

The Changing Concept of Authorship.

Case of a Monkey Selfie

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Introduction

Even though, the concept of authorship has never been the most controversial topics to discuss in the field of copyright, latest case of a monkey selfie brings attention back to this concept and gives rise to examine if the approach regarding authorship should be reconsidered. As Ginsburg well pointed out: “*a troublesome critique accepts the premise that authors’ creativity justifies moral and economic claims to the fruits of their creations, but then debunks it by stressing that real authors rarely in fact benefit from creativity.*”¹ For this situation to happen as rarely as possible, it is primarily important to identify an author of the work according to copyright laws and applying suitable principles.

This essay endeavours to explore the concept of authorship mainly in relation to works created by non-human beings; in particular, the monkey selfie case will be at the core of the discussion. The case, which will be in more details discussed later in the essay includes a controversial issue of who should be regarded as an author of the selfie taken by a monkey on a photographer’s camera.² In order to answer this and other question the essay is divided into three Chapters. In the Chapter I, general principles and standards of the notions of an “author” and “authorship” will be discussed, with emphasis on different approaches in relevant jurisdictions. In the Chapter II, the discussion will be shifted to one particular case, which is at stake, namely the case of a monkey selfie,³ and legal difficulties in the light of the US Copyright law. In this part, I will provide with the critique analysis of the concept of authorship and requirements, in particular originality requirement, that are essentially important in deciding whether a person can claim authorship over a photo taken by a non-human. In the Chapter III of this essay, I will briefly touch upon justification theories of law and personality theory in particular, which can help to resolve some of the issues. Lastly, the main research question that I am trying to answer in this essay is whether a person can be an author of the work, which was physically created by a non-human but with creative involvement of the individual, and which considerations and concepts should be taken into account when one is examining such situations.

Nowadays, when the world is moving towards digitalising, piracy and counterfeit over the web, everyone’s concern is towards the work itself and not the author. However, it should not be forgotten that an author is a centre of copyright protection, as it is the author who obtains protection and can enjoy benefits from protection of the material and moral interests. Therefore, it is especially important to apply proper standards in determining an author of the work. In the case at hand, the troublesome exists because it was not a photographer who took

¹ Jane C. Ginsburg, “*The Concept of Authorship in Comparative Copyright Law*”, DePaul Law Review, Vol. 52, Issue 4, 2003, at 1065.

² For more details and facts of the case, see the Chapter II.

³ See Annex.

a picture but a monkey who presses a button and took a shot. Controversies emerge when one starts to analyse whether a photographer should enjoy copyright protection in something that he did not physically make (namely take a shot).

It should, be remembered throughout the essay that copyright is still the most national right out of all intellectual property rights. At the same time, due to the international treaties in the field many concepts has been harmonised and brought to the same standard, which can be partially said about the concept of “authorship” also. However, the substantive analysis in this paper will be based on the US Copyright law and principles derived from the case law.

I. Concepts of an “Author” and “Authorship”

In this Chapter, I will focus on the existing legislation and standards in relation to the notions of an “author” and “authorship.” This will consequently be the basis for the more substantive analysis in the following chapters. Regarding the first Chapter, there are two important questions to answer: who is the author, and what makes a person an author?

A few national laws explain the concept of authorship and who is regarded to be an author. This means that there are different national interpretations as to what is required for “authorship” and as to who is an “author.”⁴ The Berne Convention, does not help in this regard either. The Convention mentions a term author in many occasions throughout the text, but barely explains it. According to the Convention, protection provided by it shall operate for the benefit of the author and his successors in title,⁵ and an author is regarded as such, if “his name to appear on the work in the usual manner.”⁶ Nevertheless, nothing like a concise definition is given in the text. As the concept is nowhere explained in the Convention, it is therefore totally left for interpretation by the signatory States. As Ricketson and Ginsburg, one of the most authoritative commentators of the Berne Convention suggest, such a failure clearly to designate who is an author may be due to the divergences between national laws on other aspects of authorship that have become more pronounced since the Convention’s initial promulgation (for instance different approaches to the originality requirement.)⁷ Although now it seems that countries have come to the general conclusion that an author’s intellectual participation is the most important element in relation to the authorship. Because for a long period of time the common law countries used to give more importance to “labour and skill”

⁴ Jane C. Ginsburg, “*The Concept of Authorship in Comparative Copyright Law*”, 2003, at 1069.

⁵ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as amended on September 28, 1979, art. 2(6).

⁶ Berne Convention. art. 15.1.

