Innovation for All

Commission on Intellectual Property

WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI)

ICC Response

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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 and comments submitted by ICC

Issue 1 : Definitions

ICC welcomes the definition of Artificial Intelligence proposed in the revised issues paper. Indeed, many conversations on AI are made difficult by the lack of distinction between narrow and general AI, and it is useful to limit discussions to the category of narrow AI, which has clear and present implications to intellectual property protection systems.

Comments:

Paragraphs No. 11 and 12.

While the proposed distinction between "AI-generated" and "AI-assisted" systems is useful, further clarification could be useful in the context of discussions surrounding the intellectual

property implications of human intervention at the moment of selection of the input, during the operation of the AI application, and at the moment of selection of the output.

The proposed definition in the Revised Issues Paper defines "AI-Generated" outputs as those where the generation of the output is done "without human intervention". This definition does not specify if the absence of human intervention happens in a specific moment or during the whole operation. This can generate confusion as the reader may equate "AI-Generated outputs" to fully autonomous "General AI", and narrow AI applications will typically have some degree of human intervention at least in the selection of the input.

Does WIPO intend to further clarify this distinction, to make it clearer for the reader that the distinction between "AI-Generated" and "AI-Assisted" inventions can be a matter of degree of human intervention, rather than the presence or absence of it?

Paragraph No. 13.

In the definition of "Output", it should be considered to include "data" as another possible output from an AI system.

Paragraph No. 15, (i) Should the law define the line between AI-generated and AI-assisted outputs, and if so, how? How much human input should be considered material?

ICC appreciates that, at the moment, it is not easy to establish what the percentage of human intervention should be to be considered material contribution and to be able to better define the resulting IP issues. Given this difficulty, it is important that any agreed-upon standard is the result of a multistakeholder process, that reflects the impact that the line drawn would have on a wide range of business models and on the evolution of AI applications.

Issue 13 : Trademarks

Comments:

Paragraph No. 39, (ii) Are there any concerns raised by ownership of trademarks with respect to AI?

Regarding the ownership of trademarks, given that there is no requirement that a trademark be created by an individual, the conception of a trademark by AI does not superficially appear to be an issue. In many situations, AI may be useful in the creation of novel trademarks that avoids confusingly similar marks.

That said, there conceivably may be an issue in the enforcement of the trademark if the trademark itself would otherwise be copyrightable. In some jurisdictions, ownership of a copyright to the image of the design trademark is a basis for initiating an opposition proceeding

or invalidation proceeding against a third-party trademark. This raises the following question: If AI-generated or AI-assisted works are not protected by copyright in some jurisdictions, should this also mean that the option of using that copyright as a basis to oppose or invalidate a trademark would be unavailable?.

This option, of opposition or invalidation actions based on copyright, is useful for a large number of companies in those territories where the trademark has not yet been registered.

Paragraph No. 39, (iii) Do the functions, law and practice of trademarks need to be reconsidered with the increasing use of AI in marketing and the proliferation of AI used by consumers in the context of Internet of Things applications?

With respect to the use of AI in marketing, concerns regarding the use of trademarks by AI is somewhat anticipated by existing trademark practices and law. This includes the unauthorized use of third-party trademarks to guide consumers to a competing product (for example, through the use of meta tags or keywords). Further consideration could be given, however, to whether the question of liability for the use of AI tools is sufficiently addressed in the existing trademark framework.

Concerning the proliferation of AI used by consumers in the context of Internet of Things applications, how the AI communicates trademarked goods and services may, for example, create evidence of generic use of a trademark. Once an AI system begins responding to the end-user requests by using a trademark for a generic product, it may become difficult to control the AI's use of the trademark.

Likewise, even if no meta tags are used, AI applications could make undesired connections between the trademark and "similar" or "related" products or services to those actually identified by the trademark. These undesired connections may be difficult to detect and difficult to prove due to AI's black box dilemma, even when they may have a real impact on the market.

Paragraph No. 39, (iv) Will the use of AI, knowingly or unknowingly, by the consumer for product selection affect brand recognition? Will principles of trademark law, such as distinctiveness, recollection, likelihood of confusion or average consumer need to evolve due to the increasing use of AI? Are these issues for policymakers to consider?

The use of AI may affect brand recognition by the consumer. Currently, many marks comprising similar pronunciations co-exist in connection with similar goods and services, but many of these marks further comprise distinctive appearances, impressions, and connotations. These distinctions impress upon consumers' minds and form the consumers' purchasing decisions. In the case of an AI that communicates with consumers through verbal responses, that communication is limited to the pronunciation of the requested trademark —and consequently— the AI could fail to consider other visual differences between competing marks. Given the aural similarities between brands, the AI may respond with unintended results.

