Copyright Protection for Works Created by AI:

A Comparative Analysis

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Creativity was once considered primarily, if not exclusively, a human endeavor. People create art, literature, and music, while machines handle mechanical tasks. The world has changed. Developments in the power and robustness of artificial intelligence (or AI) have made it possible for a wide array of AI-generated works to be created. Early developments, such as the IBM Deep Blue's mastery of the game of chess, were still somewhat mechanical in nature. But the development of machine learning has progressed to the point that AI can succeed at creative games (such as Go) and can create works comparable to the fruits of human creativity. A discussion of AI requires an awareness of its potential for future development. As Max Tegmark notes, a conversation "about the future of AI needs to continue, because it's the most important conversation of our time." Tegmark, Life 3.0: Being Human in the Age of Artificial Intelligence.

This article addresses two fundamental issues related to works created by AI — (1) are these works eligible for copyright protection and (2) if so, who should own the rights to these works? The law is currently unsettled and divergent as to the first question, even as AI developments increasingly involve making independent creative choices that are similar to those made by human authors. Current precedents from most jurisdictions allow only works created by human authors to be eligible for copyright protection, as illustrated by the US decision, Naruto v. Slater (animal does not have statutory standing to assert a copyright claim). The Supreme Court, in Feist Publications v Rural Telephone, indicated that copyright protection is limited to "original intellectual conceptions of the author … founded in the creative powers of the mind," and that "[t]he writings which are to be protected are the fruits of intellectual labor." See US Copyright Office, Compendium of Copyright Office Practices, § 313.2; Acohs Pty Ltd v Ucorp Pty Ltd. (Australia). On the other hand, some jurisdictions have found that a computer-

generated work is eligible for protection, with ownership by the programmer or initiator of the creative process. See UK Copyright, Designs and Patents Act 1988, Sections 9(3) & 178.

This article makes several proposals regarding the copyrightability of AI-created works. First, copyright protection should be given to the programmer or initiator as a matter of copyright policy, so long as the work otherwise satisfies the usual requirements of copyright protection. This approach allows for the proper incentives for developers of AI technology and for those purchasing such technologies to develop creative works. The long-run solution to AI-created works presents greater challenges. As the technology advances, the ownership question should track the general legal or constitutional treatment of AGI or super-intelligent entities. If the law of a particular nation generally recognizes the "personhood" of the AGI entity, then that entity should be entitled to equal treatment as an author for purposes of copyright law.