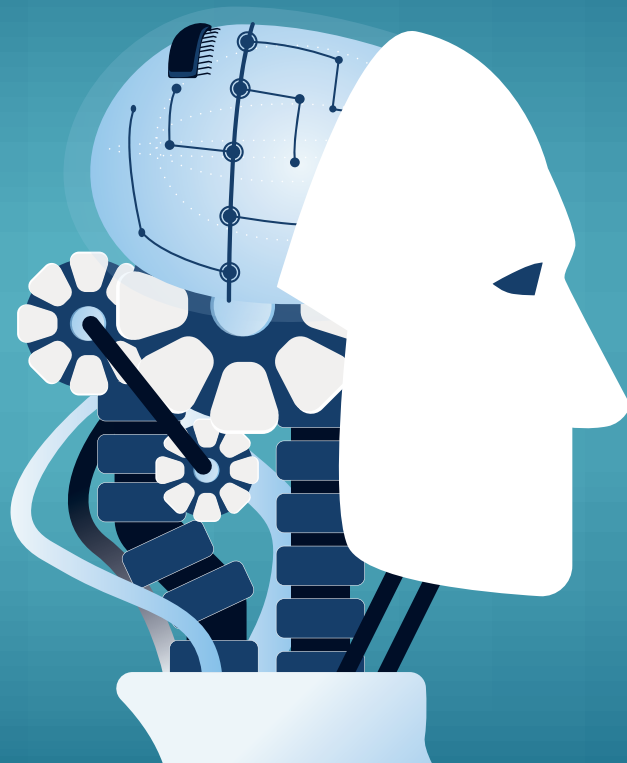


Working together

Paul Ragusa presents strategies for addressing proposed AI regulations to coexist with IP law



Artificial intelligence (AI) continues to grow in prominence and adoption in disparate industries throughout our economy. For example, the World Intellectual Property Organization (WIPO) suggested in a 2019 report that there is “an increased interest in the practical uses and industrial applications of AI technologies”.¹ In recognition of this evolution, governmental bodies have begun to propose regulations or policies to address perceived issues including protection, accountability, and preventing potential harm relating to AI.

Recently, the US Office of Management and Budget (OMB) released its *Draft guidance for regulation of artificial intelligence applications* (OMB guidance) which addresses certain policies to guide both regulatory and nonregulatory oversight of AI use outside the government. Likewise, the National Institute of Standards and Technology released a draft report titled *US leadership in AI: a plan for federal engagement in developing technical standards and related tools*, providing suggested steps for the US government to take in order to help establish AI technical standards for the private sector. The EU released a *White paper on artificial intelligence – a European approach to excellence and trust* (EU White Paper), which addresses proposed approaches to regulating AI in the EU, including proposals for increasing AI innovation within the EU and trust among the public in any AI used within the EU.

This article addresses the relationship between these proposed regulatory measures and IP law, including how existing IP law can support or inhibit proposed AI regulations. This article also presents strategies for addressing proposed AI regulations to coexist with IP law going forward to develop a consistent, encouraging, and safe framework for AI.

The ties that bind

Since its inception, AI has been closely intertwined with IP. From the software used to implement AI to training data and predictive models, IP has been an important consideration in protecting AI innovations.

Unfortunately, certain proposed regulations overlap with or do not fully consider existing IP law, running the risk of contradictory, redundant or confusing regulation. This section will address some of the foreseeable interactions between the proposals mentioned earlier and current IP law.

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Trade secrets: who, what, and how?

Trade secrets can be an important way to protect AI, including aspects of AI innovations which may not be as readily amenable to protection by other forms of IP. For example, trade secrets can be used to protect both proprietary algorithms and the data collected for use in AI techniques using those algorithms.²

The OMB guidance considers data stewardship in AI technologies to be of paramount importance. As AIs become more prevalent, they could have influence over or ultimately become responsible for making decisions that can impact healthcare, economics and issues regarding human rights. As a result, the OMB guidance recognises that proper data stewardship principles can accomplish at least two goals: ensuring that the decisions are made in a non-discriminatory, fair and transparent manner, and building public trust and confidence in AI decision making.³ For example, the OMB guidance suggests that agencies consider “issues of fairness and non-discrimination with respect to outcomes and decisions produced by AI” and “whether the AI application at issue may reduce levels of unlawful, unfair, or otherwise unintended discrimination”. The OMB guidance recommends that measures be taken to ensure that any regulations respect the existing legal regime, yet one need only look at



the uncertain fate of trade secrets under similar government disclosure requirements, such as the Freedom of Information Act, to know that there is still an inherent risk in such a regime.⁴

