Submission by the South Centre to the Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence (WIPO/IP/AI/2/GE(20/1)

The South Centre welcomes the opportunity to submit to the WIPO Secretariat input on the draft issues paper on intellectual property policy (IP) and artificial intelligence (AI). The South Centre hereby provides recommendations for the revised Issues Paper. The aim of the Issues Paper should be to provide a framework for informed discussion among Member States on the topic of IP policy and AI, without pre-empting the substance of such discussion, and to complement a process of sharing of views and experiences between different Member States and constituencies. The Development Agenda should also be mainstreamed into the discussion of IP policy and AI.

1.   General Issues

1.1. Specificities for Developing Countries according to the Development Agenda

Developing countries make up a substantial number of the membership of WIPO. The particular socio-economic and technological conditions of developing countries must be taken into account in any analysis on new issues such as IP policy and AI. The analysis should aim to identify how developing countries can accrue the possible benefits and adequately assess the shortcomings of AI in relation to IP in its various dimensions. This is in line with the Development Agenda agreed upon by all WIPO Member States and which is in regular process of streamlining into all of WIPO's work.

Recommendation 1: Analysis of the particularities of AI and IP policy in developing countries should be introduced as a theme in the Issues Paper.

1.2. Clarify the mandate of the WIPO Secretariat on AI and IP

The WIPO Secretariat has exercised significant discretion in undertaking activities and allocating resources for its work in the area of IP and AI. Member States should give early input on the scope of the work on AI and IP, and be consulted on any major activities the WIPO Secretariat suggests to carry out in this area prior to implementation, as WIPO is a member-driven organization. Stakeholder public consultations are a good mechanism for receiving wider inputs, once Member States have given the WIPO Secretariat a clear mandate for its work in this area.

The WIPO Secretariat should seek a specific and balanced mandate from Member States prior to pursuing further its activities on AI in IP policy, allowing Member States to properly reflect upon and decide upon the future goals, methods and scope of such discussions. This would provide a more robust environment for anticipating newly identified and emerging goals within the field by WIPO. Such mandate would also enhance legitimacy and enlarge participation of a broader range of WIPO Member States to the topic.

Recommendation 2: The definition of the WIPO Secretariat program of work on AI and IP should be defined by Member States, through proper Member State processes, in particular discussion in Member-State led committees, such as the SCP.

1.3. *Focus on sharing existing approaches/experiences between Member States*

The Issues Paper is done by the WIPO Secretariat done under its own initiative. As such, it should present state of the art on the subject and adopt a balanced analysis on questions that may be arising. In particular, an issues paper should refrain from advancing proposals at this stage.

The aim of the exercise for feedback should be to maximize inputs from different Member States as priority, including from those with limited experience on AI and IP issues. The issues paper should be revised for objectivity.

For instance, the issue paper asks *"Should consideration be given to according a legal personality to an AI application where it creates original works autonomously, so that the copyright would vest in the personality and the personality could be governed and sold in a manner similar to a corporation?."* This is an interesting point for discussion, but it is a leading question, also within the scope of corporate law that is completely outside of WIPO mandate. A more nuanced question could be **"Which policy options exist in national laws and experiences for copyright attributed to AI-generated works?"**

Recommendation 3: The Issue Paper should be revised to present a state of the art on the subject, based on a neutral and balanced analysis. In particular, the Issues Paper should not advance proposals. The questions contained in the Issues Paper´s questions should be reviewed to focus on initiating the sharing of approaches/experiences from Member States.

