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IP FRONTIERS

Selfies and copyrights: It's no monkey business

In all seriousness, I never thought this day would come. I am referring to the day when the U.S. Copyright Office notified the public in writing that a monkey cannot own the copyright in a selfie. But it has happened, proving, among other things, that it is a wonderful, weird world that we live in and anything can happen.

Just to be clear, I am talking here about a "selfie" -- meaning a self-portrait photograph typically taken at arm's length with a hand-held digital camera or camera phone. They are all the rage, especially on social media. No longer limited to just teenage girls, selfie-takers run the gamut. There are individual selfies, group selfies, celebrity selfies, celebrity group selfies, politician selfies, politician with celebrity selfies and apparently now monkey selfies.

By ANNETTE I. KAHLER
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Not previously aware that monkeys actually took selfies, it came as quite a surprise that apparently they do, or they can, and at least one famous and photogenic monkey did.

It happened in 2011 when an endangered black macaque in Indonesia swooped in and grabbed the camera of wildlife photographer David Slater and promptly took numerous self portraits. When Slater's efforts to license and collect royalties for the photos were compromised because the images had gone viral for free on the Internet, the question arose: Who owns the copyright in a selfie taken by a monkey?

It is probably safe to say this is an issue most of us have previously never considered, but it is a vexing question nonetheless.

And the U.S. Copyright Office has obliged us with an answer, at least insofar as it has seen fit to cover this topic in its latest revisions to the Compendium of U.S. Copyright Office Practices, Third Edition. The newly issued draft version of the compendium, which had not undergone any major changes in 20 years, now clarifies that copyright has what is called a "Human Authorship Requirement." More specifically, it states that "the U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being."

It is further explained 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 this basis, the office will not register works produced by nature, animals or plants — for example, a photograph taken by a monkey, a mural painted by an elephant, or a claim to driftwood that has been shaped and smoothed by the ocean.

So now we know the status of the monkey. The monkey cannot own the copyright in his own self-portrait. But what about the wildlife photographer whose camera was the instrument that took the pictures. Doesn't he own the copyright?

The answer to that one is also "no," but for different reasons.

Under U.S. Copyright law, an "author" is either (i) the person or persons who created the work, or (ii) the employer or other person for whom the work was prepared, if the work was created during the course of employment or commissioned as a work made for hire.

While Mr. Slater, the owner of the camera, satisfies the human being requirement, he did not actually take the pictures and therefore did not create the work. Therefore he is not the "author" of the photographs or owner of the copyright. Under the Copyright Office's guidance, Mr. Slater could not have even owned the copyright if he somehow managed to "employ" or "commission" the monkey (a non-human) to take the photos. How that employment relationship could be arranged is the subject of a different article.

Of course, the Indonesian monkey selfie is not the first time the copyright authorship of a self-photograph has been debated. Enter the now famous Ellen DeGeneres Oscar photo, of the celebrity group selfie variety, "tweeted" to more than 37 million people during the Oscar broadcast in April of this year.

Reported to be valued at nearly $1 billion (#areyoukiddingme), the photo was taken by Bradley Cooper, using Ellen DeGeneres' Samsung smartphone. In addition to Cooper and DeGeneres, the photo featured other A-list celebrities, including Meryl Streep, Jennifer Lawrence, Brad Pitt, Angelina Jolie,

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Lupita Nyong'O, Julia Roberts, Kevin Spacey and (barely) Jared Leto. More celebrities may have made it into the photo had Bradley Cooper's arm been longer.

Given the value of the photograph, the question naturally arose: Who owns the copyright? Is it Ellen DeGeneres because it was her camera phone and her idea? Was it the Academy because they hired Ellen to be the host of the show? Was it Bradley Cooper because he took the photo? Was it Twitter because the photo was uploaded and distributed through its service? Was it Samsung?

The technical answer is that Cooper, as the photographer, would be an author of the work. However, some may argue that DeGeneres could be a co-author of the work, to the extent that she assisted in the "creation" of the photo through her creative contributions as to how the photo should be taken, who would be in it, and other related details.

Indeed, it was Ellen DeGeneres that later licensed the photo to the Associated Press, suggesting that she believes she is an owner of the photo, although not necessarily the exclusive owner, with rights to license the work. But in reality, this is a copyright question that will never make it into a court of law, because the authorship and ownership will not be challenged. At the end of the day, it was a major win-win, not just for Cooper and DeGeneres, but a win-win-win-win-win-win for Cooper, DeGeneres, the celebrities in the photo, the Academy, Samsung and Twitter. No losers in that group.

In my next column we will explore yet another of the Copyright Office's recent pronouncements -- that it will not register a work purportedly created by divine or supernatural beings, although the office may register a work where the application states that the work was inspired by a divine spirit.

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