⁷ Sam Ricketson, Jane C. Ginsburg, “*International Copyright and Neighbouring Rights. The Berne Convention and Beyond*”, Vol. I, Oxford University Press, New York, 2006, pp. 358 – 359.

(or “sweat of the brow”) concept, while in civil law countries the emphasis was on the level of creativity.⁸

Talking about national legislations, the US Copyright Act, for instance, also does not provide a definition of an author. When one is to examine the concept of authorship in the US legal system, a big attention should be paid to the case law, where important standards of the concept have been established. The US Copyright Act of 1976 provides that copyright ownership “vests initially in the author or authors of the work.”⁹ As it was concluded in the Supreme Court decision in the case *Community for Creative Non-Violence v. Reid*, “an author of the work is a person who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”¹⁰ In the UK, in turn, the definition of an author is quite simple: “author, in relation to a work, means the person who creates it.”¹¹ Generally, such formulation would fit to definition of an author in every jurisdiction, but it does not really say much about requirements of authorship, and does not clarify the concept of authorship in general.

Answering the first question, of who is an “author,” it is suffice to say, that although not explicitly defined in the text of the Convention, it seems that according to it, an author can be only a natural person. Most legal scholars support this idea too.¹² Sam Ricketson, in relation to the notion of “authorship” argues that according to the general principal, derived from the text of the Berne Convention, authorship of works is limited to natural persons,¹³ while legal persons can be authors only in the exceptional cases.¹⁴ In relation to interpretation of the Convention, Ricketson argues that, even though there is no direct mentioning that a natural person should be regarded as an author, the latter was meant and implied by the drafters and can be derived from the several provisions. Firstly, the term of protection, which directly depends on the life of an author, logically links copyright protection to a human being, as non-humans can exist for infinite amount of years. Secondly, provisions on moral rights, prescribed in the Convention, make it once again obvious that it is a natural person at stake, as it does not make sense, to protect moral interest of a non-human. Finally, the only exception mentioned in the text of the Convention in relation to cinematographic works serves as an

⁸ Sam Ricketson, Jane C. Ginsburg, “*International Copyright and Neighbouring Rights*”, 2006, at 359- 360.

⁹ Circular 92, Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code, December 2011, §201(a).

¹⁰ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

¹¹ The UK Copyright, Designs and Patents Act of 1988, art. 9.

¹² Sam Ricketson, Jane C. Ginsburg, “*International Copyright and Neighbouring Rights*”; Jane C. Ginsburg, “*The Concept of Authorship in Comparative Copyright Law*”, 2003.

¹³ Sam Ricketson, “*People or Machines: The Berne Convention and the Changing Concept of Authorship*”, at 16.

¹⁴ See, for instance, art. 15(2) of the Berne Convention: “*The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.*”

exception from a general rule, and therefore, underscores the need for human authorship in all other cases.¹⁵

However, it would not be right to conclude that an author of the work can only be a natural person. Because the Berne Convention is based on the principle of a human authorship, it still does not exclude entities to benefit from copyright protection.¹⁶ It is a common practice, especially in common law countries, to widen copyright protection and include legal persons as well. Moreover, even in some civil law countries, such as the Netherlands, exist provisions that allow a legal entity to be recognised as an author of the work, in certain limited circumstances.¹⁷ At the same time, other civil law countries, like Belgium, directly provide that it is only a natural person who has created the work obtains copyright protection.¹⁸ As a result, one can conclude that even inside the EU, the notion of authorship is not harmonised and may differ from state to state. However, as protection of legal entities is usually allowed in special cases provided by law, one can conclude that as a general rule it is a natural person (human being) who can be an author of the work.

Concerning the second question of what makes one an author, it is important to look at preconditions for obtaining copyright protection. In this regard, the originality requirement is usually a vital criterion for a work to be eligible for copyright protection in most of the jurisdictions, as it is directly concerned with the relationship between an author and a work.¹⁹ This notion, although has different standards in different countries, usually means that a work should meet a certain level of originality, meaning that a person should exercise some creativity in production of the work. In simple words, an author is a person who, by expressing his or her creative and intellectual ideas produces an original work, which consequently results in copyright protection. In this regard, I can absolutely agree with Ginsburg, who suggests that “originality” is as a synonymous with “authorship,”²⁰ and will try to show why it is so.

Usually (excluding the cases of deemed authorship), those who make a creative effort in producing the work, comply with originality requirement, and consequently should be regarded as authors of the works. As Ginsburg suggests, courts while deciding who the author is, must inquire into the nature of the activities that make one an author,²¹ which in turn, sends one to the originality requirement in most of the jurisdictions. For instance in the UK, in the case of the computer-generated works, when there is no human author of the work, the author

¹⁵ Sam Ricketson, “*People or Machines: The Berne Convention and the Changing Concept of Authorship*” at 11.

