1. THE GATEKEEPER DOCTRINES: ORIGINALITY AND AUTHORSHIP IN AUSTRALIA IN THE AGE OF ARTIFICIAL INTELLIGENCE

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ABSTRACT

Copyright law in Australia has long recognised that authorship and originality are companion doctrines. Within Australian copyright law, and that of many other jurisdictions, authorship and originality serve a function of demarcating the boundaries of copyright protection. They designate who and what works are entitled to protection. Where this has been most controversial is in relation to phone directories, television listings and other compilations that raise the fact-expression dichotomy. Yet what has now occurred in light of the advances in technology is that artificial intelligence can produce works that should lie at the heart of creative expression. Their one deficiency is the lack of a human author. If copyright can look past this deficiency – a huge ask considering that copyright operates on the fundamental premise that human beings have a monopoly on creativity – the law will enter into uncharted waters. Whether this should

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emulating humans and laying siege to what has been a strictly human outpost: intellectual creativity.'

[2] IceTV Pty Ltd v Nine Network Pty Ltd (2009) 239 CLR 458, 474 (French CJ, Crennan and Kiefel JJ) ('IceTV'). See also Global Yellow Pages Ltd v Promedia Directories Pte [2017] SGCA 28.

[3] See Gervais (n 1). See Andre Guadamuz, 'Do Androids Dream of Electric Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works' (2017) 2 Intellectual Property Quarterly 169. See also Jane Ginsburg and Luke Budiardjo, 'Authors and Machines' (2019) 34 Berkeley Technology Law Journal 1, 2. See

In the author's view, the only feasible response to the

made repeated reference to individual and 'person'.[20] The requirement of human authorship was explicitly addressed in *Phone Directories*, where Yates J stated:

> In relation to works, an author is, under Australian law, a human author. So much is made clear (if it be doubted) by Section 33 of the Act, which conditions the duration of copyright on the year of the author'tiTJ /T2 5 (e)-3.4 (he .6.3 (f)d)-8 me12 18 r (f)diccse

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3. EXTENDING COPYRIGHT PROTECTION TO WORKS OF NON-HUMAN AUTHORSHIP?

having established that the current state of the plan6 H-1.827 TTJ.5 Tc 0 (n6)Tj ET EMC (p)70.7 :c1a IAN A (HO)04

suggests,[44] this is motivated by a reciprocal exchange. The utilitarian bargain that copyright seeks to foster — monopoly rights in exchange for creative and useful works — would appear to be the driving purpose of the law. Whether expanding copyright protection to include works of non-human authorship would frustrate that purpose is considered below. Here, however, that utilitarian bargain is a useful starting point for the two arguments that support protection of AI copyright.

The first argument centres on investment. The basic idea is that copyright in code is insufficient and that unless developers are given copyright in the outputs created by AI technologies, there will be insufficient motivation for them to invest in AI itself. This investment and incentives argument stands one step removed from the putative copyright work. As is well known, under the existing incentive theory, the author is incentivised to create a work in exchange for a temporary monopoly. In the context of AI, the technology developer is incentivised to invest in creating new forms of AI because the developer or end user may want copyright protection in the outputs that then emanate from the operation of the AI. Here, copyright becomes something of an 'investment protection scheme'.[45]

The investment argument is tenuous. The Jill Watson technology was not developed to secure copyright in her output. Instead, she was designed as a labour-saving device to attend to routine queries. Even in the field of journalism, QuakeBot,[46] used by the LA Times, and, ReporterMate[47] used by the Guardian Australia, were designed to attend to formulaic stories. Copyright matters here, in that the newspapers would presumably be affronted if their content was simply taken by a third party, but it is a by-product of the operation of the system rather than an end in itself. The investment in the technology was designed to free up existing resources for more productive purposes in circumstances where functionality of journalistic endeavour was the primary concern and copyright protection was a significantly lower order priority. Notably, in the account of ReporterMate, the Guardian Australia describes the technology as an efficiency promoting device.[48] At best, copyright is an ancillary concern. Nonetheless, there is significant potential for copyright to serve as a useful regime once the content generated by AI proves to be of value.

The second argument for protecting works of non-human authorship is

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[44] IceTV (n 2) 25.

[45] Gervais (n 1) 30.

[46] Yu (n 39) 1246–1247.

[47] Nick Evershed, 'Why I created a robot the write news stories' Guardian Australia (Sydney, February 1, 2019) <https://www.theguardian.com/commentisfree/2019/feb/01/why -i-created-a-robot-to-write-news-stories> accessed 11 December

originality and authorship otiose. The decisions in *IceTV* and *Phone Directories* would be practically redundant. The plaintiffs in those or similar cases could simply rely on a work-around scheme involving AI. In turn, this would further strain the application of the law on human subjects. Whether a shorter version of duration would

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