

April 2018

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### Recommended Citation

Jonathan Siderits, *The Case for Copyrighting Monkey Selfies*, 84 U. Cin. L. Rev. (2018)  
Available at: <https://scholarship.law.uc.edu/uclr/vol84/iss1/9>

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## THE CASE FOR COPYRIGHTING MONKEY SELFIES

*Jonathan Siderits\**

### I. INTRODUCTION

In 2011, British photographer David Slater traveled to an Indonesian forest where he spent three days photographing a troop of crested black macaques.<sup>1</sup> During one of his photo shoots, Slater set up his camera on its tripod for the monkeys' use, and a number of photographs taken by the monkeys were eventually shot.<sup>2</sup> While most of these shots were out of focus and unusable, a few were surprisingly well taken. The self-portraits captured in these shots have since been referred to as the first ever "monkey selfies."<sup>3</sup> Due to the unique circumstances leading to their creation, these photographs generated considerable publicity and captivated a widespread Internet audience.<sup>4</sup> The popularity of these photographs initially was a huge financial success for Slater; he reportedly received £2,000 from buyers in the year after the photographs were taken.<sup>5</sup>

However, it did not take long for others to begin capitalizing on the photographs without permission or payment. The Wikimedia Foundation, the non-profit Internet giant that operates such staple websites as Wikipedia, posted one of the photographs on its image repository, Wikimedia Commons,<sup>6</sup> where the image was freely available for public use.<sup>7</sup> At one point, the photograph was even included in a Wikipedia article about the crested black macaque species, although it

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1. Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, NEWSWEEK (Aug. 21, 2014, 9:31 AM), <http://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961>. The crested black macaque, or *macaca nigra*, is a critically endangered species of Old World monkey that inhabits certain islands of Indonesia. *Celebes Crested Macaque*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Celebes\\_crested\\_macaque](http://en.wikipedia.org/wiki/Celebes_crested_macaque) (last visited Feb. 14, 2015).

2. Stewart, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Photographer 'lost £10,000' in Wikipedia monkey 'selfie' row*, BBC NEWS (Aug. 17, 2014), <http://www.bbc.com/news/uk-england-gloucestershire-28674167>.

6. Wikimedia Commons is a collection of more than 20 million images and videos that Wikimedia provides without cost to anyone online. *David Slater's Monkey Selfie Photoshoot – the unseen pictures*, THE TELEGRAPH, <http://www.telegraph.co.uk/news/picturegalleries/earth/11021255/David-Slaters-monkey-selfie-photoshoot-the-unseen-pictures.html?frame=3000650> (last visited Feb. 14, 2015).

7. *File:Macaca nigra self-portrait (rotated and cropped).jpg*, WIKIMEDIA COMMONS, [https://commons.wikimedia.org/wiki/File:Macaca\\_nigra\\_self-portrait\\_\(rotated\\_and\\_cropped\).jpg](https://commons.wikimedia.org/wiki/File:Macaca_nigra_self-portrait_(rotated_and_cropped).jpg) (last visited Feb. 14, 2015).

has since been removed.<sup>8</sup>

Since petitioning the Wikimedia Foundation in January 2014 to have the image removed, Slater has been locked in a dispute over whether he owns the copyrights to the photographs.<sup>9</sup> Slater estimates that he has lost “tens of thousands of pounds” in income as a result of Wikimedia Commons publishing the images.<sup>10</sup> He blames Wikimedia for his lost earnings and for destroying his business, because the organization actively has encouraged the public to use the images without compensating Slater by publishing his photos online and providing a link to download a high-resolution copy.<sup>11</sup> While Slater successfully has sold the photographs to various purchasers, Wikimedia is one of several entities that did not purchase, or even seek a license, prior to using the photograph.<sup>12</sup> Wikimedia defends its actions arguing that because Slater did not take the pictures himself he does not hold a copyright.<sup>13</sup> It maintains the monkeys are the true authors of the works, and because monkeys cannot own copyrights, the photographs are in the public domain and thus may be freely and legally used by anyone.<sup>14</sup>