¹⁶ Thomas Dreier, P. B. Hugenholtz, “*Concise European Copyright Law*”, Kluwer Law International, 2006, at 16.

¹⁷ See, the Copyright Act 1912 of the Netherlands. art. 8.

¹⁸ See Belgian Law on Copyright and Neighboring Rights, art. 6.1.

¹⁹ Lionel Bently, Brad Sherman, “*Intellectual Property Law*”, Oxford University Press, New York, 2009, at 93.

²⁰ Jane C. Ginsburg, “*The Concept of Authorship in Comparative Copyright Law*”, 2003, at 1078.

²¹ *Ibid.*, p. 1071.

is deemed “a person by whom the arrangements necessary for the creation of the work are undertaken.”²² While such arrangements are not specified, it will be a subject to interpretation by a court. It should however be remembered that the originality threshold is different in different legal systems, and also differs depending on the nature of the work.

As the centre of the current discussion is the notion of authorship in relation to photographs, it is logically to say a few words about legal nature of such cases. It is already a common practice not to narrow down authorship of a photograph to a person who actually presses the button. Many scholars, as well as case law in numerous jurisdictions, come to the same conclusion that it is important that an author make his or her own original choices in relation to whole process of taking a photo, as merely pushing a button would constitute a passive participation in the process, which does not contain any originality. However, in more details the issue will be discussed in the following chapters.

II. Monkey Selfie Case

a) Factual circumstances

Coming to the main part of the discussion, I will first provide with the factual circumstances of the case. Unfortunately, there is no case brought in front of the US court, therefore, the facts I am operating are based on the news reports and statements provided by alleged parties.

In 2011, a British photographer David Slater went to the forests in Indonesia to take photos of the nature and animals in the region. After he spent some time with macaques and they got used to him, Slater decided to leave the camera for a monkey to pick it up and probably make portrait photos. As Slater tells the story:

*"After three days spent in the forests of Indonesian, the monkeys followed me around, I followed them around, they got used to me, eventually started grooming me, touching me... But I wanted that shot one shot [a selfie], full face, for my satisfaction, to give it to an agent, but it would not happen, not unless they took the photograph themselves. So, I set the camera with a cable relies, framed up the shot and got the exposure right, walked few meters away, to let the monkeys play with the camera, and then they took their own shot."*²³ He concludes, *"all you've got to do is give the monkey the button to press and lo and behold you got the picture."*²⁴

Some of the photos were later uploaded to the Slater's website and also appeared in "The Telegraph" article. After the selfies got public attention, a selfie was used by Wikimedia Web site, in relation to the particular macaques, with no authorisation from the Slater's side. Slater,

²² CDPA (U.K.), c. 48, § 178; CDPA (U.K.), 1988, c. 48, § 9(3).

²³ <http://petapixel.com/2014/08/22/us-copyright-office-wont-register-monkey-selfie-one-taken-god/>

²⁴ <http://www.bbc.com/news/uk-england-gloucestershire-28674167>;

in turn, requested Wikimedia to take down the photo, claiming ownership over it. Wikimedia responded with a refusal, arguing that as a monkey and not a human being created the photo, copyright law does not protect it, and therefore there could not be any claim for authorship in the meaning of the US Copyright law, which leaves such a photo in the public domain.²⁵ According to the Wikimedia's licensing report, which explains authorship of a selfie, "the photo is in the public domain, because as the work of a non-human animal, it has no human author in whom copyright is vested."²⁶

Accordingly, the main question, in relation to this case is whether a photographer and David Slater in particular, can claim authorship over a selfie taken by a macaque, and if yes, what the basis for such a claim are. I will approach the case based on the facts provided in a particular circumstances, but one should not limit the analysis to this work only.

The main arguments by Slater are based on that, first, he is an owner of the photo camera and consequently, is the owner of the photograph taken on it.²⁷ Second, Slater's argument grounds in his investment in the process of taking pictures, such as spending time with monkeys, getting closer to them, setting up a camera, etc., which according to him is enough to enjoy copyright protection in the selfie. He also emphasises that copyright is vested in the person who can profit from a work and that he has lost 10.000 pounds over two years, already. Lastly, he argues that after all, the only thing that the monkey did was to press the button, so the monkey can be regarded as his assistant.²⁸ However, to my surprise, he did not try to argue his direct authorship over the photos based on the originality requirements, which would have been a much stronger case.