1.4. *AI in IP Administration is a matter of IP policy*

The topic on "AI in IP Administration" should be fully integrated under the notion of "IP Policy" and therefore be discussed as an issue of relevance, and not just the issue of "Accountability for IP Administrative Decisions" (Issue 13). There are issues dealt with under this theme of accountability that pertain more directly to patent policy, as in the case of patentability criteria. For example, the Issues Paper notes that "*the present list of issues is not concerned with questions relating to the development and possible sharing of such AI applications among Member States, which are being discussed in various working meetings of the Organization and in various bilateral and other relationships between different Member States.*". While sharing experiences of AI applications among Member States may seem purely administrative, it should be debated what are the benchmarks utilized in such usages, how do they benefit countries with different economic structures/technical capacities, etc. These elements do not only pertain to sharing applications, but rather substantive IP policy issues.

Furthermore, given the many potential consequences that furthering AI in IP management and policy may entail (both positive and negative), there is no justification to exclude the topic of AI in IP Administration in the Issues Paper exclusively on the argument that the topic is being discussed across other meetings and informal consultations.

Recommendation 4: The revised Issues Paper should integrate the theme of AI in IP Administration as is a matter of IP policy rather than exclude it from the scope.

2. Specific Issues

2.1. Accountability for IP Administrative Decisions (Issue 13)

Issue 13, ii (in the discussion on whether legislative changes need to be envisaged to facilitate decision-making by AI applications) appears to be taking the position that decision-making by AI applications *should* be done.

Questions that should be asked prior to discussing legislative changes are, for example: "***What is the policy rationale for countries deploying AI for the prosecution and administration of IP, especially decision-making activities?***" and "***What evidence is there so far, from national experiences, on this deployment?***" In some jurisdictions, there is significant debate on the legality of such instruments in the first place.

Recommendation 5: The topic of what are the consequences of deploying AI for the prosecution and administration of IP at country level, considering particularities, should be included in the revised Issues Paper.

Moreover, nuanced language should be used in considering the questions in relation to decision-making by IP applications, such as, *"What are the legal challenges related to decision-making by AI applications? Can IP applications be decided by AI? If so, are any legislative changes needed?"*

The topic could also be expanded to include issues such as decisions that partly rely on AI, but which are ultimately decided by human examiners/policymakers (e.g. *should any AI uses be disclosed and previously authorized?*).

Other topics to explore include:

Are manual/automated routes available in case an applicant decides to prefer one or another?

What would be the consequence in terms of fees – reduction, augmentation, no change – for AI applications if an IP office widely utilizes AI?

Recommendation 6: The Issues Paper should review the language of Issue 13 to be more neutral towards decision-making by AI applications. It should explore issues of disclosure of AI use, existence or not of different routes for patent applicants (AI or non-AI) and impacts on fees due to use of AI.

2.2. Patents (Issue 1 and AI in IP Administration): Consequences of use of AI in IP applications for patentability criteria and risk of unintended harmonization of laws and regulations

The issue of patentable subject matter and inventive step (or non-obviousness) is directly related to the issue of AI in IP Administration. The use of AI can potentially challenge the concept of the territorial nature of the examination of patent applications and the grant of patent rights. Therefore, the revised Issues Paper should address the topic in this perspective.

In particular, a discussion on the possible consequences of the uses of AI applications for the decision process of a patent and other IPRs, as well as the data sets used as baseline for prior art search, should be held. This discussion directly impacts on the definition of patentability criteria referred to in the current draft Issues Paper. For instance, if a decision is taken on whether a certain application is new and meets an inventive step depends on a jurisdiction´s understanding of what is novelty and

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inventive step according to its national law and regulations (such as guidelines), which are not the same around the world. It would be thoughtful to take in account that the adoption of an AI decision-making entails prior decisions on patentability criteria, among others. Without such considerations, the support for use of AI applications could lead to an informal and unintended harmonization in the implementation of IP laws (particularly patent laws) and to overlooking differences in the applicable legislation, clearly allowed by the TRIPS Agreement. This would take place without a proper mandate or process such as a multilateral agreement.

Furthermore, these topics fall within the broader scope of the Development Agenda adopted by WIPO Member States in 2007, particularly in the issue of Technical Assistance. This is of significant importance for developing countries that may wish explore the usefulness and feasibility of AI use in their own IP administration and particularly for those who have not specific guidelines in their IP offices concerning such topics.

