

Response to Productivity Commission interim report: Harnessing data and digital technology

September 2025

SUMMARY OF POSITION

It is not necessary to introduce a text and data mining (TDM) exception to facilitate AI development in Australia. Nor is it necessary for hosting data centres in Australia.

To the contrary, a TDM exception would be harmful to both Australia's creative industries, and to ongoing enhancements to AI technologies, services and products that are reliant on new, quality content.

A TDM exception is primarily being pushed by multinational companies and their representatives, as part of their global positioning, rather than what is best for Australia and Australians.

By contrast, Australian start-ups are committing to fair payment to creators and publishers for the use of their content for AI development.

There are no changes needed to other aspects of Australia's Copyright Act. It is sufficiently technology-neutral and flexible to enable the continued development of content licensing arrangements to support Australian AI development.

In addition, it is difficult to address unauthorised use of Australians' content in other countries with enforcement provisions in Australia's copyright legislation, as they apply to activities that take place in Australia. That issue needs to be addressed, but it requires a different mechanism.

CONTEXT FOR CONSIDERATION OF A TDM EXCEPTION

In its interim report, the PC acknowledges:

1. The introduction (or not) of a TDM exception is unlikely to affect whether AI models continue to be available and used in Australia.
2. It is unclear whether the introduction of a TDM exception would result in training of large AI models in Australia, that would not otherwise occur.

Another key consideration is the breadth, and potential further application in practice, of Australia's current statutory licensing schemes for government and education.

WHY A TDM EXCEPTION IS UNNECESSARY

Two Australian start-ups have recently announced that they will develop sovereign AI models with legally sourced content, and compensation to rightsholders. Neither says that it is impeded by the current copyright law.¹

Australian AI developers can use content legally under Australia's copyright system in a number of ways that include:

- content in which they or their client owns copyright
- content covered by an open licence that allows AI-related activity²

¹ Maincode (Matilda) and Sovereign Australia AI.

² This is not everything that is 'publicly available', for example on the internet. Some material available on the internet has terms of use that do not cover use for AI development: for example, the material may only be licensed for personal use.

- content that is licensed specifically for AI development by a rightsholder (such as a large publisher) or under a collective licence

Development in the education and government sectors may also be facilitated by the very broad statutory licence schemes for those sectors.

AI AND CONTENT INVESTMENT ARE COMPLEMENTARY, NOT A TRADE-OFF

Apart from its value in training of AI models, quality content is critical to the performance and outputs of AI tools in a number of other ways, such as retrieval augmented generation (RAG). These uses also provide opportunities for ongoing licensing revenue, with resultant ongoing investment in content as part of a ‘permanent loop’.

Quality content fuels AI development and enhancement; risk of running out of data for AI training



AI developers paying for content stimulates continuing creation of content for AI development

INTERNATIONALLY, THINGS ARE VERY UNSETTLED BUT LICENSING IS DEVELOPING

Contrary to claims by some that Australia is ‘out of step’ with international developments, the international situation is very unsettled. For example:

- **US:** There are now 50 court cases, most of which centre on the highly uncertain ‘fair use’ exception in US copyright law, and are likely to remain unresolved for many years. One thing is certain, though: the ‘fair use’ exception does not apply to use of pirated material. As has been widely reported, Anthropic has agreed to a proposed US\$1.5b settlement for the use of pirated books (that were registered with the US Copyright Office).
- **UK:** Consultations are ongoing, following the Government’s revision of its position from a ‘preferred option’ (TDM exception with opt out) to no preferred option. The Government has acknowledged the implications of a TDM exception for the creative industries, and questioned whether an opt out mechanism can be effective in practice. The multinational platforms do not have a consistent position.³
- **Hong Kong:** There are discussions about a potential TDM exception, but with a ‘licence override’.
- **Japan:** There is an exception for some TDM activity, but it is more limited than is often stated, and there is also licensing for AI activity.
- **Singapore:** There is a TDM exception, but a data centre is being built just over the border in Malaysia, which does not have a TDM exception.

‘OPT-OUT’ DOES NOT WORK IN PRACTICE

Some have proposed a TDM exception with an ‘opt out’ mechanism, but it is clear that opt-out is not working in practice, particularly for AI training. This is partly to do with process and scale, and that it is difficult for small and individual rightsholders to implement. In addition, there have been reports of AI developers deliberately bypassing robots.txt, and scraping data that publishers have clearly

³ Google has supported a TDM exception with opt out, like the European model. OpenAI, on the other hand, has support a TDM exception without opt out, on the basis that opt out does not work in practice.

labelled as blocked from scraping, and reports that developers are sourcing the content from elsewhere.

In its submission in April 2025 to the UK Government, OpenAI [opposed a TDM exception with opt-out](#):

In the EU, the lack of clear and scalable technical standards has created uncertainty about what opt-out methods are workable and valid, causing uncertainty for both AI companies and rightsholders.

EXAMPLES OF LICENSING FOR AI-RELATED ACTIVITIES

The Copyright Alliance lists a large number of AI-related licensing arrangements on its [AI Licensing for Creative Works webpage](#).

