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FEATURE

Intelligent Guessing: Is European IP Law Keeping Pace with AI?

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This article explores intellectual property (IP) aspects of artificial intelligence (AI) and how these issues are being addressed in the United Kingdom (UK) and elsewhere in Europe.

What Is AI?

Let's start with the basics. Understanding the characteristics of AI systems enables a focus on potential IP challenges.

Most of us are using AI, even if only at a relatively simple level, when we say, "Hey Siri," allow Spotify to recommend music, or engage with customer service chatbots online. But how do we define AI?

As pioneers in the commercial application of AI, IBM Corporation's website offers extensive historical perspectives and definitions. Succinctly, "[a]rtificial intelligence leverages computers and machines to mimic the problem-solving and decision-making capabilities of the human mind." (1) The key word is "mimic." Today, AI systems are still considered relatively "weak," focusing on the performance of narrow tasks—in contrast to the prospect of "strong" AI that might reproduce or surpass human intelligence to a broader extent. Although Google reportedly parted ways in

2022 with an engineer who claimed that Google's LaMDA AI chatbot was "sentient," [2] current AI algorithms can merely mimic human characteristics.

Draft European Union (EU) legislation defines AI systems by reference to software having listed characteristics and generating outputs such as "content, predictions, recommendations, or decisions influencing the environments they interact with." [3]

IP policy-making bodies have suggested their own definitions. For example, WIPO has noted that "AI systems are viewed primarily as learning systems; that is, machines that can become better at a task typically performed by humans with limited or no human intervention." [4]

Building on this, a recent UK government policy paper emphasized the "adaptive" and "autonomous" aspects of AI:

> AI systems often partially operate on the basis of instructions which have not been expressly programmed with human intent, having instead been "learnt" on the basis of a variety of techniques; AI systems are often "trained"—once or continually—on data, and execute according to patterns and connections which are not easily discernible to humans. . . . [T]his means that the logic or intent behind the output of systems can often be extremely hard to explain . . . . AI often demonstrates a high degree of autonomy, operating in dynamic and fast-moving environments by automating complex cognitive tasks. . . . [This] means that decisions can be made without express intent or the ongoing control of a human. [5]

Concerns about these aspects of AI have led EU legislators to mandate market surveillance authorities to have full access to a company's AI training, validation, and testing datasets and, where necessary for assessing conformity of high-risk AI systems, access to source code. [6] High-risk AI systems will also have to be designed and developed so that their operation is sufficiently transparent for users to interpret their output and use it appropriately. Some EU countries' courts have already issued decisions mandating citizens' access to algorithms and source code underlying automated decision-making in the public sector, for example, pursuant to freedom of information laws.

AI also gives rise to ethical concerns that may influence IP policy. IBM, whose Watson system has been available commercially for some time, applies three principles of AI ethics:

1. The purpose of AI is to augment human intelligence
2. Data and insights belong to their creator
3. Technology must be transparent and explainable [7]

Each of these resonates with the IP issues examined below.

Applications of AI

Current AI capabilities are taking things in interesting directions, especially for IP attorneys. One application programming interface offered by OpenAI powers hundreds of apps that incorporate search, conversation, text completion, and other features. Customer feedback business Viable, for example, uses OpenAI to derive aggregated customer relations insights based on themes, emotions, and sentiments that it identifies in surveys, or from help desk tickets, live chat logs, and user reviews. [8] This can be used to improve customer experience.

In drug research, Exscientia, a company based in Oxford, UK, and originating as a Dundee University spin-off, applies AI techniques to small-molecule drug discovery, reducing timescales from years to months. [9] Recursion Pharmaceuticals in Utah is generating massive collections of data on cellular behavior in the hope that these can be mined using AI for insights to aid drug innovation. [10]

AI is also already embedded in the creative industries and the field of journalism. A 2022 cover image for the *Economist* was produced using Midjourney, trumpeted with the title "How a Computer Designed This Week's Cover—While We Pressed a Lot of Buttons." [11] In June 2022, *Cosmopolitan* magazine similarly engaged DALL-E 2 to create a swaggering, athletic, female astronaut striding toward the viewer on its cover. [12] These are tools for generating images from a user's text prompts and subsequent winnowing, on potentially any topic—such as "swaggering female astronaut" or (just a thought) "bald British attorney with post-Brexit angst playing maracas" perhaps.

Similarly, the joint Microsoft/ING Bank project, "The Next Rembrandt," soaked up pixel-by-pixel data from the Dutch master's vast oeuvre and produced a new portrait of a non-person in the same style, down to the authentic pattern and thickness of Rembrandt's brushstrokes. [13]

The more prosaic thispersondoesnotexist.com, which is strangely addictive, uses NVIDIA StyleGAN to generate random fake faces of nonexistent humans in the form of photographs.

