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Sunday, 14 September 2014

More on Monkey Business

Ctein's Monkey. Ctein made this photo. Ctein pressed the shutter. The copyright is Ctein's. The monkey received no compensation for its participation.

By **Ctein**

Folks, I'm still on hiatus, until the all-consuming remodeling and novel writing is done. (End of month, he said hopefully? We'll see.) This is a brief hiatus from the hiatus.

My other significant other, Laura (who is an IP attorney) and I were chatting about Slater's Macaque over lunch yesterday. An interesting question came up. Not over whether the photograph is copyrightable—it is unquestionably not. Read Copyright Act section 503.03(a):

> **Works—not originated by a human author**
>
> *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.*

As with all IP law, there is no hard and clear dividing line. At one end of the scale you'll have a "yes" on a particular question; at the other end a "no." Somewhere in the middle you hit a point where it's annoyingly gray. I'm sure there is some computer software out there that is getting perilously close to the undefined fuzzy boundary on this matter.

That doesn't invalidate the law or change the extreme cases. As Laura put it, the monkey case is the "most corner of corner cases." It's really hard to imagine a purer example than that.

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Here is the *interesting* question that Laura asked:

The derivative/transformational bar for copyrighted photographs is extremely high. Your alteration of a copyrighted photograph has to be quite profound and substantial before you can claim it is a new work and not merely a derivative one. That's what protects you, as a creator, from people copying your photograph as silkscreened T-shirts or posters or making changes to the cropping or color balance and claiming that it's a new work that they have the rights to. Those are all merely derivatives of your original work and they are owned by you. It is hard to create a new copyrightable work from an existing copyrighted work; it is supposed to be. But...

...Where is the bar set for works in the public domain? How much do you have to modify a public domain work before you are entitled to a copyright on the modified version?

In particular, what kind and degree of manipulation might Slater have to effect before that derivative becomes a new work that he can copyright?

No idea. There probably is some case law on this, but we're not familiar with it. Anyone know something about this part of copyright case law?

The question is not one of sheer labor, it's about artistic impact. (Kevin Purcell brought up this point in his comments to the previous column. You all should read both his comments. His analyses of copyright law are spot on.)

Neat question.

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Briefly addressing some other matters that people raised...

Ownership of a physical entity does not confer copyright. The copyright law is also very clear on this subject and the Office's online FAQ information even addresses that particular issue.

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To put it in modern terms, you could loan me a memory card for my digital camera with the clear understanding that you still own the card and that I have to return it after I'm done with it. You are not entitled to any rights to any photographs I make with that card. Sorry John, your "who owns the film" assertion was incorrect. I think you may have been confused by the fact that one of the conditions of being an employee (which can confer copyright to the employer) may be providing the employee with the tools and materials they need. But, it's the employment status which affects copyright ownership, not the providing of the tools.

Same applies to questions of photographers and assistants. They're either employees or they have contractual agreements that make it clear that the copyright resides with the photographer. In fact, in many studios, one of the perks of being an assistant is that you can use the equipment and the facilities on your own time to make photographs. Those photographs belong to you.

Can a minor claim copyright? The following is from this link:

> *Minors may claim copyright, and the Copyright Office issues registrations to minors, but state laws may regulate the business dealings involving copyrights owned by minors. For information on relevant state laws, consult an attorney.*

Remote triggers of various sorts don't raise a new issue. They've been used for a long time, e.g., stroboscopic photography in the studio, which today is done with equipment not much different than the animal photograph triggers. Another case would be many of most dramatic photographs you see of space launches from Canaveral. The cameras that are placed so close to the launch site that no humans are allowed there during launch because they would be injured or killed. The cameras have to be autonomous and self-triggering; uncontrolled radio transmitter/receivers aren't allowed that close to a live rocket either. No one has a successful legal challenge to the idea that the photographer who set up that camera and arranged the triggers and all of that isn't the owner of a copyrightable photograph.

It is possible that some future legislation or case law will invalidate that. It could happen. It's not bloody likely. The concept of long-standing accepted practice carries a lot of weight in law. It's not especially close to that fuzzy gray line. Until the law changes, Slater's Macaque doesn't affect these matters.

Now it's back to writing the novel. Have a good week, people!

