**The *Monkey Selfie* case and the concept of authorship: an EU perspective**

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**This article:**The question whether a macaque named Naruto could be regarded as the author of protectable works (self-portrait photographs, ie selfies) has captured popular attention, and been the subject of litigation in the US. Further to the 2016 decision of theUS District Court for the Northern District of California that rejected that a monkey could have standing and the subsequent appeal to the Court of Appeals for the Ninth Circuit, the case was settled out of court in 2017.

This short contribution discusses whether, generally speaking, copyright can vest in works by non-human authors. It does so from the perspective of international and EU laws, addressing issues such as originality, as well as the concept of ‘authorship’ in relevant legislative texts.

It concludes that, while there remain ambiguities regarding who can qualify as an author, arguments can be advanced against consideration of works by non-human authors as protectable by copyright. However, the article also highlights how this issue is likely to resurface with reinvigorated force (and relevance) in light of technological advancement, notably in the context of artificial intelligence.

**1. The story of Naruto and its selfies: why the case matters**

The dispute between, initially, the Wikimedia Foundation and UK wildlife photographer David Slater and, subsequently, between the latter and People for the Ethical Treatment of Animals (PETA) over copyright ownership of the (now infamous) self-portrait photographs, ie selfies, taken in Indonesia by a Celebs crested macaque named Naruto (also known as the ‘Monkey Selfies’) has attracted widespread attention, both among lawyers and the general public.

In 2014 the Wikimedia Foundation rejected Slater’s takedown request to remove from a Wikipedia page one of the photographs taken by Naruto. The Foundation did so on grounds that no copyright could subsist in a work created by an animal. It also concluded that the argument by Slater that he had befriended a group of macaques and set up the photographic equipment, so that they would use it and possibly take pictures (with him editing the resulting photographs) held no value.[[1]](#footnote-1)

In a separate lawsuit against Slater, PETA – admittedly on behalf of Naruto – sought a decision that would acknowledge that works created by an animal hold a valid copyright, of which the animal, as author, is the owner. More specifically, as a next friend, PETA alleged that the defendants had infringed Naruto’s copyright pursuant to sections 106 and 501 of the US Copyright Act of 1976, by displaying, advertising, reproducing, offering for sale, and selling copies of the Monkey Selfies.

In 2016 the US District Court for the Northern District of California dismissed the action, on grounds that “the [US] Copyright Act does not confer standing upon animals like Naruto”.[[2]](#footnote-2) The court recalled that the notions of ‘works of authorship’ and ‘author’ are not defined in the statute. This was a deliberate choice on the side of the legislature, intended “to provide for some flexibility.”[[3]](#footnote-3) However, the court referred to a case decided in the area of environmental law: *Cetacean*.[[4]](#footnote-4)

There, the Cetacean Community, created by the “self-appointed attorney for all of the world’s whales, porpoises, and dolphins,” had brought an action on behalf of the Cetaceans for violations of the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act. The Ninth Circuit examined the language of each statute and excluded that US Congress had wished to confer standing on animals. The court concluded that: “if Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.”[[5]](#footnote-5)

According to the court hearing the *Monkey Selfie* case, a similar conclusion could be reached in relation to the US Copyright Act. Decisions of the US Supreme Court and Ninth Circuit have referred to ‘persons’ or ‘human beings’ when addressing issues of authorship.[[6]](#footnote-6) In addition, in its Compendium of Copyright Practices, the US Copyright Office clearly states that:

“To qualify as a work of “authorship” a work must be created by a human being. See *Burrow-Giles Lithographic Co*., 111 U.S. at 58. Works that do not satisfy this requirement are not copyrightable. The Office will not register works produced by nature, animals, or plants.”[[7]](#footnote-7)

The Compendium specifically refers to “[a] photograph taken by a monkey” as an instance of work that cannot be protected. Courts take into consideration the US Copyright Office’s interpretation in appropriate circumstances[[8]](#footnote-8), and in this case the District Court also referred to the Compendium to conclude that Naruto could not be the author of a protectable work.