Given that currently popular AI assistants are “blind”, but not “deaf”, when it comes to responding the consumers’ requests for a branded product, trademark examiners may apply greater weight to phonetic similarities in some analyses. Regardless, the current trademark analysis does already includes comparing the sounds of competing trademarks, as well as other factors including appearance and connotation.

As a more general note, the described principles of trademark law are based on the perception of the *human* mind (distinctiveness, recollection, likelihood of confusion or average consumer). It should be carefully assessed whether (or not) adjustments to these principles are required, and if they adequately frame the use of AI (e.g. the traditional functions of a trademark are not, or to a lesser extent, relevant for interaction of AI with or the “perception” of a trademark by AI).

Issue 15 : Capacity building

Comments:

ICC welcomes the inclusion of capacity building in this Issues Paper. The reduction of the gap in AI capacity is an important goal that should be encouraged with the participation of business and within the existing framework for technology transfers.

Issue 16 : Accountability for Decisions in IP Administration

Comments:

(i) Should AI be allowed for decisions in the prosecution of IP applications? What are the legal questions raised by using AI applications for decisions in the IP prosecution process?

To consider these questions, it will be necessary to differentiate between decisions that are based on judgement and/or discretion and those that simply apply formal rules. An example of the former is a decision to grant a patent. An example of the latter is to impose a procedural fee. The following refers to decisions of the first type, i.e. those based on judgement and/or discretion.

During a transitional phase/test, AI systems may offer recommendations and humans should take the decisions, with an assessment made as to the quality of the recommendations. Feedback data gained during this transitional period can be used to test(and possibly improve) the AI systems. If and when the assessment turns positive, AI systems could be phased in, gradually, for taking decisions. Such a system, however, would need to be subject to the same rules as a decision taken by a human. This has the following consequences:

A negative decision would have to be duly motivated in order to enable an informed reaction (complaint, appeal, etc). For example, this is now the case in EPO refusals of patent applications (examination) or revocation of patents (opposition). So an AI-taken negative decision has to be duly motivated, as if it were a human-taken decision.

A positive decision has to be duly motivated as well, in order to demonstrate uniform and equitable application of the rules and, as the case may be, enable an informed reaction from a party adversely affected. For example, this is now the case in the EPO grant process (*votum* of the examining division), because granting of a patent affects adversely all other participants in that market (in the jurisdiction at hand) but the patentee. So an AI-taken positive decision has to be duly motivated, as if it were a human-taken decision.

Whether due motivation is at all possible in the case of an AI-taken decision is still to be investigated. This will be a non-trivial task, given that for the time being the way an AI system, for instance a neural network, reaches its output, cannot be fully understood and explained.

If an AI system is used in IP administration, an applicant should not have any disadvantage because a decision in his/her case was taken by an AI system instead of a human. In other words, a decision taken by an AI system should be subject to the same rules as a decision taken by a human.

(iii) Should any policy or practical measures be taken to ensure accountability for decisions made in the prosecution and administration of IP applications where those decisions are taken by AI applications? Which principles should AI applications used in the prosecution and administration of IP applications follow (for example, the encouragement of transparency with respect to the use of AI and in relation to the technology used)?

Accountability is normally related not only to due justification of decisions, but also to sanctions in case of misguided judgement or misuse of discretion. However, in the IP case the latter is rarely the case. For instance there is no responsibility issue (and *a fortiori* no liability issue) for EPO administrative decisions. Due justification is dealt with under (i) above. Once the requirement for motivation for AI-taken decisions is accepted, in the sense described under (i) above, due justification should be required and guaranteed in the same way for human and AI decisions.

Regarding transparency, the applicant should be informed whether the decision has been taken by a human or an AI system. The applicant should have the right to ask for a human-taken decision in advance. In case of an adverse AI-taken decision, the applicant should have the right to ask for a human review.

(iv) Do any legislative or regulatory changes need to be envisaged to facilitate or to address the consequences of decision-making by AI applications (for example, reviewing legislative provisions on powers and discretions of certain designated officials)?

From a practical viewpoint, it would be desirable that any communication of an AI-taken decision clearly state at least the following:

- that the decision was taken without human intervention
- that the decision is subject to human review at the discretion of the recipient
- whether the review has a suspensive effect
- the *ex tunc* or *ex nunc* effect of the suspension

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