Ctein

The Online Photographer's former weekly columnist, now Technical Editor, Ctein writes between two and ten copyrighted columns a year, on subjects of his choosing and at his discretion.

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(*To see all the comments, click on the "Comments" link below.*)

Featured Comments from:

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Posted on Sunday, 14 September 2014 at 11:16 AM in Legal and social issues | Permalink

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Comments

Did the monkey sign a release?
Nature lover

Posted by: Nature lover | Sunday, 14 September 2014 at 11:34 AM

Is it important that Slater didn't deliberately give the camera to the monkey?

This is probably in a murky gray area we can't see into, but I'm wondering if an argument that *deliberately* giving a camera to a monkey can be argued to be analagous to some of the automated trigger scenarios. What if you modify the camera to make it more usable by monkeys? What if you train the monkey first? Is this in the area of hopeless crackpot theories, or is it in the area of pushing the law a bit further in some direction and the only way to find out is to try it?

Posted by: David Dyer-Bennet | Sunday, 14 September 2014 at 11:35 AM

"It's not bloody likely."
Are you really English Ctein, hiding behind an American facade?

Posted by: Patrick Dodds | Sunday, 14 September 2014 at 02:07 PM

I'm pretty sure there's a hard and clear line that the US Copyright Act has nothing to do with a UK photographer producing a work in Indonesia. I know the DOJ likes to behave as if their jurisdiction in unlimited, but that doesn't mean the rest of us should.

Out of curiosity I went and read the Indonesian version, which is conveniently possible to do in ten minutes, and it has no similar provision.

Posted by: Timprov | Sunday, 14 September 2014 at 04:03 PM

I'm with David D-B on the monkey case. I feel for the photographer, or in the eyes of copyright law, the camera owner. He should have made it known that he has these great photos taken by a monkey, and sold them to the highest bidder for exclusive publication rights. After all, in what sense can he not claim to at least *own* the photos? As the owner, he can sell them.

Posted by: Arg | Sunday, 14 September 2014 at 04:25 PM

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Dear DDB,

Mostly, I think the answer would be no. Merely facilitating a natural process absent a “contribution by the human author” (as the Copyright Office put it) wouldn't change anything. To borrow from their example, taking a bunch of pieces of wood to the shore and staking them out so that the wind, sand, and surf could sculpt them would not make the results copyrightable, any more than a cultured pearl is copyrightable. Merely making a camera available to the monkey or making one that is more readily manipulated by a monkey wouldn't change the fact that so far as the copyright law's concerned, the monkey is still just a “natural process.”

Now, training the monkey... here I think you could be into a lovely gray area. Of course, you'd have to show that the training made a systematic difference in the artistic results to get any traction on that line of argument, but there are known methodologies for running “reasonable observer” tests on that sort of thing.

Let's presume that the experiment is done and that there is a useful legal testimony to the effect that the works produced by the trained monkey are aesthetically distinct from the ones produced by the untrained monkey. That's a big presumption, but we will run with it. In that case, the question devolves to one of whether that would constitute human input into the process? Or, if it's really no different then deciding what initial parameters to stick in the linoleum-making machine or which configurations of shoreline are especially good for making pretty driftwood sculptures? If the former, probably copyrightable. If the latter, definitely not.

What makes this particularly lovely is that the distinction between human and natural process doesn't allow for a state of mind or intent by a nonhuman entity, and absent that there is no human input. It's outside the scope of the written statute. It is likely outside the scope of the legislative history of the statute, which is what courts turn to when the statute itself doesn't give clear guidance. A restrictive court would likely decide that it doesn't fall within the scope of law and if one wants it to, one needs to amend the statute (which can happen, viz. revising the Copyright Act to allow for copying software into computer RAM). An expansive court might consider it a logical and sensible extension of the law that falls within their purview.

pax \ Ctein
[Please excuse any word-salad. MacSpeech in training!]
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-- Ctein's Online Gallery http://ctein.com
-- Digital Restorations http://photo-repair.com
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Posted by: ctein | Sunday, 14 September 2014 at 05:33 PM

For those looking for the Kevin Purcell comments Ctein references they're here:

http://theonlinephotographer.typepad.com/the_online_photographer/20slaters-macaque.html?cid=6a00df351e888f883401b8d0685e3b970c#comment-6a00df351e888f883401b8d0685e3b970c