Even though, Slater was angry and anxious, the case has never gotten to a court, and three years later after the photo was uploaded to Wikimedia Commons, the US Copyright Office issued the Third Edition of "Compendium of U.S. Copyright Office Practices,"²⁹ providing certain practices and procedures for evaluating copyrightable authorship when examining registration of copyright. In the Compendium, the Copyright Office tried to regulate all the uncertainties in relation to authorship, and non-human authorship in particular, and eventually it took the side of Wikimedia in relation to works produced by non-humans. In Section 303, it stated that the Office will only register "*an original work of authorship, provided that it was created by a human being*"³⁰ (emphasis added). In the later section, it stated:

²⁵ <http://www.copyrighttrademarkatters.com/2014/08/07/copyright-ownership-is-not-monkey-business-wikimedia-and-slater-fight-over-selfie-photographs/>.

²⁶ [https://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait_\(rotated_and_cropped\).jpg?_ga=1.27066109.1354610862.1407365311](https://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait_(rotated_and_cropped).jpg?_ga=1.27066109.1354610862.1407365311).

²⁷ Kimberly Peaslee, "Copyright Protection: from Monkey Selfies to Cézanne", New Hampshire Bar Journal Fall 2014, at 26.

²⁸ <http://www.bbc.com/news/uk-england-gloucestershire-28674167>.

²⁹ The US Compendium: Chapter 300, "Copyrightable Authorship: What Can Be Registered", of 12.22.2014.

³⁰ The US Compendium: Chapter 300, para. 303.

*“The Office will not register works produced by nature, animals, or plants. Likewise, the Office cannot register a work purportedly created by divine or supernatural beings, although the Office may register a work where the application or the deposit copy(ies) state that the work was inspired by a divine spirit [for example], a photograph taken by a monkey.”*³¹

b) Critique analysis of the case

Because the Compendium is not a court decision, there has been no criteria established why such works are not copyrightable. Consequently, this gives a floor for a theoretical discussion of authorship, and even though the Copyright Office has clearly stated that photographs taken by a monkey cannot be registered, I believe that the issue is not that clear. These uncertainties I will first assess in relation to the US copyright law and by applying personality theory of law to the case.

First, already at this stage it should be mentioned that copyright law does not expand to animals. Even though, most of the jurisdictions, as we discovered, do not explain the notion of authorship in the legislation, it is usually stated that it is a “person” who can be an author, not an animal. Therefore, an argument that a monkey can obtain any rights over the photograph should not be discussed at all.

Secondly, the concept of “deemed authorship” and ownership of works close with the nature to photographs shall be discussed. According to the US copyright law, the author of the photograph is not necessarily the one who pushes the button. It is established in the case law that those who execute a shot are not always the authors of the work. As it was concluded in the *Lindsay* case, the mere fact that a director, in that case, did not literally perform the filming underwater (i.e. by diving to the wreck and operating the cameras), does not defeat his claims of having “authored” the footage.³² Moreover, the US law has a long time practice of treating a person as an author, even though he or she was not involved in production of a work itself at any stage. In particular such situation is obvious in relation to the concept of a “work made for hire”. Generally, if a work prepared by an employee within the scope of his or her employment, an employer would be deemed as an author of the work; or if parties explicitly agreed in a written instrument signed by them that the work shall be considered as a work made for hire.³³ Of course, in the case of the monkey selfie, the legal relationship between a monkey and a photographer cannot be regarded as a “work made for hire”, because of several reasons, but the existence of such a notion demonstrates possible cases when the person who did not create a work is treated as an author. Therefore, the claim by Wikimedia that it was not

³¹ *Ibid*, para. 313.2.

³² *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*, United States District Court Southern District of New York, October 13, 1999, para 32.

³³ 17 U.S.C., para. 101.

Slater who executed a shot and therefore, no authorship can be claimed stands rather weak on its own. Moreover, if to examine the picture itself one hardly can say that there is a lot of monkey's creativity involved in choosing the angle, background, etc. It is nothing more than a reflectory shot.

Concluding that none of above-mentioned options can be invoked on its own, the only possibility left for the photographer is to claim a direct authorship over the selfie taken by a monkey. In this regard, the main focus should be on the originality, as the decisive criteria when the authorship is at stake, as it was mentioned in the first Chapter. Wikimedia's in respect to originality seems to argue that as the monkey did all the necessary original steps while taking a selfie, e.g. it chose the angle, smiled, picked a spot, a moment for a shot etc., Slater has no grounds to claim authorship over the photo.

