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# WHO INVENTS WHEN MACHINES DO? PATENTABILITY OF AI-ASSISTED INVENTIONS AND THE PROBLEM OF AI INVENTORSHIP

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## Abstract:

Artificial Intelligence systems now take part in discovery of drugs, materials science and engineering design, and in some cases, the generation of candidate solutions. Patent law, which was designed to protect the human inventor, has been challenged with regard to inventorship of a machine and the extent of human involvement with an AI-enabled invention required for patentability. This article discusses the DABUS litigation across jurisdictions, clarifying the difference between AI-assisted and AI-generated inventions and exploring the Indian stance as per the Patents Act, 1970. It asserts that the courts have clarified the issue of machine inventorship in favour of humans, and that the true challenge is to define an implementable threshold for human contribution, to adjust the inventive step and disclosure requirements, and to avoid invention-misattribution. The article calls for maintaining human inventorship, setting a cut-off for the role of AI, mandating disclosure of AI participation and revisiting the person skilled in the art criterion.

## Introduction

Inventions have always been presumed to originate in the human mind for the most part of its history. Statutes refer to the ‘inventor', as someone who conceives, discovers or devises, and the system of rewards, oaths, assignments and moral recognition that encircles the patent puts a man or woman in the middle. However, the assumption is now being challenged. They are able to propose novel antibiotic structures, optimise antenna shapes, and suggest new material compositions, all from millions of candidates for molecular structure. In a few of these situations the human user's only job is to state a problem, provide data and choose from the output.

There are two separate questions to answer. The first is if an AI system can be recognised as an inventor itself. The second situation, which is more prevalent in actual practice, is where an

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AI-generated invention is patentable, and who should be considered its inventor. The first question has garnered interest due to a ‘staged' test case, the DABUS application that Stephen Thaler filed. The second is the more challenging one, as it involves deciding by patent officers and courts how much human intervention is sufficient.

This article raises the question: can patent law be said to recognise AI as an inventor, and what should be the role of patent law regarding inventions assisted by AI in order to fulfil its functions? Employs a doctrinal and comparative approach, relying on decisions of the United States, the United Kingdom, the EPO, Australia and other jurisdictions, as well as on the Indian statutory provisions. The article is organized like this. The theoretical background is described in Section 2. Section 3 reviews the DABUS litigation. The difference between AI-assisted and AI-generated inventions, and the tests for inventorship, are examined in Section 4. The Indian case is analysed in Section 5. Inventive step, disclosure and ownership are discussed in section 6. Section 7 considers reform options and Section 8 summarizes.

## 2. Theoretical Foundations

The reason behind patents is the primary thing to start with when answering the machine inventor question.

**Incentive theory:** Utilitarianism is the prevailing reason in common law systems. Patents provide limited monopoly in exchange for disclosure of an invention to stimulate inventors to invest in the research and make the invention publicly available. From this perspective, the concern lies with whether a patent is required to promote the activity. Incentives don't work on a machine. It isn't dependent on a monopoly to operate. The appropriate incentive is applied to humans and firms that build, train and use the system. It indicates that the law should safeguard the product of AI systems, but not make the machine the rights-holder, and that the law should act to protect the product of AI where the investment in AI research would not otherwise happen.

**Theories of natural rights and personality theories:** Lockean labour theory stipulates that a person is entitled to rights in the things that are the product of their labour. In Hegelian personality theory, the creation is a product of the creator's personality. Both theories are human-centric and neither is easily applicable to machines. As per these accounts, there is a moral aspect of inventorship, as the recognition of intellectual contribution of a person. That's

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why patent systems have to name the inventor and that's why many people consider the right to be named as a form of personal recognition.

**Public disclosure and integrity of records:** The other role of inventorship is information. It is important for naming the actual inventor to provide the public and courts with the history of what each individual did and for ownership chains, validity and enforcement. The names are listed as the inventors of their inventions, but if humans did not in fact have any meaningful conception in the invention, it is a distortion of the record and the patent's legitimacy may be questioned. Regardless of the outcome of the inventorship issue, this point provides a justification for transparency regarding AI involvement.

Though both theories converge on the narrow question of inventorship of the machine, they disagree on the larger policy question. Incentive theory has no qualms with protecting AI creations and would welcome investment in AI inventions, but personality-based theories are less at ease with it doing the same without the involvement of human intellect.

