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IFRRO Submission

Australian Productivity Commission Inquiry into Harnessing Data and Digital Technology – Public Consultation on Interim Report

The International Federation of Reproduction Rights Organisations (IFRRO) appreciates the opportunity to submit comments on the Australian Productivity Commission's interim report on its Inquiry into Harnessing Data and Digital Technology.

IFRRO is the global industry body for collective management organisations in the text/image sector. We facilitate the collective management of reproduction and other rights in text and image works through the co-operation of our 160+ member organisations drawn from more than 90 countries around the world. Our members represent many millions of creators including authors, visual artists, and publishers of books, journals, newspapers, magazines and printed music[1]. Our longstanding member in Australia is Copyright Agency, which was established over 50 years ago and is appointed by the Australian government to manage the Statutory Licence Scheme for Education. Copyright Agency is also appointed by the Copyright Tribunal to manage the Statutory Licence Scheme for the Commonwealth, State and Territory Governments; additionally it is appointed by the Minister for the Arts to manage the Artists Resale Royalty scheme.

IFRRO supports the submission made by Copyright Agency. In addition, we hereby submit comments on selected sections of the Productivity Commission's Interim Report that are of particular relevance to the IFRRO membership.

1. Balanced copyright frameworks support innovation and investment

The Interim Report highlights copyright settings as an example of where governments can act to bring *'regulatory clarity and certainty'*, and the Productivity Commission has queried *'whether reforms are needed to better facilitate the use of copyrighted materials in the context of training AI models'*.

While IFRRO supports the view that AI development presents significant opportunities for innovation and growth, we believe that responsible AI development must coexist with robust copyright frameworks that underpin creative economies worldwide. As has been widely reported, much of the AI development to date has been founded on rampant copyright infringement, using the works of creators and rightsholders without consent, attribution, or remuneration[2]. Australia's creative industries contribute over $62 billion[3] to the Australian

[1] https://ifrro.org/

[2] https://www.theatlantic.com/technology/archive/2025/03/libgen-meta-openai/682093/. See also https://www.abc.net.au/news/2025-03-28/authors-angry-meta-trained-ai-using-pirated-books-in-libgen/105101436

[3] https://www.infrastructure.gov.au/research-data/bureau-communications-arts-and-regional-research/arts/cultural-and-creative-activity

economy – AI technology, particularly generative AI, has enormous potential to cannibalise the creative industries, firstly through the loss of revenues due to the unauthorised use of their works by Gen AI models without remuneration; and replacement of their traditional revenue streams due to the substitution effect of AI-generated outputs, competing against human-made works[4]. Licensing has long played a key role in balanced copyright frameworks, and licensing solutions are well-established across all creative sectors in the Australian market. IFRRO is opposed to the introduction of any additional exceptions, such as a TDM exception, as this would undermine the emerging market for AI licensing that is critical for the ongoing viability of Australia's creative industries.

2. The international AI landscape is not harmonised

The Interim Report notes that '*Australia's regulatory response to AI should be consistent with overseas peers'*. We would emphasise that there is currently no 'standard' approach across the globe, and the international legal and policy framework with regard to AI development and application is far from settled. As a global organisation with members across over 90 countries, IFRRO also regularly engages with other international organisations such as WIPO, CISAC, and IFPI – in our experience, there is considerable variance in the approaches taken by different regions and countries. While some jurisdictions such as the EU, Brazil, and South Korea have enacted AI-specific legislation, the approaches are not uniform. With ongoing consultations, other major economies such as Canada, the UK, India, and China are yet to enact specific legislation on AI governance.

Far from being consistent, the international landscape is widely varied and unsettled – this can be well observed in the following areas:

Fair Use does not give rise to a stable regulatory environment

The Interim report refers to the role of governments in promoting investment in digital technology, including AI, by providing a stable regulatory environment, and also references the Productivity Commissions previous recommendations to introduce a fair use exception in Australia.

In the **United States,** the fair use doctrine (17 U.S.C. §107) has become the central reference point in litigation concerning unlicensed AI training. While earlier digitisation cases such as *Google Books* and *Authors Guild v. HathiTrust* recognized fair use for large-scale text and data mining, they did not confront the unprecedented scale and market substitution risks posed by generative AI. The Supreme Court's ruling in *Warhol v. Goldsmith* (2023) confirmed that transformativeness is not the sole determinant under the first fair use factor, and that the existence of actual and potential licensing markets weighs heavily against a finding of fair use.

