdf>>; *Silverman et al v OpenAI Inc* (N.D Cal, No. 3:23-cv-03416, 7 July 2023) paras 1-6, 10-12, 24-25, 28-30, 35, 52-57 <<https://s3.documentcloud.org/documents/23869693/silverman-openai-complaint.pdf>>; *Kardrey et al v Meta Platforms Inc.* (N.D Cal No. 3:23-cv-03417, 7 July 2023) paras 1-5, 21-27 <<https://s3.documentcloud.org/documents/23869675/kadrey-meta-complaint.pdf>> .

⁴³ Copyright Act, sections 40-42.

30. Even if the purpose requirements are satisfied, it may be difficult to argue that the use is fair as several factors⁴⁴ weigh against a finding of fairness.
31. A fundamental difficulty for copyright owners wishing to enforce their rights is that there is currently no transparency or disclosure by those developing AI technologies as to the data/material collected and used to build the vast databases on which an AI system is trained. The critical transparency issue for copyright owners is that they need to have clarity about both **what** and **how** protected material is used in order to ascertain whether indeed there has been copyright infringement as infringement may not occur in each instance of use.
32. If copyright material is reproduced or communicated to the public in the process of developing and improving AI systems (which may not occur in every case of use)⁴⁵, then a licence to do so must be obtained with the copyright owner entitled to set the terms for that use, including as to remuneration, if required. While there may be challenges in formulating ways in which permission for the use of copyright material in this way to train AI, is paid for,⁴⁶ some organisations are seeking to meet this challenge.⁴⁷
33. It should be noted however, that even where copyright protected material is not reproduced or communicated to the public in the training of AI, there is the equitable argument that large scale 'use' of the material should give rise to compensation to copyright owners.
34. There does not appear to be any public policy reason why these users of copyright content should be in a different position from any other user.
35. An additional consideration for any proposed licensing scheme (or any permission framework), is how to approach the issue of consent of an individual copyright owner. It is a fundamental aspect of the notion of copyright that a copyright owner has the right to grant or refuse permission for use of their material. That is, there may be circumstances where a copyright owner does not want a particular use to be made of their work, even if 'fair remuneration' is offered. That issue also arises in the context of Indigenous Cultural and Intellectual Property (ICIP). The potential 'harm' caused by the inappropriate use of such material goes beyond consideration of economic harm or reputational damage to an individual creator.
36. The moral rights of creators (which are separate to the rights of a copyright owner) are also potentially enlivened when copyright material is used for AI training. One of the moral rights of a creator (author) of a work is the right of attribution of authorship. That right arises when, amongst other things, the work is reproduced in material form.⁴⁸

Authorship and copyright ownership

37. One of the other primary questions raised by AI tools concerns copyright protection and ownership. The copyright status of works generated using such tools will depend on the extent to which a human author is involved. A work generated by an AI tool without human

⁴⁴ See Copyright Act, section 40(2). The other fair dealing provisions (e.g. sections 41-43) do not list the same factors, although several authorities suggest the same factors also apply: *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434, [301]-[302]; *AGL Energy Limited v Greenpeace Australia Pacific Limited* [2021] FCA 625, [51], [56].

⁴⁵ See paragraph 22 of this response.

⁴⁶ 'Is there a way to pay content creators whose work is used to train AI? Yes, but it's not foolproof', *The Conversation* (Web page, 11 July 2023) <<https://theconversation.com/is-there-a-way-to-pay-content-creators-whose-work-is-used-to-train-ai-yes-but-its-not-foolproof-199882>>.

⁴⁷ See for example, AP, *Open AI agree to share select news content and technology in new collaboration* <<https://www.ap.org/press-releases/2023/ap-open-ai-agree-to-share-select-news-content-and-technology-in-new-collaboration>>.

⁴⁸ Copyright Act, sections 193-194. For more information on moral rights, see the ACC's fact sheet '[Moral Rights](#)' and also its *Moral Rights: A Practical Guide* publication – available on the ACC website <<https://www.copyright.org.au/resources>>.

involvement generally will not, under current Australian copyright law, be protected by copyright.