The Law Bites: Mining Text and Data for AI Training

AI systems are trained using vast data repositories, which involves the copying of digital material in computer memory. If copyrighted works are reproduced in the course of these activities, this may amount to infringement unless a statutory exception applies.

European copyright legislation specifies that copying includes storing a work in any medium by electronic means, as well as making copies that are transient or are incidental to some other use of the work. (14) Further, EU and UK laws protect collections of data by means of a sui generis "database right," provided that there has been sufficient investment in obtaining, verifying, or presenting the contents of the database (infringement occurs by unauthorized extraction or reutilization of a substantial part).

In the past, some attention has focused on web-scraping or "spidering" disputes, i.e., where websites take data from several other websites without permission—for example, pricing or timetable data. The Court of Justice of the European Union (CJEU) has held that automated search engines trawling online data can infringe the database right. (15) There might also be a breach of website terms and conditions having contractual effect. (16)

UK copyright legislation provides only limited exceptions, for research or text and data analysis, in each case for noncommercial purposes, (17) and there is no exception at all in respect of the database right. The clear conclusion is that a license is needed to use copyrighted material and noncopyrighted database contents to train AI for commercial purposes in the UK.

The latest EU position (not applicable in the UK) is more forgiving, covering both copyright and the database right, and allowing "text and data mining" (essentially, automated analysis to generate things like patterns, trends, and correlations), provided that the material is lawfully accessed and the rights holder has not expressly reserved the rights. (18) The requirement for lawful access does, however, necessitate a subscription or use of open-access materials.

In February 2022, the EU announced a proposal for a regulation on fair access to and use of data, known as the draft Data Act. (19) This concerns industrial data generated from physical

equipment, such as engine performance data or data from agricultural equipment. It specifies that device users should have access to any data generated and be able to share it with providers of aftermarket services, who must be licensed on fair, reasonable, and nondiscriminatory terms by the device maker. It includes clarification that the sui generis database right does not apply to databases comprising data arising from use of products.

From Monkeys to the Creativity Machine: Protection for AI Outputs

As we shall see, UK law unusually provides for copyright in computer-generated works, at odds with the EU position. First, however, let's talk monkey.

Readers may remember the "monkey selfie" case, in which British photographer David Slater found himself pitted against People for the Ethical Treatment of Animals (PETA). Slater had set up a camera on a tripod in the jungle in Indonesia, and a monkey took a selfie with it. (Later in this article, we will essentially be considering replacing the monkey with an AI system.) The selfie turned out to be commercially valuable, but Wikipedia refused to take down an unlicensed copy, causing a well-publicized dispute. PETA sued the photographer in California on behalf of the monkey, seeking a declaration of ownership of the copyright, but its claim was initially dismissed and an appeal was settled (on the basis that Slater has to pay a percentage of future royalties to the sanctuary where the monkey lives). [20] In this author's view, the result may have been different under English law, where a photographer would have good arguments in terms of both subsistence and ownership of the copyright.

This throws a spotlight on whether aspects of photographic labor are sufficient to attract copyright protection. The CJEU in the *Painer* decision held that a photograph is entitled to copyright protection based on the photographer's free and creative choices of elements such as background, pose, camera lens, lighting, and developing techniques—all of which are matters that do not involve the photographer having to press the camera button themself. [21]

This standard was applied by the English court in *Temple Island Collections Ltd. v. New English Teas Ltd.* (the "red bus" case), in which the court held that individual decisions about what to photograph, the visual angle, lighting, exposure, and "being in the right place at the right time" could provide the necessary originality, even though the photograph (taken by a human) showed simply a bus passing by on a bridge in front of the Houses of Parliament. [22]

The use of AI to produce autonomous creative works potentially gives rise to similar issues of originality and authorship. In the UK, these questions are arguably determined by sections 9 and 12 of the Copyright, Designs and Patents Act 1988 (and equivalent provisions concerning unregistered and registered design rights), which state that "[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken," and the term is set, in the case of copyright, at 50 years from the end of the calendar year in which the work was made. (23) The "person" undertaking the arrangements would include a company. (24) It is not necessarily the same as the person who created the software or supplied it, although this gets blurry when we are discussing AI.

Where does this leave the requirement for originality? Must the person who "made the arrangements" exhibit skill, labor, and/or judgment, and if so, is the red bus case helpful guidance on what would qualify? It is not clear. In proceedings regarding football match data collected for commercial purposes, (25) the English high court held that a computer-generated database could not qualify for database copyright because of the specific statutory requirement that the selection or arrangement of a database be the author's own intellectual creation—but this reflected a specific provision inherited from the EU Database Directive and may not apply outside of databases as a broader principle of English copyright law.

