SCREEN PRODUCERS AUSTRALIA

Suite 2, Level 1, 36 Fitzroy Street
Surry Hills NSW 2010
+61 2 9360 8988
screenproducers.org.au

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Screen Producers Australia's submission to the Senate Select Committee on Adopting Artificial Intelligence (AI)

About Screen Producers Australia

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across production all forms and formats of screen content.

As the peak industry and trade body, we consult with a membership of around 800 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and members. Our members employ hundreds of producers, thousands of related industry practitioners and drive over $2 billion worth of annual production activity from the independent sector.

SPA's members are drawn from all elements of the Australian production ecosystem, including emerging and established producers, production businesses, services, and facilities businesses. Our members vary in size from large internationally owned entities, to partnerships, to sole traders and other corporate entities, and are found in every region, state, and territory of Australia.

On behalf of these businesses, we are focused on delivering a healthy commercial environment for the entire screen industry through ongoing engagement with elements of the labour force, including directors, writers, actors, and crew, as well as with broadcasters, distributors, and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

SPA is a member of the Copyright & Artificial Intelligence Reference Group which has been established by the Attorney General's Office to facilitate engagement, information sharing and open discussion between government and non-government sectors on current and emerging copyright-AI issues to better prepare Australia for copyright challenges emerging from AI.

Screen Producers Australia welcomes the opportunity to make a submission to the Senate Select Committee on Adopting Artificial Intelligence (AI).

For further information about this submission please contact Andy Barclay, Manager, Business & Legal Affairs ([redacted])

EXECUTIVE SUMMARY

- SPA welcomes the opportunity to respond to the Senate Select Committee on Adopting Artificial Intelligence (AI). This submission will focus on sections a – c of the Terms of Reference.
- Future generative AI systems present amazing opportunities to improve efficiency across many aspects of screen production and varying levels of scale, however a number of emerging issues require attention and resolution.
- The use of AI in the screen industry is not new. However, the adoption of Generative AI into the screen industry, particularly those widely available to the public, which includes Large Language Models (LLM's), Text-to-Image, and Text-to-Video systems, has been mixed. Production companies are using this technology in certain areas of their businesses but abstaining from using it in others due to copyright concerns.
- The risks associated to the screen industry by the adoption of AI include:
    - Copyright infringement - Infringing third-party copyright by using outputs generated by AI systems that infringe copyright when training the system, and ii) in the output generated by the system.
    - Copyright protection – the status of a production companies copyright when generating outputs through a Generative AI system. What level of human authorship is required to ensure protection of their works.
    - Disruption of established distribution models – smaller Australian production companies (of which the industry is largely made up) may not have the resources to access these systems in a way that mitigates the copyright concerns. Only those companies, such as broadcasters and larger internationally based or supported businesses, who have considerable resources would. This imbalance could lead to smaller Australian production companies, particularly animation companies, losing work to broadcasters or larger internationally supported companies who take production in-house.
    - Loss of entry pathways into the industry – the adoption of AI may reduce the entry pathways for certain roles in the screen industry, as opportunities for entry level work are replaced by AI systems.
- Numerous territories have introduced or are in the process of introducing legislation to regulate AI in their jurisdictions. SPA encourages the government to continue to develop a risk-based scheme, similar to that in the European Union, that is tailored to Australia's needs and which fits with existing legislation that applies to AI.

RECOMENDATIONS

Australian regulation of AI systems should adopt the following approach:
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- identify and regulate specific risks rather than specific technology;
- place reasonable and proportionate obligations on developers and companies that supply AI systems rather than the end-user or audience;

- apply to both developers and deployers in Australia and other jurisdiction if they are developing or deploying AI for use by Australians; and
- dovetail with and promotes compliance with existing legislation, such as the Copyright Act.

BACKGROUND

AI systems have been utilised by screen production companies, distributors, and exhibitors for many years. Examples of the use of this technology include:

- during development, testing the potential success of a production if released in the market;
- improving efficiencies, particularly shorting the length of time that it takes s to complete complex VFX shots during post-production; and
- using AI algorithms to recommend titles to viewers.

The emergence of Generative AI systems presents a great opportunity to the screen industry. These technologies have the potential to improve productivity by significantly increasing efficiency when physically producing a film or TV program. The benefits extend beyond this to the business operations of the production companies. Allowing the company to spend more time concentrating on the ideation and development of the stories they want to tell.

