CAG submission to the ACCC's Digital Platform Services Inquiry – Final Report

This submission is made by the Schools and TAFE Copyright Advisory Groups (**CAG**)[1] to the Australian Competition and Consumer Commission (**ACCC**) in response to the Digital Platform Services Inquiry Final Report Issues Paper (**Issues Paper**).

We welcome the opportunity to comment on the Issues Paper and thank the Commission for its consideration of our submission.

CAG wishes to draw the Commission's attention to an emerging competition issue concerning the inclusion of restrictive contractual terms in agreements governing the use of generative artificial intelligence (**AI**) systems, which are likely to have competition and copyright implications for end users including Australian businesses, consumers and the education sector.

CAG is concerned that these restrictive contractual terms may:

- limit the capacity of Australian educational bodies to develop bespoke AI-based educational solutions for the benefit of Australian students
- improperly override important public interest exceptions in the Copyright Act, including for science, research and education.

In this submission, CAG addresses Topic 3: identifying potential or emerging issues, particularly potential competition issues in generative AI (Issues Paper 1.3.3). CAG does not have a meaningful contribution to make in respect of Topics 1 and 2 addressed in the Issues Paper and does not respond to these topics in this submission.

1. Potential and emerging competition and consumer issues which relate to digital platform services (Issues Paper Topic 3)

CAG has become aware of an emerging competition issue in the context of AI concerning contractual terms imposed by AI developers such as Meta, Google, Adobe, OpenAI and Microsoft when making their AI systems and models available for use by third-parties (including Australian students, teachers, resource developers, schools, TAFEs, Departments of Education and administering bodies). These companies are now key proponents of AI systems in the global marketplace and are recognising significant revenues following the rapid growth of AI technologies.[2]

[1] Information about CAG is set out in the **Attachment** to this submission.
[2] For example, in 2023, Microsoft reported "a record [US]$211 billion in revenue– see Microsoft's 2023 Annual Report. Meta reported revenue of US$134 billion– see Meta's Fourth Quarter and Full

AI developers are already imposing contractual restrictions on the use of outputs of their AI systems, either in terms of use or in direct agreements with licensees. Examples of some terms that restrict the use of outputs of AI systems that CAG is aware of are summarised in the following table:

Company, product and link to licence terms	Restriction on use of outputs
Meta's Llama 2 model	*"You will not use the Llama Materials or any output or results of the Llama Materials to improve any other large language model (excluding Llama 2 or derivative works thereof)"*
Google's Gemini API services	"*You may not use the Services to develop models that compete with the Services (e.g., Gemini API or Google AI Studio)*"
Adobe's AI products such as Firefly	"*No AI/ML training: When using our generative AI features, you agree you will use them only for your creative and productivity work product and not to train artificial intelligence or machine learning models. This means you must not and must not allow third parties to, use any content, data, output or other information received or derived from any generative AI features, including any Firefly outputs, to directly or indirectly create, train, test or otherwise improve any machine learning algorithms or artificial intelligence systems, including any architectures, models or weights.*"
OpenAI's AI products including ChatGPT, DALL-E and other AI systems	"***What you cannot do**. You may not use our Services for any illegal, harmful, or abusive activity. For example, you may not… Use Output to develop models that compete with OpenAI.*" (emphasis in original)
Microsoft's AI services such as CoPilot	"*Limits on use of data from the AI Services. You may not use the AI services, or data from the AI services, to create, train, or improve (directly or indirectly) any other AI service.*"

Generally, these terms also include statements to the effect that users will own outputs of the relevant AI services.[3] Broad disclaimers, limitations of liability and indemnities which heavily favour the company who controls the AI model are also included. CAG is aware of equivalent terms being incorporated in direct licence agreements between technology companies and licensees of their AI products.

Why is this a concern?

The two main issues caused by these types of contractual provisions are that they:

- impose **competitive restraints** that could prevent Australian organisations, including schools, TAFEs, education departments and administering bodies from

Year 2023 Results. Alphabet (Google) reported revenue of US$307 billion – see Alphabet's Fourth Quarter and Fiscal Year 2023 Results.

[3] See clause 5(b) of Meta's Llama licence terms, 'Use of Generated Content' in Google's Gemini API terms, clause 1 of Adobe's Generative AI Product Specific Terms, 'Ownership of content' in OpenAI's Terms of Use.

teaching students about AI and developing improved or competing AI systems

- may **operate to the exclusion of public interest copyright protections** that would otherwise apply to uses of outputs of AI systems.

