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Insights

Machines Inventing Machines: Can AI Be an Inventor?

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Under United States patent law, inventorship can only be attributed to individuals. According to 35 U.S.C. §100(f), "the term 'inventor' means the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention." Elsewhere in the U.S. patent code, 35 U.S.C. §100 refers to an inventor as a person ("When an invention is made by two or more persons jointly …").

Business entities therefore cannot be identified as an inventor in a U.S. patent application. While businesses may take ownership of employee inventions through employment agreements and the like, in all patent cases in the U.S., only persons can be inventors.

Enter Skynet. What happens when a novel, non-obvious apparatus or method (i.e., an "invention") is fully conceived by a computer algorithm, operating without specific instruction as to conception of a particular invention from a human? In that case, who is the inventor?

For that matter, does every invention require an inventor?

The answer in the U.S., at least in the short term, is no, artificial intelligence (AI) cannot be afforded inventor status, and no, apparently every invention does not require an inventor. In Thaler v. Vidal, No. 21-2347 (Fed. Cir. Aug. 5, 2022), the U.S. Court of Appeals for the Federal Circuit turned to the Patent Act, cited above, and held that only individuals may be inventors. Looking to other federal law, and also to several dictionaries, the Court determined that "individual" means a human.

What about other countries? The United Kingdom, like the U.S., has also taken the position for now that AI cannot be afforded inventorship status. Australia, on the other hand, does not have the "individual" requirement for inventorship status and has taken the approach that AI may be an inventor.

This area of the law is developing. The U.S. federal legislature may address this issue through changes to the U.S. patent code, should AI-conceived inventions grow in number. However, one thing is settled in U.S. law and

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unlikely to change: incorrect identification of inventorship will invalidate a U.S. patent. In other words, no person may be named as an inventor if they did not contribute to the conception of an invention, and all persons who did contribute must be named as inventor in the patent application (or a later petition to correct inventorship) that is filed with the United States Patent and Trademark Office.

If you have concern that inventorship has been incorrectly identified in a U.S.-issued patent or pending patent application, or if you are considering filing a patent application, you should consider consulting qualified patent counsel for assistance. Incorrect inventorship may be remedied in many cases, but time may be of the essence.