38. Under the Copyright Act there is a requirement that the author or maker of copyright works must be a qualified person⁴⁹ which is, in turn, defined as an Australian citizen or resident (or a citizen or resident of another Berne Convention country).⁵⁰ As observed by the High Court of Australia in the *IceTV* case,⁵¹ the requirement that the creator or an author of a work is a human, is inherent in other sections of the Copyright Act, specifically:
 - copyright duration in works is fixed by reference to the date of death of the author⁵², and
 - the general rule of copyright ownership is that the creator or author of a work is the first copyright owner (subject to employment or contractual arrangements)⁵³.
39. The copyright issues associated with content created through ‘overwhelmingly automated processes’ were examined in the *Telstra* case⁵⁴. That case concerned issues of authorship and copyright ownership where a phone book was compiled through an automated computer system.⁵⁵ The Full Federal Court of Australia held that copyright did not subsist in the phone book as no individual person(s) could be identified as having conceived or having control over how the final form of the phone book was expressed.⁵⁶
40. This rationale is applicable to generative AI technologies where the outputs produced (e.g. artworks or text-based outputs) are primarily generated through the AI’s internal automated processes in response to text prompts entered by the person using that AI system. Such users may have too little control over the resulting artistic or literary work for it to be protected by copyright. However, the input of a user and the AI’s output are on a continuum. So, it is conceivable that a user who enters a detailed series of connected prompts which ‘shape’ the output of the AI tool, may ultimately be considered to have done enough to be considered the author of that output and for the work to therefore be protected.
41. The position may be different with respect to subject matter other than works.

Copyright infringement and content generated by AI

42. It is an infringement of the copyright in a work or other subject matter to reproduce a ‘substantial part’ of work or subject matter without permission.
43. It is also an infringement of copyright to ‘authorise’ another person’s infringement. Authorisation is the endorsement or sanction of another’s infringement in certain circumstances. These actions may render a person liable for copyright infringement.⁵⁷
44. It follows that using generative AI may pose copyright infringement risks in relation to the output of AI tools. That is, users who input prompts to the AI tool may be held responsible for copyright infringement if the AI output reproduces a substantial part of copyright material. The law of authorisation liability means that the owner of the generative AI tool, as well as the user, may be held responsible for any infringement of copyright.

⁴⁹ Copyright Act, sections 22(3), 22(4), 32(1), 32(2), 89(1), 90(1).

⁵⁰ Copyright Act, sections 32(4), 84.

⁵¹ *IceTV* [96]–[97].

⁵² Copyright Act section 33.

⁵³ Copyright Act section 35.

⁵⁴ *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 90 IPR 1 [88]–[89] (**Telstra case**).

⁵⁵ *Telstra case* [20]–[23].

⁵⁶ *Telstra case* [90].

⁵⁷ Copyright Act section 36 for works and section 101 for subject matter other than works.

45. The factors to be considered by the courts to make out authorisation liability include:⁵⁸
- the extent of the person's power to prevent the doing of the act concerned
 - the nature of any relationship between the parties, and
 - whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Potential gaps in approaches

- 3. Are there any further non-regulatory initiatives the Australian Government could implement to support responsible AI practices in Australia? Please describe these and their benefits or impacts.**

46. Where copyright material is used to train AI systems (that is, at the 'input' stage), there should be disclosure of the third-party copyright material (with sufficient detail to identify that material) and an indication of whether the permission of the copyright owner has been obtained.⁵⁹
47. A transparent approach by AI developers would assist Australia's creative sectors by providing a foundation on which AI developers and copyright owners could negotiate permission for use and suitable ongoing licensing arrangements, if relevant.⁶⁰
48. Copyright education can play an integral role in increasing public understanding of copyright and the rights of creators. The ACC provides [free fact sheets](#)⁶¹ on all aspects of copyright (as they apply to various industries). This includes a fact sheet on [Artificial Intelligence & Copyright](#)⁶², developed in response to increasing numbers of queries about AI's impact on creator rights.

Responses suitable for Australia

- 5. Are there any governance measures being taken or considered by other countries (including any not discussed in this paper) that are relevant, adaptable and desirable for Australia?**

49. We note that each jurisdiction has its own copyright framework. While the frameworks of many countries may be broadly similar (as signatories to the Berne Convention), there are important differences, including in how they approach the issue of exceptions to copyright infringement. The appropriateness, for the Australian context, of initiatives in other countries would therefore need to be very carefully assessed. At this stage, it does not appear that any other jurisdiction has implemented any legislative measures in response to AI developments. We outline three major initiatives below (without commenting on their efficacy).⁶³

⁵⁸ Copyright Act sections 36(1A) and 101(1A).

