**International Trademark Association
Comments on the
WIPO Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence
10 February 2020**

Introduction

The International Trademark Association (INTA) welcomes the opportunity to provide input concerning the "WIPO Request for Comment on Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence" which was published on December 13, 2019.

As an initial matter, INTA would like to call attention to the fact that trademarks have not been identified as an issue for exploration in this Paper. We believe that trademarks should indeed be a part of the paper as artificial Intelligence (AI) currently has and will continue to play an important role in shaping the future of trademark law and IP policy. INTA, through the work of its Emerging Issues Committee's Artificial Intelligence Subcommittee, is actively exploring the role that AI plays in trademark law and practice, as well as the impact that AI may have on the way that consumers interact with brands.

The use of AI by IP registries is gaining prevalence. AI technologies are beginning to be implemented in trademark searching, trademark examination and stakeholder interactions with the aim of improving the efficiency and consistency of the handling and processing of trademark registrations. As implementation of AI solutions is in the early stages by many of the respondent registries in our own study, the full extent of the possibilities is not yet clear with developments still being explored. Nevertheless, the trend among IP registries appears to be towards positive engagement with AI solutions, embracing and exploring the possibilities that artificial intelligence may provide in the prosecution and registration of trademarks.

The following comments do touch on other and related IP rights covered in the draft WIPO paper, which INTA is either interacting with, or developing policy to better serve brand owners. We include a number of questions that WIPO might wish to further explore.

Specific Comments

(a) Patents, Issue 1: Inventorship and Ownership, Paragraph 7

Proposed for exploration as part of Issue 1, Paragraph 7:

- Should the law permit or require that the inventor of the AI algorithm be named as the owner/inventor of any inventions resulting from the AI?

- If consideration is afforded to the proposal to exclude from the availability of patent protection any invention that has been generated autonomously by an AI application, what impact may this have on the fundamental objectives of the patent system? For example, might excluding patent protection for AI generated inventions discourage inventors from

disclosing these inventions and seeking patent protection (instead relying on trade secret protection)?

(b) <u>Patents, Issue 4: Disclosure</u>

Proposed for exploration as part of Issue 4, Paragraph 10 ("A fundamental goal of the patent system is to disclose technology so that, in the course of time, the public domain may be enriched and a systematic record of humanity's technology is available and accessible. Patent laws require that the disclosure of an invention be sufficient to enable a person skilled in the relevant art to reproduce the invention.").

- Consider exploring whether this standard should be replaced with an algorithm equipped with the same data as is proposed for consideration in Section 9.

(c) <u>Copyright and Related Rights, Issue 6: Authorship and Ownership</u>

INTA suggests adding to this Draft Issues Paper questions that explore the implications of affording different standards for or systems of IP protection for AI-generated inventions (as is proposed in Issue 5) and/or AI-generated copyright works (as is proposed in Issue 6). For example:

- If a different standard or system of protection is provided to human versus AI inventions/creations, would this create an incentive for applicants to intentionally mislead or conceal the use of AI in the generation of the work in order to secure the most favorable terms of IP protection?

- How will individuals and IP offices identify and distinguish inventions/works created by humans versus those created by AI?

- Will the disclosure of use of AI in the invention/creation of a protectable work be mandatory in the application for IP protection? If so, what level of AI participation in the creation of the work will require disclosure (e.g., any participation at all or a majority of the resulting work)?

- If offices require the disclosure of AI participation in the generation of the work, will this be an incontestable presumption based on what is disclosed in the application?

- Will third parties have an opportunity to challenge authorship/the applicant's failure to disclose use of AI in the creation or invention? If so:

    o Who will bear the burden of proof in this theoretical "AI authorship challenge" – the applicant/registrant or the challenger?

    o What will that burden of proof be?

    o What will the resulting penalties be if an applicant is proven to have misled or concealed the participation of AI in the work?

Issue 12: Capacity Building

As part of WIPO's mandate to promote intellectual property globally, technical assistance to Offices could reduce or at least contain the technology gap in AI capacity. Digitalization of offices, with digital access to files by the public and possible digital interactions may appear as a prerequisite to contain the technology gap.

While fostering diversity of solutions, compatibility of AI systems used by Offices, Courts and interested parties will be a critical issue from a global point of view.

Issue 13: Accountability for Decisions in IP Administration

As noted in the paper (§27.), the use of AI in IP administration raises various issues of accountability for decisions taken in the prosecution and administration of IP applications.

Transparency with respect to the use of the AI and technology appears to be critical.

Proper revision and potential appeals to decisions generated by AI should also be available to parties as well remedies in case of AI failures or bugs.

Other Recommendations

INTA recommends that WIPO explore the possibility of developing best practices for the protection of IP rights for AI-generated works. These best practices should take into account the impact on examination, prosecution, and proceedings relevant to the various registries for IP, including trademark registries.

Should you wish to further discuss any of the points raised or additional issues, please contact INTA's representative to WIPO, Tat-Tienne Louembe, at tlouembe@inta.org.