Recent district court decisions illustrate this point. In *Thomson Reuters v. Ross Intelligence* (D. Del. 2025), the training of a competing model on Westlaw headnotes was held not to qualify as fair use, with appeal pending. In *Kadrey v. Meta* (N.D. Cal. 2025), summary judgment in Meta's favour rested largely on the plaintiffs' procedural missteps, while the court cautioned that in "most cases" unlicensed training would likely be unlawful given the displacement effects on

[4] PMP Strategy and CISAC (2024), "Study on the economic impact of AI in music and audiovisual industries". Available at: https://www.cisac.org/services/reports-and-research/cisacpmp-strategy-ai-study.

human-authored markets. In *Bartz v. Anthropic*, (N.D. Cal. 2025), Judge Alsup denied summary judgment for Anthropic that pirated library copies could be treated as training copies, finding that every fair use factor in such a scenario would point against Anthropic (fair use was nevertheless acknowledged in the other situations at hand in the case). The recent announcement that Anthropic has agreed to pay $1.5 billion to settle copyright infringement charges[5] highlights the complexity and risk in relying on the fair use doctrine in the context of AI development.

The U.S. Copyright Office has reinforced this position in its *Copyright and Artificial Intelligence – Part 3: Generative AI Training* (2025), stressing that training should not be presumed transformative, that "training alone is rarely the ultimate purpose", and that market harm is the most significant factor in the analysis[6].

South Korea also relies on a fair use-style provision, Article 35-5 of its Copyright Act, which requires courts to consider factors such as purpose, commerciality, amount used, and market harm. In 2024, the Ministry of Culture and the Korea Copyright Commission cautioned that unlicensed scraping and dataset creation for AI training may infringe copyright, recommending that developers secure rightsholder authorisation to avoid disputes[7].

These experiences show that fair use and fair use–style doctrines are ill-suited to provide the legal certainty needed for AI and copyright. By leaving questions of legality to unpredictable, fact-specific litigation, they fail to establish the stable environment that governments, innovators, and rightsholders alike require. In Australia, the current copyright framework already provides this clarity, with licensing markets for AI and other uses actively developing and expanding. This approach ensures lawful access to works, protects creative markets, and promotes sustainable innovation without undermining incentives to create.

There is no clear nexus between TDM exceptions and AI investment

The international legal landscape on text and data mining (TDM) and AI training shows that exception-based solutions are neither harmonised nor reliable. A handful of jurisdictions have adopted TDM exceptions, but these provisions are recent, largely untested, and their application to the full scope of AI training remains deeply uncertain. This uncertainty, coupled with the consistent requirement of lawful access and the availability of licensing markets, demonstrates that exceptions cannot serve as a secure foundation for regulating AI training.

Japan was the first country to introduce a TDM exception, in 2011. Article 30-4 of the Copyright Act, revised in 2018, allows the unauthorised use of works for data analysis—defined as the extraction, comparison, classification, or statistical analysis of language, sounds, images, or other data—provided there is no intent to "enjoy" the expression and no unreasonable prejudice to rightsholders, with lawful access as a condition. The provision applies broadly without limits on beneficiaries, subject matter, or commerciality, and commentators have suggested

[5] https://storage.courtlistener.com/recap/gov.uscourts.cand.434709/gov.uscourts.cand.434709.362.3_2.pdf
[6] US Copyright Office, Copyright and Artificial Intelligence – Part 3: Generative AI Training (Pre-publication Version) (May 2025). See also: JC Ginsburg, 'Fair use in the US redux: Reformed or still deformed?' (March 2024 Online) Sing JLS 1
[7] Ministry of Culture, Sports and Tourism and Korea Copyright Commission, *A Guide on Generative AI and Copyright* (15 April 2024), pp. 16-17, emphasis added.

contractual reservations may be unenforceable[8]. Yet it remains bound by the three-step test, and the Japanese Copyright Office has clarified that reproducing databases for AI training where licences are available would fall outside the exception[9].

