

Can AI Be Issued Patents?

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Robert J. Marks:

Welcome to Mind Matters News. I'm your unalienable host, Robert J. Marks. We are talking to attorney and author Richard W. Stevens about artificial intelligence and patents. Richard, welcome.

Richard W. Stevens:

Thank you, Bob. Good to be here again.

Robert J. Marks:

This is incredible. There's this very popular robot called Sophia. She's been on late night talk radio. She's done a lot of interviews. And she's kind of clunky. I don't know why people are impressed with her, but she has been granted citizenship to Saudi Arabia, of all places.

Richard W. Stevens:

Does she have to wear an e-veil?

Robert J. Marks:

That's a good question. I don't know. She has a bald head, which is transparent, that shows some of the electronics inside her head. So maybe that's okay. She bald, so.

Richard W. Stevens:

Yeah.

Robert J. Marks:

She doesn't have to, she might not. I don't know the Muslim law on that. But anyway, that surprised me until I learned that Homer Simpson has been given honorary citizenship in Winnipeg, Canada. So you have all of these different rights being given to non-entities and so nothing is surprising anymore. Are you aware of any current US laws that gives artificial intelligence rights? We're going to talk about patents in a minute, but any place that gives AI rights?

Richard W. Stevens:

Well, all right, so the lawyer in me says I got to define the terms. And artificial intelligence, and I rather think you agree, artificial intelligence is a term bandied about and is applied not as carefully as it might. And when you ask the question this way, I want to answer it by saying, "Okay, when you say artificial intelligence granted rights, what you're really referring to is hardware and software."

Robert J. Marks:

Yes.

Richard W. Stevens:

That form a system.

Robert J. Marks:

Yes.

Richard W. Stevens:

So it's really, another way of saying this would be, has a computer or computer system been accorded rights? And I would say at this point I'm unaware of any state or federal law that accords a computer system legal rights in and of itself.

Robert J. Marks:

Okay, well, that's good news. That's in the United States, right?

Richard W. Stevens:

Right.

Robert J. Marks:

There was a ruling recently made in the US Appellate Court about AI and patents, and you wrote about this on Mind Matters News. Could you walk us through this?

Richard W. Stevens:

Well, sure, and I think the listener needs to know a little bit about this, about the background. I won't go way in detail, but just enough. The person at the center of the controversy is Stephen Thaler, T-H-A-L-E-R, Thaler. And he's apparently a heck of a entrepreneur and a software designer. So he formed a corporation and their purpose was to create systems with artificial intelligence that would be able to invent new things. That's the purpose of it, is to actually use artificial intelligence systems to invent new things. So he has taken it upon himself as something of an activist to try to get the world to recognize AI, artificial intelligence systems, as creative entities in and of themselves, as though they were human, but they're independent, that they are somehow independently creative.

So he has used his computer system, reportedly, and I have no reason to doubt it, he's used the computer system to have it invent things and then he has applied for patents all around the world naming the computer system, which is called DABAS, D-A-B-U-S, it's an acronym, naming DABUS as the inventor. So it's something of a PR move on his part. That's not to denigrate any of the work involved in creating DABUS or its results, but what he's trying to do, it appears, is to get some government to somehow say somewhere and give it stamp of approval on the idea that AI can independently create. And once you get a government to say that, then you can go around telling the whole world, "Hey, my systems are independently creative. After all the government of somewhere has said so." And the US would be perfect for that.

So he's been doing this, and so most recently, at least in the case at hand, the DABUS system created two inventions and Thaler and his lawyers put together an application and filed it with the Patent Office. And on the form, okay, this is a form filling out exercise, and on the form it says, "Who's the applicant?" And he writes down DABUS. All right. And he does it for both patents. Well, when the patent examiners took a look at that, they said, "Wait, it's not a natural person." And they rejected the patent application immediately, not after thinking about what the patent content was like we have talked about in

previous broadcast, but just the application itself was defective. That's what the whole case is about. Can you apply in the name of an inventor that's a computer system?

So that's what came up and the Patent Office said, "No, you can't. The law says that Congress has enacted in the regulations there from says that it has to be a natural person." And so that's at the Patent Office. Well, the appeal or the review of the Patent Office is US District Court, and the US District Court heard the case, and the US District Court said, "No, Patent Office is correct. The law as it's written does not, the law expects you to put down a human, not a computer."

Thaler and his group took it up to the Federal Circuit Court of Appeals, which is homed in DC, but it's the Special Court of Appeals that handles certain kinds of cases only, and certain kind of cases that it handles is reviews on patent matters. And so that's where you go if you have an appellate matter that goes up above, it goes to federal circuit, not to all the other circuits. So that's why it went to the federal circuit in DC and they affirmed the lower two decision makers saying, "No, the way Congress has written the law and the intentions of the law are that it has to be a human, a natural person, not a corporation, not a machine, who's listed as the inventor." That's the whole case.

