

Submission
No 24

INQUIRY INTO ARTIFICIAL INTELLIGENCE (AI) IN NEW SOUTH WALES

Organisation: Australian Copyright Council

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Australian Copyright Council response to the Inquiry into Artificial Intelligence (AI) in New South Wales

20 October 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 and present, 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 to the [Portfolio Committee's \(Premier and Finance\) Inquiry into Artificial Intelligence \(AI\) in New South Wales](#) (the **Inquiry**).

About the Australian Copyright Council

2. The ACC is an independent, not-for-profit, non-government 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, expert 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 representing 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 Inquiry comes at a time of other investigations into artificial intelligence (AI) including:
- the [Department of Industry, Science and Resources' public consultation on mitigating risks posed by AI and supporting safe practices](#) (to which the ACC made a detailed submission – [ACC Submission on Supporting responsible AI](#))³,
 - 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)⁴, and
 - the Commonwealth Attorney General's [Ministerial Round Tables](#) in which AI is part of the discussions.⁵
7. This submission only addresses Item (i):

whether current laws regarding AI in New South Wales that regulate ... intellectual property ... are fit for purpose

to the extent that it relates to Commonwealth copyright law (copyright being a form of intellectual property).

What is copyright?⁶

8. Copyright refers to a set of exclusive rights that the copyright owner (usually the 'author' or 'maker'⁷) has over copyright materials.
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.
10. There are two broad categories of material which may be protected by copyright:
- 'original works' – which include literary works (e.g. books and other text-based material), artistic works (e.g. photographs, painting and illustrations), dramatic and musical works⁸, and
 - 'subject-matter other than works' - cinematograph films, sound recordings, broadcasts and published editions⁹.

² See Appendix 2.

³ See [Published Responses – Department of Industry, Science and Resources \(industry.gov.au\)](#) Response 482. (**ACC Submission on Supporting responsible AI**) <<https://consult.industry.gov.au/supporting-responsible-ai/submission/view/482>>.

⁴ See [Submissions – Parliament of Australia \(aph.gov.au\)](#) Submission 69.

⁵ AI was discussed on 28 August 2023. For the AI & Copyright Issues Summary Paper and high level summary of discussions see <[ag.gov.au/rights-and-protections/publications/high-level-summary-third-roundtable-copyright](https://www.ag.gov.au/rights-and-protections/publications/high-level-summary-third-roundtable-copyright)>.

⁶ For a more detailed discussion of the policy and history underpinning copyright in the context of AI see [ACC Submission on Supporting responsible AI](#) paras 6-18.

⁷ *Copyright Act 1968* (Cth) sections 35(2), 97-99. (**Copyright Act**)

⁸ Copyright Act, sections 10 'work', 32.

⁹ Copyright Act, Part IV.

11. The exclusive rights of the copyright owner¹⁰ and the duration of protection¹¹ vary depending on the type of copyright material. However, the rights to reproduce material and grant permission to others are common to all types of copyright material.¹²
12. Charging fees or receiving royalties in exchange for permission (or a 'licence') is the most common way that copyright owners derive income from their creative material. In this context, copyright is the framework which supports and incentivises the creation of new copyright materials.
13. There are circumstances where use of copyright material does not require permission and does not infringe copyright. These exceptions to copyright infringement may:
 - be purpose specific e.g. fair dealing¹³
 - specific to particular sector-users e.g. libraries or educational institutions¹⁴, or
 - apply to types of copyright material¹⁵ e.g. taking photographs of sculptures situated in public areas does not infringe copyright in the sculpture¹⁶.
14. If a user reproduces a 'substantial part' of copyright material (or exercises one of the other exclusive rights of the copyright owner) without permission and there is no exception to copyright infringement applies, the user is likely to have infringed copyright.¹⁷
15. There is no definition of 'substantial part' in the Copyright Act – it is both a qualitative and a quantitative test. The courts look at whether the part is an 'essential' or 'material' part of the work (that was reproduced or used).¹⁸
16. There are a range of remedies that a copyright owner may seek for infringement including damages and the destruction or delivery of any copies that the infringer has.¹⁹

AI and copyright

17. The ACC's [Submission on Supporting Responsible AI](#) identifies three main issues in relation to copyright and AI:
 - the development²⁰ and training of AI and the use third-party copyright material (the 'input')
 - the protection of content generated by generative AI (the 'output'), and
 - the output and copyright infringement.

