Monkeying around with Selfies and U.S. Copyright Law

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In 1884, a (human) primate named Napoleon Sarony, an eccentric lithographer and photographer, won a groundbreaking case before the Supreme Court that extended copyright protection to photographs. The unauthorized use of his photograph of Oscar Wilde by the Burrow-Giles Lithography Company was, indeed, unauthorized, according to the Court. More than 100 years later, a primate called a macaque took hundreds of photographs with a camera stolen from David Slater, a British photojournalist, but was denied copyright protection.

To be clear, if a human child took a camera from a photojournalist and took the same photographs as the macaque who stole Slater’s camera, those photographs would almost certainly be protected by copyright. Copyright law applies to “original works of authorship” that have been “fixed in a tangible medium of expression.” I may not have shown a tremendous amount of artistic promise as a child, but it is a safe bet that the macaque running wild with Slater’s camera had a better eye than I did at a young age. One of my favorite activities as a child was throwing a blanket over my head and running blindly around my parents’ apartment until a wall obstructed my progress, which might explain why my first word was an onomatopoeia, “ka-boom.” My parents might have preferred a macaque.

The Monkey Selfie

In 2011, in an Indonesian forest, British

Self-portraits of a female Celebes crested macaque (Macaca nigra) in North Sulawesi, Indonesia, who had picked up photographer David Slater’s camera and photographed herself with it, 2011.
photographer David Slater set up a tripod with a camera and then walked away for a short time. Monkeys, including the macaque, began playing with the camera, actually snapping several hundred photos. The stunning images, some strikingly humanlike monkey selfies, ended up in the media, and eventually, on Wikipedia, including Wikimedia Commons, the public domain photo library. In 2012, Slater, who did not post the image, asked Wikimedia to remove it, citing copyright, and the photo was removed from the site. Soon, however, the photo reappeared on the site. Slater again requested its removal, again citing copyright. In 2014, Wikimedia issued a statement denying the request, saying that since Slater did not snap the photo, he could not own its copyright. The same year, the U.S. Copyright Office, which registers copyrights in the United States, published its third edition of the Compendium of U.S. Copyright Practices, the first update in two decades. The compendium included a provision banning copyrights on works made by “nature, animals, or plants,” and specifically identified a “photograph taken by a monkey,” as an example of such a work. Other examples included a mural painted by an elephant, driftwood shaped by the ocean rather than an artist, natural markings on stone, and a song written by “the Holy Spirit.” While Slater does not deny that the macaque actually took the photo, he maintains that the photo was still his “creation” and thus should be his copyright. To date, Slater has not appealed the Wikimedia ruling or pursued any case in court, but his story provides a very twenty-first century entrée into discussions of copyright.

Useful Arts
To understand how hundreds of photographs actually fixed in a tangible medium of expression by the second most widespread genus of primates could be denied copyright protection while the highest court in the United States granted protection to a single photograph that was arranged by a member of the most widespread genus of primates, we must look at a document that, to my knowledge, a macaque has yet to draft. James Madison submitted to the framers the constitutional provision that eventually gave Congress the power to protect intellectual property. Article I § 8 cl. 8 of the U.S. Constitution states that “Congress shall have the power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” (Emphasis added). Courts have repeatedly interpreted this constitutional mandate as giving Congress wide discretion in determining how and when to grant copyright protection. This discretion was solidly affirmed by the Supreme Court in 2003 when it upheld the Copyright Term Extension Act, which prolonged the life of most copyrights by 20 years. Throughout history, Congress has experimented with a number of different strategies to promote the “useful arts” using the carrot of copyright protection. While the technical requirements for protection have varied widely, the basic rationale is that giving an artist exclusive rights to his or her creations incentivizes people to create. Despite Bukowski’s advice to aspiring writers in So You Want To Be A Writer (“don’t do it”), he was probably glad of the money he made from publishing the poem. More importantly, Bukowski did not serve in the House or the Senate, which have decided that giving people the right to profit from their art if they so choose is the best way to promote the creation of art. Although Manhattan Supreme Court Justice Barbara Jaffe recently made history by granting an order to show cause and a writ of habeas corpus on behalf of two chimpanzees being used for biomedical experimentation, Congress has yet to recognize the artistic efforts of any non-human primate as “useful arts.” At first blush, it might seem absurd to grant copyright protection for a selfie. Pressing a few buttons to capture an image of myself staring at my laptop requires few, if any, artistic choices. As discussed above, even a macaca can do it. Viewing the current state of copyright law in its historical context, however, valid reasons for giving a selfie respect emerge. It would have been impossible for the Supreme Court to envision the sheer volume of photographs taken by even a single modern individual when it found Sarony’s photograph of Oscar Wilde deserving of copyright protection. Would Justice Miller have written such a broad opinion if he could have foreseen the surfeit of mundane images captured thoughtlessly by the hordes of people who mediate every concert they attend through a cell phone held at arm’s length? In granting protection to Sarony’s photograph, Justice Miller wrote that “[the word] writings [as used in the Copyright Act] is meant ... to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression.” He went on to write for a unanimous Court that “[w]e entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.” (Emphasis added).

