3-21-2024

Building a Text and Data Mining Limitation: The Brazilian Case

Luca Schirru
American University Washington College of Law, luca.schirru@ibdautoral.org.br

Allan Rocha de Souza
Universidade Federal Rural do Rio de Janeiro, allan@rochadesouza.com

Claudia Chamas
Oswaldo Cruz Foundation

Recommended Citation

BUILDING A TEXT AND DATA MINING LIMITATION: THE BRAZILIAN CASE

Luca Schirru[*][♣]*; Allan Rocha de Souza*[**]*; Claudia Chamas*[***]

ABSTRACT

In recent years, there has been a growing body of legal regulation of TDM. Since 2018, Japan, the European Union, Singapore and others have promoted changes to their copyright law and included specific limitations and exceptions for TDM. These changes have been slow in the Global South and the developing world, even though they are urgently needed there. This report aims to present the Brazilian copyright legal framework and the policy documents related to Intellectual Property, Artificial Intelligence and innovation influencing political and public debate. This set of policies and legislative texts provides the grounds for the discussion on the need for a TDM Limitation in Brazil, a debate which has been intensified within the scope of the work carried out by a special commission that was convened by the Brazilian Senate to work on a substitute draft for the AI Bill. Brazil's TDM provision is focused on uses carried out by public-interest-oriented organizations. It found its place within the Bill on AI as a distinct topic and is currently formally part of Bill 2338/2023, which is being discussed in the Senate. While there is a reasonable possibility that the TDM provision will be voted on and approved in the Senate, recent developments on Generative AI may bring even more complexity to the debate on the interplay between AI and copyright.

Keywords: Copyright; Text and Data Mining; Limitations and Exceptions; Artificial Intelligence; Intellectual Property; Innovation.

---

[*] Brazilian Copyright Institute (IBDAutoral); Centre for IT & IP Law - Katholieke Universiteit Leuven (KUL).

[♣] Corresponding author: luca.schirru@ibdautoral.org.br

[**] Federal University of Rio de Janeiro (UFRJ); Brazilian Copyright Institute (IBDAutoral).

[***] Oswaldo Cruz Foundation (FIOCRUZ); National Institute of Science and Technology for Innovation on Diseases of Neglected Populations (INCT-IDPN).

I.   INTRODUCTION: BRAZILIAN COPYRIGHT FRAMEWORK AND THE EXISTING LIMITATIONS

Brazil is a party to some of the main International Treaties on Intellectual Property (IP). These include, but are not limited to, the TRIPS Agreement, the Berne Convention, the Rome Convention, and the Marrakesh Treaty. Brazil has not adhered to the WIPO Copyright nor to the WIPO Phonogram and Performance Treaties. Internally, on copyright, the main legal instruments are the Federal Constitution and the Brazilian Copyright Law (Law n. 9.610/98),[1] which is complemented by the software protection legislation,[2] and more general statutes such as the Civil Code.[3]

Intellectual Property Rights find their foundational underpinning within the Brazilian Constitution, and, as provided for all other property regimes, should be exercised in a manner coherent with its social function.[4] The Brazilian Constitution is clear that everyone has the fundamental right to property[5] and also that every property should comply with its social function.[6]

---

[1] Law on Copyright and Neighboring Rights, 1998 (Law No. 9.610 of February 19, 1998, as amended by Law No. 12.853 of August 14, 2013) (Braz.), https://www.planalto.gov.br/ccivil_03/leis/l9610.htm. Some other important laws in the Brazilian legal framework and which may relate to copyright and its scope are the following: Law No. 12.965 of April 23, 2014 ("Establishment of Principles, Guarantees, Rights and Obligations for the Use of the Internet in Brazil"); Law No. 6.533 of May 24, 1978 ("Provides for the regulation of the professions of Artists and technicians in Entertainment […] and other measures."); Law No. 6.615, of December 16, 1978 ("Provides for the regulation of the radio broadcaster profession and other measures").

[2] Law on the Protection of Intellectual Property of Software, its Commercialization in the Country, and Other Provisions (Law no. 9.609 of February 19, 1998) (Braz.), https://www.planalto.gov.br/ccivil_03/leis/l9609.htm.

