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7 January 2022

FSB response to the IPO's AI consultation

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the IPO's consultation on Artificial Intelligence (AI) related matters.

FSB is a non-profit making, grassroots and non-party political business organisation that represents 160,000 members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

We have not responded to every question in the consultation, but instead, have chosen to respond in general terms where we can offer a view or need to raise a concern.

Computer generated works

It is important that businesses are able to compete both nationally and internationally in an effective way. It would be unhelpful if the UK were to alter the current international consensus about any IP rights on a unilateral basis without clear evidence that the alteration would not adversely affect UK businesses in the global market or provoke protectionism. We therefore regard unilateral removal of protection in respect of computer-generated works as the wrong step. If current protections are to be replaced or altered in any way, we believe this would be best achieved by international consensus.

Small businesses will not commonly rely on the computer-generated works provisions, and so our observations are of a general nature regarding the consultation proposals. There is no objection in principle to introducing a wider computer-generated works related right, but we anticipate there will be difficult areas where the respective human and computer contributions towards a work may be unclear, and so the rules relating to definition and interpretation would need to be drafted carefully and unambiguously. The position with regard to joint human/computer created works would need to be addressed. With regard to the possible term of any such right, it would seem reasonable to suggest that there for purely computer-generated works there should be a fixed term, perhaps similar to that applicable to sound recordings, but where there is any degree of human contribution to the creation of a work, then the usual rules relating to term of copyright should apply.

We will address the AI related position below. The key factor for SMEs is that whatever the mechanisms or processes they use to create works or outputs that have commercial value to them,



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they must be able to own and control those works and outputs, otherwise there is no commercial incentive to innovate by using AI or computer-generated processes or systems.

Whilst it may be said that contractual arrangements can always resolve these sorts of issues, SMEs have less knowledge and resources than other businesses, and are therefore more likely to be exploited by those offering AI services. Recognising that inventions often have a creative process with many contributors will help to avoid anti-competitive AI invention opportunities and protect small businesses. SMEs commissioning and paying for AI services should be entitled to become the owners and controllers of the works or outputs generated by their commissioning and not be limited by superior bargaining power or anti-competitive market terms imposed by the larger AI Service providers.

Copyright - Text and data mining (TDM)

We would support careful improvements in the licensing environment for TDM. However we are concerned that, as larger businesses already have a significant advantage over smaller businesses in terms of data exploitation, any changes should not make that position worse and therefore tend to create a less level playing field. Extending existing exceptions to enable useful commercial research, with an obligation to protect data by anonymisation and make the recipient of any data subject to the same legal obligations towards the data subject as the original data processor, seems a reasonable aim, but removal of the right of data subjects to object should only be permitted in limited and controlled circumstances. It is difficult to envisage a fair and effective 'one size fits all' approach to the question of licensing for TDM purposes, as the extensive variety of commercial circumstances will inevitably cause imbalances and prejudices in some cases.

Patent Inventorship

This is an important area where there is potential for SMEs to be prejudiced if the necessary changes in the law to accommodate AI systems are not designed in a fair and balanced way. There is already a large preponderance of new patents being accumulated in the hands of a limited number of global businesses, and changes in AI related law could increase that imbalance and make it extremely difficult for SMEs to compete in the innovation protection arena. AI systems rely upon software, hardware and most importantly, large quantities of good quality training data. Large businesses already have the advantage with regard to the latter, and may be able to acquire or utilise the former on more attractive terms and at lower costs than SMEs, and if there is to be a future level playing field (or at least one where the ruts are not so deep that SMEs cannot surmount them) there needs to be consideration as to how to avoid skewed and anti-competitive AI invention opportunities.

A further consideration is the way in which SMEs may of necessity develop innovatory products or services. Larger businesses will have greater in-house resources and many global businesses will have teams of people working on leading edge possibilities aided by in-house AI systems. They may also have access to large pools of good quality in-house data.

In contrast, SMEs will have to hire in a variety of services possibly including third party software and hardware services, and license third party data usage or employing data aggregation services. This different and necessary way of working places SMEs potentially at a considerable disadvantage in respect of some proposed legal changes.

The discussions which are taking place in some academic circles appear to accept that it is inevitable that future patent generation and acquisition will be concentrated in an ever shrinking caucus of global businesses. FSB absolutely rejects that such a concentration is inevitable, and it is certainly not desirable from either a consumer or business perspective. If the situation was to arise in the future that SMEs become practically unable to make use of patents, then it will be an indication that there has been a failure in policy design. As many innovative ideas and processes are created by individuals or SMEs, it is important that their innovatory impulses should not be stifled, or the benefit of their creativity lost, by virtue of the unintended consequences of AI related legal change.

With those general points in mind, it is clear that the detailed possibilities for and the consequences of AI related legal change need very careful consideration. Competition is ultimately in the interests of both consumers and the economy, and any legal changes which limit fair competition must be avoided. What most businesses will want is to be able to develop their creative output, with the assistance of AI if necessary, in a way which enables them to remain in control of it and its exploitation, and the precise legal technicalities relating to AI devised inventions or contributions would be a secondary consideration, the overriding consideration being that their rights ownership and control is preserved.