⁵⁹ ACC affiliate, the Australian and New Zealand Screen Alliance (**ANZSA**) does not support the ACC's position on transparency.

⁶⁰ See paragraphs 22-36 of this response.

⁶¹ See ACC website: Fact Sheets <<https://www.copyright.org.au/search?page=1&imprint=info>>.

⁶² see <<https://www.copyright.org.au/browse/book/Australian-Copyright-Council-Artificial-Intelligence-&-Copyright-INFO142/>>.

⁶³ For further detail see Bell, G., Burgess, J., Thomas, J., and Sadiq, S. 'Rapid Response Information Report: Generative

50. The UK has announced a working group comprised of industry representatives to draft a code of practice regarding copyright and AI. The UK government's intention is that the final code will be adopted on a voluntary basis. However, if it is not adopted or an agreement is not reached, regulation through legislation may be explored.⁶⁴
51. Note that the UK has an exception for 'text and data analysis'⁶⁵, which allows for the use of copyright works for non-commercial purposes provided the user has 'lawful access to the work' e.g. through a licence or other permission. Proposals to expand this exception have been criticised following an enquiry and report by the House of Lords' Communications and Digital Committee.⁶⁶
52. In 2021, the EU announced a framework of legislation and policy regarding the development and use of AI. In June 2023, the EU announced more stringent regulation as part of the risk based approach in the proposed AI Act⁶⁷ resulting in higher penalties for corporate non-compliance and the establishment of a European Artificial Intelligence Board to oversee the implementation and enforcement of regulation. Note that this is in the context of the existence of EU text and data mining (TDM) exceptions,⁶⁸ that is exceptions which allow, in certain circumstances the use of 'any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations'.⁶⁹
53. The ACC opposes any attempt to introduce TDM exemptions to the Australian Copyright Act.⁷⁰
54. The US has announced a series of steps aimed at 'promot[ing] responsible innovation' in artificial intelligence.⁷¹

Target areas

6. Should different approaches apply to public and private sector use of AI technologies? If so, how should the approaches differ?

55. In general, there do not appear to be any compelling reasons for drawing a distinction between public and private sector use of copyright material in AI technologies. The fundamental

AI - language models (LLMs) and multimodal foundation models (MFMs)', Australian Council of Learned Academies, 24 March 2023, (**Rapid Response Information Report**) Appendix 3, pp 28-29.

<https://www.chiefscientist.gov.au/sites/default/files/2023-06/Rapid%20Response%20Information%20Report%20-%20Generative%20AI%20v1_1.pdf>.

⁶⁴ UK Intellectual Property Office 'Code of Practice on Copyright and Artificial Intelligence Terms of Reference', 29 June 2023 <<https://www.gov.uk/guidance/the-governments-code-of-practice-on-copyright-and-ai>>.

⁶⁵ UK Copyright, Designs and Patents Act 1998 section 29A.

⁶⁶ Communications and Digital Committee 'At risk: our creative future', 2nd Report of Session 2022-23 - published 17 January 2023 - HL Paper 125 paras [26]-[35]

<<https://publications.parliament.uk/pa/ld5803/ldselect/ldcomm/125/12502.htm>>.

⁶⁷ See Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts <https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF>

⁶⁸ Copyright Directive 2019/790/EU: Article 3 Text and data mining for the purposes of scientific research and Article 4 Exception or limitation for text and data mining. <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790>>

⁶⁹ Copyright Directive 2019/790/EU Article 2 Definitions <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790>>.

⁷⁰ See for example Josh Taylor, 'Google calls for relaxing of Australia's copyright laws so AI can mine websites for information | Artificial intelligence (AI)', The Guardian 19 April 2023.

<<https://www.theguardian.com/technology/2023/apr/19/google-calls-for-relaxing-of-australias-copyright-laws-so-ai-can-mine-websites-for-information>>.

⁷¹ See <<https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/fact-sheet-biden-harris-administration-announces-new-actions-to-promote-responsible-ai-innovation-that-protects-americans-rights-and-safety/>>.

principle of seeking permission from the copyright owner and negotiating any associated licensing fees should apply to all sectors.

56. AI developers, if using copyright material to train AI, must seek permission and pay appropriate remuneration (if required) to the copyright owners of the materials they use. If permission is not granted then the materials cannot be used.

