

Friday 12th of January, 2024

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**Subject:** Comments on the Scoping Study On The Practices And Challenges Of Research Institutions And Research Purposes In Relation To Copyright prepared by Professor Raquel Xalabarder (SCCR 44/4)

Dear Deputy Director General Sylvie Forbin,

In response to the invitation of the 44th Session of the Standing Committee on Copyright and Related Rights, the Global Expert Network on Copyright User Rights (aka User Rights Network), chaired by the Program on Information Justice and Intellectual Property at American University Washington College of Law, submits the following comments on the *Scoping Study On The Practices And Challenges Of Research Institutions And Research Purposes In Relation To Copyright* prepared by Professor Raquel Xalabarder (SCCR 44/4).

To prepare these comments, we shared the draft Study with the academic members of the User Rights Network and also with members of the Access to Knowledge Coalition of organizations representing beneficiaries of copyright limitations and exceptions. We accepted written comments on the draft and also held a meeting to discuss the comments. Individuals who participated in the comment process included:

- Allan Rocha de Souza, Federal University of Rio de Janeiro (PPED/IE) | Federal Rural University of Rio de Janeiro (ITR), Brazil
- Andres Izquierdo, Program on Information Justice and Intellectual Property, American University Washington College of Law, USA
- Anubha Singa, The Centre for Internet & Society, India
- Arul George Scaria, National Law School of India University, India
- Bernd Justin Jütte, University College Dublin, Sutherland School of Law
- Carolina Botero, Fundación Karisma, Colombia
- Carys Craig, Osgoode Hall Law School, York University, Canada
- Caterina Sganga, Scuola Superior Sant'Anna, Italy
- Jonathan Band, Library Copyright Alliance, USA
- Luca Schirru, Brazilian Copyright Institute | KU Leuven (CiTiP), Brazil - Belgium
- Martin Senftleben, University of Amsterdam, The Neatherlands

- Patricia Diaz, Datysoc, Uruguay
- Sean Flynn, Program on Information Justice and Intellectual Property, American University Washington College of Law, USA
- Stephen Wyber, International Federation of Library Associations and Institutions (IFLA)
- Teresa Nobre, Communia, Portugal

This document compiles and summarizes the comments we received through this process. We did not, however, ask that every member of the comment team approve and endorse every suggestion.

### *Summary of views*

On the whole, we find that the Study does an excellent job at synthesizing and explaining the implications of various issues at the intersection of copyright policy and research uses of copyrighted works. It is useful that the Study covers a full range of policy issues that have been discussed in the SCCR, including override of limitations and exceptions by contracts and by technological protection measures. It should form a useful basis in informing considerations of principles, objectives and options for research exceptions that will be considered by the SCCR as part of the work plan adopted by the Committee. It is also useful that the Study examines both research "institutions" and "purposes," consistent with the Committee's consideration of the subject.

### *Specific suggestions*

We make the following specific suggestions for a revision to the Study or for further work:

### **Cited sources**

- It would be useful to cite more of the research relied upon or available on the topic. Ideally, the Study would include a footnote and citation after each provable proposition on which supporting research exists. Alternatively or in addition, a bibliography could be provided. We attach a bibliography of some major works of scholarship on the topic that the Study may reference and note specific support for some of our suggestions, below.

### **Executive Summary**

- The utility of the Study to policy makers and to members of the Committee would be advanced with inclusion of a one-page executive summary that highlights key findings of the Study on limitations and exceptions for research in international and comparative copyright on the priority issues adopted as elements of the L&E agenda in the Work Programme SCCR/43/8. Specifically, it would be useful to summarize and highlight the implication of the Study for the following elements of the Work Programme:
  - adaptation of exceptions and limitations to the online environment, such as by permitting teaching, learning and research through digital and online tools (para 2.a.);

