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Brazilian National Institute of Industrial Property (INPI)
Praça Mauá, 7 – Centro
Rio de Janeiro - RJ, 20081-240
Brazil

RE: Comments of ACT | The App Association on the Brazilian Patent Office's Draft Guidelines for the Examination of Patent Applications Related to Artificial Intelligence

I. Statement of Interest

ACT | The App Association is a global policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. App developers like our members also play a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property protections. The value of the ecosystem the App Association represents—which we call the app economy—is approximately R$9.8 trillion and is responsible for hundreds of thousands of Brazilian jobs, while serving as a key driver of the $8 trillion internet of things (IoT) revolution.[1]

The app ecosystem's success, reliant on continued innovation and investment in connected devices and interfaces, hinges on the sufficiency of key legal and regulatory frameworks, including those surrounding the question of patent inventorship for artificial intelligence (AI) assisted inventions. Patents allow small business innovators to protect their investments in innovation, attract venture capital, and establish and maintain a competitive position in the marketplace. As more devices throughout the consumer and enterprise spheres become connected to the internet, App Association members' innovations will remain the interface for communicating with these devices.

AI systems have increased efficiency in the development of new technologies and products by reducing waste (i.e., cost and time), streamlining redundant tasks, and optimizing solutions. AI tools have made it possible for innovators to reduce the number of technical tools used in invention creation and focus on training and instructing AI to yield outputs that anticipate consumer needs and lead to commercial success. For software

[1] ACT | The App Association, State of the App Economy (2022), https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf.

developers, including App Association members, AI systems, particularly machine learning (ML) tools, have become invaluable to the invention creation process.

Small business technology developers have learned how to work alongside AI to improve the invention creation process and further train a new generation of strong software developers. Software developers use AI to run quality assurance checks that reduce the chance of human bias and error and the potential for disrupting production timelines because a critical mistake was not diagnosed early enough. While we may be able to anticipate AI systems being able to write code independently, this is not our reality today. AI tools are invaluable to the coding process but not without human instruction. In fact, even where human intervention is needed less, AI tools will never truly work alone without direction from software developers. AI supports human processes and reduces time spent on simple but time-consuming tasks so that innovators can increase productivity. Beyond invention creation, AI used for software-as-a-service (SaaS) or used in other maintenance of software has already proved to be instrumental in receiving feedback from consumers, diagnosing issues, and providing solutions in real time.

The App Association places AI inventions into three overarching categories, which align closely with INPI's proposed classification: (1) a primary AI invention (AI models and techniques); (2) an alternative application of an AI invention (AI-based inventions); and (3) inventions developed solely by AI.

The App Association considers the first category, primary AI invention, to be the baseline AI invention. These are inventions where the core innovation is the AI itself, such as a new algorithm or model architecture. These inventions can be delineated, declared, and evaluated in a way equivalent to other software inventions. Therefore, we see no significant new challenges for this type of AI invention under existing patentability requirements.

The second group, an alternative application of an AI invention, involves the application of an AI model or technique to solve a problem in a specific field. These AI-based inventions may increase challenges around subject matter eligibility. The App Association is confident that a combination of existing laws and an assessment based on concrete foundations—as opposed to edge use cases—will successfully address these patent applications.

The final category covers inventions developed solely by a machine with no human involvement. We note our continued support for the appropriate clarification that an AI machine does not qualify as an inventor under patent law, as clearly stated in item 1.5 of the draft guidelines.

II. Impact of AI on Prior Art

The patent system runs into issues of patentability where the application of AI is less definite and measurable. For small businesses, the patent system, while sometimes

providing resources and concessions for smaller patent applicants, can be difficult to navigate with limited financial and legal resources. This is why the App Association consistently advocates for stronger emphasis on examiner training and clear guidance on complex evaluations, including subject matter eligibility.

While we believe that providing examiners with ample sources for prior art leads to strong patent issuance, disclosures on AI-assisted or AI-generated inventions must be uniquely examined. If human conception is the threshold for inventorship, which must have a "definite and permanent" idea to allow a person of skilled in the art to "…reduce the invention to practice, without extensive research or experimentation," then all steps in the examination process should consider this point. Since the concept of human authorship is a cornerstone of many intellectual property systems, including Brazil's, this understanding should also inform the approach to prior art.

Therefore, the treatment of AI-generated and non-AI-generated disclosures should come down to human contribution and the ability to reduce such information to practice, without extensive research or experimentation. If the human contribution requirement is satisfied, then there may be a cause to consider this information as prior art. If not, then considering this information prior art would interfere with the purpose of the patent system to incent human innovation. This analysis would similarly aid a patentability determination. We also note that projects that purposefully publish AI-generated information that otherwise would be patentable are directly disrupting the patent system by disallowing innovators to apply for patents with claims consisting of that information (ex. allpriorart.com). In addition to undercutting individual Brazilian inventors from securing patents that underlay critical products, this type of effort would force inventors to seek strong patent protections from international patent systems that do not treat such information as prior art.

