



# International Business Bulletin

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This newsletter is designed to highlight new issues of importance in international trade and business related law. We hope you will find it interesting and welcome your comments.

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*“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.”*

## COPYRIGHT PROTECTION OF MONKEY SELFIES AND OTHER NON-HUMAN WORKS

Henry J. Chang

### 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.

*“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.”*



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### 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<sup>1</sup> 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.

<sup>1</sup> The *Copyright Act of 1976*, Pub. L. No. 94-553, 90 Stat. 2541 (as amended).

*“[T]he survey found that less than 50% of respondents had attended anti-corruption training and there had been a reduction in the level of reporting on compliance issues to boards.”*

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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.<sup>2</sup>

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. ■

<sup>2</sup> 17 U.S.C. §101.

## ANTI-CORRUPTION COMPLIANCE STALLS, DESPITE AGGRESSIVE ENFORCEMENT

Paul Pimentel

Anti-corruption compliance efforts appear to be stalling, despite an increase in enforcement actions. According to a global fraud survey conducted by auditing firm Ernst & Young, the percentage of companies that have anti-bribery/anti-corruption policies has increased by only 1% over the past two years, and a persistent minority has yet to take even the basic steps toward an effective compliance program.<sup>1</sup> The survey was based on interviews with more than 2,700 senior decision-makers in a sample of the largest companies in 59 countries, including Canada.<sup>2</sup>

While more than 80% of respondent companies had anti-corruption policies in place, the survey suggests anti-corruption compliance efforts have stalled at that level.<sup>3</sup> Moreover, the survey found that less than 50% of respondents had attended anti-corruption training and there had been a reduction in the level of reporting on compliance issues to boards.<sup>4</sup> The survey also found that less than a third of businesses are always or very frequently conducting anti-corruption due diligence as part of their mergers and acquisitions process.<sup>5</sup>

These findings are particularly disturbing in light of more aggressive enforcement actions in Canada, the United States and the United Kingdom. For example, Nazir Karigar, a 67-year old Ottawa-based

<sup>1</sup> Ernst & Young, “13th Global Fraud Survey: Overcoming Compliance Fatigue” (3 June 2014) Online: Ernst & Young at 2 <[http://www.ey.com/Publication/vwLUAssets/EY-13th-Global-Fraud-Survey/\\$FILE/EY-13th-Global-Fraud-Survey.pdf](http://www.ey.com/Publication/vwLUAssets/EY-13th-Global-Fraud-Survey/$FILE/EY-13th-Global-Fraud-Survey.pdf)>.

<sup>2</sup> Id at 22.

<sup>3</sup> Id at 14.

<sup>4</sup> Id at 2.

<sup>5</sup> Id at 3.

“[T]he agreement is expected to initially increase bilateral trade by 20% and boost Canada’s economy by \$12 billion annually.”



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executive who was acting as an agent for the firm Cryptometrics Canada, was sentenced to 3 years in prison for his role in a plan to bribe officials from Air India and an Indian Cabinet Minister.<sup>6</sup> The RCMP has since issued warrants for the arrest of three more Cryptometrics executives, including its CEO and COO.<sup>7</sup>

In 2013, the United States saw an increase in the fines levied against corporations under the *Foreign Corrupt Practices Act*<sup>8</sup> (“FCPA”), jumping from US\$260 million in 2012 to US\$720 million in 2013.<sup>9</sup> There was also an increase in the number of actions brought against individuals under the legislation,<sup>10</sup> although there was a decrease in the number of actions brought against corporations.<sup>11</sup>

The United Kingdom has also seen significant sentences handed down for the bribery of foreign officials. For example, four executives at Innospec Inc., a specialty fuels company, received sentences ranging from 4 years to 18 months in prison for their role in bribing officials in Indonesia and Iraq.<sup>12</sup>

These enforcement actions underscore the importance of developing an anti-corruption compliance program, which complies with requirements of the *Corruption of Foreign Public Officials Act*<sup>13</sup> and, if applicable, the FCPA and the UK’s *Bribery Act 2010*.<sup>14</sup> ■

## CANADA AND EUROPEAN UNION AGREE TO COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

Patrick Gervais

Canada and the European Union (EU) reached an important milestone on August 5, 2014, by agreeing to a draft trade agreement (CETA) now undergoing legal review. This brings Canada one step closer to a historic agreement that would significantly reduce tariffs on goods and services exported to the European market. Canada would access the largest economic block in the world with significantly reduces tariffs while the EU would gain easier access to the North American market via Canada. Once implemented, the agreement is expected to initially increase bilateral trade by 20% and boost Canada’s economy by \$12 billion annually. The tentative date of implementation is 2016, if there are no further hick-ups in negotiations.