Further to an appeal filed by PETA before the Ninth Circuit[[9]](#footnote-9), the case was settled out of court in 2017.[[10]](#footnote-10)

The issues raised by the *Monkey Selfie* case are not just whether an animal can be the author of a copyright work, but – more broadly – what the basic notion of authorship entails and whether protection is also available – in principle – to non-human authors. Similarly to the case of animal authors, the Compendium of the US Copyright Office suggests that protection is not available to “works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”[[11]](#footnote-11) It is nonetheless apparent that at a time in which artificial intelligence, while being arguably still in its infancy, promises to deliver results that up to this point were believed to be solely part of the realm of human creativity, this question cannot be dismissed lightly.

The present contribution focuses specifically on the EU context, and attempts to answer the question whether EU law can accommodate non-human authors within its own copyright regime. Further to a review of international sources, this article considers provisions in relevant EU directives, as interpreted by the Court of Justice of the European Union (CJEU). It concludes that, if EU copyright law intends originality as the display of personality, freedom and creativity of the author – as opposed to mere skill, labour or effort – then works created by means of random or automatic processes, including those that are the result of intervention by an animal, might not be *generally* eligible for protection.

**2. International law: what the Berne Convention does (not) say**

Similarly to the US statute, international instruments do not define who can be regarded as an author. As explained by Goldstein and Hugenholtz, “[t]he consequence – and doubtless also the cause – of the silence of international agreements […] is that countries vary, sometimes widely, in the answers they have given.”[[12]](#footnote-12)

In this sense, the Berne Convention is not different from the other international instruments. However, legal scholarship seems oriented in the sense of concluding that, from its text and historical context, only natural persons who created the work can be regarded as authors.[[13]](#footnote-13) In particular, although the Berne Convention does not explicitly sets an originality requirement, this already existed in national copyright laws at the time of drafting the Convention. According to Ricketson, it was clearly understood that this was also a requirement for the purposes of protection under the Convention, and inherent in the phrase ‘literary and artistic works’ in Article 2. The condition that a literary and artistic work possesses a sufficient (how much, however, the Convention does not say) degree of originality postulates

“the need for the author to be a human being and for there to be some intellectual contribution above and beyond that of simple effort ("sweat of the brow") or what may be called mere "value in exchange."”[[14]](#footnote-14)

In any case, although generally speaking it seems possible “to agree that an author is a human being who exercises subjective judgment in composing the work and who controls its execution”[[15]](#footnote-15), this does not mean that at the national level there are not situations in which also works created by non-human authors can qualify for protection, or courts have not addressed issues of non-human authorship. In the UK context, examples of the former include the fictions of authorship in section 9(2) of the UK Copyright, Designs and Patents Act 1988 and, even more evidently, the provision in section 9(3) therein, according to which – in the case of a literary, dramatic, musical or artistic work which is computer-generated – the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.[[16]](#footnote-16) As regards the latter, courts have been required to decide, for instance, cases relating to “the curious context of automatic writing” or psychography, ie works produced by persons who claimed to act as amanuenses for “a disembodied spirit or consciousness”.[[17]](#footnote-17)

At the EU level – with the exception of cinematographic and audiovisual works, computer programs and databases – copyright directives do not really address the issue whether only human beings can be regarded as authors. Article 1(5) of Directive 93/83[[18]](#footnote-18) (the Sat-Cab Directive) states that for cinematographic[[19]](#footnote-19) or audiovisual works the principal director shall be considered as its author or one of its authors, leaving Member States free to provide for others to be considered as co-authors.[[20]](#footnote-20) Article 2(1) of Directive 2009/24[[21]](#footnote-21) (the Software Directive) provides that the author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation. Article 4(1) of Directive 96/9[[22]](#footnote-22) (the Database Directive) admits the possibility that the author of a database can be, not just the natural person or group of natural persons who created the base, but also – where the legislation of the Member States so permits – the legal person designated as the rightholder by that legislation. In any case, Directive 2006/116[[23]](#footnote-23) (the Term Directive, sub Recital 14) refers the calculation of the term of protection of copyright to the life of authors as “physical persons”.

The question that arises under EU law is, therefore, whether – with the exclusion of cinematographic and audiovisual works, computer programs and databases – Member States can protect works created by non-human authors.

**3. Originality under EU law**

Harmonization of the standard of originality at the EU level has been limited. Only the Software Directive (Article 1(3)), the Database Directive (Article 3(1)) and the Term Directive (Article 6) provide that, respectively, for computer programs, databases and photographs copyright protection shall be only available if they are their “author’s own intellectual creation”.