¹⁰ Copyright Act, sections 31(1)(a) *cf* 31(1)(b), 85-88.

¹¹ Copyright Act, sections 33 *cf* 93, 95-96.

¹² Copyright Act, sections 13 (especially 13(2)), 31, 85-88.

¹³ Copyright Act, sections 40-43, 103A, 113E *cf* 104, 113F.

¹⁴ For instance, library and archive sectors: see Copyright Act, Part III Div 5.

¹⁵ For instance, see Copyright Act, Part III Div 7. Also see Divs 3, 4-4B, 8.

¹⁶ Copyright Act, section 65.

¹⁷ Copyright Act, sections 14, 36, 101.

¹⁸ *Data Access Corporation v Powerflex Services Pty Ltd* [1999] HCA 49 [83]-[84]; *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273 [47] (McHugh ACJ, Gummow and Hayne JJ).

¹⁹ Copyright Act, Part V, especially sections 115-116.

²⁰ In the United States of America, there has been an allegation of infringement of copyright in computer code in the development of AI: see filed complaint of *DOE 1 et al v GitHub Inc. et al* (N.D Cal, No. 3:23-cv-06823, 3 November 2022) githubcopilotlitigation.com/pdf/06823/1-0-github_complaint.pdf.

Computer programs are protected as 'literary works' under Australian law: see Copyright Act, section 10.

Training and developing AI – the ‘input’

18. The training and development of AI raises copyright issues if the processes use third-party copyright material i.e. copyright protected inputs, that the AI developer did not create.
19. Currently, this training may involve large-scale reproduction of copyright materials without the permission of, and without compensating the copyright owner(s).²¹ If no exception to copyright infringement applies, AI developers may be liable for copyright infringement by exercising the copyright owner’s exclusive right of reproduction.²²
20. In the United States of America (**US**), there have been several class actions against AI developers brought by the copyright owners of the copyright materials reproduced and used in AI training.²³
21. Some of these US cases allege that the AI developers source copyright materials from illegal online sources such as shadow libraries²⁴ (websites which primarily host and distribute copyright material without permission).²⁵
22. In Australia, it is a criminal offence to:
 - infringe copyright on a ‘commercial scale’²⁶ (which may apply where there has been a high volume of copyright material used in AI training), and
 - make and possess infringing copies of copyright material²⁷ (which may apply if copyright material is, for example, sourced from shadow libraries).
23. The next two issues mainly concern generative AI.

Copyright protection of ‘output’

24. It is a well-established principle that for copyright to subsist in material it must be created by a human author.²⁸ In contrast, material created through processes which involve little or no creative input by humans, lack human authorship and therefore do not have the benefit of copyright protection.²⁹
25. Developers of generative AI generally train their systems on a dataset. Users of generative AI then typically provide text prompts (or upload images).³⁰ In turn, the generative AI responds by generating content based on the text/image prompts.

²¹ See [ACC Submission on Supporting responsible AI](#), pp 5-7.

²² Copyright Act, sections 33(1), 36(1).