[3] Civil Code (Law no. 10.406, of January 10, 2002) (Braz.)

[4] Constitution of the Federative Republic of Brazil. Translated and revised by Istvan Vajda, Patrícia de Queiroz Carvalho Zimbres. Vanira Tavares de Souza, Constitutional text of october 5, 1988, with the alterations introduced by Revision Constitutional Amendments no. 1/94 through 6/94, by Constitutional Amendments no. 1/92 through 72/2013 and by Legislative Decree no. 186, 2008 ("Constitution of the Federative Republic of Brazil"), https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11 ("Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004)… XXVII – the exclusive right of use, publication or reproduction of works rests upon their authors and is transmissible to their heirs for the time the law shall establish; XXVIII – under the terms of the law, the following are ensured: a) protection of individual participation in collective works and of reproduction of the human image and voice, sports activities included; b) the right to authors, interpreters, and respective unions and associations to monitor the economic exploitation of the works which they create or in which they participate; XXIX – the law shall ensure the authors of industrial inventions of a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, names of companies and other distinctive signs, viewing the social interest and the technological and economic development of the country")

[5] Ibid, art. 5.

[6] Ibid, art. 5, XXII, XXIII ("Article 5. …XXII – the right of property is guaranteed; XXIII – property shall observe its social function").

It becomes crystal clear when one reads art. 5, XXIX that the granting of rights on industrial creations are subject to the social interest and is expressly linked to the advancement of the country's technological and economic development.[7] Limitations and Exceptions (L&Es) should be seen, therefore, as an expression of the exercise of the social function of IPRs.[8]

The existing legislative provisions governing limitations for copyright in Brazil require improvement. Both the Brazilian Copyright Law[9] and the Brazilian Software Law (Law n. 9.609/98)[10], outline L&E in the form of predefined lists of permissible uses that, when exercised, do not constitute copyright infringement. While there is no specific provision explicitly addressing research uses, the Brazilian Copyright Law encompasses a range of limitations that include, but are not limited to, activities such as parody[11], quotation[12], and adaptations of works to facilitate access by visually impaired individuals[13], among others[14]. In contrast, the Brazilian Software Law provides Limitations for (i) single copies for backup purposes,[15] (ii) quotation for teaching purposes,[16] (iii) similarities based on "functional characteristics of its application, compliance with normative and technical precepts, or alternative limitation on its expressions;",[17] and (iv) the integration of the

---

[7] Constitution of the Federative Republic of Brazil, art. 5, XXIX.

[8] Allan Rocha de Souza, A Função Social Dos Direitos Autorais: Uma Interpretação Civil-Constitucional dos limites da proteção jurídica. Brasil: 1988-2005. Campos dos Goytacazes: Ed. Faculdade de Direito de Campos, 2006. 339p. (Coleção José do Patrocínio; v.4) at 282 ("A efetivação da função social tem como objetivo principal a limitação da utilização social dos bens intelectuais pelo titular, em razão de diversos interesses da coletividade.".)

[9] Law on Copyright and Neighboring Rights, 1998 (Law No. 9.610 of February 19, 1998, as amended by Law No. 12.853 of August 14, 2013) (Braz.), https://wipolex.wipo.int/en/text/505104

[10] Brazilian Software Law (Law no. 9.609 of February 19, 1998) (Braz.), https://wipolex.wipo.int/en/legislation/details/513

[11] Brazilian Copyright Law ("Art. 47. Paraphrases and parodies that are not true reproductions of the original work are not free nor imply disrepute.")

[12] Brazilian Copyright Law ("Art. 46, ... III - citation in books, newspapers, magazines or any other means of communication, of passages of any work, for purposes of study, criticism or controversy, to the extent justified for the purpose to be achieved, indicating the name of the author and the origin of the work;")

[13] Brazilian Copyright Law ("art. 46, I – reproduction: … d) of literary, artistic or scientific works, for the exclusive use of the visually impaired, where the non-commercial reproduction is made by the Braille system or other procedure on any medium for those recipients;")

[14] Brazilian Copyright Law, arts. 46, 47 and 48.

