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### Submission to Canadian Government Consultation on a Modern Copyright Framework for AI and the Internet of Things

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American University Washington College of Law

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9-17-2021

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**Authors**

Sean Flynn, Lucie Guibault, Christian Handke, Joan-Josep Vallbé, Michael Palmedo, Carys J. Craig, Michael Geist, and João Quintais

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## Consultation on a Modern Copyright Framework for AI and the Internet of Things

We are grateful for the opportunity to participate in the Canadian Government's consultation on a modern copyright framework for AI and the Internet of Things. Below, we present some of our research findings relating to the importance of flexibility in copyright law to permit text and data mining ("TDM"). As the consultation paper recognizes, TDM is a critical element of artificial intelligence. Our research supports the adoption of a specific exception for uses of works in TDM to supplement Canada's existing general fair dealing exception.

Empirical research shows that more publication of citable research takes place in countries with "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> Empirical research also shows that text and data mining research is promoted through exceptions that more specifically authorize text and data mining research.<sup>2</sup> While these studies are preliminary and we are still improving on them, they provide evidence that supports the approach of combining a general research exception with a more specific data mining 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").

<sup>2</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 Dobрева 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.").

## A. Open Exception for “Research”

Canada currently has in its law what we call a “general” exception for research. A general exception is one which covers multiple purposes of use in a single exception.<sup>3</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” has been interpreted broadly by the Canadian Supreme Court to include uses for consumer research.<sup>4</sup> Some civil law countries also provide general exceptions that apply to research uses.<sup>5</sup> One notable and interesting example of a general exception that is very useful for research is Japan’s exception for any use “where such exploitation is not for enjoying or causing another person to enjoy the ideas or emotions expressed in such work.”<sup>6</sup>

The benefit of a general exception for research is that it can accommodate unforeseen uses that are nonetheless fair to the right holder. Countries such as the United States and Canada, both of which have such exceptions, 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.

## B. Exception for Text and Data Mining

As noted above, empirical research suggests that there may be additional benefit to providing a specific exception for text and data mining in addition to a general exception for research.<sup>7</sup> Other countries with general research exceptions have followed this model and provide as well a specific exception for TDM.<sup>8</sup>

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

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<sup>3</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>4</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>5</sup> *E.g.* 618/2003 Coll. Act of 4 December 2003 on copyright and rights related to copyright [Copyright Act] Sec. 44 (Slovak) (“Copyright is not infringed by a person who without authorisation of its author uses released work by making a copy, by public performance or communication to the public for the purpose of organising object lesson for educational or scientific research, provided that such using of work does not result in direct or indirect economic benefit.”).

<sup>6</sup> Act No. 48 (amended 2018) [Copyright Act], art.30-4(ii) (Japan).

<sup>7</sup> See Handke et al., *supra* note 2.

<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.

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 is adopting a very useful and highly specific exception for “computational data analysis.” The 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 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>

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<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 Lilla 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).

<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”).

### C. Open General Exception

Several countries from both the civil and common law tradition provide open general exceptions that can apply to a use for any purpose as long as the use is fair to the rights of the author.<sup>15</sup> The U.S. fair use right is one example.<sup>16</sup>

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, as does Canada.<sup>17</sup> This may indicate that fair use gives researchers a positive signal that can be beneficial to their work, even where the fair dealing exception already covers research purposes. Thus, one additional change to the Canada's Act that could benefit TDM research could be to transition from fair dealing to an open fair use right.

We would be happy to discuss our research in more detail. Again, we are grateful for the opportunity to participate in this consultation.

Respectfully,

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<sup>15</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>16</sup> United States, U.S. Copyright Act of 1976, 17 U.S.C. § 107.

<sup>17</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).