This brings us to the core issues about ownership of AI devised intentions. It is increasingly unlikely that in the future, the 'inventor' of a new patentable device or process will be a single human being. Patent law must move with the technical and other changes that have been taking place this century and perhaps a holistic review of the entire patent system is necessary. Adjusting parts of the existing system which is already skewed in favour of larger players will simply bake in some of the current imbalances. If, for instance, we maintain the requirement that there must be an 'inventor' – a creative mind for the invention – that will become increasingly disconnected from the reality of creative processes. It is illogical to think in terms of one 'creative mind' (whether that be a human or an AI system) and we should therefore focus more on the 'creative process' and the different contributions to it, that lead to the invention.

In the past, there have been debates as to whether the camera owned the photograph taken, or whether recording devices owned the sound recordings produced, and both of those scenarios have been satisfactorily resolved by making the taker of the photograph (not necessarily the owner of the camera) and the person who makes the arrangements for the recording (not necessarily the owner of the recording equipment) the first copyright owners. It is tempting, and may be reasonable, to follow the same approach with regard to AI-devised inventions. There are however some differences between, say, the various components needed to make a sound recording, and the components required for an effective AI system. The recording desk and digital or tape storage

devices equate to the computer systems upon which the AI software is run. Bespoke AI software could be likened to the bespoke inputs of the performers.

However from then on the positions diverge. The AI system has to be fed data, the quality and amount of which may be critical to its output. The AI system, unlike the performer's input, then learns from the data fed into it and may take the system in unknown directions even beyond its apparent remit. There is a gap in UK law in respect of who owns the intangible output of the AI system, and that gap needs plugging urgently.

It is suggested that there is no perfect solution to the current questions, and that any solution decided upon will create tensions somewhere in the patent system. However the focus should be on outcomes – for consumers and creators – and legal imperfections may be a necessary by-product of that focus. With that in mind, options include a complete redefinition of 'inventor' (potentially a person, legal entity, thing or collection of people or legal entities) to reflect all contributions to the invention, or disposing of the notion of an 'inventor' altogether? In commercial practice, some of the creative contributors would of course be contractually required to provide their services and cede their rights (if any) to the individual or business driving the creative project, but that is only possible if not over-ridden by law, and raises the inequality of knowledge and arms point we have mentioned above.

The position of the parts of the AI system as potential contributors obviously needs to be clearly established, and it could be provided that humans or business entities responsible for or owning parts of the AI system should own or share their respective inputs and share in the collective output. That is likely to lead to unnecessary complexity and would be prejudicial to smaller businesses who would have less ability to compel collaboration or contractual concession of rights.

So in response to the options set out above, first, no change is simply unrealistic. Secondly, allowing AI systems to be 'inventors' simpliciter, or saying that the 'humans who are responsible for the AI system' (whatever that might be defined to mean) should be the 'inventor', does not really bring the patent system up to date. Thirdly, simply creating a new type of protection for AI devised inventions is again only a partial answer. The likelihood is that in future all inventions will be hybrid – part human devised and part AI devised – and that the latter needs considering in the context of holistic review which gets away from the 'sole human inventive mind' concept, and recognises that even without AI input, the manner of creation of ever increasingly complex inventions in the 21st Century, is a hybrid or multi-contributory process and that the system must accommodate that reality.

Finally, on the subject of SME protection, it is essential that any proposed changes are impact assessed and if necessary trialled to ensure commercial practicality and effectiveness, and that they avoid unintended anti-competitive consequences. It goes without saying that SMEs want a system that is clear, commercially viable, and internationally acceptable. It may not be possible to create a 21st Century fit for future purpose system all in one go, and an interim position may have to be adopted, given the time it usually takes to achieve international consensus. However the UK and IPO should be leading the way towards it.

General questions

We consider that SMEs will regard IP ownership and the control of the output of an AI system which they own, or of which they have licensed the use, as a crucial factor in deciding to invest in AI usage or development. Potentially, AI offers enormous benefits to SMEs, as in theory it may enable them to compete more effectively with larger businesses, provided of course that the potential difficulties we have outlined above are addressed. If that were so, the economy should benefit from the resulting increased competition, and substantial R&D costs might be saved. Machine learning has already demonstrated that it can generate improvements in processes and productivity, and there is no reason to believe that its usage will not become more widespread among SMEs provided that access to AI is possible on fair commercial terms and under a fair IP system.

It is however possible to envisage a sort of ‘race to the middle’ where different AI systems all output the same optimal results and there is a conflict of apparently independently produced outputs in terms of works or inventions. Under copyright law, it is theoretically possible for two independent people to produce identical works and both be entitled to copyright, whereas in the case of patents or designs, it is in general a first past the post registration system. There may therefore be hidden risks in investing in AI driven R&D and a potential for IP disputes. Scope for potential conflicts may excite IP lawyers, but SMEs want and need a smooth ride towards market, and so any issues of this type must be anticipated and resolved in regulatory terms to avoid SMEs who are striving for innovation wasting investment and risking their economic stability. The terms upon which AI processes should be contracted to be used, and the protections for inexperienced innovators deploying them, should therefore be carefully debated, and possibly model contract terms proposed, to avoid a new tranche of contractual disputes relating to AI usage, and the consequent damage to the economy.

Thank you for considering our response to this consultation. If you would like to discuss any of the points further, please contact me via [REDACTED]

Yours sincerely,

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