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Testimony and Submissions

Right to Research in International Copyright  
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### Dick Kawooya and Sean Flynn make submit comments to Nigerian copyright reform consultation

Sean Flynn

Dick Kawooya

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## Consultation on Copyright Amendment Bill

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We are grateful for the opportunity to participate in Nigeria's consultation on its copyright bill. Below, we present some of our research findings from PIJIP's [Project on the Right to Research in International Copyright](#) relating to the importance of flexibility in copyright law to permit text and data mining ("TDM"). TDM is a critical element of numerous machine learning and "artificial intelligence" intelligence applications.

Our research supports the adoption of the proposed open fair dealing exception for "research." Our research also supports consideration of an additional specific exception for uses of works in TDM to supplement the proposed general fair dealing exception.

### A. General Exceptions for Research

Empirical research shows that more publication of citable research takes place in countries with more "open" research exceptions -- that is, research exceptions that are open to all uses (e.g. reproduction and communication), to all works, and to all users.<sup>1</sup>

The Executive Bill proposes the adoption of an open general exception for research and other purposes in Section 20. Our research supports the adoption of this exception.

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<sup>1</sup> Sean Flynn & Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance* (Joint PIJIP/TLS Research Paper Series no. 2018-01) (finding that more open limitations and exceptions are correlated with higher research and development investments and scholarship output); Mike Palmedo, *The Impact of Copyright Exceptions for Researchers on Scholarly Output*, *Efil Journal of Economic Research*, 2(6), 114-39 (2019) (finding that "scientists residing in countries that implement more robust research exceptions publish more papers and books in subsequent years").

A general exception is one which covers multiple purposes of use in a single exception.<sup>2</sup> Our research finds that most Commonwealth countries provide a general exception for “fair dealing” with a work for multiple purposes including for “research.” The category of “research” can be interpreted broadly to include uses for consumer research.<sup>3</sup>

Section 20 is an example of what we call an open general exception. By virtue of the addition of the words “such as” before the list of permitted purpose, the Nigerian proposal would operate like the U.S. fair use right and permit application to other purposes. Several countries from both the civil and common law tradition provide open general exceptions.<sup>4</sup> The U.S. fair use right is one example.<sup>5</sup>

The benefit of an open general exception is that it can accommodate unforeseen uses that are nonetheless fair to the right holder. Countries such as the United States were the first to adopt text and data mining methodologies even before the practice was clearly authorized, thus gaining significant advantages in the fields of research and technology.

Interestingly, empirical research has shown that transitioning from a fair dealing right with a closed list of purposes to a fair use right with an open list of purposes can benefit research, even where the prior fair dealing right explicitly protected research uses.<sup>6</sup> This may indicate that open exceptions give researchers a positive signal that can be beneficial to their work, even where the fair dealing exception already covers research purposes.

## **B. Specific Exception for Text and Data Mining**

Empirical research evidence shows that text and data mining research is promoted through exceptions that more specifically authorize text and data mining research.<sup>7</sup> Other countries with

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<sup>2</sup> See Research Paper Series no. 2018-01) (distinguishing between “general,” “open” and “flexible” exceptions such that Canada’s fair dealing exception would be labeled both general and flexible, but not fully open).

<sup>3</sup> *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] S.C.C. 36 (Can.) (holding that short previews of music provided by music stores are considered fair dealing for the purpose of research by a consumer to enable them to determine what they want to purchase).

<sup>4</sup> See, e.g., Copyright Act B.E. 2537 [Copyright Act] Sec. 32 (Thai.) (“An act against a copyright work under this Act of another person which does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright shall not be deemed an infringement of copyright. Subject to the provision in the first paragraph, the following acts in relation to a copyright work shall not be deemed an infringement of copyright: (1) research or study of the work which is not for profit.”).

<sup>5</sup> United States, U.S. Copyright Act of 1976, 17 U.S.C. § 107.

<sup>6</sup> Handke et al., *supra* note 2 (finding a statistically significant increase in TDM research in countries shifting from a fair dealing to fair use general exception).

<sup>7</sup> See Christian Handke et al., *Is Europe Falling Behind in Data Mining? Copyright’s Impact on Data Mining in Academic Research*, in *New Avenues for Electronic Publishing in the Age of Infinite Collections and Citizen Science: FfScale, Openness and Trust* 120–130 (Brigit Schmidt & Milena Dobrova eds., 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2608513](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2608513) (measuring the degree to which the law certainly, probably, or probably not requires consent for TDM research and finding “that countries in which data mining for academic research requires the express consent of rights holders, data mining makes up a significantly smaller share of total research output.”).

general research exceptions have added specific exceptions for text and data mining as well.<sup>8</sup> we encourage Nigeria to consider such a specific TDM exception in its law, and present Singapore’s recent copyright amendment as an excellent model.

