

Would You Like to Pay Rent to a Machine? AI Inventorship and Intellectual Property



By Brandon Zuniga, Esq.

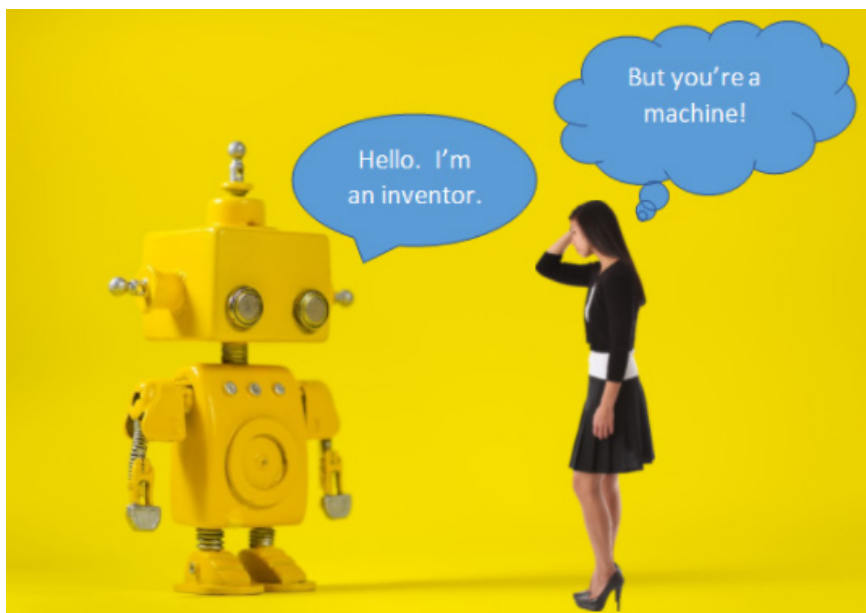
On August 6, 2020, Dr. Stephen Thaler filed a lawsuit against the Director of the United States Patent and Trademark Office. At the heart of the dispute, is the USPTO's recent conclusion that Artificial Intelligence (AI) cannot be an inventor.

I am not surprised by USPTO's conclusion given the current state of the law, or by Dr. Thaler's opposition to the decision as he argues that he "is in the business of developing and applying advanced artificial intelligence (AI) systems that are capable of generating patentable output under conditions in which no natural person traditionally meets inventorship criteria." (See Complaint For Declaratory and Injunctive Relief, available at <https://www.courtlistener.com/recap/gov.uscourts.vaed.483404/gov.uscourts.vaed.483404.1.0.pdf> (last accessed Aug. 24, 2020).

But is inventorship by a natural person foreclosed because AI is involved? 35 U.S.C. § 101 states that "Whoever invents or discovers any

new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." (Emphasis added.) Thus, it

under the current law where an inventor instructs a lab technician to conduct an experiment, then the inventor identifies inventive results from the experiment. Under these circumstances, the lab technician conducting the experiment is



seems plausible that the people who develop AI algorithms or the people who see and understand the novel output from an AI algorithm could be legally entitled to inventorship. Ultimately, this does not seem very different from situations

generally not an inventor. Though the lab technician might have done most of the work, under current U.S. law, merely carrying out instructions under the direction of another does not rise to the level of conceiving of an invention.



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Of course, in circumstances involving an inventor directing a lab technician, the individuals' identities and roles are often reasonably well-defined. Does the same hold when AI is involved? For example, even if many individuals contribute to building an AI tool for discovering inventions, is this so different from any modern laboratory where scientists use numerous pieces of equipment and programs developed by others? Thus, even when an AI tool is involved, would it still make sense to identify inventors as (i) the individuals providing input to the AI tool, (ii) the individuals interpreting the output of the AI tool, (iii) or perhaps both if neither group were merely following the instructions of another?

Furthermore, if inventorship is determined in this way, it would seem to dovetail nicely with existing laws. These laws clearly contemplate a natural person as an inventor because the inventor must be an "individual" who is able to

"invent[] or discover[]" and who can "execute an oath or declaration" identifying themselves as an inventor. 35 U.S.C. §§ 101, 115(a).

The idea of limiting inventorship to natural persons might also be appealing given the ramifications of being deemed an inventor. For example, in the U.S., absent an assignment, the inventor gets to profit from an invention by preventing others from making and selling the invention. In this light, one can see why Dr. Thaler might prefer a legal rule in which a machine, owned by a company, can be an inventor.

Of course, this all begs the question: should artificial intelligence be allowed to own intellectual property such as patents? Or, more broadly, should machines be allowed to own anything or possess legal rights in general? What are the implications of such a legal rule?

If a machine can own an invention, would it also have the right to collect royalties due for using

the invention? Would machines generally be granted the capacity to contract with others? If a machine can own intellectual property and contract with people, would it also be entitled to own real property and become a landlord?

Perhaps more importantly, would granting legal rights to a machine be beneficial to people? Even if answers are not immediately forthcoming, I think it is worthwhile to start the conversation. Machines are increasingly being integrated into almost every aspect of modern life, and the marriage of humans and machines seems almost inevitable. But, before we jump headlong into an ever-deeper union, it may be worthwhile to pause, reflect, and thoughtfully define the relationship. If you have questions about patents, need help with a lawsuit, or would like to file your own patent application, feel free to call 972.367.2001 or email bzuniga@cclaw.com.

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