

Kluwer Patent Blog

AI as an inventor: when patent law is locked up in modern times mythology (a brief history of the inventor notion)

Matthieu Dhenne (Ipsilon) · Tuesday, September 28th, 2021

Two recent decisions in [South Africa](#) and [Australia](#) have accepted the fanciful thesis that an AI could be an inventor. I have no intention of commenting these decisions here, I simply want to try to understand how such a farfetched (and useless) idea, could have gained such ground in such a short time.

Let's say it right away: although this thesis has always seemed fanciful to me, even to the point of smiling, I thought that we should perhaps (more) question why it could be charming, instead of just criticizing it wholesale. Try to listen to it, not only to hear it, to understand it, and thus understand its success (above all media success, after all).

So why has this burlesque idea gained so many followers? Probably because it makes shortcuts that all lead back to the mythology of Patent Law. Since Ancient Greece, the craftsman and his *technè* (τέχνη) have always had the greatest difficulty in making a place for themselves in front of the poet and his creation (the poet was seen as the only creator before the monotheistic religions developed)^[1]. However, it is only in the twilight of the 18th century, at the dawn of our modern patent law, the inventor was glorified as the emblematic figure of Genius^[2]. An historian has demonstrated this this was the result of a desire of recognition for new a social group that has been rejected by the traditional "Academy", in other words by scientists^[3]. In Article 1 section 8 paragraph 8 of the American Constitution, the Founding Fathers of the United States of America already declared "*The Congress shall have power [...]. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.*" And the Patent system on the other side of the Atlantic remained until recently attached to this emphasis on the inventor, to the detriment of the applicant. Thus, from the end of the 18th to the beginning of the 20th century, the figure of the inventor as we know it was born: a single person, with an extraordinary intelligence, who, alone in his cellar, makes humanity progress by his mind. Bergson thus saw in invention, the characteristic of human intelligence, what it has of more elusive, which made his progenitor a genius^[4].

This figure of the inventor continues, even today, to permeate people's minds,

especially those who are not familiar with Patent Law. This being the case, the mythology, which the Greeks did not believe in themselves^[5], continues to captivate the uninitiated: the inventor, this extraordinary character, would be fundamental in the Patent Law system and should necessarily being the owner of its invention. Hence two (erroneous) ideas put forward as a basis for recognizing the AI as an inventor: recognizing an inventor other than the AI (when it could supposedly invent on its own) would be tantamount to not recognizing the “right” owner, it would diminish the moral right of the inventor (which is in reality only a right of paternity intended to follow the chain of rights) and, above all, it would prevent the patentability of inventions in which the AI would have participated.

However, any Patent Law practitioner knows the reality: the applicant is the owner of the property right while the inventor is, *ab initio*, excluded, being presumed that his right has been assigned to the applicant from the beginning. This is the famous distinction between the first-to-invent and first-to-file systems. In such a first-to-file system, now adopted by countries all over the world, the inventor has only two (marginal) rights: to claim ownership of the invention if he proves that it has been stolen from him and the right to be named as inventor. As a consequence, at the end of the day, it does not follow that any of the arguments of the “defenders” of the AI inventor hold water, if one remembers that: an AI never invents alone and that the applicant (its owner) will necessarily be the owner of the invention in which its IA has participated. In other words, recognizing an AI as an inventor requires twisting the legal system (especially on the issue of legal personality), creating unnecessary confusion and insecurity, for no result, since the AI will be protected in any case^[6].

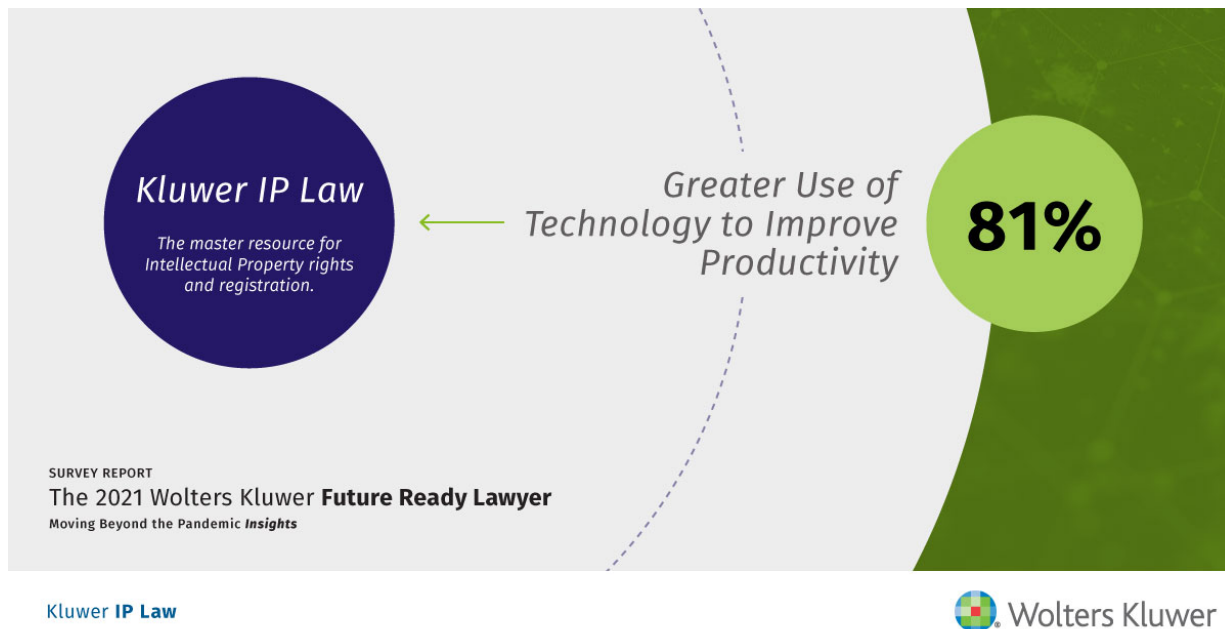
To conclude, this history of the AI as inventor reminds us of the power of Myths, and, at the time of the bicentenary of Napoleon’s death, that “imagination rules the world” (for good or ill, one might add, as the Emperor himself demonstrated it).

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