[15] Software Law: ("6. The following shall not constitute offense to the rights of the software program title-holder: I. the reproduction, in one single copy, of a legitimately purchased copy, provided the copy is intended as a backup copy or electronic storage, in which case the copy shall be used as a backup copy")

[16] Software Law: ("6... II. partial quotes of the program, for teaching purposes, provided the program and the title-holder of the respective rights are duly identified;")

[17] Brazilian Software Law: ("6... III. the similarity of the program with another, preexisting, program, when this occurs by virtues of the functional characteristics of its application, compliance with normative and technical precepts, or alternative limitation on its expressions;")

software program with another program or operational system, subject to certain conditions.[18]

Despite the option for listing the L&Es in the copyright legal framework, the Superior Court of Justice has established its interpretation as extensive and not limited to the situations set forth in that list which, as it now stands, must be considered to be a flexible set.[19] On this matter, the Superior Court decided in 2011 that

> The effective scope of protection of copyright (art. 5, XXVII, of the Federal Constitution) arises only after considering the restrictions and limitations opposed to it, being considered as such those resulting from the exemplary list extracted from articles 46, 47 and 48 of Law 9.610/98, which must be interpreted and applied in accordance with fundamental rights.[20]

This understanding was amplified by interpretative Statement 115 set forth by the Federal Justice Council: "The limitations of copyright established in articles 46, 47 and 48 of the Copyright Law must be interpreted extensively, in accordance with the fundamental rights and the social function of the property established in article 5, XXIII, of CF/88".[21]

Despite the flexible character of L&Es in Brazil, none directly addresses uses for research or text and data mining (TDM). However, some recent discussions on the legislative and executive branches have begun to confront the issue, particularly in relation to innovation and the training of Artificial Intelligence (AI) systems.

II.   IP, INNOVATION AND AI NATIONAL STRATEGIES

In Brazil, the actions and objectives for technological development, particularly at the crossroads of data-intensive technologies and Intellectual Property (IP), can be found in different policy documents. These are usually

---

[18] Brazilian Software Law: ("6... IV. the integration of a program, maintaining its essential characteristics, with an application or operational system, technically indispensable for user needs, provided it be for the exclusive use of the person who effected it.")

[19] Allan Rocha de Souza,'Copyright, Human Rights, and the Social Function of Property in Brazil', in Jonathan Griffiths, and Tuomas Mylly (eds), Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights (Oxford, 2021; online edn, Oxford Academic, 23 Dec. 2021), https://doi.org/10.1093/oso/9780198863168.003.0013

[20] S.T.J. Recurso Especial No. 964.404 ES (2007/0144450-5). Relator: Ministro Paulo de Tarso Sanseverino, 15.03.2011, Diario da Justica Eletronico [D.J.e.], 23.05.2011 (Braz.) ("III - O âmbito efetivo de proteção do direito à propriedade autoral (art. 5º, XXVII, da CF) surge somente após a consideração das restrições e limitações a ele opostas, devendo ser consideradas, como tais, as resultantes do rol exemplificativo extraído dos enunciados dos artigos 46, 47 e 48 da Lei 9.610/98, interpretadas e aplicadas de acordo com os direitos fundamentais").

[21] Conselho da Justiça Federal, III Jornada De Direito Comercial, Enunciado 115. ("As limitações de direitos autorais estabelecidas nos arts. 46, 47 e 48 da Lei de Direitos Autorais devem ser interpretadas extensivamente, em conformidade com os direitos fundamentais e a função social da propriedade estabelecida no art. 5º, XXIII, da CF/88."), https://www.cjf.jus.br/enunciados/enunciado/1310.

referred to as "strategies", of which three are of relevance for us here: the Brazilian Artificial Intelligence Strategy (EBIA),[22] the National Strategy for Intellectual Property (ENPI)[23] and the National Strategy for Innovation (ENI).[24]

Supported by WIPO, the Brazilian Federal Government undertook a comprehensive assessment of the National System of Intellectual Property (SNPI). The findings of this evaluation revealed a critical issue, namely that the SNPI is not entirely fitted to promote[25] development and foster creation and innovation,[26] having as one of the problems the "imbalances in the uses of the IP system related to underuse and overuse of IP rights".[27] To address these pressing concerns, the ENPI proposes guidelines, goals, objectives and actions divided into strategic thematic axes.[28]