SPA is not oblivious to the potential harm that these AI systems present. Broad and aggressive adoption of these systems could have a large and negative impact on the labour market within the screen industry, removing employment opportunities for creatives and crew members, while also removing career entry pathways into the industry.

It is SPA's view that these AI systems should be adopted by production companies in a way that empowers the creatives and crew they employ, rather than replace them. All participants in the screen industry ecosystem should be able to benefit from the opportunities these AI systems present.

A - Recent Trends and Opportunities in the Development and Adoption of AI Technologies in Australia and Overseas, in Particular Regarding Generative AI

Recent Trends

During consultation for this submission, SPA surveyed its members regarding their adoption of Generative AI within their businesses. The results of that survey show that Australian production companies are adopting AI in their businesses. 75% of survey respondents have implemented AI in one or more areas of their business.

Production companies, from SMEs to large employers, are utilising AI to improve efficiencies, with more than 50% of respondents adopting it in their business operations (scheduling, project management, etc.) and when developing ideas for upcoming productions. These systems are enabling producers to complete tasks, such as research, ideation for marketing plans, and management of business affairs,

in a timelier and more cost-efficient manner. This time saving allows them to focus on other areas of their business, often the creative areas, that they are so passionate about.

SPA is anecdotally aware that Generative AI is also being used by crew members, generally on smaller productions, during pre-production for a range of tasks, including creating mood boards for the 'look' of the production, expediting the creation of rendered costume drawings, and contracting below-the-line cast, crew, and service providers.

Our survey identified another benefit of adopting these systems, particularly for micro and small production companies, is it enables them to increase the quality and quantity of their output. For example, a single person production company with very limited resources is able to enhance the quality of their pitching materials - those documents and materials used by a producer to pitch a production to commissioners and distributors - by including high quality, story specific images created from a Text-to-Image AI system.

It is important to note, that in this scenario the use of a text-to-Image AI system is not replacing a job that would have otherwise gone to a graphic designer or artist; the production company does not have the resources to engage a professional with those skills. The producer would have completed the task, albeit it in a more inferior and less timely manner.

Despite the potential gains to be had, the adoption of publicly available Generative AI systems into production is not universal. Some survey respondents indicated their opposition to its adoption based on philosophical grounds, while others indicated hesitation due to copyright concerns.

Opportunities

Future generative AI systems present amazing opportunities to improve efficiency across many aspects of production and varying levels of scale.

SPA is aware of a soon-to-be-announced business affairs platform, developed by an Australian company, that will automate the contracting of below-the-line cast, crew, and service providers, along with completion documents for delivery to the commissioner/distributor. Such a service will dramatically reduce the workload of over worked line producers during pre-production and streamline completion and delivery to distributors and broadcasters.

Similarly, an AI system that is developed to optimise production schedules by analysing scripts, locations, cast and crew requirements, talent availability, weather, and numerous other factors, would deliver huge efficiency gains to the screen industry. Not only that, but such a system could ensure cast and crew fatigue levels are appropriately maintained. Such an outcome would be a positive step towards

addressing crew retention rates and shortages, which have been impacting Australian production companies' ability to engage crew for their productions.[1]

B - Risks and harms arising from the adoption of AI technologies

There are three risks, specific to the screen industry, that SPA will focus on in this submission:

1. how copyright concerns are affecting the adoption of AI;
2. the potential disruption to established distribution models; and
3. loss of entry pathways into the screen industry.

1. Copyright Concerns

Producers and production companies are like any other creative when it comes to the use of AI and copyright. They are creators of copyright material and are concerned with the protection and enforcement of their copyright.

Additionally, as many copyright protected works are used in the making of a film or TV show, production companies are also vigilant not to infringe on third-party copyright. Contracting practices have been established to achieve this.

The adoption of publicly available Generative AI systems (Chat-GPT, Dall-e, Runway, etc.) into physical production has been slowed by concerns over how and when the use of these systems might infringe another's copyrights.

Producers, and downstream licensees who distribute and exhibit films and TV shows, are concerned that:

- the copyright of the production company may be infringed by developers when included in data sets to train the AI systems without authorisation;
- outputs created using generative AI will not be accorded copyright protection under the current legislation; and
- outputs, generated by the AI system may infringe third-party copyright;

These three issues generate enough concern that broadcasters and distributors will not agree to independent production companies using this technology when physically producing a film or show, as the production company cannot provide the required warranties.