## 3. A comparative survey of the DABUS litigation

Stephen Thaler filed patent applications in various jurisdictions using the same names, DABUS, for the food container and flashing light, which he claimed were the "sole inventions" of these systems, created by and "for" them. He said that he owned it because he owned the machine. The applications were crafted to determine if machine inventorship was permissible under existing law. The results were similar in most cases.

**United States:** In Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. The Federal Circuit ruled in this fashion in Gilead v. Merck (2022), where it was decided the Patent Act requires the inventor to be a natural person. The court looked at the statutory definition of an inventor as an "individual" and the personal pronouns and references to a person's belief in the oath requirement. It did not explicitly rule on the patentability of inventions created with AI assistance, and highlighted that the matter of patentability of AI-generated inventions is a policy issue.

**United Kingdom:** The Supreme Court in Thaler v Comptroller-General of Patents [2023] UKSC 49 ruled in an unanimous decision that an inventor under the Patents Act 1977 (UK) must be a natural person. It further rejected the claim to ownership that Thaler argued, based on the doctrine of accession, since the invention is intangible and was never created by any

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person. The Court noted that it was not ruling on the patentability of inventions made using the resources of AI, but rather what the existing patent statute entails.

**European Patent Office:** The Legal Board of Appeal in its decisions J 8/20 and J 9/20 has established that the European Patent Convention stipulates that the first named inventor in an application must be a natural person. The Board agreed the applicant may be an entity that has a claim to the invention; however, the Board did not agree to a machine being named. The Board also noted that the name bestowed on a machine did not correspond with the rights established under the Convention because of the inventor.

**Australia:** The approach in Australia was fairly different at the start. In Thaler v Commissioner of Patents [2021] FCA 879 Justice Beach said that an AI system may be an inventor as the term "inventor" is an agent noun and may be applied to anything that invents. This was overturned by the Full Federal Court in Commissioner of Patents v. Thaler [2022] FCAFC 62, which ruled that an inventor must be human, and the High Court denied special leave to appeal.

**Other jurisdictions:** The granting of a patent in South Africa in 2021 for a patent named DABUS is of little precedential value, as it is based on a formal examination system that does not consider the substantive requirements, such as inventorship, for patent. In Germany, Japan, New Zealand, Canada, Israel and elsewhere, the courts have taken similar stances with regard to the requirement to name a human inventor, although in Germany, the Federal Court of Justice has ruled that a natural person who set up and operated an AI can be named as the inventor, with the AI's role noted in the application. This is a useful way to do it, since it maintains inventiveness in human form and is honest about the technical realities.

The trend is evident. The statutory text has been considered the final say by courts, and a few have stated that the policy question is for legislatures. The lawsuit thus definitively resolves the question of whether DABUS can be considered an inventor but still raises the far more significant issue of what is enough human contribution.

## 4. AI-Assisted, AI-Generated Inventions

### 4.1 A spectrum, not a binary

While the difference between an AI-assisted invention and an AI-generated invention can be helpful, it is not a clear-cut divide. AI is a tool, as a simulation program or laboratory instrument is a tool: a human defines the problem, creates the approach, and tests and tweaks the approach

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with the system. On the other hand, a system trained with large data sets suggests a new solution which the human could not have predicted and the human contribution is to recognize the value of it, or to operate the system. There are numerous examples in between in which a researcher sets up the task, chooses the training data, fine tunes the model, understands the results and conducts additional experiments.

The difference is important because most patent systems define the concept of inventorship as a conception, which is the process of forming in the mind of the inventor the definite and permanent idea of the complete and operative invention. Where a human did not conceive the invention, there might not have been an inventor and thus no patent, although the invention might be useful and otherwise meet all the criteria. It presents a danger that the valuable inventions created by AI can remain unpatented or patents can be granted to inventors who in fact did not actually invent them.

### 4.2 Tests on human contribution

In the United States, the rules for joint inventorship look to whether the person contributed to the idea of the invention for one or more of the claims, and the factors in Pannu v. Iolab Corp., 155 F.3d 1344 (Fed. Cir.). Cir. The 1998 rules state that every inventor must make a significant contribution to the invention, not just explain known ideas, and more than a token contribution to the invention. In 2024 the USPTO published guidance that applied this framework to AI-assisted inventions, which held that a natural person must make a “substantial contribution” and provided some helpful principles, including that there must be more than a “mere recognition of a problem or a reduction of an AI output to practice,” and that mere ownership or oversight of an AI system is not a contribution of a natural person. This change in USPTO thinking in 2025, by treating AI as a tool and then applying the same conception-based claim-to-invention standard as would be used for any invention, should be examined before citing.

There appear to be three challenges.