Slater has threatened legal action against unlicensed users of the photographs, claiming: “There’s a lot more to copyright than who pushes the trigger on the camera. I set up the shot, I was behind all the components in taking that image.”<sup>15</sup> In particular, Slater claims that during his three days spent shadowing the monkeys in Indonesia, he “became accepted as part of the troop . . . they touched me and groomed me . . . so I thought they could take their own photograph.”<sup>16</sup> Slater allegedly conceived the idea to set up his camera on its tripod for the

8. See *Celebes Crested Macaque*, WIKIPEDIA (WAYBACK MACHINE INTERNET ARCHIVE) (Dec. 8, 2013), [https://web.archive.org/web/20131208051727/http://en.wikipedia.org/wiki/Celebes\\_Crested\\_Macaque](https://web.archive.org/web/20131208051727/http://en.wikipedia.org/wiki/Celebes_Crested_Macaque).

9. Devin Coldewey, *Monkey Selfie on Wikipedia Drives Photographer Bananas*, NBC NEWS (AUG. 6, 2014, 7:59PM), <http://www.nbcnews.com/tech/internet/monkey-selfie-wikipedia-drives-photographer-bananas-n174251>.

10. THE TELEGRAPH, *supra* note 6.

11. *Id.*

12. BBC NEWS, *supra* note 5.

13. See Keir Simmons et al., *Selfie Monkey Was ‘My Assistant,’ Legal-Battle Photographer Says*, NBC NEWS (AUG. 7, 2014, 7:56 AM), <http://www.nbcnews.com/tech/internet/selfie-monkey-was-my-assistant-legal-battle-photographer-says-n174781>; see also Mike Masnick, *Monkeys Don’t Do Fair Use; News Agency Tells Techdirt To Remove Photos*, TECHDIRT, <https://www.techdirt.com/articles/20110712/01182015052/monkeys-dont-do-fair-use-news-agency-tells-techdirt-to-remove-photos.shtml> (last visited Feb. 14, 2015).

14. *Id.*

15. THE TELEGRAPH, *supra* note 6. There is some inconsistency as to whether Slater actually engineered the shot at all, or if the monkey seized the camera while Slater was away. See, e.g., Masnick, *supra* note 12. For purposes of this article, the author will assume that Slater did in fact set up the shot in the manner in which he has claimed.

16. BBC NEWS, *supra* note 5.

monkeys to use after one of the monkeys spontaneously grabbed the camera and took a few blurry shots of the surrounding forest.<sup>17</sup> Other steps that Slater took to facilitate the photographs included: setting up the camera with a wide angle lens; configuring the camera's settings for a facial close-up (e.g. predictive autofocus, motorwind, and flashgun); framing the shot; and adjusting the exposure.<sup>18</sup> By Slater's account, he even kept one hand on the tripod while the monkeys began touching the lens and playing with the camera and its buttons.<sup>19</sup> They watched their reflections in the lens and grinned at themselves while they pressed the shutter button, capturing the so-called monkey selfies.<sup>20</sup>

Wikimedia has expressed its rejection of Slater's argument that he substantively contributed to the photographs enough to warrant copyright protection.<sup>21</sup> At one point, the Wikipedia page on animal-made art—which discusses the monkey-selfie controversy—quoted Slater as claiming he had “engineered” the shot; however, the “engineered” text provided a hyperlink to Wikipedia's article on the long-rejected “sweat of the brow” legal doctrine.<sup>22</sup> Clearly, Wikimedia finds Slater's position is without merit.<sup>23</sup>

This dispute has spurred controversy over whether works such as Slater's, which blur the line between copyrightable works of human authorship and uncopyrightable “works of nature,” should be protected. Part II of this Casenote discusses the relevant background information needed to understand the underlying purpose of copyright protection in the United States, as well as the requirements for obtaining a copyright. Part II further discusses the recently released public draft of the Copyright Office's third edition of the Compendium of U.S. Copyright Office Practices, which clearly alludes to the Slater controversy, as well as the Seventh Circuit's decision in a case analogous to Slater's, *Kelley*

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17. Stewart, *supra* note 1; David Slater, DJS PHOTOGRAPHY, <http://www.djsphotography.co.uk/Tropical%20Forests/Sulawesi%20Macques.htm> (last visited Feb. 14, 2015).