You may think copyright law doesn't affect you but it might when you least expect it

The Mackie v. Rieser case resulting from photographing the Dance Steps on Broadway (a piece of public art about 50m away from where I am typing this) is a important to keep in mind if you shoot stock or commercial photography.

http://suffolkmedialaw.com/2010/02/17/photographing-public-art-a-legal-waltz-in-seattle/

http://www.ecases.us/296F.3d909

http://www.capitolhillseattle.com/2011/06/broadway-dance-steps-lawsuit-settled-not-worth-continuing-to-fight/

By just taking an "ordinary" photo of a copyrighted artwork you may be creating a derivative work of the artwork not a new photographic work if you don't add enough "transformation".

The "how random/deterministic do you have to be to not get copyright" boundary might be argued pedantically by geeky folks that a program controlling a camera using a pseudorandom number generator which is actually deterministic but it looks statistically random is actually deterministic and so the resulting images should have copyright.

I think, in real life, I think a sensible judge would rule that the process looks random to a human and so those images don't have copyright because of the randomness in the process used to capture the image. AFAIK, this has not been tested in court.

NASA automated space launch photos mentioned by Ctein (often) are in the public domain but not because they were taken with automated systems but because any work done by the US federal government does not have US copyright. But if they're taken by a contractor working for the government then (depending upon the contract) the contractor may or may or have copyright. See how murky this can get?

http://en.wikipedia.org/wiki/Copyright_status_of_work_by_the_

Posted by: Kevin Purcell | Sunday, 14 September 2014 at 05:35 PM

Regardless of the current state of the law, I think it's a shame that Slater doesn't get to own the rights to this photo. He invested a lot of time, money, and effort to be in a position where this serendipitous result occurred, and now he's just out of luck when it comes to getting a bit of return on his investment. Any chance of a TOP print sale of the monkey image? I'd suggest a modest-sized print, signed by Slater, and accompanied by his written description of how the photo came to be.

Posted by: Bill Tyler | Sunday, 14 September 2014 at 06:00 PM

Since reading Bad Monkey I now defer all questions regarding monkeys to Carl Hiaasen who clearly has already nailed all issues pertaining to monkey-ness. 8-)"

Posted by: Steve Rosenblum | Sunday, 14 September 2014 at 07:53 PM

I can't answer for Ctein, but I've been known to utter the word *bloody* a few times since marrying an Englishwoman. You could call it guilt by association.

Posted by: Chuck Holst | Sunday, 14 September 2014 at 09:33 PM

Dear Timprov,

The US Copyright Act has a lot to do with Techdirt vs Caters, because Techdirt *is* based in the US. Deciding the appropriate venue and jurisdiction around international Internet stuff is always tricky, but the now-usual default is that where the physical entity is based determines what law applies. Primarily because just about anything else is unworkable–– the long arm of the law frequently fails to reach across borders. The US DOJ has little sway over what happens in Indonesia, but conversely the Indonesian DOJ has little to say about activities within the US.

Yeah, the Berne Convention eliminated a lot of inconsistencies, but not all of them.

~~~~

Dear Arg (and Bill),

Slater *IS* the owner of the photograph. And he is free to sell it to anybody in any form he wants. In fact, he is selling prints of it. He can even sell it exclusively to somebody, if he should so desire. What he does not hold is a valid US copyright on the photograph. What that means is that if someone else should get their hands on a copy of the photograph, he has no say over what they do with it.

This is not an unusual situation. People make and sell all sorts of art and product out of illustrations that are now in the public domain, because they've timed out or the rights were somehow lost. They are entirely free to do so. What they can't do is prevent someone else from making use of those same illustrations if they can get their hands on them.

Slater is not remotely out of luck in terms of making money off of this photograph. He just can't prevent other people from doing so if they can obtain a useful copy of it.

Personally, while I'm thrilled when any artist can make money, including Slater, I don't think anyone is ENTITLED to the benefits of a random event that fell into their lap with no effort on their part. It's nice when it happens, but the Universe doesn't owe anyone that.

~~~~

Dear Kevin,

I could've been a little clearer in my writing. Many of the automated-camera launch photos are made by private, independent photographers and news and photographic organizations. They are allowed to set up cameras (once they've been properly vetted), not just NASA. Those private automated cameras produce copyrighted photographs.

