LETTER FROM EUROPE

Cheeky Monkey

Wikipedia claims copyright comes down to the press of a button.

In my childhood, come summer, the UK Parliament would go into recess, and because that seemed to signal the end of lots of newsworthy items—political scandals, Government and opposition taunting each other, etc.—the period became known as the 'Silly Season'. You probably have an equivalent where you live, that time when journalists grasp for something—anything—that might yield column inches and generate clicks.

Some things never change, and once more the Silly Season is upon us. How do I know this? Two words: monkey selfie. By now you've likely heard the tale: British nature photographer David Slater was following and shooting a tribe of crested black macaque monkeys in Indonesia. At one point, one of the monkeys helped herself to his camera and took a few selfies. One of these was a particularly good shot. When Mr. Slater saw the photo on the Wikimedia Commons site, which features free-to-use images and video files, he asked Wikimedia to take the image down. Wikimedia refused, and now there's a fight over who owns the copyright: Mr. Slater or the monkey?

Yes, everyone, Wikimedia appears to consider that the monkey has the better right to claim title to copyright and the photos. Or possibly they consider them to belong to a category of copyright called 'orphan works', where the true owner of the copyright can't be established. In either case, they get to publish them, and Mr. Slater gets no royalties.

I'm not sure where Mr. Slater put the photos online originally, but on the basis he's a Brit, I am going to lean towards English copyright law as being the relevant law in this case: unless Indonesia, where the monkey pulled the trigger, so to speak, actually allows animals to own copyright works. I doubt it somehow.

Under the UK's Copyright, Designs and Patents Act 1988 (CDPA), it is clear that the owner of copyright has to be a legal person—so an individual, or body corporate, partnership, etc. only.

The problem arising for Mr. Slater is that he did not physically take the photos. However, the earlier news stories back in 2011 explained what happened. No doubt, like any good naturalist, in the days leading up to the photograph being taken, he and his guide sought to establish they were no threat to the animals, so they could get their trust and then take photographs.

So there he was, tripod all set, camera primed and ready—he gets distracted (or relieves himself in the jungle, which is why he disappeared for a few moments)—and by the time he comes back, the macaque monkey that has taken the camera begins to push the buttons.

Apparently, the noise of the shutter going off got the monkey's attention, and she just kept hammering away at the 'take photo' button. Given that Mr. Slater's camera was digital, it's worth noting that the very thing that triggered the sustained bout of picture taking—the shutter sound—was itself just there for us humans who have become used to the sound (and rely on it to tell us a picture has been taken).

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The relevant section in the CDPA relating to 'authorship' is section 9, and there is a sub-section dealing with literary, dramatic, musical and artistic works (the latter category is the one in which a photograph would fall) where the work is 'computer-generated'.

Being a digital camera, the image created when the button is pushed is actually computer-generated. No longer is a roll of film required, carefully shielded from the light so as not to expose it. It all depends on that all-pervading microchip.

In that sub-section, the author is taken to be the person who makes the arrangements for the creation of the work.

Now, as lawyers, we can have all sorts of fun with what those words mean and how to apply them in any given

scenario—well, most scenarios. I am also pretty certain that at the time the CDPA came into force, digital photography either didn't exist or else was in its infancy, and the CDPA wasn't designed to cover it and certainly didn't envisage Mr. Slater's situation.

But nevertheless, a digital camera creates a computer-generated work (the image in front of it), and the author is, in most cases, the person who switches the camera on (i.e. makes the arrangements for), and the computer-generated image is created by the pressing of the shutter button.

In which case Mr. Slater, good news; you're the author and you do own the copyright!

Of course, those of you with a particular love of copyright will immediately point out that case law suggests that the person who takes the photograph is the one who owns the copyright. True, but those cases were decided, no doubt, when Eastman Kodak was still in business making film. With the advent of digital cameras, possibly that old approach really should no longer apply ... especially if it is not your camera. Mind you, if 'making the arrangements' simply means 'switching the camera on'—well, that may simply be swapping one problem for another.

But that would be opening up a new can of worms when all I'm doing is trying to clarify a bit of monkey business. ■

The Letter from Europe *will be taking a break until the Summer Silly Season has passed. In September, Paul will return and once again cast an inquisitive eye over the World's IP and commercial conundrums.*

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