AMERICAN UNIVERSITY
WASHINGTON
COLLEGE of LAW

PROGRAM ON
INFORMATION JUSTICE AND
INTELLECTUAL PROPERTY

January 28, 2022

To: Committee on Trade and Industry
For attention:

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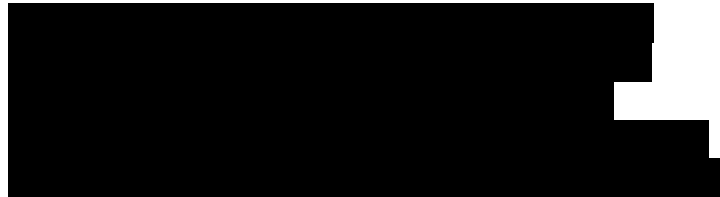
Dear Honorable Chairman:

We write on behalf of the Project on the Right to Research in International Copyright, which is an activity of the Global Expert Network on Copyright User Rights. We write to advise that Parliament not eliminate "research" from among the specifically enumerated purposes for which the fair use exception in Section 12A may be applied, and to add a reference to "computational analysis" as a permitted purpose.

Parliament proposes to eliminate in section 12A reference to several purposes that are also protected in Section 12B for the expressed purpose of avoiding duplication. Other fair use provisions, including in the U.S., mention purposes that are also subject to specific exceptions elsewhere in the Act.[1] This is important because fair use may extend to a use *beyond* those mentioned in a specific exception. And, by the same token, a specific exception can define uses that are exempt from copyright for reasons of public policy that are more specific than those embodied in fair use. These specific policy judgments can both clarify and expand the universe of lawful uses exempt under fair use, and fair use can in turn protect activities the legislature may not foresee in its specific exemptions. The two approaches may overlap in some cases, but they are complementary, not redundant. We therefore counsel against removing additional illustrative purposes in the fair use right for proffered purpose of avoiding duplication.

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[1] See 17 U.S.C. 110 (providing a specific exception for performance and display of works in education); 17 U.S.C. 107 (defining "teaching (including multiple copies for classroom use)" as a permitted purpose for fair use).

In particular, we counsel for the reserving of the mention of "research" as a permitted purpose. Although inclusion of the "such as" language renders the list of enumerated purposes open, we advise that South Africa follow the examples of all other fair use and fair dealing countries and specifically mention "research" as a protected use of copyrighted materials.[2] This is especially important because otherwise there would be no specific mention of research as a protected use in the Act.

Empirical research shows that more publication of citable research takes place in countries with "open" research exceptions -- that is, exceptions that specifically mention "research" as a protected purpose and are open to all uses (e.g. reproduction and communication), to all works and to all users.[3] Empirical research also shows that text and data mining research - often referred to as "computational analysis" -- is promoted through exceptions that specifically authorize such practice as a protected purpose.[4] Recent copyright reforms in Japan and Singapore are exemplary.[5]

The CAB can take full advantage of the benefits of research exceptions in copyright by adding the following to the list of enumerated purposes protected by the fair use clause in section 12A:

[2] *See* Sean Flynn, Michael Palmedo, Andres Izquierdo, *Research Exceptions in Comparative Copyright Law* (2021) PIJIP/TLS Research Paper Series no. 72, https://digitalcommons.wcl.american.edu/research/72 (quoting and analyzing research exceptions from nearly every country in the world).

[3] Sean Flynn & Mike Palmedo, *The User Rights Database: Measuring the Impact of Copyright Balance*, Joint PIJIP/TLS Research Paper Series no. 2018-01 (2018) (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"); Flynn, Sean; Palmedo, Michael; Izquierdo, Andrés. "Research Exceptions in Comparative Copyright Law" (2021) PIJIP/TLS Research Paper Series no. 72 (showing that every copyright law in the world has at least one exception to promote research uses of copyrighted works, but that such exceptions vary widely between countries).

[4] *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 Dobreva eds., 2015) (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."). *See generally 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); Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining is Lawful*, 53 U.C. Davis L. Rev. 893 (2019); Thomas Margoni, *Text and Data Mining in Intellectual Property Law: Towards an Autonomous classification of Computational Legal Methods*, CREATe working paper 01/2020, forthcoming in Calboli I. & Montagnani L., Handbook on Intellectual Property Research (OUP, 2020); Josef Drexl 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).

[5] *See* Act No. 48 (amended 2018) [Copyright Act], art.30-4(ii) (Japan) (providing exception where "exploitation is not for enjoying or causing another person to enjoy the ideas or emotions expressed in such work," such as "information analysi"); Copyright Act 2021, art. 243 (Singapore) (providing exception where ¨using a computer program to identify, extract and analyse information or data from the work or recording¨ and ¨using the work or recording as an example of a type of information or data to improve the functioning of a computer program in relation to that type of information or data¨).

(x) Scholarship and research, including computational analysis.

We finally note that the proposed addition of section 12A(d) appears duplicative and potentially harmful. The section could be read to require that the four factor fair use test be applied by courts in addition to the internal limitations already contained in each specific exception. Applying the fair use factors on top of these existing tests appears duplicative and may cause unintended consequences in the development of South Africa's jurisprudence.

We thank Parliament for its consideration and would be pleased to consult on these matters further.

Signed,

Sean Flynn, American University Washington College of Law (counsel of record), on behalf of the Right to Research Academic Steering Committee:

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