Until the landmark 2009 decision in *Infopaq*, C-5/08[[24]](#footnote-24) it was believed that for works other than those for which harmonization of the originality standard had explicitly occurred EU Member States remained free to define the conditions of copyright protection under their own legal regimes. In that judgment the CJEU took the (rather radical) view that this would not be the case, and that also for works protected under Directive 2001/29[[25]](#footnote-25) (the InfoSoc Directive) the same standard of originality as in the Software, Database and Term Directives should apply.

The reason, according to the CJEU, is that the Berne Convention (notably Article 2(5) and (8)) presupposes that protection is available to works that are intellectual creations[[26]](#footnote-26), and this is the standard also envisaged under the Software, Database and Term Directive.[[27]](#footnote-27) According to the court, the InfoSoc Directive is based on the principle that a work is protected if it is its author’s own intellectual creation. This is evidenced by Recitals 4, 9 to 11 and 20 in the preamble thereto.[[28]](#footnote-28) Hence, also under the InfoSoc Directive the standard of originality is that of ‘author’ own intellectual creation’.[[29]](#footnote-29)

The CJEU elaborated on the notion of ‘author’s own intellectual creation’ in subsequent case law. When discussing copyright protection in graphic user interfaces, the court held that the standard of originality requires that the author expresses “his creativity in an original manner”.[[30]](#footnote-30) In *Football Association Premier League*, C-403/08 and C-429/08, the court clarified that originality as author’s own intellectual creation requires exerting “creative freedom”, ie something that football matches – being subject to the rules of the game – do not possess.[[31]](#footnote-31) The CJEU refined further its construction of the standard of protection in its subsequent decision in *Painer*, C-145/10.[[32]](#footnote-32) In discussing originality for photographs and, in particular, portrait photographs, the court held that what is required is for the author “to express his creative abilities in the production of the work by making free and creative choices”[[33]](#footnote-33), so that he “can stamp the work created with his ‘personal touch’”.[[34]](#footnote-34) It is therefore apparent that the EU standard of originality, as also acknowledged by Advocate General Mengozzi in his Opinion in *Football Dataco*, C-604/10 entails a “‘creative’ aspect, and it is not sufficient that the creation of [the work] required labour and skill.”[[35]](#footnote-35)

Defining concepts like ‘creativity’, ‘originality’, ‘personality’, and ‘authorship’ has proven complex, not just in the legal sphere. The work of Harold Bloom, Roland Barthes and Michel Foucault is exemplificative in this respect.[[36]](#footnote-36) Applying them in a non-human context proves even more challenging. If one adopts a minimum common denominator that, at least, what is needed under creativity, originality, personality, and authorship is to provide some sort of advancement over the *status quo*, then animals, might fail short of this requirement.[[37]](#footnote-37)

**4. Same concepts in different EU directives; the content of the InfoSoc Directive**

Another argument against the proposition that also non-human authors can be regarded as potentially eligible for copyright protection in their works is that, at the EU level, the general rule is that concepts used in different directives must in principle have the same meaning. So, in *Football Association Premier League*, C-403/08 and C-429/08, the CJEU clarified that if a directive in based on rules and principles already laid down in other directives[[38]](#footnote-38), “given the requirements of unity of the European Union legal order and its coherence, the concepts used by that body of directives must have the same meaning, unless the European Union legislature has, in a specific legislative context, expressed a different intention.”[[39]](#footnote-39)

In the case of the InfoSoc Directive (as well as the Term Directive, with specific regard to photographs) this might mean that, similarly to what is instead expressly stated Software Directive, the concept of author implies that this is a human being. This is because, as the CJEU clarified in *Infopaq*, C-5/08, the InfoSoc Directive, as well as the Term Directive, is based – *inter alia* – on the same principles and rules laid down in the Software Directive.

A further argument in favour of the conclusion that under EU copyright directive only human beings can be recognized as authors descends from the reading of its various provisions. In particular, the InfoSoc Directive vests authors with the right to *authorize* third parties to make acts of reproduction (Article 2a), communication to the public (Article 3(1)), and distribution (Article 4(1)) of their works. One may wonder how an animal or any other non-human author can exercise such rights. The question becomes even more complex, if not impossible to solve, if one considers that the CJEU has clarified that the language of that directive imposes that authors are considered as the exclusive first owners of economic rights.[[40]](#footnote-40)

**5. Non-human authorship: a monkey business?**

From the discussion above it emerges that, with limited exceptions, legislation – both in the US and the EU – is generally silent regarding the question whether copyright can vest in works authored by non-humans. However, a broader reading of legislative texts – including at the international, regional and national levels – suggests that the notion of authorship for the sake of copyright protection is *generally* reserved to human beings.