Many scholars argue that text and data mining should not be considered within copyright’s exclusive protection because copyright was never intended to require authorization for reading and analysis.<sup>9</sup> Nonetheless, copyright questions can be raised with respect to the technical reproductions required to create a “corpus” of works to be mined for many projects.<sup>10</sup>

Our research indicates that the most useful text and data mining exception is:

- Open to all TDM “uses,” including specifically to communications or distributions needed to promote research collaboration and validation;
- Open to all users, both individuals and institutions, commercial and non-commercial;
- Open to the use of all works, including, for example, audio visual works.

Legislators have defined the purpose of the use protected in TDM exceptions through terms such as “text and data mining”,<sup>11</sup> “computational” use,<sup>12</sup> or “data analysis”.<sup>13</sup>

Singapore has just adopted a very useful and highly specific exception for “computational data analysis” that provides a clear model Nigeria could follow. Singapore’s exception extends to reproductions and communications to the public that are necessary for the purposes of: (i) verifying the results of the computational data analysis or (ii) collaborative research and study. The exception encompasses both commercial and non-commercial uses. Article 60 specifically provides that computational data analysis under the exception does not constitute a protected

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<sup>8</sup> See, e.g., United Kingdom, Copyright, Designs and Patents Act 1988, c.48, article 29A (UK), <https://wipolex.wipo.int/en/text/580475>; Act No. 48 (amended 2018) [Copyright Act], arts. 30-4 and 47-7 (Japan); European Parliament and Council Directive 2019/790, arts. 3-4, 2019 O.J. (L130) 113-114.

<sup>9</sup> Rossana Ducato & Alain Strowel, *Ensuring Text and Data Mining: Remaining Issues With the EU Copyright Exceptions and Possible Ways Out* (CRIDES Working Paper Series no. 1/2021) in 43 EIPR 2021/5, 322 (forthcoming 2021), <https://ssrn.com/abstract=3829858>.

<sup>10</sup> See Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 J. Copyright Soc’y of the U.S.A. 291 (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3331606](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331606); Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining is Lawful*, 53 U.C. Davis L. Rev. 893 (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3531231](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3531231); Thomas Margoni, *Text and Data Mining in Intellectual Property Law: Towards an Autonomous classification of Computational Legal Methods* (CREATE working paper 01/2020) in Irene Calboli & Maria Lillà Montagnani, *Handbook on Intellectual Property Research* (OUP, forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3602699](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602699); Josef Drexler et al., *Technical Aspects of Artificial Intelligence: An Understanding from an Intellectual Property Law Perspective* (Max Planck Institute for Innovation & Competition Research Paper No. 19-13, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3465577](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465577).

<sup>11</sup> *Urheberrechtsgesetz [UrhG]* [Act on Copyright and Related Rights], Sep. 9, 1965, Federal Law Gazette at 1273, as amended by Act of Sep. 1, 2017, art. 60d (Ger.); European Parliament and Council Directive 2019/790, arts. 3-4, 2019 O.J. (L130) 113-114.

<sup>12</sup> See United Kingdom, Copyright, Designs and Patents Act 1988, c.48, article 29A (UK) (referring to “computational analysis”); Copyright Act 2021 Bill No. 17/2021, art. 244 (Singapore) (providing exception for “computational data analysis”).

<sup>13</sup> Act No. 48 (amended 2018) [Copyright Act], art.30-4 (Japan).

publication. And as the EU Copyright in the Digital Single Market Directive, Singapore provides that computational data analysis “may not be excluded or restricted” by contract.<sup>14</sup>

We would be happy to discuss our research in more detail. you may contact us at [sflynn@wcl.american.edu](mailto:sflynn@wcl.american.edu). Again, we are grateful for the opportunity to participate in this consultation.

Respectfully,

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<sup>14</sup> Art. 187 (“Any contract term is void to the extent that it purports, directly or indirectly, to exclude or restrict any permitted use under any provision in ... Division 8 (computational data analysis)”). See European Parliament and Council Directive 2019/790, art.7(1), 2019 O.J. (L130) 114 (providing with respect to the text and data mining right in Article 3: “Any contractual provision contrary to the exceptions provided [for TDM and other uses] shall be unenforceable”).