Where copyright does protect outputs of AI systems, CAG is very concerned that these contractual restrictions will improperly prevent copyright owners controlling their own works and exercising their exclusive rights under the Copyright Act. These provisions may be used to override any applicable public interest exceptions under the Copyright Act, including for science, research and education. This is particularly concerning where there is an obvious imbalance of power between the parties.[4]

As the Commission noted in its first submission to the ALRC's Copyright and the Digital Economy inquiry in November 2012, "*the ACCC is concerned only where contracts go beyond the scope of IP rights and are used to achieve anti-competitive purposes*".[5] Restrictive terms in licence agreements for AI systems such as those set out above are obvious examples of provisions that should be a focus for the Commission.

If new public interest exceptions were introduced into the Copyright Act to permit the use of copyright works to train AI models, these contractual restrictions may effectively override those exceptions and frustrate their intent and purpose: to support and encourage the development of Australian knowledge and capability in the AI space. Technology companies could be improperly empowered to prevent the use of copyright works generated using their AI systems to train AI models despite an exception otherwise permitting that use.

It is also relevant that AI developers currently dominating the global AI market are typically large companies based in the United States who have developed or trained their AI models under United States copyright law, in reliance on a broad fair use exception that may permit them to use copyright works to train AI models.

If the United States' fair use provision permits the use of copyright works to train AI models by companies based in the United States, and outputs of those AI models generated by users in Australia are subject to contractual restrictions preventing their use to train competing AI models, the Australian education sector could effectively be at a double disadvantage: they may not be able to rely on any existing exception in the Copyright Act to use third-party copyright works to train and develop their own models, and they may also be prevented by contract from using outputs that they generate to develop their own AI models.

2. AI and copyright: issues for Australian education

Although copyright law is not a focus of the Issues Paper, we see copyright reform as

[4] See ACCC second submission to the ALRC Copyright and the Digital Economy Inquiry, 31 July 2013 at 6.7, p 15.
[5] ACCC first submission to the ALRC Copyright and the Digital Economy Inquiry, November 2012, p 50.

a key step to facilitate the adoption of AI across the education sector. The rapid growth of digital technologies, including AI, has increased the urgency of reform and review of public interest exceptions and statutory licensing regimes under the Copyright Act.

AI presents a number of opportunities for education, and it is already being adopted and used by schools and TAFEs in a range of applications, including:

- jurisdictions developing (or considering developing) their own in-house AI systems
- jurisdictions licensing commercial AI systems from third parties (for example, OpenAI or Microsoft), and potentially customising commercial AI systems to suit their needs
- providing education for students about AI, including demonstrating how to use AI in classroom exercises and conducting in-depth instruction on how AI tools work (which may include hands-on training about developing AI tools)[6]
- using AI to develop new learning resources or adapt existing resources to suit particular teaching purposes, such as making content accessible for students with a disability.

Australia is already out of step with other jurisdictions with legal frameworks that underpin the use of technologies including AI in education. These uses are likely to be covered by 'fair use' exceptions in some countries or by a specific text and data mining exception in others,[7] but neither provision exists in Australia.

The result is that Australia has a much less flexible copyright framework than other jurisdictions, which in CAG's view imposes significant impediments to the development, operation and use of AI systems in Australia for purposes that are squarely in the public interest, including education, science and research. The importance of preserving public interest exceptions for education is recognised not just in Australia, but in global copyright treaties.[8]

CAG is advocating for the introduction of new public interest exceptions for education that are fit-for-purpose for digital technologies including AI. Introducing appropriate exceptions would bring Australia's copyright system into line with those in other jurisdictions with more flexible, robust and future-proof copyright regimes and consequentially strong technology and innovation sectors, such as the US, Singapore

[6] For example, the NSW Institute of Applied Technology has recently introduced an 'Introduction to Artificial Intelligence' course, and a microskill course 'Responsible Artificial Intelligence'.
[7] The USA and Israel have fair use exceptions, while the UK, Singapore, Japan and the EU each have text and data mining exceptions.
[8] For example, the preamble to the World Intellectual Property Organisation's 1996 Copyright Treaty, to which Australia is a party, recognises "…*the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention*". The Australian Law Reform Commission has noted that "*education has been called 'one of the clearest examples of a strong public interest in limiting copyright protection'*": see ALRC Copyright and the Digital Economy Discussion Paper (DP 79) at paragraph [13.6].

and Israel.