If a party submits a printed publication or other evidence that the party knows was AI-generated to the INPI, the party should at least reasonably disclose the information that it knows regarding its AI-generated components. A party that intentionally withholds information from INPI should be held liable. A party should not have a general duty to determine if a work is AI-generated if they are unaware of this fact after base-level research. This requirement would be unduly burdensome on the smallest innovators. Rather INPI should equip patent examiners with the appropriate tools and training to determine whether a disclosure is AI-generated. The likelihood that AI systems produce incorrect information should have no bearing on a determination of prior art. Since AI-generated inventions do not survive a patentability analysis unless they satisfy the human intervention requirement, AI-generated disclosures should not have a presumption of operability or enablement. If a determination of prior art is based on human contribution and the ability for a person skilled in the art to reduce such information to practice, the volume of AI-generated disclosures should have no bearing on patentability, although the accessibility of prior art will depend on tools available to the public. For small innovators, the inability to locate relevant disclosures could have significant bearing on the ability to innovate.

III. Inventorship and the Impact of AI on a Person Skilled in the Art

INPI's draft guidance reaffirms that only natural persons can be inventors under Article 6 LPI, rejecting inventions "autonomously generated by an AI" where a human makes no intellectual contribution beyond triggering the system, while recognizing AI-assisted inventions when a person identifies the technical problem, configures the system toward a goal, validates the proposed solution, and concretizes it for industrial application. Even where AI proposes solution alternatives, the inventive concept must ultimately reflect human intellectual work, and examination should focus on the technical effects achieved by the claimed invention rather than on the AI system used as a tool. The App Association urges INPI to explicitly incorporate a "significant human contribution" standard, clarifying that at least one named inventor must have made a material contribution to the conception of the claimed subject matter, while confirming that mere ownership, operation, or routine prompting of an AI system is insufficient. This clarification would harmonize cross-border practice, avoid over-deterrence of legitimate AI-assisted research and development (R&D), and give examiners a principled basis to assess inventorship in complex collaborations where AI aids, but does not replace, human conception.

AI systems and other technical tools do not differ in a significant way when applied to the creation of an invention. AI systems only differ from other technical tools in that they are self-learning and self-directed. However, these features do not amount to the "conception." The advancement of AI systems over time does not change this fact. Since "conception" is defined in relation to the inventor, and an inventor must be a natural person, AI cannot be considered an entity that can "conceive" of an invention for purposes of patent inventorship. AI solely remains an efficient tool in the invention process until courts and legislatures addresses this question further. An AI system may be necessary to build the end product but cannot complete its development without human intervention. Therefore, AI systems and other technical tools do not differ with regards to determining the inventorship of a patent. While we can imagine how AI will be used in the future, we only have the knowledge to understand its ability now. As the courts or legislators decide to visit this issue, we urge the INPI to seek industry input again to determine how to develop and continuously update detailed and robust guidance on AI.

The availability of AI as a tool should not impact an analysis of whether something is well-known or common knowledge. This analysis should focus on if a claim can be reduced to practice by a natural person with skill and relevant knowledge in the particular art. Similarly, elements of an obviousness determination (ex. analogous art) should be sustained, but reflect how AI has advanced and converged fields for invention. Rationales to modify prior art, determining whether such modification yields predictable results, evaluating objective indica for obviousness, and other elements should be examined on a case-by-case basis, considering that a person skilled in the art has access to an equivalent AI used in the inventive process, or well-known and commonly used AI available in the relevant field.

IV. INPI Should Take a More Flexible Approach to Eligibility and AI Model, Training, and Data Claims

Initially, we note that an obviousness requirement is important to prevent AI from enabling the proliferation of simple, broad, or frivolous inventions that do not contribute to a narrow and purposeful patent system. However, the App Association urges INPI to take a more factors-based approach to eligibility and AI claim categories to avoid under-protecting genuine technical advances and over-privileging claim form over demonstrated technical application and effect. Replacing *per se* bars with a practical-application and technological-improvement analysis would preserve robust screens against abstractions "as such" while allowing protection when model architectures, training procedures, or dataset constructions yield concrete improvements, with examiners free to request targeted details when material to evaluate eligibility or enablement.