²³ [ACC Submission on Supporting responsible AI](#) identifies 7 pending cases: see pp 4-6. Since that submission, there have been others involving AI and authors. See filed complaint of *Authors Guild et al v OpenAI Inc* (SD NY No. 1:23-cv-8292, 19 September 2023) <authorsguild.org/app/uploads/2023/09/Authors-Guild-OpenAI-Class-Action-Complaint-Sep-2023.pdf> and *Mike Huckabee, Relevate Group, David Kinnaman, TSH Oxenreider, Lysa Terkeurst, and John Blasé v. Meta Platforms, INC., Bloomberg L.P., Bloomberg Finance, L.P., Microsoft Corporation, and The Eleutherai Institute*, SD NY No 1:2023cv09152, 17 October 2023 <https://www.courthousenews.com/wp-content/uploads/2023/10/AI-lawsuit-sdny.pdf>

²⁴ See filed complaint of *Kardrey et al v Meta Platforms Inc.* (ND Cal No. 3:23-cv-03417, 7 July 2023) paras 25-28. <courtlister.com/docket/67569326/1/kadrey-v-meta-platforms-inc/>.

²⁵ Gabriel Gardner et al. ‘Shadow Libraries and You: Sci-Hub Usage and the Future of ILL’ (Conference Paper, 2017, Association of College and Research Libraries, 22-25 March 2017) 1.

²⁶ Copyright Act, section 132AC especially 132AC(5).

²⁷ Copyright Act, sections 10 ‘infringing copy’, 132AD, 132AJ.

²⁸ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 [23]-[26], [96]-[97].

²⁹ *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 90 IPR 1 [88]-[90]. For a detailed discussion, see [ACC Submission on Supporting responsible AI](#), paras 39-40.

³⁰ See ChatGPT 3.5 user interface (text only) cf DALL-E interface (text and images) <<https://platform.openai.com/apps>>.

26. The question of whether the ‘output’ of an AI process is protected by copyright, is therefore dependent on the extent to which there is human involvement in the creative process.

Copyright infringement and AI ‘output’

27. If generative AI reproduces a ‘substantial part’ of existing copyright material in the output, depending on the nature of the (text or image) prompt, the user may be liable for copyright infringement³¹.
28. For the owner of the generative AI platform, there are risks of authorisation liability if the owner has the power to prevent the infringing act but fails to take reasonable preventative steps.³² Offences relating to distributing infringing copies³³ may also apply if the material is sourced from shadow libraries.
29. It is unlikely that the large scale ‘scraping’ of copyright material would fall under one of the exceptions to copyright infringement.³⁴

AI and copyright laws – fit for purpose?

30. The current copyright framework appropriately balances the rights of copyright owners and users who wish to use copyright material³⁵.
31. The use copyright material without permission and without fair remuneration to copyright owners, shifts the balance in favour of users at the expense of the copyright owners who already operate in an ‘already precarious creative [career]’.³⁶
32. Any initiatives by the New South Wales government to introduce copyright exceptions for AI development, must consider the constitutional implications of doing so.³⁷

Conclusion

33. The ACC thanks the Portfolio Committee for considering these comments. We look forward to the continuous process of working with the NSW Government and other stakeholders. If the Portfolio Committee has any further queries or requires further information, please let us know.

Eileen Camilleri

Chief Executive Officer
Australian Copyright Council

20 October 2023

³¹ Copyright Act, sections 31(1)(a)(i), 31(1)(b)(i), 36(1).

³² Copyright Act, section 36, especially 36(1A).

³³ Copyright Act, section 132AI.

³⁴ See discussion in [ACC Submission on Supporting responsible AI](#), paras 28-33.

³⁵ See [ACC Submission on Supporting responsible AI](#) paras 11-12 for a discussion of the public policy underpinning Australian copyright protection.

³⁶ Kelly Burke, ‘Biggest act of copyright theft in history’: thousands of Australian books allegedly used to train AI model’ *The Guardian* (online, 29 September 2023) quoting Olivia Lanchester, CEO, Australian Society of Authors, <[theguardian.com/australia-news/2023/sep/28/australian-books-training-ai-books3-stolen-pirated](https://www.theguardian.com/australia-news/2023/sep/28/australian-books-training-ai-books3-stolen-pirated)>.

³⁷ See *Commonwealth of Australia Constitution Act 1901* (Cth), section 109.



Appendix 1 Australian Copyright Council Affiliates

as at 20 October 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.