Kluwer Copyright Blog

Monkey business finally settled: the ‘monkey selfie’ disputes

Paulina Julia Perkal (IViR) · Monday, February 5th, 2018

The legal battle over who has the copyright claim to the pictures taken by a monkey has finally come to an end. The monkey self-portrait (“selfie”) dispute is a series of much discussed legal proceedings concerning photos taken in 2011 by a crested black macaque, Naruto, using equipment belonging to a British tourist (David Slater) while visiting the Tangkoko Reserve on the island of Sulawesi, Indonesia. The cases raised questions regarding the assignment of copyright protection to non-human beings as well as jurisdictional issues in connection with the online publication of the pictures. Two main cases are discussed here. The first dispute took place at the United States Copyright Office where Mr Slater opposed Wikimedia Commons, who reproduced and hosted the pictures online without authorisation. The second proceedings (*Naruto et al v. David Slater*) refer to a lawsuit lodged against Mr Slater by an animal organisation, People for the Ethical Treatment of Animals (PETA).

David Slater v Wikimedia Commons

The first dispute arose in 2011 when Wikimedia, the non–profit organisation behind Wikipedia, refused Mr Slater’s request to remove the pictures. In the same year, Mr. Slater decided to license some of the pictures to Caters News Agency, who later contacted the Daily Mail, The Telegraph,

and The Guardian in order to have the pictures published. After distribution in the British media, the picture of the smiling monkey was quickly picked up by other news sources around the world and the story went viral. Later that same year, an editor of Wikimedia Commons created a note describing the whole incident and included an accompanying picture of a monkey, with the following statement: 'This file is in the public domain, because as the work of a non-human animal, it has no human author in whom copyright is vested'. Importantly, Wikimedia Commons only accepts content which is free of licence, is ineligible for copyright protection and available in the public domain. After discovering the statement in question, Mr Slater requested that Wikimedia remove the pictures from their domain, without success.

The conflict between Wikimedia and Mr Slater was covered in detail by the blog *Techdirt*. *Techdirt* also used one of Naruto's selfies with a public domain licence, using the same argument as Wikimedia. In essence, *Techdirt* argued that the picture at issue cannot constitute an 'artistic work' within the meaning of copyright law since Mr Slater was not directly involved in the creation of the picture and the picture itself did not meet the requirement of an 'author's own intellectual creation'. Shortly thereafter, Caters News Agency issued a takedown notice to *Techdirt* claiming lack of any permission to have the pictures published. In return, the blog's author claimed that the use of the picture qualifies as 'fair use' under U.S copyright law. In response, and in order to bolster his claim as the owner of copyright in the pictures, Mr Slater argued that he had engineered the situation which led to the taking of the picture. He had travelled to Indonesia, got acquainted with the group of wild animals and sacrificed a significant amount of time in setting up the camera equipment in a favourable environment, which encouraged wild animals to use the camera. In doing this, he considered his contribution sufficient to entitle him to copyright protection.

Eventually, the dispute ended up at the United States Copyright Office. On 21 August 2014, the Office decided that the picture at stake was not susceptible to copyright protection, since "only works created by a human can be copyrighted under United States law, which excludes pictures and artwork created by animals or by machines without human intervention" and that "because copyright law is limited to 'original intellectual conceptions of the author,' the copyright office will refuse to register a claim if it determines that a human being did not create the work". On 22 December 2014, the US Copyright Office further clarified its stance not to grant copyright protection to a picture, stating that it would be equal to the assignment of the copyright protection to a 'mural painted by an elephant', which is another well-known example of creations not susceptible to copyright protection and therefore not eligible for registration.

Naruto et al v. David Slater

In separate legal proceedings dating back to September 2015, PETA decided to sue Mr Slater in a California District Court on behalf of the monkey Naruto. After Slater's official publication of the monkey's pictures in a book, "Wildlife Personalities", published by Blurb Inc., PETA accused both Slater and the publisher of "falsely" claiming authorship of the pictures. Using the 'next friend principle', PETA requested that the District Court assign (i) copyright protection to Naruto, and (ii) the administration and the management of its rights to PETA. To this effect, the organisation argued that the profits derived from commercial distribution and advertisement of the pictures will be contributed to Naruto and other macaques living in the Indonesian National Park.

During the hearing in January 2016, the US District Judge did not grant standing to Naruto, on the grounds that a monkey cannot be considered an author within the meaning of the US Copyright

Act. The case was later dismissed on the basis that copyright protection cannot be granted to animals.

In March 2016, PETA filed an appeal to the Ninth Circuit Court of Appeals. However, in August 2017, before any proceedings took place, the lawyers of both parties notified the court that they had reached a settlement in which Mr Slater would donate twenty-five percent of the revenues generated by the pictures to the animal organisations committed to the protection and preservation of the monkey's natural habitat.

Concluding remarks

Although the issue of the copyright protection for animals has been previously discussed in academic circles, the Monkey Selfie disputes clarify that, as a general rule, non-human actors are not entitled to copyright protection. This is also consistent with the European practice whereby the work must pass the originality test as established by the CJEU in *Infopaq*, that the work must be the 'author's own intellectual creation' – it is a test which a monkey would surely fail. As to pictures in particular, the CJEU further specified in *Painer* that copyright also subsists in a picture if the work reflects the personality of an author, and it expresses his/her free and creative choices, evidenced e.g. by lighting, framing, editing and the overall atmosphere created. In this case, although the monkey took the picture as such, it can be argued that Mr Slater's efforts in coaxing the monkey to take the pictures could suffice to assign copyright protection to the photographer.

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