Robert J. Marks:

Okay. Richard, why would he do this? For what possible reason? Now, this guy paid big bucks to take his suit before federal court. And why? Why did he do this? If Hal Phillip is right, my friend Hal Phillip said that the only purpose of a patent is a license to sue, I mean, is the AI going to be able to sue? For what possible reason could this guy want AI listed as the inventor? There must be some higher reason here that isn't apparent to me.

Richard W. Stevens:

If you look back in the various disputes in our society, and I'm thinking here in American society, over the last many, many decades, there's some really hot button issues we won't go into right this second where one side or the other has said, "The Supreme Court says," and that's all you got to do, right? The US courts say ABC is true, and therefore they can use that as a selling tool, as a persuasive tool. Well, if the high court or the Federal Court of Appeals says this, then it must be true. I haven't interviewed him, I'd like to, but I haven't interviewed him, so I can't hear his side of this.

But I rather think, the oppressed, he would have to say, "Well, I'm trying to get the government to say that my machines are independent creative entities, like humans." That's a major victory business wise, but it's also a paradigm shift for people. They now start thinking that computers have consciousness. "Well, after all, look, the court says they invent things. That's all there is to it."

Robert J. Marks:

That is really strange. So you think he's trying to impose a world view or an ideology in doing this? Is that right?

Richard W. Stevens:

I don't know if it's impose, but it's to sell, it's to persuade. So once people are persuaded, and of course if you got the Federal Circuit Court of Appeals to say that AI systems are the equivalent of natural human beings in creativity, well, then you could take and use that in other courts. You could take and use that in arguments for legislation. You could take that and use it in a number of different ways, in addition to just aggrandizing the business entity that Thaler runs. But the whole world could and certainly in America could start to take the view that computers are independently creative. And you've

written a whole book, *Non-Computable You*, to suggest that, no, computers can't do that. But if you can get the government to say it, then it must be true, right?

Robert J. Marks:

It must be true. If I was on the other side, if I was on Thaler, is that his name, Thaler?

Richard W. Stevens:

Mm-hmm (affirmative)

Robert J. Marks:

If I was on Thaler's side, I would say, "Look, this human thing is outmoded." And I would use an old parable about the newlyweds where the woman in preparing a meal cut off a good percentage of the ham that she was baking. And her husband says, "Why are you cutting off that good piece of the ham and throwing it away?" She says, "I don't know. My mother did." So they ask her mother, "Why did you do that?" And she says, "I don't know. It's because my mother did." So they went to the grandmother and they said, "Why did you cut off the end of the ham every time?" And she said, "Because the pan was too small." So I'm wondering if this is the stance that they're taking, that this old idea of just humans is outmoded. It's just something that has been passed down from generation to generation and it's time to review it. Maybe the pan was too short in some sort of sense. Is AI, I think I know the answer to this, but is AI allowed to be listed as the inventor of patents in other countries other than the US?

Richard W. Stevens:

The question is answered with sort of an asterisk. I researched in advance of writing the article for *Mind Matters News* that, I went and looked, and it's in flux a little bit. Thaler has applications in a number of countries, including the EU. He was down in Australia, he's over in South Africa, and all these other places, and trying to get some government somewhere to allow him to patent something but have it in the name of the inventor, his computer. As of today, based on my research, I'm unaware of any country that has permitted him to do it, with the sole exception of South Africa.

Robert J. Marks:

Wow.

Richard W. Stevens:

The Union of South Africa, Republic of South Africa. And my understanding is that the laws in South Africa are very lax in defining some of this. And they don't have, I guess, the same exacting standards for patents as other nations. That's not a bad thing, it's just a fact. So they figure, "Well, we don't care who invented it, and as long as you stated a patent you're on." So they allowed it, their laws allowed it.

But, see, in the United States and other jurisdictions too, who can apply for a patent is defined by law. It's defined by statute, or perhaps by court decision, but it's defined. And it's a little bit arbitrary in the sense that Congress literally could pass a law next week and the President sign it, that said, "No, now anything that invented something can be listed as an applicant." And then the law would be different.

Robert J. Marks:

I see. Getting back to the ham example, is there any reason that given that humans are the only entities allowed to be listed as inventors of patents? In other words, it's the law, yeah, I understand that, but is

there reason given for the law? Typically, I know in Supreme Court cases for example, that people write down, the judges of the Supreme Court write down, reasons why they made their decision. Are there any reasons why only humans can be granted patents in the United States?