The definition of "computer-generated" in the UK statute also suggests potential problems with joint authorship: "'computer-generated,' in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work." (26) Since this applies only where there is no human author at all, there can be no joint authorship in a cocreation by a human and an AI system.

The relative contributions of humans and AI may not always be easy to discern. Where the AI system will be merely a tool to aid a human author, there should be no need for artificial constructs as to authorship, as discussed in a UK Intellectual Property Office (UKIPO) consultation document, which stated: "A copyright work may be created by a human who has assistance from AI. If the work expresses original human creativity it will benefit from copyright protection like a work created using any other tool." (27) This would not be a "computer-generated work." But can we always decide easily whether a work is purely computer-generated or also has a human author? Take, for example, a system designed to produce "generative" art based on an initial input from a user. Does this element of human involvement go beyond "arrangements necessary for the

creation of the work" and constitute an element of human authorship? This can only be determined on a case-by-case basis.

Other gaps exist in UK copyright coverage. For example, moral rights: the right to be identified as the author does not apply to computer-generated works, and the same applies to the right to object to derogatory treatment. [28] Nor is there provision for protection of computer-generated designs under the UK's post-Brexit "supplementary unregistered designs" regime (which replaced the EU unregistered design right in the UK from January 1, 2021), or under the sui generis database right (which belongs to the person who "takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation"). [29]

IP lawyers in many other territories without such artificial provisions may be surprised to learn of the UK's specific protections for computer-generated works. In the EU, for example, works are protected only if they are original, in the specific sense that they are an author's own intellectual creation. In the *Painer* photography case cited above, the CJEU noted that "an intellectual creation is an author's own if it reflects the author's personality. . . . That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices . . . ." [30] This seems at odds with copyright for pure computer-generated works. There is also no mention at all of "computer" in the EU designs regulation, which vests EU design rights in "the designer." [31]

In the U.S., Dr. Stephen Thaler failed in 2018 to register a copyrighted work entitled *A Recent Entrance to Paradise*, which was stated to have been authored by an autonomous AI system called "Creativity Machine." The application was based on a claim that the machine had produced a work for hire on behalf of the machine's owner. Based on U.S. Supreme Court precedent regarding the concept of authorship, the U.S. Copyright Office refused to register the copyright because there was no human author; if a computer is involved, it must be merely as an aid to the human author. [32]

Thinking Inside the Box: AI Inventions

In September 2019, Thaler filed International Patent Application No. WO 2020/079499 A1, entitled "Food Container and Devices and Methods for Attracting Enhanced Attention," citing as its inventor "DABUS, The invention was autonomously generated by an artificial intelligence." DABUS

stands for "device for the autonomous bootstrapping of unified sentience." [33] Thaler stated that he did not instruct DABUS to invent the items in question, hence his suggestion that he was not the inventor. He claimed to be the rightful applicant by reason of owning DABUS.

The Australian Federal Court reversed an initial decision to accept the application, [34] and both the U.S. Patent and Trademark Office and U.S. Court of Appeals for the Federal Circuit rejected it. [35] The European Patent Office (EPO) likewise refused the application, emphasizing that "where the applicant is not the inventor or is not the sole inventor, '[t]he designation shall contain a statement indicating the origin of the right to the European patent.'" [36] It stated that the named inventor must be a legal person, and that ownership of a machine was not a valid basis for claiming entitlement to file a patent application. The EPO acknowledged, nevertheless, that the operator of the system could file a patent application in their own name as inventor, and that inventions made with the assistance of AI are not per se unpatentable. The German patent office likewise requires a natural person as inventor, albeit allowing an AI system to be named alongside them. [37]

The English Court of Appeal has also found against Thaler, [38] and a decision of the Supreme Court is expected once it hears the case in 2023. The UK issues are slightly more nuanced as they relate to the specific formalities required when filing at the UKIPO. Section 13(2) of the Patents Act 1977 requires that "an applicant for a patent shall . . . file with the Patent Office a statement—(a) identifying the person[s] whom he believes to be the inventor[s]; and (b) where the applicant is not the sole inventor or the applicants are not the joint inventors, indicating the derivation of his or their right to be granted the patent." [39] "Inventor" is defined in section 7(3) as "the actual deviser of the invention." [40]

Much turned on Thaler's claim to entitlement by virtue of owning DABUS. But the court drew an analogy with a borrowed camera: the owner of the camera does not own the copyright in the resulting photographs (unless perhaps it was borrowed by a monkey?); and since AI could not be an inventor, Thaler could not own the resulting invention by virtue solely of owning the machine. It was also common ground that only a person could file an application for a patent. The application was accordingly held not to satisfy section 13(2) regarding the statement of inventorship.

