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IP Rights for Works Produced by Artificial Intelligence

IP RIGHTS FOR WORKS PRODUCED BY ARTIFICIAL INTELLIGENCE

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Introduction

The world is witnessing an explosion of technologies which are radically changing not only the way we work but our lifestyle generally. From advanced web search engines to self-driving vehicles and autonomous drones, to voice assistance, language translation or facial detection and recognition, numerous practical examples of Artificial Intelligence (AI) technologies continue to revolutionise the way we do things. Apart from the contents of the work, the process of the work is also being significantly transformed. AI has facilitated the functionality of several systems and without any necessary recourse to human presence or aid. In fact, AI has, in some instances completely taken over some jobs that hitherto required human actions such that no direct human input is needed anymore. AI has gone further to create innovations, inventions and even Intellectual Property (IP) sometimes, entirely independent of humans. In areas where human input may yet be relevant, AI complements human effort. The purpose of this essay/article is to x-ray the position of IP rights for works produced by AI.

Intellectual Property

According to the World Intellectual property organization (WIPO), intellectual property (IP) refers to a creation of the mind; it includes works of art, inventions, copyrights, trademarks and other commercial signs.[1] IP rights therefore are the rights that a person has over the creations of their minds which have been expressed and offered protection under relevant IP legislations. The creator would typically have the right and the discretion to use his/her creation or to assign the right over that creation to another person.

Artificial Intelligence

Artificial Intelligence (AI) is the capacity of a computer or computer-enabled robot or system to accomplish tasks commonly associated with intelligent human beings.[2] It is the ability to use machines or computer codes to simulate human intelligence by observing an environment, evaluating responses or data and acting in the best way to accomplish a tasks that would have required human action.[3] WIPO defines AI as 'a discipline of computer science that is aimed at developing machines and systems that can carry out tasks considered to require human intelligence.'[4]

AI has influenced and engendered numerous developments and redefinitions, including in legal parlance, to the extent that the 'personality' of robots is now being considered.

[1] World Intellectual Property Organization (WIPO): What is intellectual property? 2020 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_450_2020.pdf accessed on September 20, 2021.
[2] B.J. Copeland, 'Artificial Intelligence', Encyclopedia Britannica <https://www.britannica.com/technology/artificial-intelligence> accessed 12 October 12, 2021.
[3] E. Burns, N. Laskowski, L. Tucci, 'What is artificial intelligence?' (SearchEnterpriseAI) https://searchenterpriseai.techtarget.com/definition/AI-Artificial-Intelligence accessed 14 October 2021
[4] World Intellectual Property Organization (WIPO): Artificial Intelligence and Intellectual Property https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip.html accessed on September 20, 2021.

IP Rights in Works by Artificial Intelligence

Intellectual property (IP) systems have traditionally protected and promoted human innovations and creations. However, at present, AI can create works which if they were created by humans, would be eligible for patent protection.[5]

It has therefore become pertinent to examine the incidence of the intellectual property rights in works produced by AI. Specifically, it is germane to ascertain whether AI can be named as an inventor of a work, or if AI can activate the enforcement/protection options for any infringement of the IP rights in works created by the AI.

Ordinarily, it is the author or inventor of a work that enjoys the rights arising from the creation, authorship or invention of that work. In Nigeria, and in some other Common Law jurisdictions, within the context of employment where it was specifically provided for, the employee who creates a work in the course of his employment is regarded the true inventor while the employer is regarded as the statutory inventor. The issue here is as regards when AI autonomously authors work or creates an invention in the course of its normal operations. Note that AI is neither a person nor an employee, and has no employment or other contract binding on it.

Section 2 of the Patents and Designs Act[6] vests the right in a patent in a statutory inventor. Section 2(1) of the Patents and Designs Act provides as follows:

> Subject to this section, the right to a patent in respect of an invention is vested in the statutory inventor, that is to say, the person who, whether or not he is the true inventor, is the first to file, or validly to claim a foreign priority for, a patent application in respect of the invention.

Although the Patents and Designs Act did not explicitly define 'statutory inventor', the interpretation of the Act can be deemed as referring to a "person" and the definition of a person in law does not and cannot include AI.

The Copyright Act is more explicit on whom the right over copyright is vested. [7]Section 2(1) of the Copyright Act provides that:

> Copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made, a qualified person, that is to say-
> (i) an individual who is a citizen of, or is domiciled in Nigeria; or
> (ii) a body corporate incorporated by or under the laws of Nigeria.

The above provision leaves no doubt regarding 'persons' for the purposes of being entitled to enjoy the copyright. Clearly, a thing or being or 'system' (such as AI) which falls

[5] Ravid, S. Y., & Liu, X. 'When Artificial Intelligence Systems Produce Inventions: An Alternative Model for Patent Law at the 3A Era' (Cardozo Law Review, 39, 2215.) http://cardozolawreview.com/artificial-intelligence-systems-produce-inventions/ accessed 14 October, 2021

[6] Patents and Designs Act CAP P2 LFN 2004

[7] Copyright Act CAP C28 LFN 2004

outside those specifically mentioned by the Copyright Act, will not be able to enjoy or sustain any proprietary rights to copyright.

From the Nigerian law perspective, therefore, rights over patents or copyright inure only to a citizen or person domiciled in Nigeria and to a company incorporated in Nigeria.

In the very recent case of *Thaler v Comptroller General of Patents Trade Marks and Designs*[8], the UK Court of Appeal held that artificial intelligence (AI) cannot be listed as an inventor on a patent application. The fact of the case is that Mr. Stephen Thaler filed two patent applications in 2018 to the UK Intellectual Property Office (IPO). But in a surprise move, he listed Dabus, an AI machine, instead of himself as the inventor. The IPO rejected the application and informed Mr. Thaler that he needed to list a real 'person' as the inventor instead of AI.

Mr. Thaler had also filed similar applications in several other jurisdictions. For instance, the U.S. District Court for the Eastern District of Virginia on September 3, 2021 ruled that an AI machine is not an "inventor" under the Patent Act. The European Patent Office (EPO) also rejected Dr Thaler's arguments. However, the Australian Federal Court recognised DABUS, the AI, as the inventor and accepted Dr Thaler's patent application.[9] Also, in South Africa, the patent application was also granted with DABUS, the AI accepted and registered as the inventor.

Although the predominant position as of today is that AI machines or systems are not recognised as inventors or authors of IP works, it is possible that this position may change considerably in the future as has been demonstrated by the positions of the Australian and South African legal systems.

Conclusion

The Thaler's case remains the most recent judicial authority on this point and until a contrary Nigerian case is decided, it retains persuasive effect in Nigeria. If Stephen Thaler's case was to be decided in Nigeria, it is likely that the Nigerian courts may tow the line of the UK Court of Appeal and refuse to recognise the ability of AI to enjoy proprietary IP rights.

Notwithstanding, Artificial Intelligence has made and continues to make huge impact in technology and people's general day to day activities. AI enables computer systems to employ human-like intelligence in making decisions and achieving results. The revolution of AI in the regime of our laws may necessitate the reconsideration of different aspects of law that affect AI rights, including IP law. However, the law remains that AI is a machine/system and not a legal person as to be entitled to enjoy IP rights in its own name, but this position may change in the future as AI gains more traction and widespread acceptance.

[8] [2021] EWCA Civ 1374.
[9] Thailer v. Commissioner of Patent (2021) FCA 879.

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