Even though there is no direct recommendation to include TDM-related L&Es, some recommendations set forth in the ENPI can be related to these practices, for example:

> (i) 1.18 Automate the extraction of statistical data from the Offices' databases […];
> (ii) 1.4 Improve, update and prepare a Bill at the initiative of the Executive Branch, for the reform of the LDA - Copyright Law, mainly considering the new technologies and business models on the Internet and the responsibility of Internet service providers in relation to violations of intellectual property rights […]; (iii) 1.10 Improve regulation related to Intellectual Property Rights of emerging sectors including, but not limited to Internet plus, e-commerce and big data [...]; (iv) 7.2 Support the Government's initiatives to create a favorable environment for innovation, and, based on the knowledge of the needs for the development of new technologies, promote prospection, technological monitoring and induce the generation of IP assets[...][29]

---

[22] Full text available here (in Brazilian Portuguese): https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-diagramacao_4-979_2021.pdf. The EBIA was formalized through the Ordinance of the Ministry of Science, Technology and Innovations n. 4.617/2021. A summary of the EBIA in English can be accessed at: https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ebia-summary_brazilian_4-979_2021.pdf.

[23] Full text available here (in Brazilian Portuguese): https://www.gov.br/inpi/pt-br/central-de-conteudo/noticias/cerimonia-marca-50-anos-do-inpi-e-lancamento-da-estrategia-nacional-de-propriedade-intelectual/EstratgiaNacionaldePropriedadeIntelectual.pdf. The ENPI was formalized through the Decree n. 10.886/2021.

[24] Full text available here (in Brazilian Portuguese): https://inovacao.mcti.gov.br/estrategia/. The ENI is one of the instruments of the National Policy on Innovation (PNI), which is formalized in the Decree n. 10.534/2020 (https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/decreto/d10534.htm).

[25] ENPI, 38-39 (2020).

[26] ENPI, 38 (2020).

[27] ENPI, 38-39 (2020) [footnote omitted].

[28] ENPI, 38 (2020) ("O objetivo da Estratégia Nacional de Propriedade Intelectual é alcançar um Sistema Nacional de Propriedade Intelectual efetivo e equilibrado, que seja amplamente conhecido, utilizado e observado, que incentive a criatividade, os investimentos em inovação e o acesso ao conhecimento, visando ao aumento da competitividade e ao desenvolvimento econômico e social.").

[29] Independent translation. Original text in Brazilian Portuguese -

The EBIA, with its primary focus on Artificial Intelligence, represents a pioneering national endeavour to align with global trends in establishing a comprehensive institutional framework for AI. [30] It only briefly mentions the importance of creating a TDM limitation.[31] Hence, it misses the chance to address IP-related issues, particularly those of significant concern within the realm of the ENPI.

When it comes to public policies, it is also worth mentioning the most recent National Policy on Innovation (PNI), which was officially established through Decree No. 10.534/2020. Within its objectives, there is the encouragement of "research, development and innovation by companies, ICT and private non-profit entities, with the aim of increasing the productivity and competitiveness of the economy, generating wealth and social well-being".[32] As seen in the EBIA and ENPI, the PNI is structured around distinct thematic pillars relating to education, funding, markets, intellectual property and a culture of innovation.[33]

A pivotal component of PNI is the National Strategy for Innovation (ENI), which outlines more specific initiatives. Again, it does not address TDM or the need to (re) consider IP rights in the context of AI and data-intensive technologies; however, it does provide initiatives that are dependent of a regulatory framework able to provide legal certainty on activities such as the training of AI systems. An example would be initiative #M862, which endeavors to "[e]ncourage the adoption of artificial intelligence in innovative products, services and processes ethically and responsibly" and one of the actions related to it involves mapping "the technologies and actions that enable the adoption of emerging technologies, especially IoT, high-performance connectivity, prediction algorithms[...]"[34], for which TDM may be a relevant enabler.

