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CAN ARTIFICIAL INTELLIGENCE BE AN INVENTOR IN A EUROPEAN PATENT APPLICATION?

In January 2020 the European Patent Office (EPO) published two decisions containing reasons why two European patent applications designating artificial intelligence (AI) as the inventor had to be refused.

Both applications were filed by the same applicant, and in both cases without designating an inventor. Upon request by the EPO, the applicant filed a designation of inventor indicating a machine called "DABUS" as the inventor. The applicant described this machine as a "Creativity Machine", i.e. *"a particular type of connectionist artificial intelligence"*. The applicant further argued that *"the machine only received training in general knowledge in the field and proceeded to independently conceive the invention and to identify it as novel and salient"*.

The applicant took the position that the European Patent Convention (EPC) does not contain any provision explicitly prohibiting protection for inventions by autonomous machines, and that the position of inventor should not be restricted only to natural persons.

On the other hand, the applicant argued that machines should not own patents as they do not have legal personality or independent rights, concluding that the machine's owner should be the default owner of the intellectual property it generates.

In its decisions, the EPO indicated that the legal framework of the EPC provides the possibility for natural persons, legal persons and bodies equivalent to legal persons to act e.g. as inventors or applicants. The EPO stated that the EPC does not provide for the possibility that "non-persons" (i.e. neither natural nor legal persons) could be the applicant or inventor of a European patent application. Specifically, as regards the inventor the EPO decisions clearly state that the legislative history of the EPC shows that the inventor can only be a natural person.

The EPO went on to state that at present, AI systems or machines have no rights because they have no legal personality comparable to natural or legal persons. This is because natural persons are such because they are human, and legal persons are such because of a legal fiction. The EPO explained that such legal fiction is created by legislation or developed through consistent jurisprudence, and in the case of AI inventors *"there is no legislation or jurisprudence establishing such legal fiction"*.

The EPO also noted that the understanding of the term "inventor" as relating to a natural person seems to be an internationally accepted standard, and pointed out that the national courts of several countries have already issued decisions to this effect.

Finally, in its decisions the EPO stated that simply giving a machine a name is not sufficient to satisfy the relevant EPC requirements.

The applicant had also tried to remedy the situation by arguing that he had acquired the right to the European patent application from DABUS as its employer (rather than as its owner), but the EPO rejected this argument, explaining that AI systems or machines cannot be employed and also cannot transfer any rights.

The above EPO decisions refusing the two patent applications are open to appeal by the applicant. It will surely be interesting to see how the EPO Board of Appeal will rule on these cases, should the applicant indeed file an appeal.