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**Eighth Session of the WIPO Conversation – Generative AI and IP
20th / 21st September 2023**

**Statement by GRUR – German Association for the Protection of Intellectual Property
By: Prof. Dr. Herbert Zech, Prof. Dr. Thomas Dreier**

The German Association for the Protection of Intellectual Property is a non-profit association with an academic focus. Its statutory purpose is the academic advancement and development of industrial property, copyright and competition law at the German, European and international level.

Several of GRUR's Standing Committees – namely on patent law, copyright law and on the law of data – have been monitoring the development and discussion relating to generative AI and its implications for intellectual property law. While there are scores of legal issues to be discussed, GRUR would like to focus in the context of this 8th WIPO Conversation primarily on one pivotal question:

May AI-generated inventions / works of art be granted protection under intellectual property laws?

This basic question is important to discuss on an international level, as (i) world wide harmonization on this aspect is essential and (ii) GRUR is of the opinion that it cannot be resolved in the same manner for all types of intellectual property.

(1) The Situation in Patent Law

In patent law, generative AI has already attracted attention regarding the question of inventorship. Current decisions (e.g. EPO J 0008/20 Designation of inventor/DABUS 21-12-2021; CAFC Thaler v. Vidal 05-08-2022) focus on the designation of a (human) inventor as a formal requirement for granting a patent. The related questions regarding substantive patent law remain open.

(a) The first question is whether inventorship (that is the *existence* of an inventor) is a substantive patentability requirement. Arguably, neither from the requirement of an invention nor from the requirement of an inventive step such a requirement may be derived.

(b) The second question regards ownership. Since ownership is tied to inventorship, this mandates a clear definition of inventorship. Such a definition is still missing in international patent law: Different to copyright law, a *personal* creation is not necessary. Definitions in literature suggest that a creation in the sense of a sufficiently “creative act” of the inventor is necessary. A minimum requirement is the *causation* of the existence of an invention. Regarding the use of AI, this means that different actors may be (co-)inventors, e.g. operators, programmers, trainers or even data providers. Only if no natural person meets this requirement the question arises whether AI itself should be treated as an inventor and, consequently, also as a co-inventor.

(c) From a more practical point of view, GRUR sees the most immediate effect of the advent of generative AI on the *requirement of inventive step* (nonobviousness). If, in a certain field, the use of AI becomes the state of the art and the skilled person employs this technology, this may raise the threshold of nonobviousness.

All in all, GRUR opines that patent law is quite well prepared for the advent of generative AI. Therefore, at the current stage, a change of the legal framework does not seem necessary. However, this might change in the future.


(2) The Situation in Copyright Law

(a) Other than in patent law, where it might be subject to debate that AI could be regarded as an inventor, in copyright law the question whether AI can be considered as an author is not an issue. The reason simply is the human centered approach of copyright. Only human beings can be authors, but neither animals nor machines. It is, of course, another matter whether *de lege ferenda* a sui generis right should be created to also protect AI output. However, GRUR opines that neither incentive nor protection of investment is necessary to further the use of generative AI – which both would be a necessary condition to justify a new intellectual property right.


Therefore, if harmonization on an international level is to be achieved, GRUR strongly urges to abstain from a uniform approach for all intellectual property laws.

(b) From a copyright perspective, the main question regarding generative AI rather is a different one: Which criteria have to be applied to distinguish between, on the one hand, the

use of AI as a *mere tool* in the process of a human creation, and, on the other hand, output which is generated by *AI alone* ? It seems that this question can only be answered on a case-by-case basis – but it may be helpful to elaborate sample cases on an international level to avoid a race to the bottom resulting in granting protection also in cases which do not warrant protection.



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