The Annex to the PNI introduces some guidelines aimed at promoting strategic initiatives outlined in the ENI.[35] Despite not providing any specific comment on L&Es and/or TDM, the matters it addresses reinforce the need for it. Among the multiple guidelines, some related to the "protection of knowledge" and the "dissemination of the culture of entrepreneurial

---

innovation" stand out because they expressly mention the need to reassess the regulatory framework related to IP and ensure that the IP system promotes innovation and scientific and technological development.[36] Furthermore, these directives are closely intertwined with initiatives focused on enhancing the nation's international market and the promotion of open innovation.[37]

III. THE LEGISLATIVE DEBATE

1. The Development of the TDM Clause

On September 29, 2021, the House of Representatives debated and passed Bill 21/2020 as part of their commitment to the regulation of AI.[38] Under art. 5, the Bill institutes some guidelines for a TDM limitation, which reads as follows:

> Art. 5. The following are principles for developing and applying artificial intelligence in Brazil:… VIII – availability of data: non-infringement of copyright by the use of data, databases and texts protected by it for the purpose of training artificial intelligence systems, provided that the normal exploitation of the work by its owner is not impacted.[39]

While there were some opportunities for improvement in the initial text, it marked a significant milestone as the first legislative initiative that clearly states the need for a TDM limitation to copyright. On approval it was sent to the Senate for discussion and to complete the legislative process. Once in the Senate, it met two additional proposed Bills, and in order to agglutinate, restructure and improve the content and wording, a dedicated commission was convened[40] to

> Subsidize the preparation of the substitute draft for the evaluation of Bills No. 5,051/2019, 21/2020, and 872/2021, which aim to establish principles, rules,

---

[36] Decree n. 10.534/2020, annex: "[...] IV - regarding the axis of knowledge protection: a) establishment of a national system of intellectual property as a stimulus to the development of science, technology and innovation in the country; b) reassessment of the country's intellectual property regulations;".

[37] Decree n. 10.534/2020, annex: "[...] V - regarding the axis of dissemination of the culture of entrepreneurial innovation: a) stimulus to open innovation; [...] f) promotion of the country on the international scene as an innovative nation; and [...] h) stimulus to the modernization of Brazilian business capacity aligned with public policies for the country's competitive insertion in the international market of products, goods and services; and [...] i) update of legislation so that the country can contract products and services from innovative companies in a simpler way.".

[38] Brazilian House of Representatives, Bill n. 21/2020 https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2129459&filena me=REDACAO%20FINAL%20PL%2021/2020.

[39] Brazilian House of Representatives, Bill n. 21/2020 ("Art. 5º São princípios para o desenvolvimento e a aplicação da inteligência artificial no Brasil:…VIII – disponibilidade de dados: não violação do direito de autor pelo uso de dados, de banco de dados e de textos por ele protegidos, para fins de treinamento de sistemas de inteligência artificial, desde que não seja impactada a exploração normal da obra por seu titular..").

[40] "Commission of Jurists responsible for subsidizing the elaboration of a substitutive bill on AI in Brazil" (CJUSBIA).

guidelines and foundations to regularly instruct the development and application of artificial intelligence in Brazil.[41]

The Commission's public hearings delved into a comprehensive spectrum of topics, encompassing four pillars: (i) concepts, understanding and classification of AI; (ii) Impacts of AI; (iii) rights and duties; (iv) accountability, governance and oversight.[42] One of the issues under rights and duties was specifically TDM and Copyright.[43]

The Commission actively sought contributions from various stakeholders and conducted public hearings, including dedicated sessions focused on TDM, which will be further examined in the following section.[44] On December 6, 2022, the Commission released its Final Report, which is comprised of a substitutive text, justifications, and a comprehensive summary of contributions received from diverse entities such as the Private Sector, Government, Academia, and Civil Society[45]. When it comes to TDM, the substitutive text is more precise, complete and reasonable and reads as follows:

Art. 4º. For the purposes of this Law, the following definitions are adopted:

[...] VIII – text and data mining: the process of extracting and analyzing large amounts of data or partial or full excerpts of textual content, from which patterns and correlations are extracted that will generate relevant information for the development or use of artificial intelligence systems.

[...]