Infringement of Production Company Copyright

Developers of the widely available Generative AI systems have not been transparent on whether the data sets used to train the AI were free of copyright protected material.[2] These systems require huge data sets of billions of pieces of data, and it is

[1] *Crew Shortages a global problem*, David Knox, May 16, 2023, TV Tonight < Crew shortages a global problem | TV Tonight>

[2] *The scary truth about AI copyright is nobody knows what will happen next,* James Vincent, Nov 2022, the Verge.

more than likely they were trained on copyright protected material, collected by scraping the internet.

Given this is a new emerging field, legal jurisprudence has not created precedents on which businesses can rely. The industry is eagerly awaiting the outcomes of numerous lawsuits, including those brought by authors and creatives against AI developers, particularly Open AI (Chat-GPT).[3] However, it may be years before a final determination is made and a precedent set.

Any regulation of AI systems implemented in Australia, must have a requirement on developers to disclose the training data sets and ensure compliance with existing copyright legislation. Such an obligation would dissuade developers from using copyright protected materials to train their systems. It would also provide copyright owners with the ability to effectively monitor and enforce their copyright when infringed in this manner.

Copyright protection of an output

Copyright can only subsist in material that is created by a human author.[4] Therefore, materials created through a process with little or no human input, lack authorship and are not protected by Australian copyright law.[5] However, *The Copyright Act 1968* (Cth) is silent on the level of human authorship required to give rise to copyright protection.

The process of creating outputs on a generative AI system, particularly Text-to-image and Text-to-Video, involves the end-user providing a written prompt which the AI interprets before generating an output. Human input in these prompts can vary from a few words to a series of complex prompts each iterating on the prompt before.

As this technology is so new and the Copyright Act is silent on the level of human authorship, the industry must look to the courts for an interpretation. Unfortunately, to date Australian courts have not yet provided an answer to this issue, and copyright issue therefore remains a concern for all end-users of these systems.

Outputs that infringe copyright

It is however still possible under Australian copyright law that an output generated by an AI system may infringe copyright. There have been numerous articles and research papers written displaying examples of potential copyright infringement.[6] Under the Copyright Act, copyright is infringed if a 'substantial part' of existing copyright material is reproduced, without exemption or authorisation.[7]

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[3] *Franzen, Grisham and Other Prominent Authors Sue OPenAI*, Alexandra Alter and Elizabeth A. Harris, Ney York Times, 20 September 2023 < Franzen, Grisham and Other Prominent Authors Sue OpenAI - The New York Times (nytimes.com)>

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

[5] *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 90 IPR 1.

[6] *Generative AI has a Visual Plagiarism Problem*, Gary Marcus and Reid Southen, IEEE Spectrum, 06 January 2024 < Generative AI Has a Visual Plagiarism Problem - IEEE Spectrum>

[7] *Copyright Act 1968* (Cth), sections 14, 36, 101.

As is noted in the cited article, some generative AI systems enable users to reproduce a substantial part of well-known copyright material, sometimes without explicitly referencing the copyright work in the prompt. This is particularly concerning for end-users of these systems as they may be liable for copyright infringement.[8]

There are risks of authorisation liability, under the Copyright Act, that would apply to the owner of a generative AI system if they have not prevented the infringing act when they were able to take reasonable steps to do so.[9]

The requirement to disclose training data (above), would again provide protection to end-users where developers had used copyright material in the training data sets. Without the copyright material in the data set, the end-user would be unable to generate an infringing output.

2. Disruption on Established Distribution Models

One possible outcome that results from these copyright concerns not being resolved, or likely taking many years to resolve, is the disruption of established distribution models in the screen industry. This would arise as only those companies with significant resources (i.e. TV broadcasters, International Video On Demand (VOD) services, and the major international production studios) are able to create AI systems that are free from the copyright concerns discussed above.

Traditionally, global screen production, with the exception of the US industry, has been undertaken by small, often micro, enterprises often labelled 'independent 'production companies as they are independent of the distribution and commissioning of the content. Companies generate IP, which is then commissioned (sent into production) by a broadcaster, commissioner, distributor, sales agent, or in Australia's case a mix of all. These parties provide the finance required to physically produce the production. In return, they receive a license to distribute the film or TV show on their channel or service for a set period of time.