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[Please excuse any word-salad. MacSpeech in training!]
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Posted by: ctein | Monday, 15 September 2014 at 02:45 AM

So, if the camera was set up with an intervalometer and the monkey picked it up and looked into it at just the right moment, it would be copyrightable, but because the monkey pressed he shutter, it isn't.

Posted by: Chris Crowe | Monday, 15 September 2014 at 07:07 AM

In regard to ownership not inferring copyright are the recently published images by Vivian Maier available to all of us to copy and distribute as we please?

Posted by: james wilson | Monday, 15 September 2014 at 08:15 AM

Ctein wrote:
> Folks, I'm still on hiatus, until the all-consuming remodeling and
> novel writing is done.
> [..]
> Now it's back to writing the novel. Have a good week, people!

I'm curious as to whether Ctein will be able to deliver a novel approach to a bromidic subject ;-)

Posted by: Bruno Masset | Monday, 15 September 2014 at 11:42 AM

The definitive place to from established practice is *Compendium of U.S. Copyright Office Practices*. The Third Edition has just been published in draft form with the final version taking effect in Dec 2014.

http://copyright.gov/comp3/

Fortunately they also publish it in chapters and Chapter 300 *Copyrightable Authorship* is the that pertains to this discussion. It's only 39 pages long.

http://copyright.gov/comp3/chap300/ch300.html

I think the Copyright Office is pretty unambiguous now in defining the Human Authorship Requirement. The human must directly create the work.

> *306 The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being.*
>
> *The Human Authorship Requirement*
>
> *The copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." Trade-Mark Cases, 100 U.S. 82, 94 (1879). Because copyright law is limited to "original intellectual conceptions of the author," the Office will refuse to register a claim if it determines that a human being did not create the work. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).*
>
> *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.*
>
> *Examples:*
> *• A photograph taken by a monkey.*
> *• A mural painted by an elephant.*
> *• A claim based on the appearance of actual animal skin.*
> *• A claim based on driftwood that has been shaped and smoothed by the ocean.*
> *• A claim based on cut marks, defects, and other qualities found in natural stone.*

So I think Ctein's hypothetical trained monkey would fail this requirement by still not being a human author. A trained monkey is still just a monkey. It's not outside the legislation but specifically excluded by it and made concrete in the Copyright Office's policy.

Perhaps another way to look at it is Ctein's elementary school teacher won't be able to claim a copyright interest in Ctein's and John Camp's book because she "trained" Ctein in English at one point. Training isn't authorship.

Burrow-Giles Lithographic Co. v. Sarony from 1884 mentioned above is an interesting case for TOP as it established copyright for "art" photographs in the US and also established the idea of a human authorial intent even when the human is using a "mechanical" device i.e. a camera to fix an idea. But the human has to use a mechanical device to render his intent not an animal.

http://en.wikipedia.org/wiki/Burrow-Giles_Lithographic_Co._v._Sarony

> *Burrow-Giles argued, photography was merely a mechanical process rather than an art, and could not embody an author's "idea". The Court accepted that this may be true of "ordinary" photographs, but this was not in the case of Sarony's image of Wilde. The trial court had found that Sarony had posed Wilde in front of the camera and suggested his expression, and selected his costume, the background and accessories to create a particular composition of line and light. This control that Sarony exercised over the subject matter, in the view of the Court, showed that he was the "author" of "an original work of art" over which the Constitution intended Congress to grant him exclusive rights.*

Posted by: Kevin Purcell | Monday, 15 September 2014 at 01:48 PM

Dear Chris,

Yeah, pretty much.

That may sound silly to you, but if you think about the purpose of copyright law, which is to protect human-created works, it's a huge distinction.

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Dear James,

Vivian Maier's works are all protected by copyright. That is not in dispute. The argument is over who should own those copyrights, and, as well, the physical prints (as an inheritance issue, not a copyright issue). So, you have it backwards. You could own all the copies of Vivian Maier photographs in the world and that still wouldn't entitle you to recopy or republish them.

The monkey case is different because the photo is not copyrightable in the US.

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Posted by: ctein | Thursday, 18 September 2014 at 07:09 PM

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