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Locke Lord QuickStudy: The UK Government Has Published Its ?Response to Its Consultation on Artificial ?Intelligence and ?Intellectual Property

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The UK Government on 28 June 2022 published its response to its Consultation on Artificial Intelligence ("AI") and Intellectual Property ("IP"). The Consultation examined three areas of IP where the capability of AI has started to challenge traditional notions of IP; protection of computer-generated works ("CGWs"), the use of text and data mining ("TDM"), and patent protection for AI-devised inventions.

In a move that may be seen as contentious by some, the UK Government intends to introduce a new copyright exception for TDM for any purpose, expanding significantly on the current exception which is limited to non-commercial research. No changes are currently planned for the protection of CGWs or in respect of patent protection for AI-devised inventions, but the UK Government intends to keep these areas under review.

The Consultation

The Consultation sought evidence and views on a range of options on how the patent and copyright laws in the UK should be updated to address the challenges created by AI technology – if at all. This reflects the growing tension between copyright and patent law, which traditionally have rewarded human creativity and innovation, and the growing capacity of AI technology to mimic human creativity and innovation. The consultation focused on three specific areas:

1. copyright protection for works that are generated by computer in circumstances where there is no human author;
2. text and data mining; and
3. patent protection for AI-devised inventions.

The UK Government received a wide range of responses from a number of sectors, including the creative and technology industry, as well as academics and IP professionals.

Copyright in Computer Generated Works

The UK is one of a few jurisdictions that currently grants copyright protection to works that are generated by

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computer in circumstances where there is no human author. The author of such works is deemed to be the person who made the arrangements necessary for the creation of that work. The protection lasts for 50 years starting from the date on which the work is created.

The Consultation provided three potential options in relation to CGWs:

Option 0 – make no legal change;

Option 1 – remove protection for CGWs altogether; or

Option 2 – replace protection for CGWs with a new right of reduced scope or duration.

The UK Government decided to adopt Option 0 and to make no change to the existing protection for CGWs. It concluded that, as the use of AI to generate artistic, musical, and literary content is still in its early stages, it is presently unclear whether removing protection for CGWs would promote or discourage innovation and the use of AI technology. The UK Government intends to monitor the impacts of existing protection, and did not rule out changes to CGW protection in the future.

Text and Data Mining

TDM involves the large-scale harvesting of data through technological means. TDM is often critical to the development of an AI system, as it provides the raw data needed to train and refine AI algorithms. By processing large volumes of data, to identify patterns, trends and other information, AI systems are able to hone and refine their outputs.

Some of the data captured through TDM may constitute copyright works. Accordingly, a licence is required to exploit those works through TDM. UK copyright law has, since 2014, included a copyright exception for TDM, but it is limited to TDM for non-commercial research. The Consultation sought views on the following potential options in relation to TDM:

Option 0 – make no legal change;

Option 1 – improve licensing environment for the purposes of TDM;

Option 2 – extend the existing TDM exception to cover commercial research;

Option 3 – adopt a TDM exception for any purpose, with a rights holder opt-out; or

Option 4 – adopt a TDM exception for any purpose, which does not allow rights holders to opt out.

The UK Government decided to adopt Option 4, and has indicated that it will put forward legislation which would create such an exception. The proposed exception would not allow rights holders to opt out, or charge for a licence to engage in TDM. The UK Government's response does state however that the "lawful access" requirement of the current exception will also apply. This will allow rights holders to charge subscriptions or access

fees if the data is behind a paywall.

Patent Protection for AI-devised Inventions

Currently, in the UK an invention can only be subject to patent protection where a human is identified as the deviser of the invention. This was tested and confirmed in the recent cases concerning DABUS, and is consistent with most other jurisdictions. However, the increasing capacity for AI systems to contribute to, and in some cases even devise, inventions cannot be ignored. The Consultation provided four potential options in relation to AI-devised inventions:

Option 0 – make no legal change;

Option 1 – expand the definition of ‘inventor’ to allow humans responsible for the AI which invents to be named inventor;

Option 2 – allow AI to be named as inventor or remove requirements to name an AI inventor; or

Option 3 – introduce a new patent-like right to protect inventions devised by AI.

The Government again decided to adopt Option 0 to make no changes to UK patent legislation. Respondent feedback that the current UK patent rules on inventorship are enough to protect AI-assisted inventions informed this decision.

Regarding Option 1, the UK Government recognised that there was no consensus as to how to expand the definition of ‘inventor’ without detrimental ownership consequences. Similarly, Options 2 and 3, if adopted prematurely in the UK, could have counter-productive consequences for those seeking uniform patent protection abroad.

The UK Government will, however, again keep this area under review, particularly in light of the increasing ability of AI to invent with reduced (or even no) human input. The UK Government has also committed to advance the discussion around AI inventorship at the international level, as many respondents considered that, given the importance of this issue, a harmonised global solution should be agreed.

Conclusion

The UK Government’s response in respect of CGWs and patent ownership was cautious, with the UK Government adopting a “wait and see” approach. This is in stark contrast to the approach to TDM, where the UK Government has expressed a preference for the most expansive proposal on which it consulted. The news will come of particular concern to those engaged in the business of licensing data for such purposes, but also will be of concern to businesses in general. It may in fact stifle innovation and access to information generally by encouraging the owners of data sets, that were previously generally available, to place them behind paywalls.

We await with interest more detail on the proposed new exception.

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