Target areas

- 7. How can the Australian Government further support responsible AI practices in its own agencies?**

57. The Australia Government can support responsible AI practices by developing and implementing 'best practice' guides in relation to the use of such technology. Those best practice guides should be informed by a commitment to transparency and disclosure for similar reasons to those outlined in paragraphs 31-34 and 44, above. We note that Australia was one of the first nations to develop an ethics framework for AI, with the publication of its AI Ethics Principles.⁷²

Target areas

- 8. In what circumstances are generic solutions to the risks of AI most valuable? And in what circumstances are technology-specific solutions better? Please provide some examples.**

58. In terms of copyright, obtaining permission to use copyright material is generally the most significant way of mitigating risk. Monitoring compliance with the permission granted further reduces risk of infringing copyright.

Target areas

- 9. Given the importance of transparency across the AI lifecycle, please share your thoughts on:**
- a. where and when transparency will be most critical and valuable to mitigate potential AI risks and to improve public trust and confidence in AI?**
 - b. mandating transparency requirements across the private and public sectors, including how these requirements could be implemented.**

59. In the area of copyright, the use of AI to impersonate humans, for example – deepfakes – may infringe copyright in an artistic work, that is the 'input' to the AI tool (e.g. photograph/s to obtain the victim's likeness) and likely other copyright material (e.g. a video or photo) that the victim's likeness is superimposed onto/in, the resulting 'output'. There are of course other issues

⁷² Australia's AI Ethics Principles are available on the website of the Department of Industry, Science and Resources <<https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles>> .

raised in areas other than copyright, including privacy, identity theft and fraud.⁷³ As a result, transparency is most important at the 'input' stage for the reasons set out in paragraphs 46-48 above.

Target areas

10. Do you have suggestions for:

- a. Whether any high-risk AI applications or technologies should be banned completely?
- b. Criteria or requirements to identify AI applications or technologies that should be banned, and in which contexts?

60. From a creator's perspective, blanket bans on the use of AI are not desirable. There are legitimate uses of AI tools in the process of creating copyright works.⁷⁴

Conclusion

61. The ACC thanks the Department of Industry, Science and Resources for considering these comments. We look forward to the continuous process of working with the Government and other stakeholders. If the Department has any further queries or requires further information, please let us know.

Eileen Camilleri

Chief Executive Officer
Australian Copyright Council

11 August 2023

⁷³ See Rapid Response Information Report p 12.

⁷⁴ See for example discussion in [Fashion's new fakes: How AI will change what you wear \(smh.com.au\)](https://www.smh.com.au/fashion/fashion-s new-fakes-how-ai-will-change-what-you-wear-20230729-p5d98g), Janice Breen Burns, 29 July 2023 and [Paul McCartney says 'final Beatles record' out this year aided by AI - ABC News](https://www.abc.net.au/news/2023-07-29/paul-mccartney-says-final-beatles-record-out-this-year-aided-by-ai/10308444).

Appendix 1

Australian Copyright Council Affiliates

as at 11 August 2023

The Australian Copyright Council's views on issues of policy and law are independent, however we seek comment from the organisations affiliated to the ACC when developing policy positions and making submissions to government. As at the date of this response, the Australian Copyright Council affiliates are:

1. [Aboriginal Artists Agency Ltd](#)
2. [APRA|AMCOS](#)
3. [Ausdance National](#)
4. [Australia New Zealand Screen Association](#)
5. [Australasian Music Publishers Association Ltd](#)
6. [Australian Cinematographers Society](#)
7. [Australian Guild of Screen Composers](#)
8. [Australian Institute of Architects](#)
9. [Australian Publishers Association](#)
10. [Australian Recording Industry Association](#)
11. [Australian Screen Directors Authorship Collecting Society Limited](#)
12. [Australian Society of Authors](#)
13. [Australian Writers Guild Authorship Collecting Society \(AWGACS\)](#)
14. [Big Studio Movie Licence](#)
15. [Copyright Agency](#)
16. [Design Institute of Australia](#)
17. [Illustrators Australia](#)
18. [Image Makers Association Australia](#)
19. [Media Entertainment & Arts Alliance](#)
20. [Musicians Union of Australia](#)
21. [National Association for the Visual Arts](#)
22. [Phonographic Performance Company of Australia](#)
23. [Screen Producers Australia](#)
24. [Screenrights](#)

Appendix 2

ACC Guidelines

A core part of the Australian Copyright Council's (ACC) activities is our free written legal advice service. This unique service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.