In 2021, **Singapore** reformed its copyright law to include a Computational Data Analysis exception (s.244) covering text TDM. The provision, which cannot be restricted by contract, allows copies of works and performances for computational data analysis or preparatory activities, without limiting beneficiaries or distinguishing between commercial and non-commercial uses. It is, however, subject to a lawful access requirement, and in 2024 the Ministry of Law and the Intellectual Property Office confirmed that this requirement is not met where access is obtained by circumventing technological protection measures[10].

In the **United Kingdom**, the only statutory TDM exception (Copyright, Designs and Patents Act 1988, s.29A) is restricted to non-commercial research and requires lawful access. Government proposals to expand this in 2023 were initially abandoned following industry opposition. When the issue was revisited in a 2024–25 consultation on copyright and AI, there was strong public outcry, notably through the multi-sector, nationwide 'Make it fAIr'[11] campaign; the UK government has undertaken to publish an economic analysis of proposed policy options and the consultation is yet to be resolved. As it currently stands in the UK, TDM is permissible only for non-commercial research, leaving commercial AI training clearly outside the scope of the exception.

Lastly, in the **European Union**, the 2019 Digital Single Market Directive introduced two new TDM exceptions. Article 3 permits TDM by research organisations and cultural heritage institutions for scientific research, subject to lawful access and not overridable by contract. Article 4 creates a broader exception, applicable to any beneficiary and purpose, but only where works are lawfully accessed and rightsholders have not exercised their right to "opt out" through an appropriate rights-reservation mechanism. Both provisions are recent, with courts disagreeing on what constitutes a valid reservation[12]. Moreover, a report from the US Copyright Office highlights that significant concerns have been raised about the effectiveness and

[8] T Ueno, 'The flexible copyright exception for 'non-enjoyment' purposes – Recent amendment in Japan and its implication' (2021) 70(2) GRUR int 145

[9] Japan Copyright Office (JCO) (Copyright Division, Agency for Cultural Affairs, Japan), *"General Understanding on AI and Copyright in Japan" -Overview- (published by the Legal Subcommittee under the Copyright Subdivision of the Cultural Council)* (May 2024)

[10] Ministry of Law and Intellectual Property Office of Singapore, *Summary of Key Changes to Prescribed Exceptions in part 6, Division 1 of the Copyright Regulations 2021* (19 December 2024 §10

[11] https://newsmediauk.org/make-it-fair/; See also https://www.theguardian.com/gnm-press-office/2025/feb/25/make-it-fair

[12] Judicial interpretation of the Article 4(3) DSMD requirement to reserve rights remains limited and inconsistent. Recent rulings illustrate this divergence: the Regional Court of Hamburg (*LAION*) accepted that a reservation expressed in natural language is sufficient, as web crawlers are capable of interpreting such language; the Amsterdam District Court (HowardsHome) held instead that only express, "machine-readable" reservations excluding all potential TDM bots could be effective, rejecting the plaintiffs' use of the Robots Exclusion Protocol (see A Cerri, "Dutch court holds that TDM opt-out must be done by "machine-readable" means", The IPKat, 2025); while the Municipal Court of Appeals of Hungary (Gamekapocs) recognised that the Robots Exclusion Protocol could in principle constitute a valid machine-readable objection under national law, even though the particular crawler at issue had not preserved the exclusion signal (see P Mezei, The Multi-layered Regulation of Rights Reservation (Opt-out) Under EU Copyright Law and the AI Act -For the Benefit of Whom? (31 March 2025)).

availability of opt-outs[13]. The EU AI Act has added copyright-facing obligations for general-purpose AI providers, but these do not resolve the fundamental uncertainty about whether Articles 3 and 4 can lawfully encompass unlicensed AI training[14].

It must be highlighted that all copyright exceptions, including those for **TDM, must be interpreted within the boundaries of the three-step test,** which is embedded in international treaties, regional instruments, and national laws. The test requires that exceptions apply only in certain special cases, that they do not conflict with the normal exploitation of the work, and that they do not unreasonably prejudice the legitimate interests of rightsholders. In practice, this means that exceptions must be narrowly defined, should not displace established or emerging licensing markets, and cannot be applied in ways that deprive rightsholders of significant commercial opportunities[15].

