Copyright and Non-Humans

Ownership

In Indonesia, David Slater left his camera unattended, and a crested macaque (Macaca fascicularis) took pictures of himself. The photographer initially claimed copyright in the selfies, but PETA argued that monkeys should own the copyright. The Ninth Circuit held that the Copyright Act’s language assumed that authors were humans and excluded animals that legally could not own or transfer property interests. N.Y. Times v. Slater, 888 F.3d 418 (2d Cir. 2018).

Slater has argued that he is entitled to copyright in the images, and in 2016 threatened to sue Wikipedia for using the photos. But he has not thus far. Although the photos are in the public domain, the photos are in the public domain.

Authorship

Can animals create art? Whether through training or natural talent, some animals, including cats and elephants, have produced works that many would recognize as pieces of art. In the spirit of this discussion book Why Cats Paint: A Theory of Feline Aesthetics, Heather Busch and Burton Silver present feline artists and their creations. The U.S. Copyright Office does not recognize nonhumans as authors, and will not register a work not created by a human. Commerzbank v. Commerzbank, 757 F.3d 12 (2d Cir. 2014). If the work were actually made by a cat, it is far for the creator to be denied legal recognition or reward. Or perhaps the owner/executor for the cat should be the rightful owner? These are questions we would have to ask if we ever considered copyright beyond human-made works.

Creative Contribution

Copyright protects original, creative works. When a user uses AI to alter or create a work, should the user have copyright over the finished work, even if much of what makes the work special was added by the AI, not the user? For instance, this image was created using Google’s Deep Dream tool to alter a photo of a gold coin. The user uploaded a file and clicked a few buttons. Do those actions meet the minimal standards of originality to receive copyright protection? If the AI did much of the work, should the AI creators have some interest?

Incentive to Create

Developers have taught AI how to write text and music by applying machine-learning algorithms to large collections of material. The AI then creates its own works based on what it has observed. Some programs are more advanced than others. Racter, the program that created this poem, generates text at random (though as you can see in the vote totals, more people thought a human wrote the text). Other programs apply sophisticated criteria when generating its products. Should these works then be copyrighted? Perhaps the creators of the software deserve some credit, but they aren’t motivated to make the AI just to make new works. An original program of copyright is to provide an incentive for creators. Works that were made by a computer should be in the public domain.

Most copyrighted works are made by humans, but what about when a cat makes an attractive pattern on the floor after walking in paint? Or when a monkey plays with a camera and takes a selfie? Computers now create works that, if made by a human, would certainly be copyrighted. Who (if anyone) should own the copyright in those works? The four examples on this poster discuss copyright in works by nonhuman authors and make us consider some foundational concepts of copyright law.

The AALL Copyright Committee helps advocate for balanced copyright law and educate AALL members on copyright matters. More information on the Committee is online at https://www.aallnet.org/about-us/who-we-are/committees/copyright-committee/