In relation to the Slater's argument that his ownership of the camera and equipment, and his significant financial investment in the process of making a photo should lead to copyright protection, it should be stated that such an argument finds no support in neither the US copyright law nor the case law. The US court again and finally decided in the *Feist* case, a cornerstone decision by the Supreme Court of the US, the "sweat of the brow" doctrine, which is based on a person's investment, could not be taken into account in determining whether a work is an original work of authorship.³⁴

We already established that it is not necessary for a photographer to push the button in order to be regarded as an author, therefore the requirement for originality in such cases should be derived from actual process but not only a work itself. The main question probably here is how much authorship has a person to contribute in order to obtain a copyright?

As it was established in *Feist* case, an individual claiming to be an author for copyright purposes must show "*the existence of those facts of originality, of intellectual production, of thought, and conception.*"³⁵ In that case, the court dealt with copyrightability of the phone directory, and eventually stated that, "the choices as to selection and arrangement, as long as they are made independently by the compiler and entail a minimal degree of creativity," are sufficiently original to be protected under copyright law.³⁶ The main complexity the court faced in that case was to decide whether the decisions while compiling a directory were original and possessed at least some degree of creativity, so the directory as a whole would

³⁴ *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

³⁵ *Ibid.*

³⁶ *Ibid.*

constitute an original work of authorship,³⁷ which at least shows in which direction one should look once examining originality of a work.

In relation to photographs, the Second Circuit of Appeal, in the case *Rogers v. Koons*, established that among others, some elements of originality in a photograph includes "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any variant involved."³⁸ Accordingly, if a photographer takes steps to set the lights, fix the camera, taking into consideration the place and surrounding, as well as spends time to get monkeys used to him, show them camera, teach and train monkeys, I do not see any reasonable grounds to deny his or her authorship in the photograph. A monkey in such a case would be merely an instrument to make a photographer's original idea alive. Moreover, after the shot is taken, a photographer will usually engage in a few more steps before publishing the photo, such as to choose the best photo, to make post-photo arguments to the photos itself. Such process and steps as a whole, I argue, include photographer's original steps and choices which should be enough to recognise his or her authorship in the selfie. In the particular case at hand, according to the facts provided by Slater, his steps could be considered as original, especially when one realise that there is no other way one can make a selfie of the monkey, but to give a monkey a camera to make it itself. At the same time, it should be remembered that mindless implementation of a monkey in taking a picture does not make one an "author", but subjective or personalised manipulation of it may.³⁹

Moreover, as zoologists' say, macaques are intelligent and curious creatures, so it is not surprising that they got interest in the camera, due to their heavy vision reception.⁴⁰ Therefore, it also might be assumed that Slater could reasonably expect a monkey to take a picture, and consequently his argument in favour of the authorship would also rise, as in this case, there can be traced a connection between his creative intentions and pictures taken by a monkey, which is not just a coincidence.

At this stage, I would like to show such cases are not limited to monkey selfies only, and has a potential to be discussed in broader sense, by drawing a parallel with other situations that are close by legal nature, like cases when artificial intelligence is involved.⁴¹ Already at this stage robots that run on a certain algorithm, are possibly able make a selfie or other kind of creative work, with no involvement of a human being in the process, which will consequently rise the same set of question regarding authorship over such works. Obviously, for the same reasons as animals, machines cannot be subjects to copyright protection. Unfortunately, there is no

³⁷ Such a conclusion is based on the oral arguments presented by the parties and questions asked by the Court.

³⁸ *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

³⁹ Jane C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law", 2003, at 1077.

⁴⁰ <http://mashable.com/2014/08/09/monkey-wikimedia-copyright/>.

⁴¹ One can logically conclude that the same provisions of Compendium would apply to the cases involving artificial intelligence.

case decision ruled yet, therefore, the only way to look at such potential case is again by applying originality criteria.

However, with respect to the question of copyright in computer-generated artworks, the automatic writing cases suggest that such works should be regarded as copyrightable, despite their non-human genesis, because they have a sufficient nexus to human creativity.⁴² Regarding computer-generated works, the problem is that a person only creates a code or a software on which the machine would run, and therefore, it is basically a machine who is the work's author-in-fact.⁴³ In this regard, some scholars argue that the programmer of generative software should logically be an owner of copyright in the works generated by his or her software, as he or she, after all, is "the author of the author of the works."⁴⁴ However, for Randall Davis, the ownership issues seem clear when it comes to software-authored works, because human action is inevitably at the core of the creative process that leads to the production of such works.⁴⁵

As a result, one, by making an analogy with computer-generated works, may however, conclude that in this case Slater's, actions were at the core of the creative process that led to the production of the selfie, as he was a creator of an idea and its moving force, which in the end resulted in an original work of authorship.

