The International Association for the Protection of Intellectual Property
Internationella föreningen för immaterialrättsligt skydd
Association Internationale pour la Protection de la Propriété Intellectuelle

AIPPI
SWEDEN

Stockholm, Sweden 25th August 2020

Dear Director General

Dear Director AI Policy Division

AIPPI Sweden appreciates having had the opportunity to participate at the 2nd Session of the Conversation on IP Policy and AI and is looking forward to the 3rd Session.

To achieve productive results of the continuation of the Conversation, it is in our opinion essential that the orientation and structure of the further work is considered taking into account the present time and other constraints on the 3rd Session. In the attached submission, we therefore suggest to focus on a few practically important issues and outline two such issues.

Yours faithfully,

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President of AIPPI Sweden

Bodil Ehlers
Vice President of AIPPI Sweden

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THE CONTINUATION OF WIPO CONVERSATION ON IP POLICY AND AI

Summary

The development of AI and related technologies has far reaching effects on the global IP system and raises a wide range of IP policy issues that are addressed on the global level in the in the WIPO Conversation. Realizing the need of user contributing to these considerations, AIPPI Sweden finds it essential for a productive continuation of the Conversation that the orientation and structure of the work be directed by the experiences of the successful work hitherto.

In the ambition to contribute to a productive result of the 3rd Session, AIPPI Sweden submits that organizational measures in respect of the working method and a concentration of the issues addressed be considered;

The WIPO Conversation

The Conversation provides member states, users and other stakeholders an open forum to exchange views on the impact of AI on IP policy in order to help surface the most-pressing issues related to IP and AI and understanding the impact of AI.

It is common ground that the development of the AI technology has effects that are potentially far reaching also for the global IP system. On national level, normative changes in view of such effects need to be considered and on the global level, potentially serious cross border effects raise concerns.

WIPO Conversation is a unique forum for considering effects on the global IP system and needed adaptions of the global IP system to the development of the AI technology, taking into account the relevance for AI of the development of computer power, 5G telecommunications and IoT. To address AI related normative changes and harmonisation, it is essential to identify to what extent AI changes the basis for present legal evaluation of IP protection and whether national laws differ substantially in those respects.

The orientation and structure of the continued work is decisive for a meaningful development of a global IP policy to cater for the effects of AI technology. The basis for the Conversation is the WIPO Issues Paper, which is a comprehensive

mapping of the whole area of the effects of AI on IP policy, listing eight IP areas and policy issues within each of these areas. This was the basis for the 2nd Session of the WIPO Conversation on July 7-9. Over 50 written interventions covering a wide range of selected issues were submitted before the Session; one being submitted by AIPPI Sweden. These interventions were briefly presented at the Session but – with a few exceptions - not commented upon at the meetings. In the available time, there was no room for discussion of issues addressed in the interventions, which are published on WIPO's website.

On the basis of the 2nd Session, WIPO has announced the intention to prepare a priority list of issues and develop preliminary considerations for IP policy on a number of questions for discussion by member states and other stakeholders.

To allow a thorough exchange of views at the 3rd Session of the WIPO Conversation in November and to achieve an efficient and constructive discussion producing concrete and practically essential results, the working method and the focusing on a limited number of issues may have a critical impact.

Assuming that less than two hours will be available for debating at the session each day, a limitation of the theme(s) to be addresses each day seems to be required in order to make it practically possible to debate the varying aspects thereof in the available time. Such a limited selection of themes to be discussed at the 3rd Session should not restrict the breath of the WIPO Conversation but only aim at an efficient structuring of the next Session.

Further, a preparation in writing of the themes to be addressed at the 3rd Session seems to be required to obtain productive verbal discussions of each theme. Such a preparation seems to need to include a presentation of the issues to be discussed as a guiding basis for interventions and such interventions in writing commenting on the selected issues should be invited. Interventions submitted should also be published before the 3rd Session in order to save time at the meetings and in particular to facilitate an exchange of views that may contribute towards a shared understanding of the issues discussed.

Issues

Inventorship

Within the patent area, the Issues Paper lists a number of IP policy issues arising as a consequence of the AI technology and among them *Inventorship and Ownership*, which is the subject of a present AIPPI Study Question.