It should further be stressed that **TDM does not cover all acts necessary for AI training**. TDM is narrowly confined to acts of reproduction and/or extraction for the purpose of uncovering "new knowledge or insights," as defined in Article 2(2) of the DSM Directive. By contrast, the steps commonly associated with AI training involve additional restricted acts — including communication to the public and making available to the public — that may also trigger other exclusive rights. For this reason, even in jurisdictions with TDM exceptions, AI training cannot be regarded as fully exempted, and licences remain necessary[16]. Moreover, we are unaware of any evidence to indicate that the introduction of TDM exceptions in the above jurisdictions have led to increased investment from AI developers, and note that the Interim Report itself does not refer to economic data that would support the view that there is a clear nexus between TDM exceptions and AI investment.

Taken together, these examples confirm that TDM exceptions are limited, fragmented, and unstable. They remain largely untested in practice and cannot be relied upon to legitimise the full spectrum of unlicensed AI training. The common thread across all systems is the requirement of lawful access and the continuing expectation that licences are obtained where markets exist. For Australia, the lesson is clear: exception-based solutions are not the way forward. A licensing-first approach offers the only clear, sustainable, and internationally consistent path for regulating AI training.

Licensing solutions exist and are evolving quickly

The Interim Report acknowledges licensing is a key mechanism through permissions for the use of copyrighted material are granted[17] and indeed, there is a wide range of established, transparent, and reliable copyright licensing arrangements across all creative sectors, both internationally and in Australia.

[13] https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf

[14] Currently, a case is pending before the CJEU asking inter alia whether AI training engages the right of reproduction and, if so, whether the TDM exceptions apply (CJEU, *Like Company v Google*, C-250/25).

[15] E Rosati, No Step-Free Copyright Exceptions: The Role of the Three-step in Defining Permitted Uses of Protected Content (including TDM for AI-Training Purposes) EIPR 46(5) 2024

[16] See N Lucchi, *Generative AI & Copyright: Balancing Creative Rights, Legal Integrity, and Accountability in the AI Age* (2025) & E Rosati, 'Is text and data mining synonymous with AI training?' (2024) 19(12) JIPLP 851

[17] https://www.pc.gov.au/inquiries/current/data-digital/interim, p.24

Rather than relying on untested statutory exceptions, licensing markets are already providing workable, lawful, and scalable solutions for AI. In recent years, the number of agreements between AI companies and individual creative industry stakeholders has steadily increased, confirming the ongoing relevance of direct licensing. In parallel, recognising the growing demand for lawful and responsible access to repertoires, many collective management organisations (CMOs) have begun developing collective licensing options tailored specifically to AI use cases.

These collective solutions — pioneered by organizations such as the Copyright Agency in Australia, the Copyright Clearance Center (CCC) in the United States, the Copyright Licensing Agency (CLA) in the United Kingdom, VG Wort in Germany, and the Japan Academic Association for Copyright Clearance (JAC) in Japan — represent a significant shift in how licensed content can be leveraged in AI systems[18].

- In the United States, CCC has incorporated AI re-use rights into its Annual Copyright Licenses to cover the internal use of copyrighted content within AI systems[19]. CCC has also announced a forthcoming AI Systems Training License to permit AI developers to use lawfully acquired works for model training and the generation of externally accessible outputs[20].

- In Japan, JAC has expanded its Digital Copyright License to cover internal AI use cases, developed in partnership with RightsDirect Japan. This provides companies with lawful access to global and local repertoire for tasks such as summarization, extraction, and internal analysis[21].

- In the United Kingdom, CLA has launched a TDM License enabling organizations to copy, store, and analyze works for lawful data mining, with additional permissions now included in workplace licenses to reflect the rise of enterprise AI tools[22]. CLA has also announced that a license for generative AI training will be launched in late 2025[23].

