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## **CAN AI BE CATEGORIZED AS THE ‘PERSON SKILLED IN ART’ IN A PATENT APPLICATION?**

*“AI is the most powerful technology force of our time. It is the automation of automation, where software writes software.”, said Nvidia CEO Jensen Huang*

### **INTRODUCTION**

In today's fast-paced world, the question of whether AI can be recognized as the inventor in intellectual property rights (IPR) realms has become increasingly prominent, particularly in light of the notable DABUS (Device for the Autonomous Bootstrapping of Unified Sentience) case. Presently, patent laws across various national jurisdictions acknowledge *inventions* requiring *human intervention* and innovation. The definition of 'inventor' exclusively categorizes *natural or legal persons*, limiting inventorship rights to this group. As the impending technoscape evolves, with AI-based software potentially serving as the sole inventor, the absence of legal recognition within existing frameworks or specialized laws, poses significant challenges. It has and will put into question the concept of 'inventorship' and what would it look like in the context of AI-based inventions. Failure to address this issue may lead to discouragement in the industry workmen who have been making huge monetary investments in this domain.

### **AI INVENTORSHIP CONUNDRUM**

AI, or Artificial Intelligence, refers to the simulation of human intelligence processes by machines, especially computer systems. These processes include learning (the acquisition of information and rules for using the information), reasoning (using rules to reach approximate or definite conclusions), and self-correction.<sup>1</sup> These systems can be implemented within machines to produce a specific output that may be classified as an invention. They may also be

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<sup>1</sup> ChatGPT - OpenAI

programmed in a unique way to produce the desired output. DABUS is one such AI system created by Dr. Thaler, incorporating Artificial Neural Networks (ANN), with him being the owner of the copyright for the DABUS source code. To seek a patent for the said invention created solely by this AI software, Dr. Thaler named DABUS as the inventor in the patent application with the additional comment ‘the invention was autonomously generated by an artificial intelligence’<sup>2</sup>. This application was filed across various national jurisdictions including Australia the U.K., the U.S.A Germany, South Africa and the EU. The courts in all these countries (except South Africa) have come to a similar conclusion that only a natural or legal person is capable of being recognized as an inventor and only such person can seek legal protection within the IPR framework. The exception of South Africa has made a stride in a different direction. The patent laws in South Africa are different from other countries in the sense that they mainly focus on the procedural aspect of the patent application rather than its substantive content. Although Mr. Thaler succeeded in obtaining a patent in South Africa, the *fundamental question* remains unanswered, i.e., *whether the existing legal jurisprudence is well-equipped and whether it can be interpreted in such a way that may bring ai-related inventions under its umbrella*

There are two aspects that need to be dealt for an ai-based invention

- i) Whether the AI-based invention is patentable?
- ii) Whether Ai can be classified as the ‘inventor’ of such invention in a patent application?

The key to addressing the first question lies in understanding the prerequisites for patentability of an invention. In general, every patentable invention must meet the three-fold requirement<sup>3</sup>-

- Novelty
- Non-obviousness
- Industrial application

An Ai made invention may fulfill the above-stated requirements. Further, the primary judge of the federal court in Australia clarified this (though this view was later overruled by the full federal court). “*Only a human or other legal person can be an owner, controller or patentee.*

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<sup>2</sup> Thaler v commissioner of patents [2021] FCA 879. Available at: <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca0879> (Accessed: 26 March 2024).

<sup>3</sup> WIPO-pub-867-23-en-wipo-patent-drafting-manual

*That of course includes an inventor who is a human. But it is a fallacy to argue from this that an inventor can only be a human. An inventor may be an artificial intelligence system, but in such a circumstance could not be the owner, controller or patentee of the patentable invention.”*

As far as the patentability of the inventions is concerned the existing laws are well-equipped to grant patent to such innovations. However, the courts are hesitant and have taken a safer route by taking a more apparent and obvious direction.

The question of whether AI can be regarded as the inventor is inherently complex, and the answer may vary depending on the jurisdiction in question. Inventorship is typically granted to either a natural person or a legal entity in accordance with existing laws. In the case of *M. Siddiq (D) thr. L.Rs. vs. Mahant Suresh Das and Ors.* it was held “*an object or thing which is not a natural person is nonetheless recognised as a legal person in the law. Two examples of this paradigm are, where a collection of natural persons is collectively conferred a distinct legal personality (in the case of a cooperative society or corporation) and where legal personality is conferred on an inanimate object (in the case of a ship)*”<sup>4</sup>. It was further held that “*a legal person is to possess certain rights and duties under the law and to be capable of engaging in legally enforceable relationships with other legal persons.*”<sup>5</sup>

It is difficult to categorize AI in either of the categories owing to its complex nature. In above-stated categories, it is relatively easier to pin down the liabilities, duties and rights associated with a legal person. However, AI’s more human like resemblance. “Examples of people “over-attributing” human-like cognitive capabilities to AI that have had a range of consequences.... The most harrowing was the report of a young Belgian man who was said to have taken his own life after prolonged conversations with an AI chatbot.”<sup>6</sup>

Legal frameworks typically attribute inventorship to natural persons or legal entities. While legal personality has been extended to inanimate objects like ships, AI’s unique characteristics blur traditional categorizations. Unlike clear-cut legal entities, AI’s human-like traits complicate the assignment of liabilities, duties, and rights. Instances of individuals attributing human-like cognitive capabilities to AI, with detrimental consequences, underscore this

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<sup>4</sup> M. Siddiq (D) thr. L.Rs. vs. Mahant Suresh Das and Ors. (09.11.2019 - SC) : MANU/SC/1538/2019

<sup>5</sup> *Id.*

<sup>6</sup> Neil Saunders Senior Lecturer in Mathematics (2024) Evolution is making us treat AI like a human, and we need to kick the habit, *The Conversation*. Available at: <https://theconversation.com/evolution-is-making-us-treat-ai-like-a-human-and-we-need-to-kick-the-habit-205010> (Accessed: 26 March 2024).

complexity. As AI continues to evolve, there's a pressing need for nuanced legal frameworks that navigate its intricate nature while ensuring accountability and ethical use.