Art. 42. It is not copyright infringement the automated use of works, such as extraction, reproduction, storage and transformation, in data and text mining processes in artificial intelligence systems, in activities carried out by research and journalism organizations and institutions, and by museums, archives and libraries, provided that:

I – does not have the objective of simply reproducing, displaying or disseminating the original work itself;

II – the use takes place to the extent necessary for the purpose to be achieved;

III – does not unjustifiably harm the titleholders' economic interests and

IV – does not compete with the normal exploitation of the works.

§ 1 Any reproductions of works for the data mining activity will be kept under strict security conditions and only for the time necessary to carry out the activity or for the specific purpose of verifying the results of the scientific research.

---

[41] Translated by the author. Original text is available on the Brazilian Senate website. https://legis.senado.leg.br/comissoes/comissao?codcol=2504.

[42] Brazilian Senate website, https://legis.senado.leg.br/comissoes/comissao?codcol=2504.

[43] The presentation on TDM held by Prof. Dr. Allan Rocha de Souza can be found here: https://legis.senado.leg.br/sdleg-getter/documento/download/da74b1f4-e6fe-4a1c-8d2d-277127ae6667.

[44] The Public Hearings can be accessed here: https://legis.senado.leg.br/comissoes/audiencias?codcol=2504.

[45] The Final Report can be downloaded here: https://legis.senado.leg.br/sdleg-getter/documento/download/bdaad0dc-5c0a-4217-a6d0-aefb0d8ec8d4.

§ 2 The provisions of the caput apply to data and text mining activities for other analytical activities in artificial intelligence systems, subject to the conditions set out in the caput and paragraph 1, provided that the activities do not communicate the work to the public and that access to the works was given legitimately.

§ 3 The text and data mining activity involving personal data will be subject to the provisions of Law No. 13,709, of August 14, 2018 (General Law for the Protection of Personal Data).

Today, the text above is part of Bill n. 2338/2023, currently under debate in the Senate.

2. *Diverse positions in the creation of the TDM Limitation.*

Multiple stakeholders participated in the discussion surrounding the substitutive text of the AI Bill, delving into various facets concerning regulatory measures and liability considerations. This section will provide an analysis of the key contributions that emerged during the discourse on text and data mining.

Contributions to text and data mining went from supporting a comprehensive TDM limitation to avoiding its existence. On one hand, academic representatives supported the existence of L&Es for TDM, especially for research and innovation purposes. They recognized L&Es as a tool for promoting development, research, and innovation.[46] Conversely, certain entities have taken a stance opposing the implementation of these exemptions, fearing that they may pose obstacles to the creative industry.[47]

One argument advanced by one representative of the publishing sector is that the TDM limitation as written might potentially go against the Berne Convention, namely the three-step test, although it did not explain its rationale. [48] The representative from the audiovisual sector proposed an alternative text in case the TDM provision could not be removed from the AI Bill. This was to limit the use only to scientific research institutions and cultural heritage organizations to promote research in AI systems, provided it does not impact the normal exploration of the work and the legitimate interests of the right-holder. [49]

Private sector positions are very diverse. For instance, a key advocate within this sector champions the interests of developers and technology firms, actively endorsing the implementation of a copyright limitation. This advocacy aims to bring greater clarity to organizations engaged in the advancement of AI technologies, facilitating their innovation and growth.[50]

Diverse perspectives among similar stakeholders are also apparent within civil society and academia. One of the representatives acknowledges the significance of the Text and Data Mining (TDM) discourse but refrains from

---

[46] Final Report from the CJUSBIA, p.863.
[47] Final Report from the CJUSBIA, pp.864-865
[48] Final Report from the CJUSBIA, p.866.
[49] Final Report from the CJUSBIA, p.865.
[50] Final Report from the CJUSBIA, p.864.

specifying whether Brazil should implement a TDM provision, underscoring concerns related to competition.[51] In contrast, a Civil Society representative, in harmony with the academic counterpart's viewpoint, advocates such a limitation, recognizing its pivotal role in fostering innovation and strengthening Brazil's global stance.[52]

