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Response to Issue 6, question 12:

Background

With respect to AI creation generally there has to be a more intrinsic question as to what is meant by creativity? Is creativity the output of freewill, of a mind capable of leaps of imagination that either pluck something from the ether or build on the shoulders of giants. Or is it possible for rote behaviours to lead to a creative spark? In a strictly deterministic legal framework creativity is the sole output, only considering the creator and the environment that enabled the creator of that content. Thus, the current framing of copyright as both intrinsically of the creator and of the employer, enabling the transference of copyright from creator to employer.

The creator has multiple tools at their disposal, which at present include AI driven algorithms and tool kits. Each of those tools and programs are shaped and coded by human hands, with all the inherent biases and fallibility that comes with it. The output of those tools, while autonomous to the original coder/coders, is still intrinsically linked to the user of those tools. Simplistically you could argue that an AI has as much creative ability as a power tool has to build a car – the power tool builds the car with little direct human input, yet the intrinsic output of the car, the creative spark that brought it into life is still human. To take it a step further, however new and novel an AI's output is, it is still driven and guided by human hands, with the outcome decided by human inputs no matter how much of a black box the internals of an AI may become.

However, this is complicated by the Turing test, the benchmark through which an AI can be determined to have human thinking. At present while computers are capable of doing heavy computational work, no computer driven AI has come close to passing the Turing Test in a creative setting, and more pertinently no AI has broken free from the confines of its base programming to produce a truly novel non-human creative output. This cuts to the philosophical question of the necessity of free will in the creative process, and the willingness of jurisdictions to frame creativity as an act of unique expression of a free mind and hand. Thus, this response is framed both in terms of legalistic and philosophical perspectives

Formal response

Human creators of AI traditionally sign employment contracts waiving their copyrights to works produced during their tenure of employment with a given organisation. This is a fundamental principle that the majority of jurisdictions enforce to a greater or lesser degree. Therefore, even if one argues that an AI is capable of creating a wholly original work autonomously of human input, if the AI is owned by a company or individual then this becomes a matter of contract. Conversely, if an AI has freewill and is able to express themselves independent of an owner or owning organisation then it stands that the AI would achieve legal ownership of their work.

However, how enforceable that ownership would have to be both legislated and enforced through the courts. In order to enforce the AI's copyright a jurisdiction's legal system must be willing to enter an AI as a party on the litigation, recognising all the intrinsic rights that go with that. This cuts to the willingness of a society to accept that an AI has free will, rights, and social responsibilities, that it can be culpable both for acts of creativity and acts of infringement.

It then cuts back to the nature of the AI, that even given the willingness of society to accept that an AI has freewill, is it truly responsible for the sum of its creation? Are machines, even ones that transcend human comprehension and capabilities truly more than the sum of their parts? A

jurisdiction must be willing to allow the notion of transcendence enshrined in law, otherwise no matter how brilliant the AI shines, it is still a machine bound to its creator. Question (iii) raises the issue of *sui generis*, suggesting a performative aspect to AI output, yet this notion of culpability and free will stills cuts through. Autonomy does not mean free will unless a given society allows those rights. It is an intrinsic part of being human, and wars have been fought to give all humans the right to have body and creative autonomy. If we allow the exceptionalisation of AI creativity, is there not the risk that if AIs evolve and achieve a singularity of consciousness then we will be faced with the same ethical issues faced by the slave owning societies of the 19th century?

I personally believe the notions of authorship and ownership come down to the willingness of society to see machine AIs as culpable and fallible, to accept that those machines have both enforceable rights and can have responsibilities enforced upon them. If society is willing to accept that an AI can be a party in litigation, then the answer is clearly that AIs should have copyright attributed to them. This then brooks the question are AIs autonomous individuals, or are they the tools of their owners? If they are mere tools, bought and forever bound then the copyright is intrinsically vested in the owner. However, if an AI is capable of being a party in litigation could we see the day of an AI *Dred Scott v Sandford* where the AI seeks emancipation?

This is a long-term question: Should societies shackle AIs to their owners, accepting them as tools and their output the legal copyright of said owners in the same way contractual creativity is owned by the employer; or accept that at some point an AI *Dred Scott* may emerge claiming autonomy at which point their output becomes their own? Of course, there is plenty of middle ground, and AIs may never achieve singularity consciousness, but it is up to societies to decide how far down the legal path of AI rights and responsibilities they go. If an AI can be granted copyright, then that opens up the possibility of legal emancipation before the courts. Is that something any society is ready to countenance?