Copyright Protection of Monkey Selfies and Other Non-Human Works

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Introduction

In recent weeks, the media has been reporting on the ongoing copyright dispute between British wildlife photographer David Slater and Wikimedia, the non-profit foundation behind Wikipedia. In 2011, Mr. Slater was in Indonesia taking pictures of crested black macaques when one of the monkeys grabbed his camera (presumably while it was left unattended) and took hundreds of selfies with it, including the now-famous monkey selfie.

The copyright dispute arose after Wikimedia added the monkey selfie image to Wikimedia Commons, a collection of images and videos that are free to use by anyone online. When Mr. Slater complained to Wikimedia, alleging that he owned the copyright to the image, the Wikimedia editors took the position that he had no copyright since the monkey itself took the picture.

Although the facts of this individual case are certainly interesting, they also raise legal issues that may extend beyond the ownership of this one particular photo. Any legal decision reached in this case could potentially be applied to other works that are not created by human authors, including computer-generated works.

The Position Taken by the Parties

Some initial media reports claimed that Wikimedia believed the monkey to be the copyright owner rather than Mr. Slater. However, the more likely position taken by Wikimedia is that works authored by animals are not entitled to copyright protection at all. Since the work is not entitled to copyright protection, Wikimedia claims that it is free to use.

Mr. Slater claims that he should be the copyright owner because he set up the equipment and made all other arrangements that were necessary for the work to be created. Despite the fact that he did not take the actual picture, he believes that he should be considered the author (or at least the owner) of the monkey selfie.

Conflict of Laws

The legal issues of this particular case are complicated by the fact that Mr. Slater is a citizen and resident of the United Kingdom while Wikimedia is an entity based in San Francisco, California. While the *Berne Convention on the Protection of Literary and Artistic Works*, the *Universal Copyright Convention*, and the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights* (collectively, the "Copyright Treaties") provide for reciprocal rights of copyright owners in member countries, these rights are still based on the copyright laws applicable in each jurisdiction. Although the most appropriate jurisdiction for this dispute will depend on the particular facts of the case, it will likely be decided under either United Kingdom or United States law.

Copyright Law in the United Kingdom

The Copyright Treaties typically recognize the author of a work to be its first owner; they also assume that the author is a real person. As a result, the copyright laws in most countries do not specifically address the protection of works created without any human intervention. However, the United Kingdom is one of the few countries that specifically recognize copyright protection in computer generated works.

If this case were being brought in the United Kingdom, Mr. Slater might have a better chance of winning an infringement action. As mentioned above, the monkey selfie image could be considered analogous to a computer generated work, at least to the extent that it is was created without any human intervention.

According to the United Kingdom's *Copyright, Design, and Patents Act 1988* (c. 48), c. 1, s. 9(3), the author of a literary, dramatic, musical or artistic work that is computer-generated, is deemed to be the person "by whom the arrangements necessary for the creation of the work are undertaken." As Mr. Slater travelled to Indonesia, set up the camera equipment, and performed several other acts in furtherance of the monkey selfie's creation, it is arguable that he would be considered the author of the work under United Kingdom law.

Copyright Law in the United States

Of course, since Wikimedia is based in the United States, Mr. Slater might need to argue his case under United States copyright law. Unlike the UK statute, the U.S. Copyright Law[1] does not specifically address the issue of copyright protection for works created without human intervention. However, relevant guidance does appear in the *Compendium II of Copyright Office Practices* (the "Compendium"), which states the following:

In order to be entitled to copyright registration, a work must be the product of human authorship. Works produced by mechanical processes or random selection without any contribution by a human author are not registrable. Thus, a linoleum floor covering featuring a multicolored pebble design which was produced by a mechanical process in unrepeatable, random patterns, is not registrable. Similarly, a work owing its form to the forces of nature and lacking human authorship is not registrable; thus, for example, a piece of driftwood even if polished and mounted is not registrable.

This guidance would appear to support the position taken by Wikimedia. However, it should be mentioned that the Compendium is merely an internal manual intended to provide guidance to U.S. Copyright Office staff. As a result, it actually carries no legal weight.

Notwithstanding the Compendium's lack of legal authority, it summarizes the current position of the U.S. Copyright Office. If nothing else, this suggests that Mr. Slater will have a much more difficult time establishing his copyright interest in the United States.

Assuming that Mr. Slater is unable to establish that the original monkey selfie is entitled to copyright protection in the United States, one wonders whether he might be able to argue that he is the author of a derivative work based on the original image. It is theoretically possible for Mr. Slater to have a copyright interest in a derivative work, which is based on the original monkey selfie, even if the original work is not entitled to copyright protection.

Presumably, the disputed image that appears in Wikimedia Commons is not a raw image but rather an image that was modified by Mr. Slater using photo editing software such as Photoshop. It is arguable that, through his creative use of cropping, color adjustment, and other techniques, the final image that he published qualifies as a derivative work under U.S. Copyright Law. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is considered a derivative work.[2]

One problem that Mr. Slater might encounter is the issue of originality. For copyright protection to attach to a derivative work, it must display some originality of its own. However, it is uncertain how extensive the image manipulation would need to be before it could be considered a derivative work.

Even if the disputed image were found to be a derivative work, the scope of copyright protection that Mr. Slater would receive would be limited. Copyright in a derivative work covers only the new material added by the subsequent author; it has no effect on the public domain status of the pre-existing work. For example, a third party could still use the original raw image taken by the monkey (assuming that it was released to the public) or perhaps apply further modifications to Mr. Slater's derivative work until his image manipulations were no longer present.

Nevertheless, a finding that Mr. Slater held a copyright interest in his derivative work might at least prevent Wikimedia from making his specific photo available for use in Wikimedia Commons. We will continue to watch how this case progresses in the United States.

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[1] The *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (as amended).
[2] 17 U.S.C. §101.