The *Monkey Selfie* case raises important issues that will likely become more sensitive in the foreseeable future. The question of non-human authorship is not really (or just) about whether a monkey can be the owner of copyright in the photographs that it takes, but whether increasing sophisticated technologies, under the umbrella of artificial intelligence, would result in the broadening of the understanding of *what* (rather than *who*) an author is.

For years, literature and cinema have raised the question of what a human is: from the wooden puppet who wishes to become a child in *Pinocchio* to the robot-butler in *The Bicentennial Man*, from the male prostitute Mecha in *A.I. Artificial Intelligence* to the outrageous and recreational drugs-loving teddy bear in *Ted*, the public has been exposed – more or less lightheartedly – to questions surrounding the meaning of ‘human’. Now such issues might re-surface with increasing frequency and relevance also in the area of copyright and, in doing so, test the scope of protection. This will require revisiting concepts that traditionally have been considered basic. However, similarly to the case of originality, it has become clear that what ‘basic’ refers to may not be entirely straightforward.

1. See further Wikimedia Foundation Transparency Report, available at https://transparency.wikimedia.org/stories.html. [↑](#footnote-ref-1)
2. Naruto, *et al*, v David John Slater, *et al*, Case No 3:15-cv-04324-WHO. [↑](#footnote-ref-2)
3. *Garcia v Google, Inc*, 786 F3d 733, 741 (9th Cir 2015). [↑](#footnote-ref-3)
4. *Cetacean Community v Bush*, 386 F 3d, at 1171-72. [↑](#footnote-ref-4)
5. *Ibid*, at 1179. [↑](#footnote-ref-5)
6. The decision refers to *Aalmuhammed v Lee*, 202 F.3d 1227, 1234 (9th Cir 2000); *Urantia Foundation v Maaherra*, 114 F 3d 955, 958 (9th Cir.1997); *Cmty for Creative Non-Violence v Reid*, 490 US 730, 737 (1989). [↑](#footnote-ref-6)
7. United States Copyright Office, *Compendium of U.S. Copyright Offices Practices* (29 September 2017), 3rd edn, available at https://www.copyright.gov/comp3/docs/compendium.pdf, §313.2. [↑](#footnote-ref-7)
8. *Inhale, Inc v Starbuzz Tobacco, Inc*, 755 F 3d 1038, 1041 (9th Cir 2014); see also *Garcia v Google, Inc*, *cit*, at 741-42. [↑](#footnote-ref-8)
9. *Naruto, by and through his Next Friend, v David J Slater, Wildlife Personalities, Ltd, and Blurb, Inc*, 9th Cir, Case 16-15469. [↑](#footnote-ref-9)
10. David Slater also declared to the press that litigation over the Monkey Selfies had drained his financial resources: see JC Wong, ‘Monkey selfie photographer says he's broke: 'I'm thinking of dog walking'’ (13 July 2017), available at https://www.theguardian.com/environment/2017/jul/12/monkey-selfie-macaque-copyright-court-david-slater. [↑](#footnote-ref-10)
11. *Compendium*, *cit*, §313.2. [↑](#footnote-ref-11)
12. P Goldstein – B Hugenholtz, *International copyright. Principles, law, and practice*, 3rd edn (OUP:2013), p 246. [↑](#footnote-ref-12)
13. S von Lewinski, *International copyright law and policy* (OUP:2008), §5.84. stating that “[a]ll means of interpretation” lead to the conclusion that only natural persons can qualify as authors. In a similar sense, see also Goldstein – Hugenholtz, *International copyright*, *cit*, pp 247-248 [↑](#footnote-ref-13)
14. S Ricketson, ‘The 1992 Horace S. Manges Lecture - People or machines: The Berne Convention and the changing concept of authorship’ (1991) 16 Colum-VLA JL & Arts 1, p 10. [↑](#footnote-ref-14)
15. JC Ginsburg, ‘The concept of authorship in comparative copyright law’ (2003) 52(4) DePaul L Rev 1063, p 1066. See also: A Guadamuz, ‘Do androids dream of electric copyright? Comparative analysis of originality in artificial intelligence generated works’ (2017) 2(2017) IPQ 169, p 173, stating that “there is no such thing as non-human intellectual property rights”; PB Hugenholtz, ‘The Wittem Group’s European Copyright Code’, in TE Synodinou (ed), *Codification of European copyright law* (Kluwer Law International:2012), p. 345, suggesting – in relation to the Wittem Group’s European Copyright Code (available at https://www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf) – that it is “uncontroversial” to regard the author of a work as “the natural person or group of natural persons who created it”. [↑](#footnote-ref-15)