Sarony’s opponent in 1884 argued that because a photograph is a mechanical reproduction, it is not the visible expression of an idea from the mind of an author but rather a true to life reproduction of the world. At the time, Walter Benjamin was 52 years away from penning The Work of Art in the Age of Mechanical Reproduction, and photography was still in its infancy. Whereas a painter would require a tremendous amount of skill and be required to make an infinite number of creative choices to create a lifelike reproduction, there was a reasonable argument that setting up a machine to do almost the same thing required no such creativity and did not represent the original intellectual conception of an author. Five years before the Supreme Court decided Sarony’s case, it construed the text of the Copyright Act, stating that for a work to be “under the head of writings of authors,” which were protected by
Rejecting this argument, the Court found that Sarony had made a number of creative choices by posing Wilde, “selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade,” and “suggesting and evoking the desired expression.” Although a person who casually turns a phone around to take a photograph of him or herself is hardly going to the lengths that Sarony went to in setting the stage for his now famous photograph of Wilde, a person taking a selfie does make several artistic choices. Anyone who has perused a dating website knows that the angle, lighting, facial expression, and numerous other subtle factors can combine to dramatically alter a selfie to suggest and evoke the desired expression. Moreover, in 1991, the Supreme Court referenced its much earlier opinion in Sarony’s case and clarified that only a modicum of originality is required to qualify for copyright protection. The Court wrote, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”

The low bar for originality required by the Copyright Act is in keeping with the modern trend of erring on the side of liberally granting copyright protection. To be sure, the bar was not always so low. The earliest iterations of the Copyright Act granted much shorter terms of protection and contained draconian notice requirements that put a heavy burden on authors. An author who published a work without a copyright notice in the correct form as prescribed by the Copyright Act would lose all rights to the work, which would immediately enter the public domain and be freely available for anyone to use. This was still the case in 1951 when a federal circuit court held that thousands of Superman comic strips without proper copyright notice were no longer protected by copyright. Had a later publication of a different Superman comic book not been published with sufficient notice, Superman might not have evolved into the character he is today.

Renewing Copyright
Protecting authors and other content creators while ensuring that the works they create are not unreasonably withheld from the public has always been a balancing act for Congress. Under the Copyright Act of 1790, Congress only granted authors a copyright term of 14 years and placed onerous technical requirements on how a work had to be published to be eligible for copyright protection. In 1831, Congress revisited the copyright system and enacted the first general revision, which increased the term of copyright protection to 28 years and added the availability of a 14-year renewal term. Congress added
a renewal period because it discovered that authors and other creatives had little bargaining power when negotiating with publishers, who often required that an author grant the publisher an exclusive right to publish a work, or even assign the copyright entirely to the publisher. By adding a renewal term after the expiration of the original period of protection, Congress theoretically erased all licenses or assignments made during the initial 28-year period hoping to allow an author whose work became successful to renegotiate on stronger footing.

The issue of whether to retain the renewal period was the subject of intense debate during the hearings leading up to the Copyright Act of 1909. Some authors, including Samuel Clemens (Mark Twain), would have preferred a system that granted a longer term of protection in lieu of a renewal period. Clemens testified before Congress that he and other authors would rather have copyright protection measured by the life of the author plus a certain term after his or her death. Off the record, Clemens later admitted to one of the representatives on the congressional committee considering his testimony that he had benefited from renegotiating some of his contracts after the initial term of protection expired and entered the renewal period. This disclosure sunk the life of an author plus system of copyright protection for more than half a century until President Ford did. The first was sign the Copyright Act of 1976. The second was pardoning President Nixon, which he wrote about in his memoir. The Nation magazine secretly obtained a pre-publication edition of the memoir and published the roughly 300-word passage discussing his decision to pardon Nixon, which led to one of the more entertaining copyright lawsuits in history. Although it is difficult to give credit to Ford for that lawsuit, he can be credited with signing the ’76 Act.

The Copyright Act of 1976 dramatically changed the copyright system in the United States. For the first time, the rigid technical requirements for copyright protection were abolished, meaning that an author of any creative work that possessed even the smallest creative spark would own copyright protection in a creative expression as soon as it was fixed in a tangible form (such as artwork, literature, or song). The Act also overhauled the term of protection granted to authors along the lines that Clemens had advocated for before the 1909 Act, namely, that a copyright would exist for the life of the author plus a term of years. To protect authors from the imbalance of negotiating power they dealt with, especially early in their careers, Congress included a radical new provision in the ’76 Act that allows an author to terminate any license or grant previously made 35 years after the grant was made under certain conditions. One of the first high-profile authors to take advantage of the termination provision was Victor Willis, who wrote songs for and performed with the Village People. Willis successfully terminated the licenses he granted to more than 30 songs including “Y.M.C.A.”

In many ways, the current copyright regime is quite good for authors. The level of originality required for copyright protection is low enough that even a selfie should be protected, the technical requirements for publication from the first half of the twentieth century have been dropped, the term of a copyright extends for the life of an author plus 70 years during which their estates can continue exploiting successful works, and an author may terminate a license 35 years after originally granting it. Although the Internet has allowed for rampant piracy, it is actually a pretty good time in history to be an author of creative works. That is, of course, unless you are just monkeying around.

Discussion Questions
1. In what ways do you think copyright promotes creativity, or “the progress of science and useful arts,” as the framers intended?

2. How has technology challenged traditional notions of copyright?

3. Do you think David Slater should own the copyright to the photos of the monkey? Why or why not?

4. Do you think copyrights are still necessary? Why? If not, what alternatives or changes to the system would you suggest?

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