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WIPO MAGAZINE

Can the monkey selfie case teach us anything about copyright law?

February 2018

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On July 2011, British photographer David Slater travelled to a national park in North Sulawesi, Indonesia, to take pictures of the local wildlife. Once there he followed a troop of monkeys, trying to get a few unique pictures. Mr. Slater claims that he was specifically looking for a very close shot of a monkey's face using a wide-angle lens, but the monkeys were obviously shy, and didn't allow him to get too close. While he managed to take a few pictures, he didn't get the shot he was looking for. He claims he placed his camera on a tripod as the monkeys were curious about the equipment, and clicked a few shots. The first pictures they took were of poor quality. He claims he then changed the camera settings and that one monkey in particular, was drawn to the reflection of the lens. The monkey then went on to take a few pictures.

Mr. Slater claims that one of these images was an astounding, once-in-a-lifetime shot that captured an expression of pure joy and self-awareness on the monkey's face. He imagined it appearing on the front of National Geographic, so he sent it and a few others to his agent, who then circulated them to a number of news sources. Eventually, it was first picked up and published by the *Daily Mail* as a feature story, and then went viral.

The spat with Wikipedia and others

However, the popularity of the photos, came at a price. In 2014, it triggered a dispute between Mr. Slater and Wikipedia when the online encyclopaedia uploaded the picture and tagged it as being in the public domain, reasoning that monkeys cannot own copyright.

When Mr. Slater tried to get the picture removed, Wikipedia did not relent, and the so-called monkey selfie is still listed on that site as public domain material.

Then, in September 2015, the campaign group People for the Ethical Treatment of Animals (PETA) sued Mr. Slater in a California court on behalf of the monkey (named Naruto in the suit) to assert copyright over the picture, claiming that the selfie "resulted from a series of purposeful and voluntary actions by Naruto, unaided by Mr. Slater, resulting in original works of authorship not by Mr. Slater, but by Naruto."

In January 2016, the trial judge dismissed the action on the basis that even if Naruto had taken the pictures by “independent, autonomous action,” the suit could not continue as animals do not have standing in a court of law and therefore cannot sue for copyright infringement.

Astoundingly, PETA appealed the dismissal, in the Court of Appeals of the 9th Circuit, and those following the case were treated to the spectacle of US Federal Court judges and lawyers making monkey jokes and discussing whether PETA had identified the right monkey.

Somewhat disappointingly, however, the drama was cut short as the parties reached a settlement out of court. While the exact terms of the settlement are unknown, lawyers for PETA have said that the deal includes a commitment from the photographer to pay 25 percent of all future royalty revenue to the monkey sanctuary where Naruto lives.

This would seem to be the end of the monkey selfie case, but in a recent interview Mr. Slater hinted that he is thinking of suing Wikipedia for copyright infringement. But where could this lawsuit take place?

This image of a female crested black macaque monkey is at the heart of a legal row between UK wildlife photographer David Slater and Wikimedia Commons over its copyright status (photo: © David Slater / Wildlife Personalities Ltd).

Jurisdiction

The Naruto case took place in a California court because Mr. Slater has published a book called *Wildlife Personalities* using the self-publishing service Blurb, a Delaware company that ships its printed material from a San Francisco warehouse. The plaintiffs (PETA) claimed that this was enough to grant them standing in the United States. However, as Mr. Slater is a British citizen, any future litigation could take place in the United Kingdom.

The fact that the picture was shared online has been an important factor from the start of the case, overshadowing even the physical elements of the story such as Mr. Slater’s nationality. Jurisdictional issues in relation to the Internet are one of the most complex areas of cyber law because of the network’s global nature.

Thankfully, jurisdictional questions in relation to copyright tend to be rather more straightforward.

Copyright law is strictly national in nature, but there is an international system in place that allows creators to protect their works in other jurisdictions. As a general principle, Article 5(1) of the Berne Convention for the Protection of Literary and Artistic Works states that copyright in a work subsists wherever it originates, that is, in the country in which it was first published. In the monkey selfie case, the picture was taken in Indonesia, and first published in the UK through Caters News Agency, a picture and video licensing firm, which then granted permission for its publication in the British media.

UK photographer David Slater on location in Sulawesi, Indonesia (photo: © David Slater / Wildlife Personalities Ltd).

In so far as the work can be said to have originated in the UK, and since Mr. Slater has repeatedly claimed exercise of his rights in the UK (as per Article 5(2) of the Berne Convention), it would be more than fair to assume that UK copyright law would apply in this instance.

Even if we ignore the place of publication, courts seem very keen to exercise jurisdiction over their nationals. Courts in the UK have even heard cases from other jurisdictions, as was the case famously in *Pearce* v. *Ove Arup*.

Moreover, the Court of Justice of the European Union (CJEU) has been erring on the side of the creator when it comes to jurisdictional matters, and in particular when dealing with online infringement cases, such as in *Pinckney* v. *Mediatech and Hejduk* v. *EnergieAgentur*.