Lord Justice Birss dissented. He noted, "There is more than a hint in this case of the idea that if only Dr Thaler was not such an obsessive and, instead of calling DABUS the inventor, he named himself and then none of these problems would arise." [41] While acknowledging that "[m]achines are not persons," Birss thought it sufficient, from a patent office formalities viewpoint, that the applicant stated first who they genuinely believed the inventor to be and second, even if it was wrong in law, asserted the honest belief that they owned the rights through ownership of the machine. [42]

Whatever we feel about Thaler's dogged pursuit of AI inventorship in many of the world's appeal systems, these cases have sown a fertile field for debate. And they highlight many inconsistencies when we try to apply patent law concepts to AI tools. For example, should the inventor or operator of an AI system qualify as the inventor of its outputs, and is it always legitimate to state them as such on a patent application? Does an AI-generated invention in fact have the necessary qualities of inventiveness under applicable patent law, if use of that AI system would inevitably generate the "invention"? Is the ordinary notional person skilled in the art taken to have access to AI tools and relevant data?

Bruce Willis and the Internet of Things

Controversy has reportedly been stirred by an ad for telecommunications business MegaFon that utilized Bruce Willis's digitally sampled face without his physical participation. The actor's agent has told the press that he has no agreement in place with the maker of the ad, a Russian company called Deepcake. [43]

Unauthorized use of an actor's image might be dealt with in English and European laws through copyright (based on the materials used to instruct the AI system) or passing off (assuming a misrepresentation that the person took part). There may also be implications under defamation laws.

The UK government has said that "the impacts of AI technologies on performers remain unclear. It is also unclear whether and how existing law (both in the IP framework and beyond it) is insufficient to address any issues. If intervention is necessary, the IP framework may not be the best vehicle for this." [44]

There has been a similar lack of firm conclusions in respect of trademarks, for example, the potential impact on "likelihood of confusion" where AI is involved in Internet of Things (IoT) purchasing decisions, and the concept of the "average consumer" in trademark law. The UKIPO says that AI is not yet developed enough to have an impact on such concepts, but this may change in the future. [45] AI could also be a tool involved in presenting products for sale online that infringe trademarks, where the UKIPO has concluded that current trademark legislation remains "fit for purpose," although noting that this needs to be kept under review. [46]

Next Steps in the UK: Proposed Changes in the Law Hastily Reversed

The potential impact of AI on IP law has been reviewed by WIPO and the European Parliament. Of note, the European Parliament has suggested that autonomous works may be ineligible for copyright protection in the EU.

In the UK, a 2022 government consultation exercise resulted in assessments of three specific AI issues: [47]

1. **UK copyright protection for computer-generated works:** The consultation review concluded that there should be no change (reflecting that the current approach incentivizes new AI-generated works and investment in AI technology).

2. **UK patent protection for AI-devised inventions:** The government considered expressly expanding the concept of "inventor" for AI outputs to include AI programmers, operators, and so on. However, any such proposed changes were in the end shelved (subject perhaps to what the Supreme Court will say in the Thaler appeal). Surprisingly, most consultation respondents felt that AI is not yet advanced enough to invent without human intervention. It was also felt that any change to the law on inventorship must be harmonized internationally.

3. **Exceptions to copyright for text and data mining in the UK:** It is this last point where the UK was set to introduce legislative change. The government proposed a new exception, covering copyright and the sui generis database right, allowing text and data mining for any purposes (including commercial purposes), with no rights holder opt-out. As in the EU, lawful access was still going to be a prerequisite (that is, rights holders would be able to choose the platform where they make their works available, including charging for access).

Publishers' bodies complained that the proposed copyright and database right exception would harm rights holders' interests and was arguably incompatible with the Berne "three-step test" for exceptions. (48) In an independent survey of 200 creatives organized by Liberal Democrat Member of Parliament Sarah Olney, there were complaints that copyrighted work had been used without consent or compensation to train AI systems, enabling the "essence" of original content to be captured and reused. (49) Coincidentally, in January 2023, Getty Images (which has licensed certain uses of its content for AI training) commenced copyright infringement proceedings in the English High Court against Stability AI in respect of alleged unauthorized use of images and metadata. (50) In a parliamentary debate on February 1, 2023, Minister for Science, Research, and Innovation George Freeman, acknowledging widespread opposition to the measures, announced that the proposed text and data mining exception would not go ahead. (51)

The UK government's consultation and faltering attempts at legislative change are surely only the first steps in what will need to be a substantial reappraisal of many significant aspects of IP law in the coming years to reflect advances in AI.

Endnotes

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22. [2012] EWPCC 1 (Eng.).

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