Other examples include:

- [AAP and Google](#) (announced in August 2025)
- [Man of Many and ProRata.ai](#)
- In June 2025, we extended our Annual Business Licence to allow staff of licensed businesses to use news media content in prompts for workplace AI tools, introducing efficiencies for activities that businesses regularly undertake, such as summarisation and analysis. The licence will be further extended to other content in late 2025.

Licensing developments in train

We are in discussions with representatives from the government and education sectors about how the statutory licence schemes can enable AI-related activities in those sectors.

We are also in discussions with members and potential licensees about various opportunities for AI-related licensing, in addition to the extension to the Annual Business Licence.

IMPLICATIONS FOR INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY (ICIP)

In its 2022 report on [Aboriginal and Torres Strait Islander visual arts and crafts](#), the PC recommended that the Australian Government introduce new legislation that formally recognises the interests of Aboriginal and Torres Strait Islander communities in their traditional cultural assets.

In its [response](#), the Government accepted this recommendation in principle, and referred to its commitment under its Cultural Policy, *Revive*, to introduce new standalone legislation to protect First Nations traditional knowledge and cultural expressions.

There are significant concerns about the implications of AI for First Nations people and ICIP, which are outlined in submissions to the PC (for example, from the Indigenous Art Code). Unfortunately, they are not referred to in the PC's interim report, but they must be addressed in the final report.

PC'S OBSERVATIONS ON FAIR USE AND FAIR DEALING

The interim report refers to recommendations made a decade ago for introduction of a 'fair use' exception into the Australian Copyright Act, similar to that in the US Copyright Act.

The recommendations have been carefully considered and rejected by both Coalition and Labor Governments. The considerations included that the 'fair use' provision in the US is notoriously uncertain. That is patently clear from the 50 court cases in the US on AI training, whose outcomes are uncertain and that will take years to resolve.

There is no evidence that Australia's copyright system is a barrier to innovation and investment. To the contrary, barriers have been identified as a range of other factors such as risk appetite and access to venture capital.

HOW COPYRIGHT LICENSING WORKS IN AUSTRALIA

Overview

Australia's copyright legislation sets up a framework for different forms of licensing, that include:

1. One rightsholder's content (which may be masses of content, e.g. for a large publisher, or specific content, such as a work by a particular writer)
 - a. licensed directly by the rightsholder; or
 - b. licensed by the rightsholder's agent (e.g. a literary agent)
2. Masses of content in which copyright is owned by a very large number of rightsholders:
 - a. licensed by a copyright collecting society, on behalf of its members; or
 - b. under a statutory licence scheme, managed by a copyright collecting society for both members and non-members.

Under (2)(a), a rightsholder can choose to participate (or not) in a collective licence offered by the collecting society, and can choose to license directly instead.

Under (2)(b), rightsholders cannot withhold their rights: statutory licences are a compulsory acquisition of rightsholders' rights to refuse a licence and to set their own terms, and they are entitled only to fair compensation for the acquisition of these rights. However, the scope of a statutory licence can exclude activities that are harmful to rightsholders (in ways that are not addressed by fair compensation).

Licensees can, and do, enter into direct licensing arrangements with rightsholders that cover activities that are also allowed under a statutory licence, and they can cover their activities with a combination of direct and collective licences.

Statutory licences for the government and education sectors

We are appointed by the Government to manage statutory licence schemes for the education and government sectors. These schemes are technology-neutral, and therefore allow activities related to AI in Australia. The breadth of the government statutory licence is particular to Australia. There are collective licence arrangements for education in other countries, but the Australian scheme is broader in its scope. The schemes allow the use of content from any source, from anywhere in the world, for any form of reproduction or communication.

Collective licences for the business sector

We also offer collective licence schemes for the business sector, as agent for our members:

- copying and communication by staff of businesses (Annual Business Licence)
- media monitoring (including webscraping)
- full-text databases

In each case, the licensees also have direct licensing arrangements with rightsholders.

The Annual Business Licence now covers staff use of news media content as part of prompts for AI tools, to improve the efficiency of using these tools and the quality of outputs. We will be extending this to other types of content in late 2025.

There are also opportunities for collective licensing of other AI-related activities, such as retrieval augmented generation (RAG) and fine-tuning of language models for specialised use.

Who we represent

We are a not-for-profit organisation with 40,000 members, who are primarily writers, artists and publishers. Our members include agents for other rightsholders, both Australian and overseas, so we represent a larger number of rightsholders indirectly. Our members include copyright collecting societies in other countries, with which we have reciprocal arrangements so that, for example, we can license US, UK and Canadian content in Australia.

Governance

We provide detailed annual reports to the Government, which are tabled in Parliament and [available from our website](#).

Aspects of licence schemes managed by collecting societies – such as licence fees – can be (and are) determined by the [Copyright Tribunal of Australia](#). An application can be made by a collecting society or by a licensee.

We and other Australian collecting societies are signatories to the Code of Conduct for Copyright Collecting Societies. Compliance with the Code is reviewed annually by the Annual Code Reviewer (a former judge of the Federal Court), whose reports are published on the [Code of Conduct website](#).