### Eliminating Tariffs

CETA will open up the EU market to Canadian businesses by eliminating about 98% of all EU tariff lines. 100% of non-agricultural tariff lines and close to 94% of agricultural tariff lines would be eliminated. While almost all tariff lines would be eliminated immediately once CETA comes into

<sup>6</sup> R. v. Karigar 2014 ONSC 3093 at para 2 <<http://www.canlii.org/en/on/onsc/doc/2014/2014onsc3093/2014onsc3093.html>>.

<sup>7</sup> Royal Canadian Mounted Police, “RCMP Charge Individuals with Foreign Corruption” (4 June 2014) Online: RCMP <<http://www.rcmp-grc.ca/ottawa/ne-no/pr-cp/2014/0604-corruption-eng.htm>>.

<sup>8</sup> 15 U.S.C. §§78dd-1, et seq.

<sup>9</sup> Shearman & Sterling LLP, “FCPA Digest: Recent Trends and Patterns in the Enforcement of the *Foreign Corrupt Practices Act*” (January 2014) Online: Shearman & Sterling LLP at 6 <<http://www.shearman.com/~/media/Files/Services/FCPA/2014/FCPADigestTFPCPA010614.pdf>>.

<sup>10</sup> Id at 5.

<sup>11</sup> Id at 4.

<sup>12</sup> Serious Fraud Office, “Four sentenced for role in Innospec corruption” (4 August 2014) Online: Serious Fraud Office <<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/four-sentenced-for-role-in-innospec-corruption.aspx>>. Please note that these offences took place prior to the enactment of the UK *Bribery Act*, and therefore the sentencing took place under older UK anti-corruption laws. There has yet to be a successful corporate prosecution under the UK *Bribery Act*.

<sup>13</sup> S.C. 1998, c. 34.

<sup>14</sup> 2010 c. 23.

*“One key benefit to Canadian companies will be access to opportunities in the lucrative EU government procurement market.”*

force, 1% of tariffs would be eliminated over a period of up to 7 years. Certain tariffs would be subject to a phase out period, for example tariffs relating to fish and seafood products, grains, and passenger vehicles. CETA also provides protection against other kinds of restrictive trade measures that could be applied to reduce or nullify market access gains through the elimination of tariffs, including ensuring equal treatment between the parties by providing “national treatment” on goods in each respective market.

#### **Made in Canada Requirements**

CETA also provides clear rules to determine which goods are considered “made in Canada” and eligible for preferential tariff treatment, including production requirements to meet this standard. In addition to rules of origin, CETA aims to streamline exporting procedures and reduce red tape at borders. Provisions including simplifying and automating border procedures and providing an impartial and transparent system for addressing complaints about customs rulings and decisions.

#### **Regulatory Requirements**

CETA also proposes to streamline regulatory requirements between the EU and Canada. Provisions include mutual recognition of technical regulations in each respective market and acceptance of test results on products by each respective certification body. This would reduce administrative costs and allow for coherent product launches in both markets. Parties from each market would also be able to participate in the development of technical regulations.

#### **Trade Remedies**

With regards to trade remedies implemented by governments to protect domestic industries against unfair pricing and unfair government subsidies practices, CETA reflects WTO rules that require a

country to undertake a fair and transparent investigation to determine whether unfair trade is taking place before a country imposes a trade remedy. If a trade remedy is implemented, a country must do so only in a fair and transparent manner by disclosing all essential facts under consideration and allowing parties to fully defend themselves.

#### **Investments, Industries and Services**

CETA’s investment rules set out how investors and their investment must be treated by the host country. There are commitments to treat investors and investments fairly, equitably and no less favourably than domestic or foreign investors. The process that investors follow for compensation is called an “investor-to-state dispute settlement” (ISDS) and would involve an independent arbitral panel hearing facts and opining on the merits of an investor’s claim. This is a point of contention and there are rumours Germany is pushing back on CETA because of the mechanism of this ISDS.

CETA would also apply to services. However, certain services said to be fundamental to our social fabric would be excluded, for example health care and public education. A corollary to its applicability to services, CETA seeks to streamline the development of agreements between Canadian and EU regulatory bodies for the recognition of professional qualifications and for a greater mobility of skilled labour. This is the first time a free trade agreement signed by Canada would include substantial provisions on the mutual recognition of professional qualifications.

