

Kluwer Copyright Blog

AI and IP – to legislate or not? UKIPO’s public consultation seeks evidence

Alina Trapova (University College London) · Wednesday, December 1st, 2021

On 29 October 2021, the UK Intellectual Property Office launched a [public consultation](#) looking at how the copyright and patent regimes should deal with artificial intelligence. The UKIPO underlines the crucial role played by AI when it comes to innovation and creativity. With this consultation, the Office seeks to assess whether the current IP regime strikes the appropriate balance to encourage the development of AI and its use across the UK economy. The consultation closes on 7 January 2022.

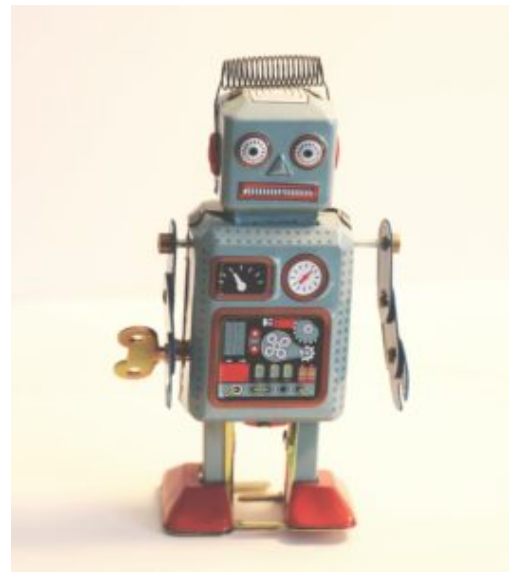


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Background

This is not the first time the UKIPO has engaged with a public call for views on the topic of AI and IP. In a [2020 consultation](#), the government sought to broadly understand the implications of AI for IP. That call concerned patents, copyright and related rights, designs, trade marks and trade secrets. It received 92 responses from a wide range of stakeholders –attorneys, trade bodies, industry associations, tech sectors, creative industries and other sectors. This was followed by a [National AI strategy](#) in September 2021, with which the UK sought to send a message to the world that its end goal is to become “a global AI superpower”.

IP plays a fundamental role in this. The UK recognises that in order to guarantee that IP incentivises innovation, the government should focus on its domestic IP law and enhance the UK’s AI competitive edge through a potential legislative reform. Against this background, with this [new public consultation](#) the UKIPO is now looking for more concrete answers on three specific topics which could potentially lead to a Parliament intervention in the field of IP and AI.

Policy objectives and areas of potential change

The main policy objective behind the consultation is “to incentivise investment in AI development and to promote the use of AI for public benefit, whilst enabling competitive markets, consumer choice and fair access to IP-protected goods for the benefit of society”. This push towards incentivising AI investment is underlined by the fact that the UK is falling behind in the use of AI as compared to the US, China and even the European Union. The UK government wants the UK to be “the best place in the world for research and innovation, and at the forefront of the artificial intelligence and data revolution”. Thus, the consultation considers whether the current IP regime strikes the appropriate balance in encouraging AI development and its use across the UK economy. A “proactive approach” is underlined in the consultation, which focuses on three specific areas where legislative reform may be needed.

Computer-generated works (CGW)

The UK (as well as Ireland and Cyprus, although with slight variations in the wording) has provisions tackling the protectability and the authorship of CGWs. The [Copyright, Designs and Patents Act 1988](#) defines a computer-generated work as a work generated by computer in circumstances such that there is no human author of the work. The author of this work would be the person by whom the arrangements necessary for the work have been undertaken.

The UKIPO is reviewing whether this provision strikes the right balance between incentivising and rewarding investment in AI creativity. It looks at the following options:

Option 0: keep the provision as it is

Option 1: remove the provision

Option 2: replace it with a new one with a shorter scope/duration

Text and data mining (TDM)

The UK currently provides for a rather limited TDM exception. [Section 29A of the Copyright, Designs and Patents Act 1988](#) permits the use of copyright protected works without the rightholders’ permission only for non-commercial scientific research. The UKIPO is wondering whether this narrow approach is geared towards the effective operation of AI considering the numerous benefits of TDM in research, business intelligence and data analytics, among many others. Responses from the earlier call for views have raised the need to improve licensing mechanisms for TDM purposes. Furthermore, the need has been felt to ease access to data, which would eventually promote innovation.

Consequently, the UKIPO puts forward the following options for a legislative move:

Option 0: no legal change, but possible guidance

Option 1: adopt a licence-based model

Option 2: extend existing exception to cover commercial research

Option 3: adopt an exception for any use, with a possibility for rightholders to contract out

Option 4: adopt an exception for any use, with no possibility for rightholders to contract out

Patents

The situation on patents is more in line with the international setting. The law in the UK, as well as in many other major jurisdictions, requires that an inventor is named in the application and that the inventor must be a natural person. Consequently, patents do not protect inventions if the inventor is an AI system – a point recently confirmed also by the [UK Court of Appeal](#).

Keeping in mind the economic rationale that research using AI *could be* discouraged, as inventions *could potentially* fall short of patent protection, the UKIPO is looking at the following legislative options:

Option 0: no legal change

Option 1: expanding the definition of “inventor”

Option 2: recognising AI as an inventor in patent applications

Option 3: protecting AI devised inventions through a new type of protection

None of the proposed options is heavily favoured by the UKIPO, but for each policy option the UKIPO presents a handy non-monetised costs and benefits analysis. At this step of the broad impact assessment, it admits the high degree of uncertainty in AI and the absence of data. There is no sufficient evidence on the current and future use of AI and the contribution of AI to inventions and creative works, nor economic evidence on the likely impact of any of the proposed options. The UKIPO is thus seeking to resolve the issue of data availability through this consultation.

Comment

Reading the consultation documents, and more specifically the [impact assessment](#), one is often left with the impression that according to the UKIPO, the main (and perhaps only) rationale for protecting IP is incentivising investment. A great deal of emphasis has been placed on the economic factors that weigh into the discussion of expanding copyright or patent protection for AI-generated works or for the purposes of TDM. In fact, the central question the consultation is seeking to respond to is whether the current IP system strikes the appropriate balance to encourage the development of AI and its use across the UK economy. While a very valid concern, underpinning all market failure arguments essential to the smooth functioning of any IP regime, these are not the only important rationales. An IP system should ensure that concerns for cultural diversity, access to works and the public domain are equally maintained and firmly promoted. It is fair to say that the UKIPO mentions that any intervention should “[not undermine IP’s wider role in promoting human creativity and innovation](#)”, but this barely comes across as prominently as the investment narrative. This is even more the case in light of the government’s emphasis on becoming a global science and innovation superpower in the AI arena. To this end, IP is seen as one of the levers to increase returns on investments for inventors and creators.

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This entry was posted on Wednesday, December 1st, 2021 at 8:03 am and is filed under [Artificial Intelligence \(AI\)](#), [Authorship](#), [Exceptions and Limitations](#), [Originality](#), [Text and Data Mining \(TDM\)](#), [United Kingdom](#)

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