Another question that one may think about is why we want such works to be protected under copyright? On one hand, everyone (except the authors) wants everything to be in the public domain. In addition, one may argue that a monopoly on something created by a monkey seems to be unreasonable, which would go against freedom of expression and public interest. On the other hand, prohibiting copyright protection of creative endeavours is also against the main purpose of the copyright law, namely to protect material and moral interests of the authors.⁴⁶ If a person examines a certain level of creativity in the process of making a picture, while a monkey only executes a shot, such an investment should be protected. My argument, essentially, is not that every picture taken by a monkey on a camera provided by a person should be copyrightable; it will create unreasonable monopoly on photos that should not get protection. The argument is rather that only those who possess certain amount of originality should be protected, as leaving it to the public would be, in turn, unreasonably suppress creative investment of photographers.

⁴² Annemarie Bridy, "Coding Creativity: Copyright and the Artificially Intelligent Author", 2012 Stan. Tech. L. Rev. 5, p. 20.

⁴³ *Ibid.*, at 21.

⁴⁴ *Ibid.*, at 21.

⁴⁵ Randall Davis, "Intellectual Property and Software: The Assumptions are Broken", Massachusetts Institute of Technology Artificial Intelligence Laboratory, A.I. Memo No. 1328 November 1991, at 4.

⁴⁶ International Covenant on Economic, Social and Cultural Rights, 3 January 1976, art. 17.

As the final comment on the monkey selfie case in relation to the US Copyright law, I want to say that the Copyright Office, by prohibiting registration of works produced by non-humans, in my opinion, went too far and interpreted authorship and originality requirements wrongly. Obviously, if all the “creative steps” are taken by a non-human being, such a work should not enjoy any protection and should find its place in a public domain. However, following the analysis provided above, it is not very hard to imagine the case where an animal executes a simple physical action in order to accomplish a person’s creative idea. In this regard, the Copyright Office should have better formulated the provision in the matter, by probably providing an exception in those cases, where the process of creating a work, included subjective creative choices would constitute an original work of authorship, and an animal was involved for purposes essentially important to accomplish the work. Nonetheless, it would have been interesting how the court would have approached the concept of authorship if such a case were brought before it.

c) Comparative assessment of the case

As copyright law and requirements are different in different jurisdictions, we have no space to examine the case in all the main jurisdictions. Just need to mention that in those jurisdictions, where it is required for a person to be responsible for the composition of the photograph in order to qualify as an author,⁴⁷ the claim for the monkey selfie case is much easier to argue, and Slater’s position would have been stronger. This would mean, for example, that a person who directed the content of the photograph, or who’s creative vision it embodies (such as deciding to let a monkey to take a selfie shot), would be the “author”.⁴⁸ In the EU countries, for instance, the originality requirement was harmonised for the countries in the CJEU *Painer* case,⁴⁹ meaning “author’s own intellectual creation,” and it is so, if it reflects the author’s personality,⁵⁰ or has the authors ‘personal touch.’⁵¹ The Court seems to leave space for interpretation of the requirement, and certainly, in the monkey selfie case (applying Slater’s example), the personality and personal touch can be traced through his actions directed to accomplish his creative idea. In some jurisdictions, such as France and Belgium, for instance, courts have found originality in works that bear the “imprint of its author’s personality,”⁵² which is a direct reference to personality theory of law, and consequently, leads to the discussion in the next chapter.

⁴⁷ Copyright Act of South Africa, 1978, art. 1, provides: “‘author’, in relation to [...] a photograph, means the person who is responsible for the composition of the photograph”.

⁴⁸ <http://themediainline.co.za/2014/09/copyright-and-the-curious-case-of-the-monkey-selfie/>.

⁴⁹ CJEU, Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and others*, 1 December 2011.

⁵⁰ *Ibid.*, para 88.

⁵¹ *Ibid.*, para 92

⁵² Jane C. Ginsburg, “*The Concept of Authorship in Comparative Copyright Law*”, 2003, at 1080.

III. Personality Justification Theory in the Light of the Monkey Selfie Case

In the last Chapter, I will examine existing theoretical justifications for intellectual property and their possible application in the monkey selfie case. In this regard, I will focus on the personality theory, as one of the most powerful justifications for intellectual property and copyright in particular. Usually, a discussion on justification theories comes in the beginning of the paper; however, as we are assessing a particular case, I have chosen to leave it until the end, so one can see how the legal theory can justify copyright protection of a monkey selfie.

