Comment

Tatsuhiro UENO

Professor of Law
Deputy Director of Research Center for the Legal System of Intellectual Property
(RCLIP)
Waseda University, Tokyo

4 October 2022
AI Tech & Policy Talks, Digital Law Center, University of Geneva

RCL|IP
知的財産法制研究所
Research Center for the Legal System of Intellectual Property

LAW
法学部
School of Law

COPYRIGHT OPEN WEEK 2016

Prof. Byung-il Kim   Prof. Tatsuhiro Ueno   Prof. Thomas Margoni   Prof. David Nimmer

November 1, 2016, Seoul

Comment

Tatsuhiro UENO

Professor of Law
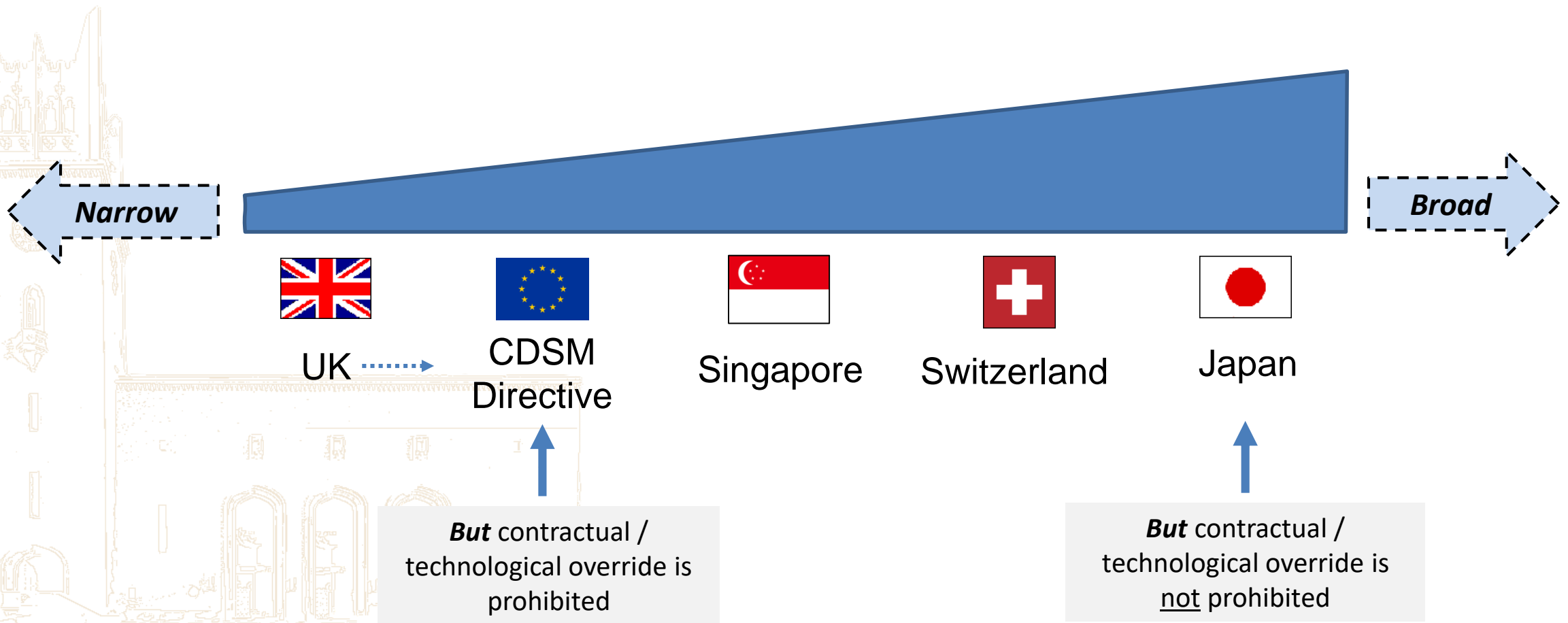Deputy Director of Research Center for the Legal System of Intellectual Property
(RCLIP)
Waseda University, Tokyo

4 October 2022
AI Tech & Policy Talks, Digital Law Center, University of Geneva

TDM Exceptions in Comparison

Narrow ← → Broad

UK ┄┄→ CDSM Directive   Singapore   Switzerland   Japan

But contractual / technological override is prohibited

But contractual / technological override is <u>not</u> prohibited

TDM Exceptions in Comparison

Type of TDM	UK	EU Directive	Switzerland	Japan
For non-commercial scientific research	OK	OK	OK	OK
For commercial research		OK (but opt-out possible)	OK	OK
Exploitations other than reproduction (e.g. Distribution, communication to the public)				OK
Woks/subject-matter not lawfully acquired (No lawful access requirement)				OK
	UK	**EU Directive**	**Switzerland**	**Japan**
Prohibition of contractual override	Yes	Yes (for scientific research)		
Prohibition of technological override		Yes		

(p.700)

…With respect to foundational concepts of copyright, the law protects the original expression of ideas, not ideas themselves, nor mere facts or data. Accordingly, **text and data mining should not be considered a copyright infringement, but a matter external to copyright's scope**. It follows that a copyright *exception* is a problematic intervention to regulate the use of unprotected ideas, principles, facts and data, often contained in literary works or other types of texts (text mining) or in structured and/or unstructured datasets (data mining).