In light of the above, an analysis of copyright authorship issues under English and EU copyright law is in order.

Authorship issues under English and EU copyright law

As a British citizen, it is fair to assume that Mr. Slater would sue Wikipedia in the UK. Commentators in the United States seem to agree that the photo does not enjoy copyright protection under US law.

While, the question remains open to debate, should Mr. Slater sue in a UK court, it would appear, given existing case law and the position of leading authorities on copyright in relation to photographs, that he has a very strong case in claiming that copyright subsists in the image and his ownership of the photo.

Take, for example, *Painer* v. *Standard Verlags GmbH* (C 145/10), an EU case involving Austrian photographer Eva-Maria Painer and several German-language newspapers.

Ms. Painer, a professional photographer, had taken a portrait of teenager Natascha Kampusch, who subsequently became famous for having been kidnapped and held for eight years in a basement. She later escaped her captor.

At the time of her kidnapping, the only available picture of Ms. Kampusch was the photograph taken by Ms. Painer. Several newspapers used a stylized digital version of the portrait to illustrate their stories of Ms. Kampusch's escape.

In 2007, Ms. Painer sued for copyright infringement for such unauthorized use. The defendants alleged, among other things, that the portrait did not have copyright as it was simply a representation of Ms. Kampusch and was not sufficiently original. The question was referred to the CJEU, which on the basis of the prevailing law and case law declared that photographs are original if they are the author's own intellectual creation and reflect his or her personality.

In this instance, however, the Court of Justice went further. It stated that the photographer's "free and creative choices" in selecting a background and pose, adjusting lighting and employing different developing techniques to produce a photo provide a "personal touch" that confers originality and makes a photo worthy of protection as an intellectual creation which conveys the photographer's personality.

This case is directly relevant to the monkey selfie case. While *Painer* deals with portrait pictures, the court clearly lists the various actions that warrant originality, including the choice of angle, lenses and even techniques for developing the photograph.

It is also important to note that nowhere in its definition – nor, for that matter, in any EU case law or legislation – does the law require that the button be pressed by the photographer. The acts preceding and following the taking of the photograph seem to be more important in establishing whether it is the author's own intellectual creation.

In similar vein, the landmark English case *Temple Island Collections Ltd* v. *New English Teas* [2012] EWPCC 1 case offers a strong indication that Mr. Slater may well be able to claim ownership of his photo in UK courts. That case involved an iconic black-and-white picture of the Houses of Parliament with a red bus crossing Westminster Bridge. The photograph, which has become famous and is routinely licensed to other companies, is owned by a firm that produces and sells London souvenirs. When

negotiations with Temple Island Collections Ltd to obtain a license to use the image on their tins broke down, the defendants, New English Teas, went ahead and produced a different version of the Temple Island picture featuring a different angle and setting, but the same monochrome background with the red bus.

Temple Island Collection won a court action against English Teas to protect their famous red bus image. The case outlines a series of acts that can convey originality in determining the authorship of a photograph (photo: © 2005Temple Island Collection Ltd).

While the case rested largely on whether a substantial part of the Temple Island image had been copied, the defendants argued at some point that the copied picture did not have copyright as it was not an original work.

Here, the judge relied heavily on *Painer* and other CJEU cases, and clearly stated that individual decisions involving “motif, visual angle, illumination” and other similar creative choices can confer originality. As long as the author has made decisions about the arrangement of the photograph, it should have copyright.

But most important, the case discusses the issue whether “the mere taking of a photograph is a mechanical process involving no skill at all and the labour of merely pressing a button,” or whether something else is needed to convey originality.

The judge identified a series of acts that can convey originality in a photograph, as follows:

- the angle of shot, light and shade, exposure and effects achieved with filters, and developing techniques;
- the creation of the scene to be photographed; and
- “being in the right place at the right time”.

Note that these three elements are to be considered more important than the mere physical act of pressing a button when determining copyright ownership.

Of particular relevance to the monkey selfie case is the third situation – being in the right place at the right time. If we accept Mr. Slater’s version of the story (and at present there are no witnesses other than the monkeys), he set up the tripod, selected an angle, adjusted the lens aperture, checked the lighting, and was in the right place at the right time.

To my mind, Mr. Slater did more than enough to be awarded copyright protection, irrespective of his actions after the photograph was taken, including its development.

Another useful perspective

His case would appear to be further supported by an interesting contrasting example of what a picture taken by an animal looks like without human intervention.

When wildlife photographer Ian Wood travelled to Borneo, he encountered a group of orangutans. He left his camera in a spot where they could take pictures (perhaps following Mr. Slater’s lead), and one in particular took several selfies. The difference in quality between these and Naruto’s selfie are astounding, and lend credit to the version of events that has Mr. Slater making an important contribution to the final shot.

While arguably not a commonly held view, there is in my opinion an extremely strong argument to be made regarding originality of the monkey selfie in the UK based on these and other cases. It will be interesting to see how this plays out.

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