As Peter Drahos, a scholar in the field of theory of intellectual property rights has stated, “intellectual property rights are fundamental human rights because they [intellectual property rights] protect the personality of the creator.”⁵³ I totally agree with Drahos on the point that intellectual property protects the creator’s personality and copyright especially. In this case, it is worthwhile to look at the personality theory of law and its application to copyright and the monkey selfie case in particular. Personality theory among many others has been described in works of Wilhelm Hegel, Immanuel Kant and Margaret Radin, and some of scholars support that idea that personality theory of property is especially relevant when talking about literary works and works of art.⁵⁴

When applying to intellectual property in general and copyright in particular, personality theory displays intuitive component: an idea belongs to its creator because the idea is a manifestation of the creator’s personality or self.⁵⁵ The main concept of personality theory was described by a German philosopher Georg Wilhelm Hegel in his *magnum opus* “Philosophy of Right”. In the core of the Hegel’s theory stand concepts of personality, human will and freedom, which later show how a will can be transformed into right. The theory centres not on the fact who has created the work, but rather who has personal connection and will in it. As Radin points out, on the contrary to Locke’s labour theory, which is also one of the main justification theories, personality theory focuses on where a commodity ends up, not where and how it starts out.⁵⁶ It finds support in Hegel’s words when he says that labour is often the means by which the will occupies an object, and while labour may be a sufficient condition for occupation, it is not a necessary one.⁵⁷ So the theory focuses on the person with whom it ends up-on an internal quality in the holder or a subjective relationship between the holder and the thing, and not on the objective arrangement surrounding production of the

⁵³ Peter Drahos, “*Intellectual property and Human Rights*”, *Intellectual Property Quarterly*, 1999, 3, at. 367.

⁵⁴ Kanu Priya, “*Intellectual Property and Hegelian Justification*”, *NUJS Law Review*, (2008), at 363; Justin Hughes, “*The Philosophy of Intellectual Property*”, *Georgetown University Law Center and Georgetown Law Journal*, December, 1988, at 28.

⁵⁵ Justin Hughes, “*The Philosophy of Intellectual Property*”, at 28.

⁵⁶ Margaret Jane Radin, “*Property and Personhood*”, *Stanford Law Review*, Vol. 34, No. 5, May, 1982, at 987.

⁵⁷ Justin Hughes, “*The Philosophy of Intellectual Property*”, at 31.

thing.⁵⁸ It should be mentioned that even though Hegel's theory mostly discusses tangible objects, which he referred to as "things", he still recognized intellectual creations such as mental endowments, science, art, etc., as something that would also fall under the category of things,⁵⁹ which means that intellectual property and copyright in particular falls within his theory.

In general, the fact that it was a monkey that took a selfie, should not be a decisive factor when one applies personality theory to a case. Consequently, as a photographer is an individual, personally interested in the work (selfie), and has the personal connection with it, the photo should end up with him. The fact that a monkey did a shot does not by itself diminish photographer's connection with the photo. According to Hegel, property is the embodiment of the personality as it reflects our will, therefore, if one can find reflection of a photographer's personality in a selfie taken by a monkey, such a work should be considered as his or her own creation. A photograph, although taken by a monkey, embodies photographer's individuality, as his or her creative idea is incorporated in the process, which also includes participation of a monkey in it.

As Hegel puts it: "a person has the right to direct his will upon any object, as his real and positive end. The object thus becomes his and receives its meaning and soul from his will."⁶⁰ One should pay a special attention to this notion as a monkey selfie can exist and receive a meaning only upon a will of the photographer. In our particular case, without Slater's creative individual idea and effort, a monkey would most likely not take the selfie and the photo would not obtain a meaning it did. Moreover, the fact that such a way to take a selfie is the only possible way to express photograph's personality only makes the claim stronger in respect to personality theory.

Talking about Radin's interpretation of personality theory, she points out that "one may gauge the strength or significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss."⁶¹ According to this view, an object is closely related to one's personhood if its loss causes some pain or damage that cannot be relieved by the object's replacement. If so, than particular object is bound up with the person.⁶² In this regard, Slater's claim concerning the loss of money is especially relevant, as there seems to be a direct link between Wikimedia unauthorised use of the Slater's photograph, and the loss of money that he could have gained. Moreover, such a loss could not be relieved by the object's replacement as the photo is in the public domain.