- cross-border uses of copyrighted works, such as where collaborating researchers or the subjects of their research are located in different countries (para 3);
  - limitations and exceptions for text and data mining research, taking into account new developments in this area (para 6);
  - cross border implications in relation to limitations and exceptions on preservation, teaching and research (para 6);
  - the UNESCO Recommendation on Open Science (2021) and its implications for international copyright laws and policies (para 6);
  - models for protection of limitations and exceptions from override by terms in contracts (para 6);
  - safe harbor protections for educational, research and cultural heritage institutions (and their agents) (para 6); and
  - exceptions to technical measures of protection and rights management information to protect uses permitted by limitations and exceptions (para 6).
- Especially when considering policymakers as the target public of the study, the structure of item 2.2 could benefit from organizing the sections according to the commonly occurring dimensions of the scope of research exceptions. Those dimensions include open v. restrictive (or “closed”) framing of the scope of exceptions as applied to uses (technology restrictions, acts permitted, sharing copies, adaptations and translations, text and data mining), users (e.g. scope of personal and private use, libraries and archives), works (e.g. including audio visual, broadcasts, etc.), and purposes (e.g. non-commercial) subject to the L&E. Thus one can distinguish closed exceptions (in any of the dimensions) from open general exceptions like U.S. fair use, open fair dealing (e.g. Malaysia, Singapore pre-2022), or other general exceptions (e.g. Thailand) that on their face permit users to claim the lawfulness of any proportionate use of any work by any user.

### **Definitions adopted in the Study**

- The Study at times treats institution-based professional academic research as the primary form covered by research limitations and exceptions. Many exceptions are drafted and interpreted more broadly, however.<sup>1</sup> And as highlighted by the UNESCO Recommendation on Open Science, the research panorama includes not only professional researchers but also the many non-professionals (e.g., family historians,

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<sup>1</sup> See Flynn, Sean; Schirru, Luca; Palmedo, Michael; and Izquierdo, Andrés. "Research Exceptions in Comparative Copyright." (2022) PIJIP/TLS Research Paper Series no. 75. <https://digitalcommons.wcl.american.edu/research/75>.

students, ordinary citizens) involved in conducting research and creating relevant knowledge to them and their communities.<sup>2</sup>

- In the section on Direct Licenses, the Study could benefit from a more granular distinction between permission or payment needed for obtaining access to works used in research and any potentially additional permission or payment needed for the right to certain uses of accessed materials. For the most part, only the latter is regulated by copyright exclusive rights whereas the former is mostly the subject of rules on technological protection measures. One can have a vibrant licensing market even in the context of broad research exceptions; and broad research exceptions do not in themselves solve inequitable access to knowledge caused by pricing of access.

### **Consideration of the differences between Developed and Developing Countries**

- It will be useful for the Study to acknowledge the special burdens often faced on accessing and using copyrighted research materials in developing countries. This is particularly true with reference to the Study's statement that "the scope of L&E is closely related to the availability of licenses in each country." It would be useful to note that this helps explain the justification for different L&E scope and implementation in poorer countries where there is often not a sufficient market for secondary uses to sustain licensing markets and Reproduction Rights Organizations (RROs); users often lack ability to pay global market prices; and licensing revenue often aggravates balance of payment trade distortions.<sup>3</sup>
- It would be useful for the Study to note that TDM, AI and machine learning research are taking place in developing countries as well. In such countries researchers are often especially reliant on free-to-use text and data sets as licensing systems and sufficiently broad L&E are often lacking.<sup>4</sup>

### **The Human Rights dimension**

- As a UN agency and international organization, WIPO has duties to craft its guides, policies and treaties to promote fundamental human rights. It would be useful for the Study to include a brief analysis of the human rights dimension of copyright exceptions

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<sup>2</sup> UNESCO, UNESCO Recommendation on Open Science (2021)  
<https://unesdoc.unesco.org/ark:/48223/pf0000379949>.