Recommendation 7: The Issues Paper should include how to address the possible unintended consequences of AI in IP applications, particularly the risk of a *de facto* harmonization of patentability criteria without a mandate or international legal instrument.

2.3. Patents (Issue 1-5)

The framework for the analysis in the patents section could be developed for other issues, particularly copyrights and related rights, and designs.

Furthermore, the reflections under Issue 5 (General Policy Considerations for the Patent System) deserve careful attention.

Recommendation 8: The Issues Paper should provide a thorough analysis of Issue 5 (General Policy Considerations for the Patent System), with a particular attention to how the implementation of AI in IP could also change non-AI-based applications.

2.4. Introduce theme of AI as tool for the protection of GRs, TK and TCEs

The topic of AI for searches of genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCE) is currently excluded from the Issues Paper.

For instance, would the use of AI provide a more comprehensive and robust search of existing GRs, TK and TCEs and therefore avoid/diminish misappropriation? Would AI solve the gap (partly or fully) of the need of access to secret/sacred/restricted TK by patent offices in order to assess prior art in IP applications? For example, by developing systems that catalogue/systematize TK and TCEs (such as the India Traditional Knowledge Library) and maybe even including "Chinese Wall"-like mechanisms[1]? Would it be necessary to include specific exceptions for GR, TK and TCEs in patent, copyright and design applications that may have used them through AI? Or are the existing exceptions enough? Should the IGC include discussion on this topic?

Recommendation 9: The revised Issues Paper should include the topic of AI for searches of genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCE).

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[1] "Chinese wall" broadly denotes for the purposes mentioned here the mechanisms used in financial markets, law firms and other institutions to avoid insider information and conflict of interest by avoiding sharing of information and segregating persons/datasets/etc. For instance, could an AI technology avoid the need to fully disclose a TK/TCE to patent examiners?

2.5. Capacity Building (Issue 12)

This set of issues should be extended, particularly in light of WIPO´s Development Agenda. For instance:

What would be the role of technical assistance to reduce the technological gap in AI capacity? Would this be exclusively proponent of adoption of new AI-related IP rights or would this require a more comprehensive set of flexibilities/exceptions and limitations in the field of AI?

What kinds of cooperation mechanism between countries of similar technological development or similar industrial parks in AI and IP could be envisioned?

What role should or not private companies that provide AI technologies and services have in the use of AI in IP offices?

What are the technological concerns (need to change systems periodically, cybersecurity risks, control, accountability, safety and trust of AI utilized) that need to be taken into account?

What are the main issues that developing countries may particularly struggle to address in order to benefit from the use of AI in IP?

<u>Recommendation 10:</u> Capacity building is a crucial topic and should be further discussed in the Issues Paper, including reflections on South-South cooperation, the role of private companies, technological concerns, main obstacles and limitations for developing countries, the role of technical assistance and the decision on the need or not of more flexibilities or exceptions and limitations in the field of AI.

2.6. Copyrights and Related Rights (Issues 6-8, particularly 7 – Infringement and Exceptions)

A general question on how do the existing exceptions and limitations apply to AI in IP could be asked, allowing a comparative approach. Eventually, it may be possible that existing exceptions and limitations currently adopted by certain or various countries are already sufficient to address the issue, without the need for new ones, or with only limited revision.

In this sense, the question *"If not, should an explicit exception be made under copyright law or other relevant laws for the use of such data to train AI applications?"* presupposes the following: if using data that is copyrighted without authorization for machine learning is an infringement, then an exception would be needed. In this sense, it would be more adequate to start by asking in the first place if the existing exceptions and limitations are enough or not: *"Are current existing exceptions and limitations sufficient for creative works that utilize copyrighted data? If not, should an explicit exception be made under copyright law or other relevant laws for the use of such data to train AI applications?"*

Along the same lines: *Are current existing exclusions, exceptions and limitations sufficient for deep fakes?*

How would copyright authorities relate to criminal and administrative authorities for solving/dealing with deep fakes?

