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Comment on Patenting Artificial Intelligence

11/6/19

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Abstract

The scope of this comment is narrowed to inventions created by artificial intelligence (AI) submitted to the USPTO to grant a patent and asserting that the AI is the inventor of the subject of the patent application.

Body

On the basis of the current language in 35 U.S.C., it is unlikely that AI or entity other than a natural person to be considered an “inventor.” If the AI was considered the creator without a special provision addressing AI inventors, specifically, an invention created by AI would not likely be a patentable invention. 35 U.S.C. states, “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...” as to the patentability of an invention.

Drawing from other sources of intellectual property, namely copyright, it is unlikely that the AI could be considered to have been the creator (author/inventor) of a work. In *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), a photographer set up a camera to capture photographs of Macaca monkeys. One such curious Macaca, inspected the camera and ultimately took a photo of itself. The court in this case stated that the Macaca was incapable of affording copyright protection to the picture of itself because it was a non-human. Neither was the photographer who set up the camera the author, under the Copyright Act, of the photo. Therefore, the photo itself was not able to afford copyright protection due to the lack of an author.

Following the reasoning in *Naruto v. Slater*, as the language currently stands, AI would likely not be able to be considered the inventor of the invention due its non-human nature and its lack of standing under 35 U.S.C., even if it was able to secure a patent. Since the AI would not be able to have standing, it could not enforce the right to exclude that a patents grants, therefore making the patent ineffective.

Section §103 sets forth the necessity for a non-obvious subject matter requirement for non-obviousness. Within §103, the non-obviousness of a patent is set to a standard of an invention that would have been obvious to a “person having ordinary skill in the art” (PHOSITA) in the field to which it pertains. If the AI were the inventor, language currently would suggest that the PHOSITA could likely need to be another AI as people or experts even in creation in AI do not operate as an AI does. If a person/expert is incapable of performing the act, would any non-AI source be sufficient as a PHOSITA?

If it were the case that a human expert would be sufficient as a PHOSITA, the sheer nature of the constant evolution and learning of an AI to mimic human functioning would likely find that the AI’s invention is non-obvious in a majority of cases due to the multiple of possibilities. This would advance the useful arts, however, may also cause patents to lose their power on the right to exclude won’t be able to keep up with the speed of advancement of technology.

Furthermore 35 U.S.C. §115 requires an inventor’s oath or declaration that the invention was made or authorized to be made by the applicant and that the applicant “believes himself or herself to be the original inventor” of the invention within the application. According to thelawdictionary.org (drawing from *Keller v. State*, 102 Ga. 506, 31 S. E. 92), belief is an

“conviction of truth of a proposition, existing subjectively in the mind, and induced by argument, persuasion, or proof addressed to the judgement.”

This brings to question of whether or not an AI is capable of “belief” given this definition. An AI does not have a mind nor has an AI’s conclusions been considered to be subjective, but rather objective. Yes, an AI can gather information as proof, but there is still a lack of ability to create a judgement rather than state facts. An argument can be made that even if it can’t be found that an AI can present the requisite belief, because an AI is, in essence, created to keep learning and can be capable of discovering prior art. However, an AI, generally, can only go as far as it was programmed or authorized to, since our current technology has not yet been able to supersede human knowledge, making that belief belonging to the creator or programmer of the particular AI, not the AI itself.

Current statutory language is unlikely to provide a sufficient pathway for an AI to be considered an inventor under 35 U.S.C and therefore afford the ability to apply for and own a patent as its inventor on its own standing. Due to the rapid advance of technology, it is likely new language will be necessary to include AI as inventors. Extensions across intellectual property and business organizations laws, have created a pathway for companies to be considered a Person in order to afford protect and fall subject to laws. AI may need a similar expansion to be considered a person in order to be considered an inventor in patent.

Works Cited

Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018). *Westlaw. Thomas Reuters.*

“What Is BELIEF? Definition of BELIEF (Black's Law Dictionary).” *The Law Dictionary*, 4 Nov. 2011, thelawdictionary.org/belief/.