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Insights: Perspectives

State of AI Patenting Trends and European Prosecution Strategy

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4 TAKEAWAYS

The State of AI: Patenting Trends and European Prosecution Strategy

Kilpatrick Townsend Partner Rich Christiansen recently presented on the state of Artificial Intelligence and strategies for successfully patenting Artificial Intelligence in Europe. Key takeaways from the presentation include:

1

AI is increasingly becoming the raw material from which new technologies are developed. The rapid growth of AI patents mirrors the increasing role of AI in technology. AI is so critical to many new technologies that this rapid growth in AI patent filings is occurring despite legal headwinds created by eligible subject matter concerns.

2

While the United States is home to the top filers of AI patent applications, China is now the largest filer of AI patent applications, and 9 of the top 20 worldwide AI patent filers are Chinese entities. China's leadership in AI filings indicates a high level of AI development activity in China, but these numbers are likely inflated by governmental subsidies and government policy favoring patents. Nevertheless, Western countries should consider the long-term consequences of conceding AI thought-leadership to China when evaluating patent policy.

3

Europe has fallen far behind other regions in AI patent filings. This appears in large part due to the perceived and actual hostility towards software and AI patent applications from the European Patent Office (EPO). Shockingly, only one of the top 20 worldwide AI patent filers is an EU-headquartered entity. Further, this gap in patent filings seems to be growing across most areas of AI and AI applications, except in self-driving vehicles where several European companies, mostly German companies, have become technology leaders.

4

Pursuing AI patents at the EPO is complicated by the EPO's practice of identifying "non-technical" elements in patent claims, and then reading those elements out of the claims. Thus, non-technical elements do NOT contribute to patentability. To increase the likelihood of having their European patent applications accepted, applicants should increase the number of technical elements in their claims. This can be done by: (1) including details of a specific architecture (either hardware or software) on which the algorithm is performed; (2) closely tying inputs to the AI model to technical aspects (increase the technical appearance of inputs); and (3) interweaving technical attributes into algorithm claim elements.

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