#### **Government Procurement**

One key benefit to Canadian companies will be access to opportunities in the lucrative EU government procurement market. CETA would only apply to high-value procurement contracts in order to ensure that governments can continue to use

*“[CETA] includes a framework to facilitate cooperation at various levels and establishes shared commitments to promote trade in a way that contributes to the objectives of sustainable development.”*

procurement to support local development, especially for small and medium-sized enterprises. The threshold-value for procurement contracts in CETA will range from \$205,000 to \$7.8 million for the 2012-2013 biannual cycle, comparable with Canada's thresholds in the WTO. Canada has also agreed to broad inclusion at its federal, provincial and municipal levels, which will help procurement processes to be carried out in an open and transparent manner to ensure greater competition for public works projects. Important exceptions are set out in CETA's government procurement rules for sensitive industries including culture, aboriginal affairs and defence.

#### **Intellectual Property**

CETA echoes the recent *Copyright Modernization Act*, which supports advances in technology and international standards and brings Canada in line with the World Intellectual Property Organization Internet Treaties. Geographical indications provide exclusive rights for a product based on its geographical origin in cases where origin is considered to confer a particular quality or character to the product, such as *terroir* products or geographical indications for wines and spirits in Europe.

#### **Dispute Resolution**

The aim of the CETA dispute resolution provisions is to provide improved, expedient and affordable settlement processes. The proposed state-to-state dispute settlement provisions set out rules to deal with trade disputes based on the WTO Dispute Settlement Understanding model, but include certain improvements such as a more robust voluntary mediation mechanism when compared to Canada's previous trade agreements, a more streamlined and expeditious process when parties chose arbitration, and an accelerated arbitration procedure for cases requiring urgent resolution, for example in the case of perishable or seasonal products.

#### **Sustainable Development, Labour and Environment**

Rather unique to the CETA is the emphasis on practices to promote economic, social and environmental objectives. It includes a framework to facilitate cooperation at various levels and establishes shared commitments to promote trade in a way that contributes to the objectives of sustainable development. CETA would also create a forum for civil society organizations to discuss the sustainable development aspects of trade relations between Canada and the EU.

CETA ensures that national laws and policies provide protection for the fundamental principles and rights at work, including the right to freedom of association and collective bargaining, the abolition of child labour, the elimination of forced or compulsory labour, and protection against discrimination. CETA establishes civil society advisory groups to provide views and advice on any matter related to the Agreement's provisions on labour and creates a mechanism through which the public can raise concerns about labour issues related to these provisions. CETA also encourages cooperation between the parties with regards to labour issues, including through information exchanges and international forums.

CETA also includes environmental provisions and aims to enforce strict environmental laws and compliance with environmental standards. CETA recognizes the importance of managing forests, fisheries and aquaculture in a sustainable way and also includes commitments to cooperate on trade-related environmental issues of common interest, such as climate change and conservation, and the sustainable use of natural resources.

#### **The Next Steps**

CETA is an ambitious endeavour that has reached another milestone. However, as legal review

*“A company may satisfy the requirements of the [Corruption of Foreign Public Officials Act] and [Foreign Corrupt Practices Act] but still run afoul of the [UK Bribery Act 2010].”*

commences, negotiations will undoubtedly lead to changes to the current CETA. Already, rumours that Germany will not support the current CETA because of the investor-state dispute settlement provision illustrate the potential pushback ahead. Several special interest groups have also been vocal about losing preferential treatment in their national markets. However, if and when implemented, CETA would benefit consumers in both markets by increasing trade, competition, ideas and innovation between both markets. ■

## OVERVIEW OF THE UNITED KINGDOM BRIBERY ACT

Paul Pimentel

### Introduction

Like the *Corruption of Foreign Public Officials Act*<sup>1</sup> (“CFPOA”) and U.S. *Foreign Corrupt Practices Act*<sup>2</sup> (“FCPA”), the UK’s *Bribery Act 2010*<sup>3</sup> (“UKBA”) has extra-territorial application. It also has unique offences and is considered more stringent than either the FCPA or the current CFPOA.

A company may satisfy the requirements of the CFPOA and FCPA but still run afoul of the UKBA. For this reason, it is recommended that Canadian companies assess their exposure to the UKBA, as well as the other foreign corrupt practices legislation, and implement compliance programs that meet the highest standards applicable to them.

### General Scheme of the UKBA

Sections 1 and 2 of the UKBA make it an offence to offer or accept a bribe. Section 6 specifically makes it an offence to bribe a foreign public official. Section 7 of the UKBA makes it an offence for a commercial organization to fail to prevent bribery committed on its behalf.

