

Artificial intelligence, the new challenge of Intellectual Property

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Artificial intelligence (AI) arises from the interest that humans have always shown in understanding their own intelligence and, consequently, replicating it in other organisms, hence emerging as a multidisciplinary area, which combines branches of science such as logic, computing and philosophy and is responsible for designing and creating artificial entities that are able to solve problems or perform tasks on their own, using algorithms and paradigms of human behavior.

Therefore, it can be deduced that artificial intelligence is in charge of giving problem solving capacity to inanimate devices, such as mobiles, computers, robots, among others, making human life much easier, since the tasks are now much simpler to make.

According to Engineer Andrés Torrubia, a Spanish expert on the subject: *"With artificial intelligence we can build the impossible".¹*

Now, in the current era of innovation, the world economy is becoming increasingly complex, since the demand for Intellectual Property (IP) modalities, mainly: patents, trademarks, industrial designs and copyright, increase quickly, so artificial intelligence poses a latent challenge for IP registration offices.

As the General Director of the World Intellectual Property Office, Francis Gurry, rightly expressed: *"We are not so far from having commercial music and inventions as a product of AI, and this is something that will transform the concepts of "composer", "author" and "inventor", although we still do not know exactly to what extent. The widespread use of technologies related to AI will also transform consolidated concepts in IP matters: patents, designs, literary and artistic works, and so on. This is something that is already happening, but it is a consequence of the digital economy, not just the AI."²*

The above is demonstrated, for example, by the fact that Google has begun to create an artificial intelligence program that will write local news articles.

Also, in 2016, a group of museums and researchers from the Netherlands presented a portrait entitled "The New Rembrandt," a new work of art generated by a computer that had analyzed thousands of works by the seventeenth-century Dutch artist Rembrandt Harmenszoon Van Rijn.

In the same year, a short novel written by a Japanese computer program reached the second round of a national literary prize.

¹ Vid. TORRUBIA, Andrés, "The AI will allow us to dedicate ourselves to more creative works", in <https://economia3.com>, consulted on February 4, 2019.

² Vid. GURRY, Francis, "Artificial intelligence and intellectual property: interview with Francis Gurry", in https://www.wipo.int/wipo_magazine/es.

In addition, the artificial intelligence company owned by Google, Deep Mind, has created a program that can generate music by listening to recordings.

In other projects, computers have written poems, edited photographs and even composed a musical. Hence, what is expressed by Andrés Guadamuz, Professor of Intellectual Property Law of the University of Sussex (United Kingdom): *"Machines are booming, but they do not come to conquer us, but to act as creators"*.³

All this has brought a great controversy over the authorship of the works created by the AI, since it represents an enormous challenge for the Intellectual Property of our times.

In the case of the works created by animals it seems that the debate is already closed, due to the famous monkey selfie "Naruto", a self-portrait taken by an Indonesian macaque when shooting the camera that he had stolen from the photographer David Slater (Naruto vs. Slater Case).

In this case, the animal rights organization (PETA), claimed the authorship of the ape on the photo, because according to the legislation on Intellectual Property in the United States, it is the author who makes the photo and not the owner of the camera, and thus began two years of arduous legal battle, which culminated on September 11, 2018 with the ruling of a court in San Francisco recognizing the authorship of Slater, considering that the protection of copyright cannot be applied to an animal.

In this regard, the real issue of discussion revolves around the protection through copyright or other forms of IP, of these works that have been emerging as a result of artificial intelligence, as referred by the father of AI, Marvin Minsky: *"There is only one thing true: anyone who says there are basic differences between the minds of men and the machines of the future, is wrong."*⁴

Then, the following question must be asked: To whom does the authorship of these original works, the fruit of AI, belong? Obviously, it is a difficult question to answer and the answer will depend fundamentally on the legal treatment that each country gives to this issue.

If we take as an example the analysis of Rembrandt's painting cited above and start from what is regulated in Copyright Law by Peruvian legislation, it should be taken into account that the Legislative Decree No. 822 states in its Article 2 that: "For the purposes of this law, the expressions that follow and their respective derived forms will have the following meaning: 1. Author: Natural person who performs intellectual creation. 2. Performer: Person who represents, sings, reads, recites, interprets or performs in any way a literary or artistic work or an expression of folklore, as well as the artist of varieties and circus.

As a result of the above, we can infer that according to our legislation, the machine that created the Rembrandt cannot be considered an author, since the norm establishes that the author will be the natural person who performs the intellectual creation, so, this means that, if there is no author, there is no artistic work in legal terms.

Regarding this dissertation, we have two positions. One which considers that the programmers behind this entity are the authors, an argument that is questionable, because in this case the software created by these people is an authorial work, but not the created works of the software.

³ Vid. GUADAMUZ, Andrés, "Artificial intelligence and copyright", in https://www.wipo.int/wipo_magazine/es.

⁴ Vid. MINSKY, Marvin, "Speech delivered when it collected the Frontiers of Knowledge Award in Information and Communication Technologies," at <https://www.bamboo.legal>.

On the other hand, some think that the people who gave the instructions to the machine could be considered authors, but at this point the provisions of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) must be assessed. It is not possible to grant protection to ideas, but to expressions, that is, to the result of ideas embodied in a material support.

Following this thread, notice that the instructions given by the programmers to the machine represent the ideas. However, the execution of these ideas were done by the software using their own decisions and based on their own analysis, so it would not be wise to say that the painting "The New Rembrandt" is the product of the execution of ideas or instructions , because it is not possible to consider that in that set of general instructions, there was determined artistic inspiration of the people who dictated these guidelines to the computer.

In short, this computer provided with artificial intelligence decided on the technique of painting, the angles, the colors, the outline of the eyes, the gestures of the face and each of the details that made possible the emergence of a distinctive and peculiar work.

Finally, we can conclude that the current regulations on copyright have fallen behind in terms of the prevailing reality and the emergence of new technologies, which give way to artistic creation in the hands of artificial intelligence.

In this sense, it is essential that the international entities that influence the regulations corresponding to this branch of law, namely the World Intellectual Property Organization (WIPO), the International Trademark Association (INTA), the World Trade Organization (WTO), among others, carry out the relevant analyzes to order the legislation in line with the new technological requirements that, without a doubt, have become a challenge for legislators and those who exercise Intellectual Property.

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