May 15, 2020

European Commission
Brussels, Belgium
COM(2020) 65 final
CNECT-AI-consult@ec.europa.eu

RE: Comments in Response to WHITE PAPER on Artificial Intelligence – A European approach to excellence and trust, European Commission (February 19, 2020)

Dear Colleagues:

As the Chair of the Section of Intellectual Property Law of the American Bar Association (the “Section”), I write on behalf of the Section to provide its comments responding to an invitation at Page 26 of the White Paper On Artificial Intelligence – A European approach to excellence and trust, European Commission (February 19, 2020) (“Commission White Paper”). The views expressed herein are presented on behalf of the Section and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and accordingly, should not be construed as representing the positions of the America Bar Association.


The Section supports the Commission’s “commit[ment] to enabling scientific breakthrough, to preserving the EU’s technological leadership and to ensuring that

new technologies are at the service of all Europeans — improving their lives while respecting their rights.”⁵ We appreciate the opportunity to offer the Commission our thoughts on artificial intelligence (“AI”) technologies relative to intellectual property law, practice and policy within the United States. The Section further appreciates the efforts of the Commission to have a global conversation regarding AI and the proactive consideration of AI’s impact on the world stage.

As provided in the Section’s USPTO Comments and the WIPO Comments referenced above, the Section does not view AI as an autonomous inventor capable of holding any rights to an underlying invention. Accordingly, the Section has adopted the following resolutions:

1. The Section opposes, in principle, recognizing an artificial intelligence as an “inventor” under U.S. patent law; and

2. The Section opposes, in principle, recognizing an artificial intelligence as an assignee, licensee, or other type of party having an ownership or possessory interest to a patent or vested with the rights granted under Title 35 of U.S. patent law.

While the Commission White Paper takes an ecosystem approach to AI, the Section’s focus is on intellectual property rights associated with AI and providing certainty that will foster AI technological advances.

The Commission White Paper states that “the Commission concludes that — in addition to the possible adjustments to existing legislation — a new legislation specifically on AI may be needed in order to make the EU legal framework fit for the current and anticipated technological and commercial developments.” Although this sentiment is true for integrating and implementing artificial intelligence in many respects, the Section does not believe that any changes are required with respect to inventorship (in patent law) and authorship (in copyright law). That is, the Section believes no changes are needed or should be implemented to the current legal frameworks in the U.S. and Europe which require a human to be an inventor or author.

In patent law, the Section resolved (1) that a human being should always be named as an inventor, and (2) that an AI application may not be an inventor. The Section’s view is primarily based on the Section’s support for U.S. law’s “conception” requirement, which is applied when a court or an organization is determining who should be listed as an inventor. Conception of an invention occurs when a person formulates “a definite and permanent idea of the complete and operative invention” in the human mind. The legal test for conception assumes that one or more human minds formulated the invention, which appropriately results in inventor recognition.

Similarly, the Section resolved that an AI process or machine (e.g., AI agent) may not be an author under U.S. copyright law. That is in main part because the U.S. Supreme Court has held the U.S. Constitution to require copyright incentives for human authors who have authored “original” works. The U.S. Supreme Court in prior automated technology cases

recognized the existence of human creation necessary for authorship where a human being uses a machine or device (e.g., a camera used to make a photograph) in developing his conception.\(^6\) The Section believes that the same reasoning applies where a human being uses a current AI agent or other instrumentality – e.g., through programming or input – to develop his conception and, fix it in a tangible medium of expression. This approach appropriately satisfies the U.S. policy goals of incentivizing and rewarding human creativity.

The current legal frameworks for inventorship and authorship account for the concern raised in the Commission White Paper that notes AI behaviors are “largely defined and constrained by its developer.”\(^7\) In circumstances where the inventive or creative process involves an AI agent, conception may be attributed to a human who puts in motion (e.g., develops the programming or algorithm) and/or who provides an input the AI agent uses to “reduce to practice” an invention or create an original work to the extent such invention and authorship meet relevant legal requirements under U.S. law. Determination of such conception (e.g., whether the human’s efforts amount to “conception” or a mere use of software) should continue to be made by fact-finding administratively and judicially under existing law. In any event, a human is available to be named an inventor or author.

The Commission White Paper reviews issues and goals for a regulatory framework for an “ecosystem of trust” in line with EU values favoring innovation while respecting “fundamental rights (e.g., data protection, privacy, non-discrimination), consumer protection, and product safety and liability rules.”\(^8\) “Data protection” in the EU includes under the General Data Protection Regulation\(^9\) data subject rights to access, correct and delete data about the data subject in the possession of controllers and processors. Given the Commission White Paper’s framework of trust calls for some level of transparency of AI data and models, EU data subject rights\(^10\) to access “personally identifiable information” in the AI data and models may conflict with the different US intellectual property notion of “data protection” as the protection of information in the possession of an AI “owner” such as reflected in trade secret misappropriation doctrine.

The Section expressed concern about these challenges to the balance of U.S. public and proprietary interests, but did not seek to resolve the issue, particularly relative to different types of information such as EU “high risk” data.\(^11\) However, it was resolved that “the Section opposes in principle, a new \textit{sui generis} law to supplement U.S. copyright, patent,

\(^6\) By “conception” we refer not to a mere idea (which is not protected by copyright) but to the author’s detailed plan for creating a work. The Section notes that the U.S. Supreme Court in \textit{Burrows-Giles Lithographic Co. v. Sarony}, 111 U.S. 53, 58 (1884), affirmed the copyrightability of photographs “so far as they are representatives of original intellectual conceptions of the author.”

\(^7\) Commission White Paper at Page 16.

\(^8\) Commission White Paper at Page 10.


\(^10\) These are only partially adopted in the U.S. \textit{E.g.}, California Consumer Privacy Act, Cal. Civ. Code §§ 1798.100 through 1798.199 (“CCPA”).

\(^11\) WIPO Comments at Page 21.
trade secrets, data access (e.g., Computer Fraud and Abuse Act, 18 U.S.C. § 1030) or contract law to protect artificial intelligence data sets and databases.” Specifically the Section, as it did a generation earlier, disfavors the EU’s “database protection” law approach. U.S. copyright law already protects original aspects of such databases in compliance with TRIPS, and the U.S. has declined to expand database protection. The Section cited in part the European Commission staff’s assessments in 2005 and 2018 that the law did not improve the EU’s competitive position in the “off-line” database industry relative to the freer access the U.S. provides to publicly presented collections of facts.

At least at this time, the Section believes that copyright, trade secret and contractual arrangements, including anti-scraping provisions, adequately protect the data associated with AI technology in most common applications.

While concerns raised by the Commission White Paper are valid, a balance of factors must be considered when proposing a legislative solution. The Section opposes any legislative change that would shift the “conception” aspect found in both patent and copyright law away from the human inventor or author to an AI agent. And even though the Commission White Paper seeks to find a coexistence between public and proprietary interests, it is the Section’s position that the current legal frameworks together with trade secret and contractual arrangements provide the required balance between the various competing factors with respect to inventorship, authorship and ownership.

The ABA-IPL Section is available to respond to any questions that the European Commission may have with respect to any of the issues discussed in this letter.

Sincerely,

George W. Jordan III
Chair, ABA Section of Intellectual Property Law

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12 USPTO AI IP Comments at Page 2; WIPO Comments at Page 19.
14 USPTO AI Patent Comments at Pages 18-19.