Richard W. Stevens:

Reasons would be what you and I or a group of lawyers and judges or legislatures, if we sat down and talked about it, the reasons would be, as we might have talked about before, which is that the idea of a patent was to protect the creative and innovative spirit and product of humans, that that's what it's about. It also has the beneficial effect, if you protect patents, has a beneficial effect on the economy in that it encourages innovation, it encourages invention. And because people can get this limited monopoly for 20 years on a utility patent, they can make the money back and maybe some more for having done all this work to create something new.

And so the whole notion is this is a human endeavor, and humans are the creative ones. If you can turn around and ask the question, "Well, why shouldn't computers be given that?" And the answer is, "Because they aren't creative. They are tools." So for example, I use this example, if you go out into your shed and you use a drill and a power jigsaw and you build a cool thing for the home, who made it? The drill and the jigsaw or you? Well, it's you.

Robert J. Marks:

Yeah.

Richard W. Stevens:

Those tools, like any tools, don't jump up and make stuff, and that's the same truth for Thaler's inventions. The thing didn't power itself up one morning, have a cup of e-coffee and decide, "Hey, I think I'm going to make something new."

Robert J. Marks:

E-coffee. That's good. Yes.

Richard W. Stevens:

Yeah. So it wasn't that way. Whereas like Edison and Tesla and all the greats, and all the unknown inventors, they're out there working on something. They're trying to solve a problem or some idea comes to them. So it's a very human endeavor to be creative. So I think that giving the honor, recognition, to human creativity underlies some of that notion, that an inventor really is a human. And as a factual matter, the inventors are humans. These two inventions that DABUS created for Mr. Thaler were the result of him and of his team doing this work to write the software that could do it. A machine did not put itself together, and the machine did not program itself, and the machine didn't even give itself the task. So all those things were all decisions and designs by other people. It was still uniquely a human effort.

So that's, I guess, the kind of reasoning that we might come to say, "We're really here to reward or to incentivize human action," not simply to say, "Hey, something made something. We're going to protect it under law." I think there's more nuance to it.

Robert J. Marks:

Is this documented anywhere in the courts, this reasoning that you just went through?

Richard W. Stevens:

Oh, yeah, probably so. I can't point to a case right now, but the arguments have been made on both sides. But the US cases, as we were talking about just a moment ago, Thaler tried to make the argument and he wanted to expand on it and say, "The computer really did it by itself. It really was a product of the computer."

Robert J. Marks:

That's baloney.

Richard W. Stevens:

Well, B=but then the federal circuit, for example, expressly said, "We have been tempted to rule on that line of argument and we're not going to," it says. I mean, words to that effect. I'm paraphrasing it. They said, "We're not going to take the bait. Your application has to have a natural person. Fill it in, dude."

Robert J. Marks:

Gotcha. If this comes up again, I mean, when I read about the Thaler case, I wanted to just run around the room and scream. And I wanted to inform the court about the reality of the inability of artificial intelligence to be creative. If I wanted to affect the outcome of some future litigation where AI was proposed as the inventor in a patent, can I do that? Should I do that? And if so, what's the best way to do that?

Richard W. Stevens:

Well, litigation posture is kind of an amorphous question because this is new stuff.

Robert J. Marks:

Yeah.

Richard W. Stevens:

Exactly where to challenge Thaler or his approach, where to do that in the court system, may be driven by how the case is presented. So I'm not sure I would know the answer to that question today. Certainly if this gets into court again somehow, because say maybe Congress changes the law and says it doesn't matter who's the applicant, someone might still challenge it then when it comes up and say, "Wait a second. Maybe the applicant be that, but the Constitution says you shouldn't be able to have computers do it, because the whole object of the game, the way the founders envisioned it, was to protect humans, not to protect computers." So you might get an opportunity from a litigation strategy somewhere along the lines.

I think the arguments are better made in the public press or in the public discourse as we're doing right now. Get people to realize that this is something of a paradigm shift and a worldview shift that is being pressed by people with an agenda, and the agenda actually goes beyond patents. The agenda goes toward transhumanism and the rest of these things where computers and humans, what's the difference? You hook them together and off we go. Of that whole worldview that that would be a better world than the one we have now is really where it's all going. This is just a small step.

Robert J. Marks:

That's very insightful. Okay. Well, I'll keep my horses stabled for a while then, I guess.

Richard W. Stevens:

Well, just wait for the opportunity. It may arise and you could continue writing on the subject as I am.

Robert J. Marks:

Okay. Yeah, that's right. That's right. I think that is, what do they call that? The court of public opinion or something like that.

Richard W. Stevens:

Right, right.

Robert J. Marks:

That's where it needs to be vetted. Thank you, Richard. We've been talking to attorney and author Richard W. Stevens. When we get back next time, for the next podcast, we'll be talking about defining the role of artificial intelligence in patents and exactly what that means. So until next time, be of good cheer.

Announcer:

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