[18] For more details, see: A. Huss-Ekerhult, & A Baris,. Pro-Copyright, Pro-AI: The Power of Collective Licensing. The Columbia Journal of Law & The Arts, (2025). 48(4).
[19] CCC Launches Collective AI License, COPYRIGHT CLEARANCE CTR. (July 25, 2024), https://www.copyright.com/blog/ccc-launches-collective-ai-license
[20] CCC Announces AI Systems Training License for the External Use of Copyrighted Works Coming Soon, COPYRIGHT CLEARANCE CTR. (Mar. 4, 2025), https://www.copyright.com/media-press-releases/ccc-announces-ai-systems-training-license-for-the-external-use-of-copyrighted-works-coming-soon/
[21] Japan Academic Association for Copyright Clearance and RightsDirect Japan Announce the Availability of AI Re-Use Rights for Digital Copyright License, BUS.WIRE (Apr. 9, 2025), https://www.businesswire.com/news/home/20250409032666/en/Japan-Academic-Association-for-Copyright-Clearance-and-RightsDirect-Japan-Announce-the-Availability-of-AI-Re-Use-Rights-for-Digital-Copyright-License
[22] For more information, see New Generative AI License Permissions by CLA, IFRRO (Mar. 4, 2025), https://ifrro.org/page/article-detail/new-generative-ai-licence-permissions-by-cla/?k=e20250304906015574 and CLA Board Approves the Inclusion of Workplace AI Permissions To Corporate and Public Sector Licences, COPYRIGHT LICENSING AGENCY (Dec. 6, 2024), https://cla.co.uk/cla-board-approves-the-inclusion-of-workplace-ai-permissions-to-corporate-and-public-sector-licences/
[23] https://cla.co.uk/development-of-cla-generative-ai-licence/

- In Germany, VG Wort has introduced an AI licensing framework allowing internal AI training and output generation within defined limits, particularly benefiting research-intensive sectors such as life sciences[24].

- In Australia, the Copyright Agency has extended its Annual Business License to permit staff at licensed entities to use news media content in AI prompts and share outputs internally, subject to safeguards against external use for AI training or commercial products[25].

Responsible-by-design AI models also show that lawful development is both feasible and effective. For example, Switzerland's Apertus model was released as a fully open and multilingual system, trained only on lawfully available data, filtered to respect machine-readable opt-outs and privacy rules, and accompanied by full documentation of datasets, weights, and training processes[26]. Likewise, Bria's award-winning visual AI platform is trained exclusively on licensed content from over 30 partners, with a patented attribution engine that links outputs back to the training data to ensure programmatic remuneration for rightsholders[27]. In the Netherlands, rightsholders have collaborated with the Netherlands Institute of Applied Scientific Research (TNO) to develop GPT-NL, the first large-scale Dutch AI language model trained entirely on legally obtained data[28]. These initiatives demonstrate that innovation can go hand-in-hand with lawful access, licensing, and transparency, providing practical examples for how AI can evolve responsibly.

Together, these examples illustrate that licensing is not only feasible but already operating across multiple jurisdictions and sectors. Far from lagging behind technological change, licensing frameworks are evolving rapidly to meet business demand and creators' expectations. For Australia, this demonstrates that a licensing-first approach is both practical and internationally aligned, offering the clarity and stability that exception-based models cannot deliver.

Summary of Position

IFRRO takes the pro-AI, pro-copyright view that it is possible to meet the twin goals of promoting innovation on the one hand and fostering creative ecosystems on the other. In order for this balance to be struck, legal frameworks must support fair licensing markets and must also avoid creating unfair arbitrage that can be exploited by powerful, commercial players.

Copyright laws as they currently exist in Australia are flexible, technology neutral, and fit for purpose to ensure that authors and rightsholders are fairly remunerated and are incentivized to create new works. The Australian licensing market is very well-developed, and the Australian

[24] VG WORT, Sondernewsletter zur KI-Lizenz Oktober 2024[Special Newsletter on the AI License October 2024], https://news.vgwort.de/online.php?u=6Tq9WGt2361
[25] Annual Business Licence Extension To Staff Use of AI Tools, COPYRIGHT AGENCY (Dec. 2024), https://www.copyright.com.au/membership/ai-and-copyright-in-australia/extension-of-annual-business-licence-to-staff-use-of-ai-tools/
[26] Apertus: a fully open, transparent, multilingual language model
[27] Bria Launches Open-Source Text-To-Image AI Model That Matches Industry-Leading Performance At One-Third The Size
[28] https://www.tno.nl/en/newsroom/2025/07/large-dataset-news-organizations-dutch/

public has benefited from a long history of well regulated, transparent, and effective collective licensing through its CMOs. AI development is a new technological frontier that could potentially bring enormous benefits – however, the introduction of fair use or TDM exceptions runs a substantial risk of delivering those benefits to a very narrow pool. Rather, what is needed is the robust application and effective enforcement of existing laws to deliver fair, responsible, and balanced benefits across society as a whole.

We thank you for taking IFRRO's comments into consideration in this important consultation process. We will be pleased to provide additional comments, information and explanation, as required.