The present global patent system is basically aiming at encouraging and protecting human inventions. AI **generated** inventions that in the future may be created without human creative contribution therefore present a potentially disruptive change of the basis for protecting technical innovations and requires

analysis and consideration of a number of consequential questions. However, the answers to these questions should be based on an understanding of AI generated inventions. Such understanding depends on how the AI technology further develops and is not available today. As important as the issue of AI generated inventions may become, it is not an issue that seems timely to address at the 3rd Session.

On the contrary, AI **assisted** inventions are a present reality representing a high and increasing proportion of global patenting. Used as a tool in the invention process, AI may provide an essential contribution to the technical solution. However, an AI entity may not be named as a co-inventor under present national and regional patent laws. Instead, the human inventive contributor, who always exists in respect of AI assisted inventions, is the inventor and should be named as such.

In studying the question of *Inventorship of Multinational Inventions* in 2015, AIPPI found that the definition of who is an "inventor" differs significantly among the various jurisdictions. Thus, it was found highly desirable to have a harmonized definition of inventorship that would be uniformly accepted in the case of multinational inventions. By such harmonization, the evaluation of different human inventive contributions that justify recognition as a co-inventor would be consistent and foreseeable. To avoid that different persons are to be named as inventors in different jurisdictions, is particularly important where a mistake in the naming may endanger the validity of the patent.

When AI assisted inventions are multinational, such inventions are also affected by the difficulties due to differences regarding inventorship in applicable national laws. Particular such difficulties arise in the context of evaluating co-inventorship based on the use of AI as a tool that is essential in the invention process. Lacking directions for this evaluation in specific rules or case law, it may be uncertain if and how general principles for evaluating co-inventorship are applicable to AI assisted inventions. Further, not only the general principles for evaluating inventorship need to be considered but also if and how the relevance of the use of AI for the specific invention is taken into account in evaluating co-inventorship.

AIPPI is presently studying *Inventorship of inventions made using Artificial Intelligence* and Group Reports provide a broad presentation of current law. This indicates i.a. that differences in national laws in the evaluation of co-inventorship of AI assisted inventions might result in contrary results with regard to the recognition as a co-inventor of the person who contributed the AI element of the invention.

For these reasons, *Inventorship of AI assisted inventions* seems to be an issue of particularly topical and practical interest, the understanding of which may be meaningfully advanced at the the3rd Session.

Rights in Data and exceptions for data mining

AI being a data-driven technology, one central aspect of IP policy regarding data related to AI is the IP protection of and the access to publicly available data sets used as training data for machine learning. The Issues Paper identifies *Data* as one area for discussion of IP and AI and lists a number of policy issues related to existing IP rights in data and possible new rights in relation to data. *Rights in Data* is also the subject of a present AIPPI Study Question.

Training data for machine learning have assumed an increased significance as a critical component of AI. That raises the issue of how exclusive IP rights in data and exceptions to such rights affect innovation in the AI field. This issue includes considering the need to balance on one hand protection of data and on the other access to and free flow of data that may be necessary for the improvement of AI, science, technology or business applications of AI. In this context, present and new rights as well as exceptions thereto need to be considered.

Development of computer power, 5G telecommunications and IoT as well as creation of dominant internet platform services has drastically advanced the means for collecting huge amounts of technical and commercial data that may be used as a source of information in machine learning. These developments create a new situation where exclusive rights in such sources might hamper the development of competing alternatives. At the same time, the development of free and open sources of training data for machine learning has shown that other incentives than exclusive IP rights may effectively advance the technological progress in AI.

In view of this situation, there is a need to consider the appropriate balance between on the one hand incentivizing creation of training data for machine learning by exclusive IP rights and on the other advancing technological progress by increased access to such data through appropriate exceptions for the use of published data sets in data mining.

AIPPI´s present study of the *Rights in data* and Group Reports provide a broad presentation of current laws. This indicates that differences in national laws result in variations in the IP rights in data sets as well as in the exemptions for data mining. Measures on the global level are therefore needed to avoid hampering or even preventing a consistent cross border IP policy for the use of published training data for machine learning.

Thus, *Rights in Data and exceptions for data mining* seems to be an issue of particularly topical and practical interest, the understanding of which may be meaningfully advanced at the 3rd Session.