- **Using a collaboration test on a non-collaborator:** The Pannu factors have been created to resolve the issues of humans. Their awkward fit is due to the lack of an obvious yardstick for determining if a contribution is "significant" when the AI does most of the generative work.
- **Evidence:** Applicants might not have insight into how an AI system generated its output, and/or might not keep track of how the AI system reached the output. The capacity of the patent offices is quite small and the strong incentive to claim human inventorship makes the investigation difficult.

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- **Moving thresholds:** The contribution of AI tools becomes increasingly important over time and a fixed threshold may be too lenient or too strict, as the AI tools get more capable and routine.

A viable strategy is to tie the test to the human's role in the claimed subject matter instead of the process, such as, "Was the human involved in the process, or did the human conceive the features which make the claim novel and inventive? It would be possible to achieve this by picking and repackaging a problem in an inventive way, designing a new system architecture or training method to find the specific result or by identifying and continuing to develop an AI output as an invention. The running of a general purpose system and the acceptance of the output would not.

## 5. The Indian Position

### 5.1 Statutory framework

AI is not explicitly mentioned in the Patents Act, 1970. Its structure, however, makes it an assumption of the human inventor. Section 6 states that an application can be filed by the true and first inventor, by a person to whom the right is assigned, or by the legal representative of a deceased person who is entitled to file the application. Then, Section 2(1)(y) negates the definition of the first inventor, namely, the first importer of an invention into India and the first person to whom an invention is made available from outside India. The Indian application forms call for a declaration of inventorship while the provisions of the Act with regard to the right to apply, assignment and the naming of inventors assume the existence of a legal person who is capable of exercising and transferring rights.

There are no Indian appellate cases addressing the question of whether an AI system can be an inventor. Reading the Act in the context of the surrounding case law, this is the result of courts in similar jurisdictions with similar wording in their laws (including the United Kingdom, whose 1977 Act had some of the same elements as Indian law) requiring that the inventor be a person. Even if an Indian court did take it upon itself to create a new category of inventor, it would be hard-pressed to do so without the guidance of legislation.

### 5.2. Defining AI-related Subject Matter

Another group of questions is about the eligibility of AI inventions for patent. Another line of enquiry is whether AI inventions can be patented at all. “Algorithms” or “a computer programme per se” or “a mathematical or business method” are not covered under Section 3(k). The Computer Related Inventions (CRI) Guidelines, issued last in 2017, provide guidance to

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examiners that the substance of the claim is important rather than the program or algorithm itself; and that claims for a technical effect or contribution are permissible. This interpretation was confirmed by the Delhi High Court in Ferid Allani v. Union of India (2019) which ruled that a computer related invention that includes a computer programme cannot be refused under Section 3(k) on the basis that it is a computer programme. To AI, this translates to the potential of a trained model or machine learning technique being rejected, or a technical application, like better image processing in a medical device or a controller for an industrial process, being more likely to be accepted.

The issue of AI-assisted inventions has two implications. First, an invention that has been created using AI can be patented like any other invention, so long as it meets the conditions of novelty, inventive step and industrial applicability and does not fall under a statutory exclusion. Being assisted by AI does not constitute a basis for refusal. Second, uncertainty regarding the applicability of Section 3(k) to methods of AI itself represents a practical obstacle for those who create the tools.

### 5.3 Gaps in the framework in India

There are a number of areas for improvement. There are no provisions in the Act or Rules to deal with the issue of inventorship where AI is involved in conception. It doesn't need to be labelled as using AI. The skill of the person skilled in the art is not taken into account in the context of AI tools. But the policy tone remains confused: The Parliamentary Standing Committee on IP in 2021 had considered the impact of AI on IP, but nothing has been done so far to pass any legislation. I suggest that applicants and/or researchers check if there is any newer guidance issued by the Indian Patent Office.

## 6. Inventive step, Disclosure and Ownership

### 6.1 Inventive step and person skilled in the art

The concept of inventive step in patent law is compared to the knowledge and skill of a hypothetical person skilled in the art, who is assumed to be competent but not inventive. Where AI tools are becoming widespread in a domain, it may make sense to consider the skilled one a user of the tools. The outcome is a higher standard for inventive step: anything an AI system can easily come up with would be considered commonplace, and fewer inventions would be accepted. This may then restrict the scope of protection for AI-generated discoveries, which may have an impact in areas like pharmaceuticals, where AI is increasingly becoming the norm. Policymakers will have to determine whether the standard will rise as the technology advances

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or if they will have to make a conscious choice, such as assuming the skilled person is knowledgeable of AI tools used in that context, but that the specific output is not "skilled to the person.

