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NOTE

From: Presidency
To: Delegations

No. prev. doc.: 5538/20, WK 1657/2020

Subject: WIPO Conversation on Intellectual Property and Artificial Intelligence: Draft
Issues Paper prepared by the WIPO Secretariat
- Final EU/Member States reply

Delegations will find attached, for information, the EU/Member States reply to the above-mentioned consultation.

This reply was discussed and agreed at the meeting of the Council Working Party on Intellectual Property on 11 February 2020, and thereafter transmitted to the World Intellectual Property Organisation on 12 February.



EUROPEAN UNION

Permanent Delegation to the United Nations Office
and other international organisations in Geneva

NOTE VERBALE

The Permanent Delegation of the European Union to the United Nations and other International Organisations in Geneva presents its compliments to the Secretariat of the World Intellectual Property Organisation and wishes to submit herewith a response of the European Union and its Member States to the public consultation on the WIPO Draft Issues Paper on Intellectual Property and Artificial Intelligence of 13 December 2019.

The Permanent Delegation of the European Union to the United Nations and other International Organisations in Geneva would like to take this opportunity to renew the expression of its highest consideration to the Secretariat of the World Intellectual Property Organisation.



Geneva, 12 February 2020

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**Response of the European Union and its Member States to the public consultation on the
WIPO Draft Issues Paper on Intellectual Property and Artificial Intelligence of
13 December 2019**

1. The European Union and its Member States warmly welcome the initiative of WIPO aimed at defining the main policy issues related to intellectual property in the context of the ongoing Artificial Intelligence (AI) and data revolution.
2. AI is a strategic technology and a key priority to the EU¹. It offers great new opportunities for both the public and the private sectors and can help producing smart solutions for many challenges in crucial fields, such as health, agriculture, manufacturing and security. The full potential of AI cannot be unlocked without access to high quality data, which has become a critical asset for the development of this technology and, more generally, a key source of global innovation and growth as such.
3. The development and uptake of technologies using AI, as well as the rise of the global data economy, require addressing important technical, social, economic, ethical and legal questions in different policy areas. Intellectual property policy is no exception in this respect.
4. The interplay between AI, data and the different intellectual property rights deserves a discussion at international level. This should involve all the relevant stakeholders, including policy makers, representatives of industry and members of the civil society. The draft issues paper published by WIPO on 13 December 2019 in the context of the public consultation on artificial intelligence and intellectual property policy presents a good opportunity to initiate such a discussion. This could in the future serve as a ‘kick-start’ to a coordinated global approach addressing the challenges that AI presents to the intellectual property system.

¹ See Council Conclusions of 18.02.2019 on the ‘Coordinated plan on the development and use of Artificial Intelligence made in Europe’, and Commission Communications COM(2018) 232, COM(2018)237 and COM(2018)795.

5. The draft issues paper covers in detail important subjects to consider. Before addressing each specific Intellectual Property right, we would like to make some **general comments**:

- The objective of the paper is to foster discussions, and in this context the EU and its Member States would favour starting this process with a general discussion. In this context, the introduction for each issue could be reviewed to avoid any statement that could be interpreted as favouring or precluding certain options, suggesting a way forward or reaching conclusions on issues that have not yet been discussed. The introduction should mainly focus on the problem definition. A more detailed articulation of problems would allow for a better understanding of the questions. The diverse techniques covered under the umbrella term AI should be considered individually, taking into account their differences (namely the extent of human intervention, the importance of data, and other resources involved).
- A further objective is to foster a discussion on fundamental aspects of the issues contained in the paper. Questions that may be interpreted as narrowing down the debate and favouring certain options may be reformulated as generally and openly as possible. It is also important to prepare the ground for evidence-based discussions and policies on each issue. In this regard, the issues paper could invite respondents to provide evidence when answering the questions
- We suggest agreeing on a glossary of terms for the purpose of the issues paper.
- We recommend introducing two additional sections, one dedicated to AI and competition law and the other one to AI and trade mark law.
- The question of whether or not AI should be considered in a *sui generis* way should be examined as a preliminary question. The applicability of the existing IP framework to AI as a tool, and to the constituent elements of AI, also need to be examined.

6. As regards the issues and individual IP rights raised in the draft issues paper, we would make the following **specific observations**:

- With respect to patents, we propose that the paper includes self-standing issues on AI and patent infringements, the concept of person skilled in the art as well as patentability of inventions assisted by AI as computer-assisted inventions. The inventorship/ownership issue should include fundamental questions concerning identification of AI-generated or AI-assisted inventions by the IP Offices, the possibility of naming a legal person as inventor and the possible consequences to society of according inventorship rights to AI. Concerning the issue of disclosure, we propose to raise additional questions on black box AI inventions and artificial neural networks. The patent policy considerations should cover the possible need for a new hierarchy of social policies to address the issues of preserving the patent system and of encouraging innovation in AI.
- On copyright, we propose that the discussions start with fundamental questions on the possible granting of copyright or related rights not only to AI-generated outputs but also to outputs produced with the assistance of AI². The rationale and empirical evidence behind granting protection to such outputs should be discussed from the outset. Impacts of the various policy options on all relevant stakeholders and the society should also be part of the discussion. We also propose to discuss, on the basis of evidence and by assessing the relevant impacts, how the copyright framework does or should apply to uses of content as input to feed AI. Furthermore, we believe that the opportunities for harnessing AI to improve the operation of the licensing market, e.g. to facilitate the identification of content and copyright holders, should also be explored.

² We consider the word ‘outputs’ to be more neutral than ‘works’.

- As regards the section on data, our main comment concerns the lack of any discussion on the existing IP framework. The data section directly focuses on the creation of new rights on data while we consider that existing solutions (be it IP law, contractual or technological solutions) should first be envisaged. It is also important that the issues paper does not start any biased discussion by only considering one policy goal or means (i.e. protection of data). The first question is not who ‘owns’ the data, but rather, whether recognising ownership of data is justified. The diversity of policy goals should be reflected in the data section.
 - We consider that the designs section should be further developed. AI is already used as a tool to create designs and many variations thereof. This trend will increase in the near future. This poses challenges as regards the basics of designs protection (i.e. the conditions of protection and the scope of designs protection). However, this is not reflected in this issues paper. For these reasons, we recommend including additional questions reflecting this concern.
 - As regards capacity building, we suggest adding questions on providing AI-based tools to IP offices and, more generally, using AI to support IP search activities. Finally, we consider that the debate on the use of AI for making decisions in the prosecution and administration of IP applications is to be conducted, to the extent possible, in the light of broader discussions on the use of AI in any administrative decision making process.
7. The EU and its Member States look forward to discussing, within the framework of WIPO, the possible answers to the final set of questions addressed in the issues paper.