INPI's baseline frames AI within computer-implemented inventions and applies Article 10 LPI exclusions to bar software "as such," mathematical methods "as such," datasets/presentation of information, and other non-technical subject matter unless the claim is drafted as an application in a technical field that solves a technical problem and produces a concrete technical effect. Claims "directed exclusively" to models/techniques, training, or datasets are deemed inadmissible and must be reformulated into application-focused claims, which places categorical weight on claim form and excluded subject matter rather than a holistic assessment of practical application and technological improvement. We urge INPI to replace categorical bars with a factors-based analysis under which model/training/data claims are eligible when integrated into a practical application or shown to improve computer functionality or another technology, recognizing eligibility where AI claims reflect specific improvements or concrete remedial actions in a technical context. INPI's guidance should emphasize technical character, specific means, and substantiated technical effect, while allowing examiners to seek targeted information when material, thereby preserving protection for core AI advances without admitting abstract claims "as such."

Further, INPI's draft would treat claims "directed exclusively" to AI models or techniques, training methods, or datasets as inadmissible, steering applicants to recast them as applications in a technical field that solve a technical problem and produce a technical effect, with datasets characterized as excluded "presentation of information" under Article 10 LPI. If a claim is initially framed to a model, training, or data but substantively solves a technical problem, examiners would be instructed to require reformulation to the appropriate application category without treating the change as added matter, embedding an examination posture that centers AI within computer-implemented inventions and filters out abstract or informational subject matter. The App Association urges INPI not to impose a categorical AI-only exclusion and instead apply existing eligibility doctrine to assess practical application or technological improvement, INPI could replace the *per se*

bar with a non-exhaustive, factors-based analysis that permits model, training, or data claims when functionally limited to a concrete technical application or demonstrated improvement to technology, coupled with examiner discretion to request targeted particulars where material to eligibility or enablement. This revision would preserve pathways to protect core AI advances in architecture, training procedures, and dataset construction when they yield unexpected technical effects, while maintaining robust screens against abstraction by focusing on technical character, specific means, and substantiated effects rather than on claim category labels alone.

V. INPI Should Take a Less Prescriptive Approach to Disclosure Requirements

INPI's draft sets detailed, AI-specific enablement expectations under Article 24, calling for clear descriptions of the dataset (source, variables, selection criteria), input–output correlations, model and hyperparameter choices, preprocessing, training and validation procedures, interactions with other technical components or specialized hardware, and substantiation that claimed technical effects are achieved, while recognizing black-box and non-deterministic behavior does not preclude enablement if reproduction without undue experimentation is possible. The draft also includes narrow exceptions permitting omission of details when the contribution does not depend on them, the omitted information is already known to the skilled person, and the technical result does not hinge on a specific omitted configuration, with a further carve-out when AI outputs are already considered reliable at filing.

Given the breadth of these prescriptions, INPI should adopt a principles-based, non-exhaustive approach that treats the listed disclosures as factors rather than mandatory checklists, allowing examiners to requisition targeted information where material to reproducibility on a case-by-case basis instead of presuming universal necessity. This calibration would align with the draft's own recognition of black-box realities and its existing exceptions, while avoiding undue burdens when underlying data cannot be shared or when representative descriptions, statistical characterizations, validation protocols, or established methods suffice to enable practice without undue experimentation; INPI could clarify that enablement may be satisfied by describing data characteristics and model behavior without disclosing full datasets or proprietary weights where those specifics are not central to the contribution, and that examiners may request additional detail when the link between inputs, outputs, and technical effects remains unclear.

VI. INPI Should Develop Further Guidance Governing the Responsible Use of AI Tools by Parties and Practitioners

The App Association urges INPI to issue dedicated guidance governing the responsible use of AI tools in practice before the Office—clarifying expectations for duties of candor and

reasonable inquiry, human signature and certification, protection of client confidentiality, and mitigation of risks such as hallucinated or fabricated content in filings. Drawing on the USPTO's April 2024 model,[2] INPI can map existing rules to AI usage, explicitly addressing duty of candor, signature requirements, confidentiality safeguards, and system-access policies, while warning of AI-related risks and offering practical mitigations. This practitioner-focused guidance would complement INPI's ongoing consultation on AI-related patent examination and give applicants and representatives clear, enforceable guardrails for AI use across submissions and proceedings. In particular, INPI should require that only natural persons sign submissions, make clear that reliance on AI outputs without verification is not a reasonable inquiry, mandate practitioner oversight to prevent fabricated citations or content, and protect client confidences when using third-party AI systems or data services. Acting to develop this guidance now would protect the integrity of INPI processes, reduce delays and costs from AI misuse, and align Brazil with emerging international best practices modeled on the USPTO framework.

VII. Conclusion

The App Association appreciates the opportunity to provide comments on the Brazilian Patent Office's (INPI's) draft guidelines regarding Examination of Patent Applications Related to Artificial Intelligence. We look forward to continuing our support for a balanced and defined approach to AI.

Sincerely,

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[2] *USPTO Issues Guidance Concerning the Use of AI tools by Parties and Practitioners*, USPTO (Apr. 10, 2024), https://www.uspto.gov/about-us/news-updates/uspto-issues-guidance-concerning-use-ai-tools-parties-and-practitioners.