<sup>3</sup> See Cabello et al (2022) The collective management of copyright in Latin America: challenges and opportunities from the advances of the digital economy. CETYS, Universidad de San Andrés, Available at <https://repositorio.udesa.edu.ar/jspui/handle/10908/19465>; Pinto (2019). BIBLIOTECAS LAC: The impact of copyright legislation in Latin America and the Caribbean. FEBAB. Available at:

<http://www.febab.org.br/febab201603/wp-content/uploads/2016/03/LIVRO-FEBAB.pdf>.; c. Cf. Education International, Financing Landscape in Tertiary Education (forthcoming 2024) (finding that, on average, countries around the globe spend less than 1 percent of their GDP on tertiary education; regions with lower spending include Latin America, the Caribbean, Africa and Oceania).

<sup>4</sup> See e.g. Pijipvideo, Prof Vukosi Marivate: NLP and TDM in Africa. Right to Research in Int'l Copyright Seminar 11.2, YouTube (March 22, 2023); Sean Flynn & Lokesh Vyas, Examples of Text and Data Mining Research Using Copyrighted Materials, Mar. 6, 2023, <https://copyrightblog.kluweriplaw.com/2023/03/06/examples-of-text-and-data-mining-research-using-copyrighted-materials/>.

for research that WIPO and its member countries must respect, protect, and promote. There is a growing literature analyzing fundamental rights to receive and impart information and to benefit from culture and science as forming what can be referred to as the “right to research” or “right to science.”<sup>5</sup> In addition, it is also recognized in the policies of many countries and research organizations that research and science should be treated as a global public good.<sup>6</sup>

### **International Copyright Law and existing research uses:**

- In the section on TDM, and the discussion of international law, an overarching question may require some further consideration: it is an open question whether, and to which extent, the concepts and norms of international copyright law cover all forms of use that have evolved in contemporary research practice. In particular, there is a robust body of literature indicating that the use of copyrighted works for TDM purposes does not constitute use of the work “as a work” in the traditional sense of use for entertainment or enjoyment. Instead, TDM and other research uses may only involve the use of copyrighted works “as data”. As use “as data” is a new, formerly unknown category of use, it has not been considered and discussed at any Diplomatic Conference in the copyright sphere. Therefore, it is not clear whether the concept of reproduction underlying the Berne Convention, and used in many national laws, covers TDM use at all. Regulatory approaches, such as the general TDM exemption introduced in Article 30-4(ii) of the Copyright Act of Japan, rest on the assumption that use for TDM purposes can be placed outside the scope of the right of reproduction altogether. Thus, it may be advisable to add a nuance, when stating in the TDM discussion, that, absent a TDM exception, “TDM uses of copyrighted contents will require the rightholders’ authorization.” (2.2.i.). For the international debate, this nuance creates important policy space. To the extent to which the traditional concept of reproduction in the Berne Convention does not cover TDM at all, there is flexibility for WIPO Member States to take a fresh look, assess protection and research needs in this area, and develop new tailor-made solutions that are not restricted from the outset by pre-existing, traditional conceptions that have evolved in international law without considering the specific policy questions in the area of these new forms of research use.<sup>7</sup>

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<sup>5</sup> See Christophe Geiger and Bernd Justin Jutte (2023) “Conceptualizing A “Right to Research” and Its Implications for Copyright Law: An International and European Perspective,” *American University International Law Review*: Vol. 38: Iss. 1, Article 1. Available at: <https://digitalcommons.wcl.american.edu/auilr/vol38/iss1/1>; Klaus Beiter, *Reforming Copyright or Toward Another Science? A More Human Rights-Oriented Approach Under the REBSPA in Constructing a “Right to Research” for Scholarly Publishing*, PIJIP/TLS Research Paper Series no. 7 (2022); Desmond O. Oriakhogba, *The Right to Research in Africa: Making African Copyright Whole*, PIJIP/TLS Research Paper Series no. 78 (2022); 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).

<sup>6</sup> See *Manifesto on Science as a Global Public Good: Non-Commercial Open Access* Toluca, Mexico October 27, 2023 <https://globaldiamantaoa.org/manifiesto/>.