⁵⁸ Margaret Jane Radin, "Property and Personhood", 1982, at 987.

⁵⁹ G.W.F. Hegel, "Philosophy of Right", Translated by S.W Dyde, Batoche Books Kitchener, 2001, para. 43.

⁶⁰ *Ibid*, para 44.

⁶¹ Margaret Jane Radin, "Property and Personhood", 1982, at 959.

⁶² *Ibid*, at 959.

Obviously, the monkey has no personal interest in taking a photo. It is a photographer, who by using a monkey as a tool expresses his personality and individual creative idea. In this case, a monkey is simply a tool for realization of personal motives. Therefore, I argue that photographer's personality exists in a photo even when it was not taken directly by a person, and this gives rise to claim authorship in a photograph on the basis of personality theory. This conclusion also finds its representation in countries that lean towards personality approach in interpreting copyright, like France and Belgium, as was provided in the examples above. In the old US Supreme Court decision, Justice Holmes reflected the personality theory and consequently delivered that, "*personality always contains something unique; it expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.*"⁶³ The US Copyright Act does not clearly restrain Slater's authorship over a monkey selfie. Such prohibition can only be found in the Compendium of the Copyright Office which decision in my opinion goes against the principles of copyright law and personality theory of law.

Lastly, in relation to the theoretical discussion of the matter, I want to touch upon public interest. The opposite of personal interest in the work, which derives from the personality theory, logically stands public interest. If this approach is applied, the author's interest and his or her ownership of photograph is not denied, however, it is tackled from the side of public interest. This interest should always be remembered when talking about copyright law, as the balance of private and public interests lies at the core of intellectual property, which is also emphasised in article 7 of the TRIPs.⁶⁴ However, if a person has a strong claim to be regarded as an author of the work, he or she cannot be denied in copyright protection, as his or her material and economic interests are protected under copyright and human rights law. In this case, public interest can be used as an exception or a tool to restrain unreasonable monopoly of the author, but in no case as a justification for not providing rights to a photographer.

Conclusion

As many things nowadays are produced not necessarily by a person, or at least not necessarily with physical touch, the main focus while deciding questions of authorship should be shifted to the person who made an original contribution to production of the work. Whether it is a photographer who teaches a monkey how to take photos, or a programmer who tries to

⁶³ *Bleistein v. Donaldson Lithographing Co.*, 188 US 239, the Supreme Court of the US, 1903, at. 250.

⁶⁴ TRIPs, art. 7: "*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*"

develop an artificial intelligence. I am more than sure that in the nearest future, these questions will arise, as technology is moving with a speed of light. At the moment of drafting the TRIPs agreement, no one could have thought of what the internet can bring to the intellectual property, and now, 10 years later, all the main cases, at least in the field of copyright law, are somehow connected to the World Web.

The point that I am trying to argue in this essay, is not essentially that legislation or standards in regard to the authorship should be changed. It is on the contrary, I believe that it is right to leave the concept of an “author” and “authorship” broad, subject to flexibilities and interpretation. The point that I am trying to bring is to make more emphasis on the requirement of originality in cases where it is hard to decide who is an author of a work, as it seems to me that this is the most important concept of deciding who has a legal grounds to claim authorship.

Applying requirements of originality and notions mentioned above, I argue the position that if a person while process of teaching a monkey to take a photo, including necessary arrangements of the camera, etc., exercises a certain level of creativity and personal touch, the final fruit of such collaboration should be considered as created by a person who made such arrangements. In the particular case that we have dealt in this paper, it is exactly an example where such concept should serve as a solution to the problem of authorship. It is hard to deny that Slater exercised a certain level of involvement in the process of taking a selfie, and his creative idea has resulted in the picture that has gained a worldwide fame. Then why such a “labour,” that involves certain steps, which would have been held original if it was a person instead of the monkey should diminish Slater’s right to claim the authorship over the photo? Even considering balancing the rights, which article 7 of the TRIPs agreement is talking about, this is not reasonable to leave such an effort unprotected. As international treaties that deal with intellectual property emphasis, creativity should be promoted and not suppressed, and such a decision of the Copyright Office, in particular, is definitely not doing any good in terms of enhancing creative effort of everyone.

Lastly, I want to emphasise that this case and completed analysis also has a broader scope and implications than just a monkey selfie controversy. As it was presented in the paper, one can easily imagine the same situation in regard to artificial intelligence, or computer-generated works. If the approach, based on the originality requirement as a leading factor in relation to authorship would be applied in such cases, it could bring a certain consistency in dealing with cases when authorship is a questionable matter.

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