### 6.2 Disclosure and enablement

A patent must adequately describe the invention so that a skilled person can make and use the invention. Indian law mandates a full and particular description and disclosure of best method. AI systems have two issues. Firstly, it could be a black box model which the applicant can't explain a result. Secondly, reproducing the invention could be dependent upon a specific trained model, dataset or parameters that the Applicant has not disclosed. Offices might need to clarify when they require disclosure of the training data, model architecture or weights, and when a description of the output and a method to verify it will be sufficient to meet enablement requirements.

### 6.3 Ownership

Where inventorship is still human, ownership will pass in accordance with the regular rules, that is, by assignment or employment. This is a key advantage of the human-inventor model as ownership issues can be addressed through existing contracts and doctrines. The problem occurs when it's unclear who the inventor is, or when there is no human inventor. If so, the rights may be lost entirely or the right may be acquired by an individual or a group without justifiable basis. It is important, therefore, that there be contractual provisions between the developer of an AI system, the operator and the user of the system such as who is responsible for naming inventors and who owns what.

## 7. Reform Options

There are three general solutions.

- **Avoid change and retain the Status quo:** In this way, the inventive contribution by humans continues to be an element of patentability, and AI-assisted inventions are still patentable when a human made “a sufficient contribution.” The benefits include certainty, matching other jurisdictions and the need for no legislation. The downside is that inventions with not enough human aspects will be unprotected and the incentive to exaggerate the human contribution will stay.
- **Provide a sui generis right for recognising AI-generated inventions:** There is another, perhaps shorter, right that would not include a moral element of inventorship,

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and that could cover inventions created by AI software that doesn't involve a valid human contributor. This would address the incentive question straight. But it would need to be proven that protection is necessary to encourage investment, as the output is sometimes easy to make and the AI developers are well rewarded through other means. It will also generate new scope, time, and interaction issues with ordinary patents and international coordination issues, and it will be a risk to incorporate monopolies that don't need to exist.

- **Keep the human inventorship, but make adjustments to the rules:** This choice retains the natural person as the inventor, but clarifies the basis for evaluation of contribution, which necessitates disclosure of the use of AI, and modifies the standards of inventive step and enablement. German naming the human that set it up and used it, and explaining its role. This strategy maintains the integrity of the system, is based upon the established doctrine and can be applied by guidelines prior to the introduction of any legislation.

At this time, Option 3 is the most defensible. It doesn't call for the law to answer philosophical issues of agency to machines and it addresses the true questions of evidence, transparency, and standards. It will be important to keep Option 2 on the table, and to consider it on an empirical basis, as to whether or not inventions created by AI are being under-produced due to lack of protection.

The following steps are suggested for India in particular:

- Adopt guidelines that will clarify that the inventor must be a natural person, as well as establish the criteria for evaluating the contribution in the case of the use of AI.
- Include a statement in the application process about its use of AI, along with measures to prevent the penalty of applicants who disclose.
- Reflect on the widespread use of AI and machine learning claims and update the CRI Guidelines to provide examples of technical effect.
- Think about how AI will affect the AI user (the person skilled in the art) and explain what is meant by inventive steps.
- Explain the disclosure requirements for satisfying Section 10, if used in combination with a trained model.

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## 8. Conclusion

The DABUS litigation has achieved its mission: It's revealed that – in the main patent systems – the law is so written that a machine cannot be an inventor. The decisions are consistent, the arguments are predominantly of a textual character and the courts have delegated the policy debate to the legislatures. The debate shouldn't be a one-sided affair focusing on the hypothetical figure of the autonomous machine inventor. The more problematic are the many and growing categories of devices where man and machine collaborate.

In such situations, the law should have a well-defined and practical human contribution test, aligned with the claimed subject matter, as well as clarity regarding the use of AI and revised versions of the inventive step and enablement requirements and contractual clarity regarding ownership. While the statute is flexible and the case law is evolving in India with regard to computer related inventions, it is yet to directly address AI. Early guidance will help applicants to obtain clarity and help India catch up with other jurisdictions. Only if there is evidence that the existing system is not fostering innovation should a more radical approach, like granting a separate right to AI inventions, be undertaken.

What's important is that patent law doesn't have to be used to answer the question of whether machines can think in order to properly reward and regulate invention in an age of AI. It must make sure that the people and companies that shape, execute and interpret machine output are appropriately credited and that the patent bargain – disclosure in return for exclusivity – remains in effect.

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