<sup>7</sup> See Ueno T (2021), “The Flexible Copyright Exception for ‘Non-Enjoyment’ Purposes Recent Amendment in Japan and Its Implication”, *Gewerblicher Rechtsschutz und Urheberrecht International* 70 (2021), 145; Ducato R, Strowel A (2021), “Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out”, *European Intellectual Property Review* 43 (2021), 322; Senftleben MRF (2022), “Compliance of National TDM Rules with International Copyright Law – An Overrated Nonissue?”, *International Review of Intellectual Property and Competition Law* 53 (2022), 1477-1505.

- The well-drafted chapter on the international treaties could benefit from the inclusion of additional instruments containing provisions on copyright exceptions for research, as is the case of (i) Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP) (art. 18.66); and (ii) Regional Comprehensive Economic Partnership (RCEP) (art. 11.18).
- The discussion of the three step test should note that the “cumulative” nature of the three steps adopted by the WTO panel in the Section 110(5) case<sup>8</sup> is contested.<sup>9</sup>

### **The role of Software as a subject of research**

- In this or a later study, the application of research exceptions to software should be explored. This includes, for example, the rights of researchers to reverse engineer, access and use software for purposes such as to repair hardware and research bias and other effects of computer programs and algorithms in fields ranging from social media to AI to operation of voting systems.<sup>10</sup>

### **Cross-border uses:**

- In relation to cross-border uses, given the fragmentation and differences in operation between the Collective Management Organizations (CMOs) of the North and the South<sup>11</sup>, licensing is unlikely to be able to solve the tensions between copyright and the rights to research and to science globally. Accordingly, it would be useful for the Study to examine exceptions based solutions, such as the models introduced in
  - the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (2013) art. 5;
  - Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite

<sup>8</sup> WTO, ‘United States - Section 110(5) of the US Copyright Act’: Report of the Panel, WT/DS160/R (15 Jun 2000), [https://www.wto.org/english/tratop\\_e/dispu\\_e/1234da.pdf](https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf).

<sup>9</sup> See, e.g. Max Planck Institute for Innovation and Competition. Declaration: ‘A Balance Interpretation of the “Three-Step Test” In Copyright Law, [https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung\\_aktuell/01\\_balanced/declaration\\_three\\_step\\_test\\_final\\_english1.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/forschung_aktuell/01_balanced/declaration_three_step_test_final_english1.pdf). Geiger, Christophe and Gervais, Daniel J. and Senftleben, Martin, The Three-Step-Test Revisited: How to Use the Test’s Flexibility in National Copyright Law (November 18, 2013). American University International Law Review, Vol. 29, No. 3 (2014), pp. 581-626, <https://ssrn.com/abstract=2356619>. Ginsburg, Jane C., Toward Supranational Copyright Law? The WTO Panel Decision and the ‘Three-Step Test’ for Copyright Exceptions. <https://ssrn.com/abstract=253867>. Kur, Annette, Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test? (October 1, 2008). Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04, <https://ssrn.com/abstract=1317707>.

<sup>10</sup> See, e.g., Rosborough, Anthony, and Aaron Perzanowski . "Repair As Research: How Copyright Impedes Learning About Devices," (2023). PIJIP/TLS Research Paper Series no. 101. <https://digitalcommons.wcl.american.edu/research/101>.

<sup>11</sup> International Federation of Reproduction Rights Organisations (IFRRO) members. Available at: <https://ifrrro.org/page/membership-list/> (reporting that in Latin America, only 1/3 of the countries have RROs); Oriakhogba; Desmond, and Kawooya; Dick. "The Status of Reproduction Rights Organisations (RROs) in Africa." (2022) PIJIP/TLS Research Paper Series no. 81. Available at <https://digitalcommons.wcl.american.edu/research/81> (examining existence and operation of RROs in Africa).

broadcasting and cable retransmission (1993) OJ L 248, art. 1(2)(b) (“The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.”).

- CDSM Art 5(3) (“The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established”).

We thank the Committee for the opportunity to comment on this important Study. Any queries in relation to this letter may be addressed to Sean Flynn at [sflynn@wcl.american.edu](mailto:sflynn@wcl.american.edu)

# Appendix: Bibliography on Research Exceptions

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*More audiovisual content on the Right to Research can be found at PIJIP's Youtube Channel:*  
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