Finally, a government entity supports the discussion on TDM and argues that regulation should be within the IP legal framework and not in the AI Bill and that the approach should be more principle-oriented.[53] While we see that the discussions on the interplay between AI, TDM and Copyright could be a relevant catalyst to promote the (much-needed) substantial review of the Brazilian Copyright Law, which dates from 1998 and has had very few reviews since then, there could also be benefits in discussing such matter within the scope of the AI Bill. One of the main ones would be the participative and diverse environment promoted by the discussions within the CJUSBIA, which enabled the participation of professionals and organizations from different backgrounds (e.g. legal, technical, and policy) and sectors (e.g., industry, academia, civil society). In our opinion, this was an important step in providing a fertile ground for the inter- and multidisciplinary debate of these (and other) complex issues. While it can be challenging for policymakers to coordinate the discussions both in the scope of the Copyright Law and the AI Bill, the current debates at the international level and the different proposals being discussed or adopted in multiple jurisdictions provide an interesting time frame and a set of useful resources to review our legislation in a way that promotes scientific, technological, and economic development.

IV.   FINAL REMARKS

In recent years, there has been a growing body of legal regulation of TDM. Since 2018, Japan, the European Union, Singapore and others have promoted changes to their copyright law and included specific limitations for TDM. In the Global South and the developing world, such changes have been slow, even though they are urgently needed.[54] While the many 'strategies' developed in Brazil are general guidelines for public policies, they nonetheless add consistency and direction to the political and public debate and influence the shaping and adoption of effective norms. From the analysis of the "strategies", it was possible to identify the need for innovation-friendly regulatory reforms, which primarily addressed the development of AI-based

---

[51] Final Report from the CJUSBIA, pp. 860-861,
[52] Final Report from the CJUSBIA, p.860.
[53] Final Report from the CJUSBIA, p.862.
[54] See AR Souza, L Schirru, MB Alvarenga, COVID-19, 'Text and Data Mining and Copyright: The Brazilian Case' in 11 WIPO-WTO Colloquium Papers (2020) Special Edition.   Available   at: https://www.wto.org/english/tratop_e/trips_e/colloquium_papers_e/2020/wipo_wto_colloquium_2020_e.pdf.

technologies and provided a fertile ground for the discussions that would happen moments later in the scope of the CJUSBIA.

TDM found its place within the Bill on AI framework as a distinct topic in Brazil. After the approval in the House, the Senate-formed Commission has gathered views from multiple stakeholders, resulting in a comprehensive final report that represents a significant departure from the existing norms. Today, the text related to TDM is currently part of Bill 2338/2023 on the regulation of AI in Brazil, which is currently being discussed in the Senate. If approved in the Senate, the final text will undergo a review by the House of Representatives before reaching the President's desk for sanction.

During the debates within the scope of CJUSBIA, research institutions and civil society organizations have mainly supported the existence of L&Es for TDM, especially for research and innovation purposes, recognizing L&Es as a tool for promoting development, research and innovation. Traditional copyright industries claimed it could economically harm them and authors alike and would not comply with the three-step test. Tech companies, on the other hand, supported its adoption, believing it would provide more clarity to organizations working on developing AI technologies. Parts of the Government contended that it should be regulated within the IP legal framework and not in the AI Bill, advocating a principle-oriented approach.

The case for a TDM limitation as designed in art. 42 of Bill n. 2338/2023, focused on selected and public-interest-oriented organizations, has been laid out, and it encountered a fertile political and social environment. After contributing extensively to the debate, from our perspective there is a reasonable chance that a TDM limitation will be approved in the Senate. As seen in other jurisdictions, recent developments in Generative AI bring even more complexity to the debate on the interplay between AI and copyright. By using copyrighted works to train AI systems capable of generating output that may potentially compete more generally with the existing works, this technology has been raising additional – and different – legal and technical issues.

At first glance, and even though it was drafted before the popularization of Generative AI systems, it is our opinion that the Brazilian TDM Limitation, as it is, provides an interesting balance between the interests of authors, rightsholders and society. This is done both by clarifying that the permitted users and purposes are those inextricably related to the public interest and, also, by the criteria listed on items I to IV. These would ensure that such uses would not compete with the regular exploitation of the works in the training set, for example. Nonetheless, a proper in-depth analysis of these particular issues raised by Generative AI should be part of a future report.