WHO CAN CREATE COPYRIGHTABLE WORK IN CANADA? MUSINGS ON A MONKEY'S SELFIE

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Dubbed the winner of the US Chamber of Commerce most ridiculous lawsuit of 2015 award, *Naruto, et al. v David John Slater*[1] examined whether a monkey could have copyright in its selfie. A few weeks ago, the final chapter was put to paper when the parties settled, thus depriving us of the Court of Appeal's deliberations. While many in the legal community dismissed the case as a publicity stunt, it raises an intriguing question: can copyright, a human construct of exclusive ownership, be extended to non-humans? And, perhaps more importantly, should it?

This bulletin summarises the US court's conclusions and considers how this novel matter might be addressed in Canada. The escalation of computer-assisted or generated creativity means that copyrightable material born outside the human mind is becoming less the stuff of science fiction and, like it or not, is finding its way into the court system. By examining the foundation of our copyright laws, one can hypothesize how such matters might be addressed by the bench.

Facts and decision in *Naruto, et al. v David John Slater*

After trudging through the Indonesian jungle and developing an understanding of the macaques, Slater, an award-winning photographer, adjusted his camera's settings and moved aside to allow the animals to independently familiarise themselves with the equipment. To his surprise, Naruto the macaque snatched the camera and, while making faces at her reflection in the lens, snapped some selfies. Fast forward a few years and PETA and Dr. Engelheart, a primatologist familiar with Naruto, filed suit against Slater alleging Naruto's copyright had been violated because he had displayed, advertised, and sold copies of the selfie.

At the trial level, the court granted Slater's motion to dismiss the case on the basis that a monkey is incapable of holding copyright. First, Justice Orrick stated the plain language in the American *Copyright Act* does not explicitly confer standing to animals. Second, the *Copyright Act* grants rights to authors, but there exists no line of jurisprudence where the word "author" was interpreted as including animals. Lastly, the Copyright Office Compendium refers to a "Human Authorship Requirement" which clarifies that an original work of authorship will be registered if a "human being" created the work. The judge concluded by noting despite the public

interest in the case, Congress, as opposed to the judiciary, was a more appropriate forum to make a case for animals to have intellectual property in art they produce. As noted, the case was heard by the Court of Appeal, but the parties settled before the judgment was rendered.

Canadian Copyright Law

(i) What does copyright protect?

In Canada, copyright exists solely as a creature of statute. The *Copyright Act* only extends copyright to works that are original and fixed in a material form. The owner of the copyright has the sole right to produce or reproduce a work or a substantial part of it in any form. The individual who creates the work should be named as author, except in the case of a photograph created prior to November 7, 2012, where the author can be a different legal entity.[2]

(ii) Animals cannot be authors

Like in the American *Copyright Act*, the Canadian *Copyright Act* does not contain a definition of "author". However, Canadian copyright law requires that the author, at the date of the making of the work, was a citizen or subject of, or a person ordinarily resident in, a treaty country.[3] Because of the requirement that an author be a citizen or person, it is unlikely that an animal could obtain copyright in Canada.

(iii) Animals may not be able to fix original expression

Another reason why an animal would not be able to obtain copyright is because he/she may not be able to fix original expression.

The meaning of "original" fixed expression has been hotly debated in our Supreme Court, and the pendulum has swung between two schools of thought. The "sweat of the brow" philosophy permits copyright over anything that requires the expense of labour or effort, whereas the creativity school mandates a modicum of creativity. In 2004 *CCH Canadian Ltd. v Law Society of Upper Canada*,[4] the Supreme Court settled the matter, stating that the answer lay in between the two extremes of creativity and industriousness. It opined that an author's expression must involve "more than a trivial amount of skill and judgment." By skill, the court clarified that this meant the use of one's knowledge, a developed aptitude or practised ability in producing the work. By judgment, it meant the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. An intellectual effort is required, and a pure mechanical exercise does not suffice.

Whether non-humans can make original copyrightable work is the subject of a treatise and not a bulletin; but, it may be difficult to definitively preclude the possibility that Naruto exercised skill or judgment when making

different faces based on her reflection. The dividing line gets further blurred when contemplating works generated by self-teaching artificial intelligence.

Closing Remarks

On a fundamental level, we ought to question whether artificial human constructs of exclusive proprietary rights, made to serve human social ends such as monetizing creativity, should be extended to non-humans. While the Canadian courts will not likely be faced with resolving whether a Canadian critter exercised a capacity for discernment and evaluation, it is likely that this case is the tip of an iceberg. With the proliferation of artificial intelligence, it is only a matter of time before the courts will have to reassess the policy considerations underlying our copyright system to reflect the changing digital world which is gradually shifting the creativity paradigm.

by Christie Bates

[1] *Naruto, et al. v David John Slater,* 2016 WL 362231.
[2] *Copyright Act*, R.S.C., 1985, c. C-42 , s. 76(2).
[3] *Copyright Act*, R.S.C., 1985, c. C-42 , s. 5.1. Treaty Countries are defined in s.2 as a Berne Convention country, UCC country, WCT country or WTO Member.
[4] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.

A Cautionary Note