Furthermore, the general tone of the questions makes a number of assumptions that could be rendered more neutral. In particular, remove reference to, for instance, *"Should consideration be given to according a legal personality to an AI application where it creates original works autonomously, so that the copyright would vest in the personality and the personality could be governed and sold in a*

manner similar to a corporation?" (Issue 12, ii), as it proposes a policy option instead of simply noting the various possible solutions.

Similarly, the expression "the free flow of data to improve innovation in AI" presupposes that AI innovation requires "free flow of data", a matter of trade negotiations in other fora and outside of the mandate of WIPO. However, the general concern (on how machine learning that uses copyrighted work could be limited due to infringement of copyright rules) should remain.

Recommendation 11: The language of Issues 6-8 should be revised to avoid inducing answers. A comparative discussion on exceptions and limitations, and whether they are/should be adopted and if the existing ones are enough, should also be brought to the Issues Paper, as per above.

2.7. Designs (Issue 9)

Questions on designs also make assumptions and induce certain answers. For example, it also proposes/points to the solution via "such as corporate policy, with the possibility of judicial review by appeal in accordance with existing laws concerning disputes over authorship" (Issue 11, 24, (i) and (ii)).

Recommendation 12: The revision of language could be extended to Issue 9 (designs).

2.8. Data (Issue 10)

Apart from sharing the reasons for the creation of new rights in data (Par. 23), it would be prudent to also share reasons *against* them, as this is not a settled discussion. This would be similar to the more balanced pros and cons section of the Issues Paper on copyright for AI works (*"If AI-generated works were excluded from eligibility for copyright protection, the copyright system would be seen as an instrument for encouraging and favoring the dignity of human creativity over machine creativity. If copyright protection were accorded to AI-generated works, the copyright system would tend to be seen as an instrument favoring the availability for the consumer of the largest number of creative works and of placing an equal value on human and machine creativity"*).

Among the possible reasons against new rights in data: data may be already sufficiently protected under existing IP laws and regulations, difficulty in defining exactly what set of data would be subject to protection (which is also very different from the description of a patent application, for instance), risk of excessively impairing the public domain needed for follow-on and disruptive innovations, even in situations where other IPRs have expired or are subject to exceptions and limitations. Some of these elements are highlighted under Issue 10, but could well be considered as a broader premise/context, instead of only topics for discussion (i.e. include the notion that there are both reasons *for and against* new rights in data as the premise for the debates).

Moreover, some other questions could be considered:

Are certain types of data excluded from the realm of patentability according to national laws and regulations?

If new IP rights were to be considered for data, what would be the relationship/limitations with data of indigenous peoples, minors and other minorities/specific groups and the effectiveness of their recognized rights?

Moreover, the controversial issue of ownership of data (including its juridical status as a propriety-like right, or a bundle of liability-based rights, or none of the above) could be further discussed, particularly in terms of the implications for data governance and the scope of the public domain of each option.

If new rights were to be considered for data, they could be based on various benchmarks apart from "inherent qualities of data" or "protection against certain forms of competition or activity in relation to certain classes of data that are deemed to be inappropriate or unfair" (Issue 10, v). They may include: purpose of the data (public interest, environmentally sound technologies, etc.), creator of data, etc. Since these discussions are very open-ended, it would seem more appropriate to simply ask – without leading answers at this stage – *"If it were necessary to design new data rights, on what basis would/should such rights be based on?"*

Recommendation 13: In Par. 23, reasons in favour and against the creation of new rights on data should be included in order to secure a more balanced view, as well as a discussion on what would/should be the basis and legal and economic arguments for an eventual new right. Further questions, such as exclusions of certain data from patentability and relation of new rights for data to the rights of indigenous peoples and local communities should be included in the Issues Paper.