

## Innovation for All

Commission on Intellectual Property

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### **WIPO Consultation on Intellectual Property (IP) and Artificial Intelligence (AI)**

ICC Response

Second session – Virtual meeting – July 7 to 9, 2020

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies, 12,000 chambers of commerce in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

ICC welcomes and supports WIPO in its attempt to have a structured global discussion about the implications of Artificial Intelligence (AI) technology on the IP system and the opportunity to provide comments. AI has the potential to change many areas of business and life in a significant manner. It will most probably continue to significantly impact creation, production and distribution of economic and cultural goods and services. AI hence intersects with intellectual property (IP) policy at a number of different points since one of the main aims of IP policy is to stimulate innovation and creativity in the economic and cultural systems. Given the complexity of the issues and their potential ramifications for businesses and the current IP system, it is important for the WIPO study to not draw premature conclusions. ICC stresses that the report should benefit from a sufficiently sound factual basis and understanding of current law and practice.

#### **Questions submitted by ICC**

**Tuesday 7 July 2020**

#### **General comment**

We note that a significant part of the questions in the revised issues paper seems to focus on the results/output of AI. Whereas it is obviously important to discuss whether and under what circumstances AI generated results/output should be protected by IP or related rights, the applicability of the current IP regime in relation to AI (as a tool) and the definition of AI should

be considered as well. This would allow for a more informed discussion of the need to (or not) treat AI differently from “traditional” computational models, algorithms or computer programs.

*Does WIPO intend to explore these issues in one of the sessions in more detail?*

## Tuesday 7 July 2020

### Session 1: IP protection for AI-generated and AI-assisted works and inventions and related topics

#### Issue 2: Patents: Inventorship and Ownership

Question: If WIPO intends to suggest possible solutions, then it may be worthwhile exploring the application of the law of trusts. Since naming an AI system as inventor can be dealt with differently in different jurisdictions, this comparative approach will eventually show advantages and shortcomings, allowing law to converge to the most viable solution. For instance, in certain jurisdictions the law of trusts could apply. If a human and an AI system are jointly named as inventor, then, by operation of law (as the trust settlor), the property, which is the subject of the **property right** vested in the AI system as inventor, would be held in trust by the human inventor (as trustee), for the fictitious benefit of the AI system as inventor (the beneficiary). Whereas the **moral right** would, by operation of the same law, not arise in the first place.

#### Issue 6: General Policy Considerations for the Patent System

Question: Does WIPO intend to assume an observer or an advisory role in the issues discussed? In particular, does WIPO intend to explore and suggest possible measures within the relevant fora, e.g. the IP5 NET/AI task force? Does WIPO intend to pursue elevation of their status within the IP5 NET/AI task force from “observer” to “delegate”?

From a perusal of EU initiatives regarding AI, it is evident that IP considerations are either absent or under-represented in the relevant documentation. Does WIPO intend to address the EU regarding the various AI initiatives, with a view to achieving including IP issues in their considerations?

## Wednesday 8 July 2020

### Session 2: AI inventions: Patentability, disclosure and guidelines

#### Issue 3: Patentable Subject Matter and Patentability Guidelines

Question: There is an inherent tension in patentability of AI subject-matter in most legal systems. By way of example, in the European patenting practice, software programs, mathematical algorithms and mental acts are excluded from patentability “as such”, and the examiner looks for the so-called technical effect, i.e. solving a technical problem by technical

means.

In the US practice, subject-matter categorized as abstract ideas (e.g. mathematical concepts, mental processes) is not regarded as statutory subject-matter, unless it is embedded in a practical application. The relevant case law has shown a notorious instability.

But exactly this kind of subject-matter constitutes the building blocks of AI applications.

Does WIPO intend to explore and suggest any measures to remove such tension?

#### **Issue 4: Inventive Step or Non-Obviousness**

Question: According to current European practice for assessing inventive step (problem-solution approach), non-technical features in mixed-type claims (i.e. claims involving a mix of technical and non-technical features) cannot support the existence of inventive step. At least not to the extent they do not interact with the technical features in order to solve a technical problem. Such non-technical features are e.g. algorithms, mathematical concepts and mental acts, namely the basic ingredients of AI, thus exacerbating the tension mentioned under issue 3.

In the US practice, due to instable case law, it is still unclear to what extent such basic AI ingredients could support non-obviousness.

The uncertainties as to who exactly is the skilled person in the AI field and where exactly to put the inventive step / non-obviousness threshold, make these phenomena even more pronounced.

Does WIPO intend to explore and suggest any measures to clarify and harmonize the assessment of inventive step / non-obviousness?

## About The International Chamber of Commerce (ICC)

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