### The Corporate Offence

Section 7 is unique to the UKBA; there are no equivalent provisions contained in either the CFPOA or the FCPA. Section 7 also has extra-territorial applicability, which may expose Canadian companies to the UKBA.

Section 7 applies if a person “associated with” any “relevant commercial organization” bribes another person intending to obtain or retain business, or obtain or retain an advantage in the conduct of business for that relevant commercial organization.<sup>4</sup> A “relevant commercial organization” is defined as any “body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom.”<sup>5</sup>

In 2011, the UK Ministry of Justice released guidance on the interpretation of the UKBA.<sup>6</sup> This guidance stated that “organizations that do not have a demonstrable business presence in the United Kingdom would not be caught” by the UKBA.<sup>7</sup> It also stated that the mere fact that a firm was listed on the London Stock Exchange would not, in itself, mean that a company was carrying on business in

<sup>1</sup> S.C. 1998, c. 34.

<sup>2</sup> 15 U.S.C. §§78dd-1, et seq.

<sup>3</sup> 2010 c. 23.

<sup>4</sup> Id, s. 7(1).

<sup>5</sup> Id, s. 7(5)(b).

<sup>6</sup> Ministry of Justice *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*, March 2011 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181762/bribery-act-2010-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf)>.

<sup>7</sup> Id at 15.

*“[C]orporations with some connection to the UK would be captured by the UKBA, regardless of whether the bribery took place within or outside the United Kingdom.”*

the UK for the purposes of the UKBA.<sup>8</sup> Similarly, a corporation having a UK subsidiary would not, in itself, be considered to be carrying on business in the UK because the “subsidiary may act independently of its parent or other group companies.”<sup>9</sup> Nonetheless, corporations with some connection to the UK would be captured by the UKBA, regardless of whether the bribery took place within or outside the United Kingdom.

A second requirement of the corporate offence is that a person “associated with” the company bribe “another person intending to obtain or retain business or a business advantage for the organization.”<sup>10</sup> Section 8 of the UKBA defines an associated person as someone who performs services for or on behalf of the organization. This person can be an individual or an incorporated or unincorporated body.

Section 8 provides that the capacity in which a person performs services for or on behalf of the organization does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included.<sup>11</sup> The definition intentionally gives Section 7 a broad scope so as to embrace the whole range of persons connected to an organization who might be capable of committing bribery on the organization’s behalf.<sup>12</sup> Examples of associated persons include contractors and suppliers to the extent that they are performing services for or on behalf of a commercial organization. However, suppliers that are “simply acting as the seller of goods” are not likely to be

considered an associated person, and therefore a commercial organization is unlikely to be liable for bribery in this scenario.<sup>13</sup>

Section 7(2) of the UKBA provides a defence to prosecution under Section 7. A company will not be guilty of bribery if it can prove that it had in place adequate procedures designed to prevent persons associated with the company from undertaking bribery. The guideline states that companies should take a risk-based approach to developing a compliance program and sets out six principles that should inform adequate compliance: (1) proportionality, (2) top level commitment, (3) risk assessment, (4) due diligence, (5) communication, and (6) monitoring and review.<sup>14</sup> The content of an adequate compliance program will vary according to the risk assessment and the size of the organization, among other factors.

#### **Facilitation Payments**

Another significant difference between the UKBA, the CFPOA and the FCPA lies in the treatment of facilitation payments. These are small payments made to facilitate what would otherwise be routine government action, such as customs clearance or police protection.

The UKBA does not provide any exemption for such payments. In contrast, §78dd-1(b) of the FCPA<sup>15</sup> provides an exemption from prosecution for such payments. The current CFPOA also provides a similar exemption for facilitation payments. However, it should be mentioned that 2013

<sup>8</sup> Id at 16.

<sup>9</sup> Id.

<sup>10</sup> Id at 15.

<sup>11</sup> Id at 16.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id at 20-31.

<sup>15</sup> <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>.



amendments to the CFPOA included a provision to eliminate this exemption but the relevant provision is not yet in force.<sup>16</sup>

### Conclusion

Due to the potential application of the UKBA to Canadian companies that have some connection to the United Kingdom, Canadian companies should assess their exposure to the UKBA (as well as the CFPOA and FCPA) and implement an appropriate compliance program that satisfies the requirements of all applicable legislation. ■

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<sup>16</sup> *Corruption of Foreign Public Officials Act*, SC 1998, c 34, Amendments Not in Force <<http://laws-lois.justice.gc.ca/eng/acts/C-45.2/nifnev.html>>.

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