

David McCombs, Eugene Goryunov, Dina Blikshteyn Author IPWatchdog Article on AI Inventorship

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The past few years saw a meteoric rise of artificial intelligence (AI) products, services, and applications. AI has evolved from merely a buzzword or a cool new idea to a substantively used tool in a variety of applications, including autonomous driving, natural language processing, drug development, finance and cybersecurity among others. Companies, universities, and inventors world-wide noted the importance of AI and began seeking to patent various aspects of AI technology. Until 2018, these patent applications identified a human inventor who invented a particular aspect of the AI technology. Then, Dr. Stephen Thaler filed a patent application for a food container and a light emitting device that identified an AI, known as DABUS, as an inventor.

Dr. Thaler's DABUS application became a poster child for what is now a worldwide question: can AI be an inventor, at least with respect to a patent application? The DABUS application was initially filed under the patent cooperation treaty (PCT) and is now being examined in more than a dozen countries, with divergent results. To date, only South Africa has granted a patent on the DABUS application. Australia presents some promise. There, the Australian Federal Court rejected the patent office's initial denial and ordered the office to examine the DABUS application on its merits. On the other hand, in the United States, United Kingdom, Germany and European Union, the courts have rejected the DABUS application, holding that AI cannot be an inventor. Most recently, the England and Wales Court of Appeal upheld lower rulings that the DABUS applications were deemed to be withdrawn, but the three judges were split, with the two patent specialists on the panel taking different views.

Defining an Inventor

A basic reason for these disparate decisions is how the term "inventor" is defined by statute. South Africa and Australia reached a result favorable to the DABUS application because their laws do not exclude a non-human, e.g., AI, from being an inventor. The laws of the United States, United Kingdom, and Europe, on the other hand, require the inventor to be human. This is because the inventor engages in the mental step of conception which, according to respective patent offices or the courts, can only be performed by a human.

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