While there are open questions about whether the outputs of AI systems can be protected by copyright, it seems clear that at least some outputs will be protected by copyright if there is a sufficient degree of human authorship involved in their creation. It is therefore critical that any public interest exceptions that allow uses of copyright materials for educational purposes will apply to AI outputs, and that dominant corporations are prevented from imposing contractual provisions that undermine those exceptions.

CAG agrees with the position previously adopted by the ACCC concerning the need for more flexible copyright exceptions and restrictions on parties contracting out of public policy exceptions in the Copyright Act. In the context of AI, it is crucial to guard against the benefit of any new exceptions being undermined by restrictive terms and conditions. CAG wishes to take this opportunity to call on the ACCC to highlight the need for flexible copyright exceptions as pro-competitive reform in the age of generative AI.

3. Recommendation

CAG strongly recommends that the Commission intervenes in respect of restrictive contractual provisions in AI licence agreements such as the ones set out above, in order to protect both the copyright interests of users of AI systems in outputs that they generate and the utility of current or future public interest exceptions under the Copyright Act.

CAG also respectfully asks the Commission to emphasise the need for flexible copyright exceptions as an important feature of pro-competitive law reform in the age of generative AI in its final report.

CAG appreciates the opportunity to provide this submission. If we can provide any further information, please contact Ms Delia Browne, the National Copyright Director for the Copyright Advisory Group at delia.browne@det.nsw.edu.au or (02) 7814 1214. We welcome the opportunity to discuss these issues further.

ATTACHMENT

About CAG and summary of the NCU's work on AI

A. About CAG

The Schools Copyright Advisory Group reports to Australian Education Senior Officials Committee (**AESOC**) and is comprised of senior representatives from the Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and Independent Schools Australia. The TAFE Copyright Advisory Group is the peak body responsible for copyright policy and administration for the Australian TAFE sector (other than in Victoria).

Together, CAG represents the almost 9,630 primary and secondary schools in Australia and their over 4 million students and over 270,000 TAFE students.

CAG is responsible for the management of copyright issues across schools and TAFEs, including the provision of copyright advice and management of obligations under educational statutory licences (schemes established in the *Copyright Act 1968* (Cth) (**Copyright Act**) to facilitate educational uses of some types of content, and appropriate remuneration for copyright owners).

CAG is assisted by the National Copyright Unit (**NCU**). Further information about the NCU's work in respect of AI in education is set out in the **Attachment** to this submission.

B. Summary of the NCU's work on AI

The education sector invests a significant amount of resources into promoting respect for copyright amongst students and teachers, as well as the broader community. Some of the copyright education initiatives undertaken by the NCU in respect of AI include:

- providing Using Generative AI Platforms in Schools and Using Generative AI Platforms in TAFEs information sheets on its Smartcopying website, to provide copyright guidance to schools and TAFEs when utilising generative AI platforms.

- delivering AI Copyright Hour webinars each term as part of its National Copyright Webinar Series, which are designed for educators and address practical copyright issues that arise when using AI in education.

- providing specialist guidance to schools and TAFEs in response to queries concerning copyright and the use of AI platforms in education. We anticipate these queries will increase as jurisdictions continue to engage with AI systems.

The NCU also represents CAG in a range of law reform initiatives in respect of AI including:

- as a member of the Copyright and Artificial Intelligence Reference Group established by the Attorney-General, the Hon Mark Dreyfus KC MP (**CAIRG**). The National Copyright Director, Ms Delia Browne, also represents CAG on the CAIRG steering committee.

- the House Standing Committee on Employment, Education and Training inquiry into the use of generative AI in the Australian education system commenced on referral from Commonwealth Minister for Education, the Hon Jason Clare MP (the **Clare Inquiry**). Copies of CAG's submissions to the Clare Inquiry are available here and here. Ms Browne also gave evidence at a public hearing of the Clare Inquiry on 29 January 2024 (see transcript here).

- the Department of Industry, Science and Resources consultation on Safe and responsible AI in Australia (the **DISR Consultation**). CAG's submission to the DISR Consultation is available here.

- the Senate Select Committee on Adopting Artificial Intelligence concerning "*the opportunities and impacts for Australia arising out of the uptake of AI technologies in Australia*" (see terms of reference here). CAG's submission to the Committee is available here.

- as a member of the National AI in Schools Taskforce which was responsible for developing the Australian Framework for Generative AI in Schools, and as a member of the Taskforce Working Group. As part of that work, the NCU is developing and delivering a research project into uses of AI in education, which will be critical to informing future law reform in that space.