

# AI Guides

## AI & Copyright Infringement

AI systems can create music, paintings, poetry and books. Such systems have created works based on Dutch masters' paintings, Kayne West rap lyrics and research texts about lithium-ion batteries

**Training AI systems using third party works may infringe the third party's copyright. Both the inputs and outputs of an AI system have the potential to infringe.**

At present in Australia, there have been no cases dealing with copyright infringement in respect of an AI system.

### Training an AI system

In order to train an AI system to create a work, the AI system must be provided with data (eg. 6,000 Kayne West lyrics). The data is fed into the system and the system creates rules based on the input data to produce its own work (eg. a new rap song).

Sometimes the input data will not be capable of being a copyright work. For example, copyright will not subsist in raw data or values, such as weather or tidal data (provided these have not been compiled in a database).

Infringement issues won't arise where the input data is old, because the copyright in the input data will have expired. For example, the "Next Rembrandt" project fed numerous

Rembrandt paintings into an AI system and the AI system produced a new work based on those paintings. There was no copyright infringement as Rembrandt died in 1669. (Copyright expires 70 years after the author's death.)

Things get more complicated where the copyright has not expired in the input data.

Varying approaches have emerged around the world. A recent EU directive introduced a narrow exception to copyright infringement, known as the "text and data mining (TDM) exception" for researchers only. The directive also introduced a broader TDM exemption for any entity, but on an "opt-out" basis (ie, copyright holders can opt-out of making their works available for TDM). In the United States, the fair use defence to copyright infringement could permit the use of copyright works to train AI systems but this has not been

decided. There is no specific exception for TDM in the Australian Copyright Act.

### The AI system's outputs

Will the AI system's outputs infringe the copyright in an earlier work?

If the AI system has created the work independently of the earlier work, there will be no copyright infringement even if the AI system has generated a work that resembles the earlier work. (This will be a harder argument to make where the claimant's work was part of the input data.)

There may be an infringement if the AI system produces a work that is a direct or indirect copy of an earlier copyright work (or if the works are substantially similar). For example, if an AI system is trained exclusively on Lady Gaga songs and creates a song that sounds just like an existing Lady Gaga song.

It has been suggested that the use of an AI system to create new works based on existing works is a form of “appropriation”, a well-known concept in the art world. This practice involves the intentional borrowing, copying and altering of existing works. Jeff Koons and Damien Hirst are current examples of artists who practice appropriation. The validity of appropriation art under copyright law has been the subject of a

number of cases (think Andy Warhol and his soup cans). These (predominantly US) cases suggest that appropriation may be protected by fair use if the resulting work is sufficiently transformative from the original work.

complicated. An AI system cannot incur liability as it is not a legal person, as discussed in our [AI & liability] guide.

### **Liability for copyright infringement**

Determining liability for infringement of copyright by an AI system will be

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#### **The AI Guides are authored by:**



**John Swinson**  
**Partner, Brisbane**  
T +61 7 3244 8050  
john.swinson@au.kwm.com



**Rebecca Slater**  
**Senior Associate, Brisbane**  
T +61 7 3244 8147  
rebecca.slater@au.kwm.com



**Kendra Fouracre**  
**Senior Associate, Melbourne**  
T +61 3 9643 4105  
kendra.fouracre@au.kwm.com

[www.kwm.com](http://www.kwm.com)

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