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WIPO'S THIRD CONVERSATION ON INTELLECTUAL PROPERTY IN ARTIFICIAL INTELLIGENCE

Session 1, 4 November 2020 – Issue 1: Definitions

Questioning the AI-Generated/AI-Assisted Distinction

SUMMARY: The way in which this Conversation on IP in AI is framed impacts the content of the discussion. This intervention argues for careful attention to the distinction between AI-Generated and AI-Assisted outputs. There is a need for greater focus on the allocation of rights in AI-Assisted outputs so that the humans behind the machines are kept at the forefront of discussions.

This intervention relates to Issue 1 (Definitions) in WIPO's Revised Issues Paper on IP Policy and AI. As the Issues Paper points out, agreed definitions are helpful in facilitating a productive international dialogue (paragraph 9). Nonetheless, as is often the case, the devil is in the detail. I would like to make a few observations about the distinction between the terms 'AI-Generated' and 'AI-Assisted'. As these terms are used to define the subject matter under discussion, it is crucial to have a clear sense of their meaning in order to ensure that the international conversation on IP in AI does not proceed at cross purposes.

The Issues Paper defines an AI-Generated output as one which is made without human intervention, whereas an AI-Assisted output is said to be one that is generated with material human intervention and/or direction (paragraph 12). The key element in the AI-Generated/AI-Assisted distinction appears to be the requirement for *material* human intervention or direction. The degree of interpretative work required to make the term 'material' meaningful, however, is raised as a matter for further discussion (paragraph 15). Defining this term is likely to be a challenging undertaking. On its face, a vague open-textured term such as 'material' lacks a stable point of reference which would enable the AI-Generated/AI-Assisted distinction to be understood and applied consistently.

What counts as a material human input may be susceptible to different interpretations depending on the context in question. When discussing the subsistence of IP rights in AI outputs, for example, one might tend to associate a material human input with one that meets the threshold requirements of the right in question (i.e. in the case of copyright, an original or creative contribution; or for patents, a technical contribution to the inventive concept). However, such an approach would result in different meanings of 'material', depending on the IP right under discussion. Furthermore, if one follows this instinct, a material contribution would also be understood differently in different jurisdictions in light of divergent approaches to the application of threshold tests for the subsistence of IP rights.

Other variables might affect the definition of 'material'. Human input may be judged to be material based upon its quantity; its observable impact on the output; or by reference to intrinsic qualities such as the skill, effort, or creative choice that it entailed. Things become even more complex where multiple human inputs or highly iterative creative processes are concerned. In

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such cases, should material human input be assessed on an individual basis or in aggregate? If one considers human input in aggregate, must a particular relationship or shared intention exist among contributors (and if so, when must this arise)? And then there is the question of which stage in a creative process an intervention must be made in order to count as material to the output.

The multiple varied human inputs in AI creative processes give rise to a certain degree of legal complexity. Sometimes the Issues Paper attempts to sidestep this complexity by focussing mainly on AI-Generated outputs, that is, those that require no human intervention at all (see especially, Issue 7 on copyright and related rights). This avoids troublesome inquiries into which human inputs are material. Framing the Conversation in this way, however, restricts opportunities for discussions of how standard IP law principles on the allocation of rights apply to the vast majority of current AI implementations which still rely on human input. There is significant legal uncertainty and international divergence in relation to these principles. This uncertainty/divergence often coalesces around the question of what counts as a material contribution. Given that intellectual property law's aim is to reward and incentivise *human* creativity, the protection of AI-Assisted outputs should be at the heart of this Conversation.

In conclusion:

1) The definition of the term 'AI-Assisted' (as it is currently framed) should not be enshrined into law, because it is too vague to provide sufficient guidance. Furthermore, prematurely incorporating the AI-Generated/AI-Assisted distinction into law risks concealing important disagreements as to what counts (and what ought to count) as material human input. These are matters of substantive (not merely formal) importance and as such they should be at the heart of this Conversation.
2) As most AI works require multiple and diverse types of human input, it would be prudent for WIPO to adopt a broad view of what counts as material human input to AI-Assisted works. More attention should be devoted to considering the application of existing IP principles to these AI-Assisted works to ensure that the people behind the machines are kept at the forefront of discussions.

ABOUT THE AUTHOR

Dr Daniela Simone is a Senior Lecturer at Macquarie Law School, specialising in Intellectual Property Law. Prior to taking up this position she was a Co-Director of the Institute of Brand and Innovation Law at University College London. Her research examines the challenges that the digital age poses for copyright law. Daniela's book, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press, 2019) was cited by the Court of Appeal (England and Wales) in a recent landmark case on joint authorship: *Kogan v Martin* (2019) EWCA Civ 1645. She has BCL, MPhil and DPhil degrees from the University of Oxford and a BA/LLB (Hons I) degree from the University of Sydney. Daniela is a Fellow of the Higher Education Academy. Prior to joining academia, she worked as a lawyer in the intellectual property, communications, and technology team in Ashurst's Sydney office.