One way of avoiding the copyright concerns above, is to create closed sand box versions of an AI system that are trained on non-copyright material. A production company could then add its existing IP to the training data set and be sure that any generated output will not infringe another's copyright. Unfortunately, this option is unavailable to most smaller Australian production companies as the resources required, both financial and content hours, are too significant.[10]

This closed sand box option is only available to well-resourced and funded organisations such as broadcasters, VOD services, and large internationally based or supported businesses. If they choose to implement such a strategy, these companies, often the commissioners in the screen industry market, would no longer need smaller Australian production companies to undertake physical production. They could rely on their in-house AI systems to create new films and programs.

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[8] Copyright Act, sections 31(1)(a)(i), 31(1)(b)(i), 36(1), 86.

[9] Copyright Act, section 36.

[10] *How Much Does it Cost to Develop a generative AI App in 2024?* Carmatec, 15 January 2024 < 1 new message (carmatec.com)>

These in-house AI apps may not excel at creating all types of content. However, one vulnerable form of production in this future scenario is animated production. Being a largely digital process, generative AI will be able to replace the need for teams of animators. If this comes to pass, Australian animation companies will be severely impacted.

3. Loss of Career Entry Pathways

The final concern, raised several times by respondents of SPA's survey, is the potential loss of career entry pathways into the screen industry. This concern is also shared among the industry, including the Australian Writers Guild; AI systems may potentially remove many entry level jobs in production.

This potential loss of entry positions is likely to affect many departments within a screen production, including writers, production secretaries and assistants, editors and editor assistants, and animators and VFX artists.

There is no simple solution for this, as technology that creates added efficiency will always have an impact on a small number of roles. At this stage SPA merely notes it as a live concern within our industry.

SPA takes confidence that its members have indicated an awareness of this issue and the problem it may cause in the future and is certain that they will adopt AI in a manner that empowers the creatives and crew they work with, rather than replace them.

C - Emerging International Approaches to Mitigating AI Risks

SPA commends the Australian Government on the risk-based approach announced in the Interim Response earlier this year.[11] Australia needs clear regulations to provide certainty and stability to businesses seeking to develop, supply, and use these technologies.

The European Union Artificial Intelligence Act (**EU AI Act**),[12] provides a well-considered approach to regulating AI. The EU AI Act is a risk-based approach which covers all actors involved in the development, importation, distribution, and manufacturing of AI systems by providing clear definitions of each.[13]

It applies to companies located in the EU as well as companies located outside the EU's jurisdiction. [14]

Being a risk-based scheme, the regulations prohibit certain AI systems – those presenting unacceptable risk, and highly regulating others – high-risk systems that

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[11] *Safe and responsible AI in Australia consultation*, Department of Industry, Science and Resources, 2024 < Safe and responsible AI in Australia consultation: Australian Government's interim response (storage.googleapis.com)>

[12] *Artificial Intelligence Act, Corrigendum, 19 April 2024,* European Union (**EU AI Act**).

[13] EU AI Act, Article 3.

[14] EU AI Act, Article 2(1).

centre around critical infrastructure and health applications.[15] With high-risk systems required to undergo a conformity assessment.

Transparency obligations apply to certain AI systems, such as chatbots and deepfakes, to ensure that end-users are aware that they are interacting with AI technology.[16]

For AI systems creating synthetic audio, video and images, there is a requirement that all outputs must be marked in a way that it is detectable that the output was generated by an AI system.[17] SPA notes that this requirement remains a live issue within the global screen industry and SPA is continuing to consult with its membership regarding mechanism that provide transparency to the end-user/audience without disrupting the viewing experience.

Finally, the EU AI Act has provisions requiring certain AI systems must comply with the Copyright Directive (EU) 2019/790.[18]

Future regulation designed to apply to AI systems in Australia needs to:

- identify and regulate specific risks rather than specific technology;
- place reasonable and proportionate obligations on developers and companies that supply AI systems rather than the end-user or audience;
- apply to both developers and deployers in Australia and other jurisdiction if they are developing or deploying AI for use by Australians; and
- dovetail with and promotes compliance with existing legislation, such as the Copyright Act.

[15] EU AI Act, Chapters II, III.
[16] EU AI Act, Article 50.
[17] EU AI Act, Article 50(2).
[18] EU AI Act, Article 53(1)(c).