Thomas Margoni and Martin Kretschmer, A Deeper Look into the EU Text and Data Mining Exceptions Harmonisation, Data Ownership, and the Future of Technology, 71(8) GRUR International, 685–701 (2022)

WASEDA UNIVERSITY

TDM and Scope of Copyright

Emphasis added

Thomas Margoni and Martin Kretschmer, A deeper look into the EU Text and Data Mining exceptions Harmonisation, data ownership, and the future of technology (2021), CREATe Working Paper 2021/7

(p.21)
II.4. Was the EU TDM exception needed? Brief theoretical considerations
 As stated in the Introduction, copyright protects the original expression of ideas, not ideas themselves, mere facts or data. Accordingly, whereas **TDM** should **not be considered a copyright infringement**, it is not through a copyright exception that the issue is best addressed. The reason is that TDM mainly refers to the use of unprotected ideas, principles, facts and data, often contained in literary works or other types of texts (text mining) or in structured and/or unstructured datasets (data mining). **TDM is simply external to copyright's scope**.

(pp.23)
 If the above is plausible, then it should become clearer why addressing **TDM** as a copyright exception is conceptually wrong and theoretically flawed. Ideas, facts and data are not copyrightable elements, therefore there should be no need for a copyright exception in order to use those elements, even when they are contained in protected works.

TDM and Scope of Copyright

General conclusions

- **Property-based approach to data** is problematic. AI applications based on machine learning and other data intensive approaches, i.e. where an algorithm needs to be trained on data, can only be developed based on a narrow (or wider but non imperative) copyright exception. Is this the intended function of copyright? To be the ultimate judge of whether, how and by whom technological development can happen and which direction should it take?

- **Property rights create issues of access** (authorization to use) and establish **conditions** (availability, price, purposes). Is the intended function of copyright to offer data holders control over data-based downstream markets such as AI development? What consequences may this frame lead to?

- **Access to data for AI in EU may be limited to** those:
  - Who are willing/can pay the price (**will EU AI be then more expansive/less competitive than US AI? Or Japan? CH? UK AI?**)
  - Train outside the EU in "cheaper" legal systems and use so trained AI in EU or import pretrained models: but what would be the impact in the EU to employ AI trained on a body of data embedding a system of knowledge, values and rules belonging to a different tradition? E.g.: See Art. 17, **would we import in the EU a US based concept of "parody" via close-to-mandatory filtering obligations?**
  - Or train in the EU anyway and hide the sources, leading to **opacity in the training process** (which would plausibly contrast with high-risk AI in AIA) – not a desirable mix of incentives for innovation.

thomas.margoni@kuleuven.be

Thomas Margoni, Property right approaches in the regulation of AI in the European Union, Slide 9

Internal Limit to Copyright?

- The Japanese TDM exception belongs to the so-called "flexible copyright exception for 'non-enjoyment' purposes" (Art.30-4) introduced in 2018.

- The basic idea behind this provision is that copyright is a right protecting only an interest in the 'inherent' exploitations which are aimed at 'enjoying' or causing someone to enjoy a work.
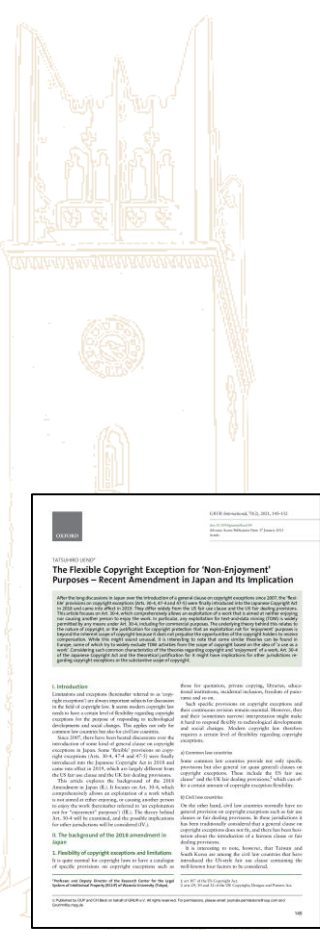
See in detail, Tatsuhiro Ueno, *The Flexible Copyright Exception for "Non-Enjoyment" Purposes: Recent Amendment in Japan and its Implication,* 70(2) GRUR International 145-152 (2021)

WASEDA UNIVERSITY

Internal Limit to Copyright?

- Japanese TDM exception can be considered as the 'internal limit' to the scope of copyright, rather than the 'external limit' to copyright.

See in detail, *Tatsuhiro Ueno, The Flexible Copyright Exception for "Non-Enjoyment" Purposes: Recent Amendment in Japan and its Implication, 70(2) GRUR International 145-152 (2021)*

WASEDA UNIVERSITY

Internal Limit to Copyright?

● Also in Europe, there are some theories which try to exclude TDM activities from the scope of copyright, based on;

- – 'Use as a work' (*A. Strowel*)

- – 'Reasonable exploitation' (*O. Rognstad & J. Poort*)

- – 'Redefined scope of exploitation' (*S. Dusollier*)

- – 'Was the EU TDM exception needed?' (*T. Margoni & M. Kretschmer*)

Thank you

Prof. Tatsuhiro UENO

uenot@waseda.jp