16. Among other things, computer-generated works raise the question of what test of originality should be applied to such works, with L Bently – B Sherman, *Intellectual property law,* 4th edn (OUP:2014), p 117, arguing that – in light of developments at the level of CJEU case law – it may be doubted whether protection shall be available to all computer-generated works. Also discussing the appropriate standard of originality for these works, see G Davies *et al*, *Copinger and Skone James on copyright*, 17th edn (Sweet&Maxwell:2016), Vol I,§4.25. [↑](#footnote-ref-16)
17. See A Bridy, ‘Coding creativity: copyright and the artificially intelligent author’ (2012) 5 Stan Tech L Rev 1, pp 18-19. [↑](#footnote-ref-17)
18. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJL 248, pp 15–21. [↑](#footnote-ref-18)
19. In the same sense, see also Article 2(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), OJ L 376, pp 28-35. [↑](#footnote-ref-19)
20. *In Martin Luksan v Petrus van der Let*, C-277/10, EU:C:2012:65, the CJEU held that a law that provided that all exclusive exploitation rights in a film vest *ab initio* in its producer and not also in its principal director, as is instead under relevant EU directives, would be contrary to EU law. [↑](#footnote-ref-20)
21. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ L 111, pp 16-22, [↑](#footnote-ref-21)
22. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, pp 20-28. [↑](#footnote-ref-22)
23. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, pp 12-18. [↑](#footnote-ref-23)
24. *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465. [↑](#footnote-ref-24)
25. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ, L 167, pp 10-19 (InfoSoc Directive). [↑](#footnote-ref-25)
26. *Ibid*, para 34. [↑](#footnote-ref-26)
27. *Ibid*, para 35. [↑](#footnote-ref-27)
28. *Ibid*, para 36. [↑](#footnote-ref-28)
29. *Ibid*, para 37. [↑](#footnote-ref-29)
30. *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, C-393/09, EU:C:2010:816, para 50. [↑](#footnote-ref-30)
31. *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), EU:C:2011:631, para 98. [↑](#footnote-ref-31)
32. *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798. [↑](#footnote-ref-32)
33. *Ibid*, para 89. [↑](#footnote-ref-33)
34. *Ibid*, para 92. [↑](#footnote-ref-34)
35. Opinion of Advocate General Mengozzi in *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others*, C-604/10, EU:C:2011:848, para 35. But see A Rahmatian, ‘Originality in UK copyright law: the old "skill and labour" doctrine under pressure’ (2013) 44 IIC 4**,** suggesting a reductionist reading of the string of CJEU originality cases with regard to Member States that have traditionally intended originality as just requiring sufficient skill, labour or effort. [↑](#footnote-ref-35)
36. H Bloom, *The anxiety of influence. A theory of poetry*, 2nd edn (OUP:1973); R Barthes, *Image Music Text* (HarperCollins UK:1977); M Foucault, ‘What is an author’?, in DF Bouchard (ed), *Language, counter-memory, practice: selected essays and interviews by Michel Foucault* (Cornell University Press:1980). See further E Rosati, *Originality in EU copyright. Full harmonization through case law* (Edward Elgar: 2013), pp 54-58. [↑](#footnote-ref-36)
37. Some recent studies suggest that, while non-human animals possess inventiveness, they rarely, if ever refine or improve upon the solutions of others: see LG Dean *et al*, ‘Identification of the social and cognitive processes underlying human cumulative culture’ (2012) 335(6072) Science 1114. [↑](#footnote-ref-37)
38. *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), *cit*, para 187. [↑](#footnote-ref-38)
39. *Ibid*, para 188. See also *UsedSoft GmbH v Oracle International Corp*, C-128/11, EU:C:2012:407, para 60. [↑](#footnote-ref-39)
40. *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, C-527/13, EU:C:2015:750, para 48. [↑](#footnote-ref-40)