Algorithms, in addition to data, are a building block of most AI inventions. They define the logical steps used by an AI in generating a decision or outcome, using the data that is fed into it. When it comes to building public trust in AI innovations, the guiding principles suggest that an informed populace can help to better integrate AI into modern life, by encouraging trust and confidence, that is, a system where not only are consumers aware of when they interact with an AI (either digitally or electronically) but also are familiar, on a basic level, with the algorithms used to make those decisions. One way that governmental bodies may further these goals is by requiring disclosure of the logic by which an AI makes certain decisions. This would allow both for government oversight to ensure that AIs are not being used improperly and for consumers to see precisely how their data is being used. On the other hand, disclosing the logic behind an AI could discourage innovation and erode trade secret protections. Further, many AI systems are so complicated that companies are unable to observe the logic being used.⁵ Regulation requiring companies to explore, oversee, and disclose that logic could be expensive, if not impactable in certain circumstances.

AI: who gets the credit (or the blame)?

Copyright and patent law provide IP protection which names one or more authors or inventors, respectively. For example, an application to register a copyright in the US requires the “name and nationality or domicile of the author or authors” under 17 USC section 409. Similarly, an applicant for a US patent must list at least one inventor, and inventorship is defined as “a person [that] contributes to the conception of the invention”.⁶

The global trend appears to be that an AI entity itself is currently not eligible to be named as an author under copyright law. According to the recent case *Naruto v Slater*⁷ non-humans may only have standing, under any statute “if an act of Congress plainly states that [non-humans] have statutory standing”.⁸ Further, the USPTO has recently declared, while refusing applications naming the DABUS AI as an inventor, that an inventor under the patent laws must be a natural

person, not a computer or other form of artificial intelligence.⁹ While the guiding principles discussed above discuss very important points, further clarification is needed regarding developing the “status” of an AI under existing law.

Anticipating regulation

While the form and extent of government regulation is unclear at present, there are steps that can be taken now to help prepare for and shape future policy.

First, companies should consider how current IP strategies can fit into the proposed regulations. For example, certain proposed AI regulations seek to ensure transparency, which could impact trade secret protection for algorithms and training data. Companies can consider what forms of information they deem most valuable, while preparing to disclose enough information to the public that they can become informed regarding the AI system at issue. Making these determinations now can help companies prepare for the future and begin advocating for the AI reforms that they need the most. Proactive steps in this regard can also help to shape policy going forward, as agencies seeking to regulate AI may look to examples that are already used and approved by the general public.

Secondly, the present push for regulation can be viewed as an opportunity to update IP law to reflect likely trends involving AI as a creative entity, for example, via considering whether AI ‘authors’ under copyright law, and/or AI ‘inventors’ under patent law should be permitted.¹⁰ The guiding principles discussed above address building public trust and confidence in a more integrated AI society. However, in doing so, important questions regarding the interplay of AI and IP law remains to be addressed.

Footnotes

1. See WIPO technology trends 2019: artificial intelligence at 39.
2. See Jessica M Meyers, Artificial intelligence and trade secrets, 11 *Landslide*, Jan/Feb 2019.
3. See OMG guidance at 3-6.
4. See Mary Griffith, US: is your trade secret safe under FOIA?, Mondaq (24 Jan 2020), <https://www.mondaq.com/unitedstates/Intellectual-Property/886682/Is-Your-Trade-Secret-Safe-Under-FOIA>
5. Yavar Bathaee, The artificial intelligence black box and the failure of intent and causation, 31 *Harv JL & Tech* 890 (2018).
6. See, *Fiers v Revel*, 984 F.2d 1164 (Fed Cir 1993).
7. 888 F.3d 418 (9th Cir 2018).
8. *Id* at 426.
9. See *In re Application of Application No.: 16/524,350* (April 27, 2020), https://www.uspto.gov/sites/default/files/documents/16524350_22apr2020.pdf?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=
10. See, eg, Russ Pearlman, Recognizing artificial intelligence as authors and inventors under US intellectual property law, 24 *Rich JL & Tech* (2018).

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