18. BBC NEWS, *supra* note 5; Stewart, *supra* note 1; THE TELEGRAPH, *supra* note 6.

19. THE TELEGRAPH, *supra* note 6.

20. *Id.*

21. Stewart, *supra* note 1.

22. *Animal-Made Art*, WIKIPEDIA (WAYBACK MACHINE INTERNET ARCHIVE) (October 11, 2014), [https://web.archive.org/web/20141011073012/http://en.wikipedia.org/wiki/Animal-made\\_art](https://web.archive.org/web/20141011073012/http://en.wikipedia.org/wiki/Animal-made_art). While the contents of Wikipedia pages are user-generated, the article's position was clearly consistent with Wikimedia's.

23. See *Wikimedia Foundation Transparency Report/Requests for Content Alteration & Takedown*, WIKIMEDIA, [https://meta.wikimedia.org/wiki/Wikimedia\\_Foundation\\_Transparency\\_Report/Requests\\_for\\_Content\\_Alteration\\_%26\\_Takedown#Monkey\\_Selfie](https://meta.wikimedia.org/wiki/Wikimedia_Foundation_Transparency_Report/Requests_for_Content_Alteration_%26_Takedown#Monkey_Selfie) (last visited Feb. 14, 2015) (“We received a takedown request from the photographer, claiming that he owned the copyright to the photographs. We didn't agree, so we denied the request.”).

*v. Chicago Park District*. Part III of this Casenote presents various arguments in favor of granting Slater copyright ownership of the photographs and criticizes the *Kelley* decision. Finally, Part IV of this Casenote summarizes Slater's strongest legal arguments and concludes that, if Slater pursued legal action against entities such as Wikimedia, ultimately, he would prevail.

## II. BACKGROUND

### *A. The Law Governing Copyright Protection*

The United States Constitution grants Congress the power “[t]o 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.”<sup>24</sup> Acting under the power granted by this clause, also known as the “Patents and Copyrights” clause, Congress has enacted a series of Copyright Acts establishing the United States Copyright Office, setting forth the requirements for copyright registration, outlining the basic rights of copyright owners, and detailing the length or “lifespan” of copyright protection.<sup>25</sup> Notably, registering a work with the Copyright Office is not a prerequisite to copyrightability, but a work must be registered before an infringement suit may be brought.<sup>26</sup>

To merit copyright protection, a work must be an “original work[] of authorship fixed in [a] tangible medium of expression.”<sup>27</sup> Therefore, the fundamental criteria for copyright protection are originality and fixation in a tangible form.<sup>28</sup> Under the Copyright Act, a work is considered fixed in a tangible medium when “its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>29</sup>

The inter-related concepts of originality and authorship are less straightforward than the fixation requirement and require an analysis of relevant case law to be fully understood. Moreover, the potential tension between fixation and originality must be addressed, as this

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24. U.S. CONST. art. I, § 8, cl. 8.

25. The Copyright Acts have been codified in Chapter 17 of the United States Code. Currently, the Copyright Act of 1976 is the primary basis of U.S. copyright law.

26. 17 U.S.C. § 411(a) (2008).

27. 17 U.S.C. § 102(a) (1976).

28. *See, e.g.*, 2 WILLIAM PATRY, PATRY ON COPYRIGHT § 3:26 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 50 (1975)).

29. 17 U.S.C. § 101 (2010).

tension clearly is at work in the Slater controversy. Finally, copyright law's hallmark principle that only expressions, and not ideas, are protected also will be discussed.

### 1. Authorship

The term "author," despite appearing as an explicit requirement for copyright protection in the Constitution, is not defined by statute.<sup>30</sup> As interpreted by the Supreme Court, the term generally implies that the work must, in some way, owe its origin to a person.<sup>31</sup> However, one need not necessarily be the creator of a work to be an author. For example, under the work-made-for-hire provision of the Copyright Act, an employer or commissioning party can satisfy the authorship requirement, even if he added no copyrightable expression to the work at all.<sup>32</sup> In fact, a work need only be created in the scope of one's employment for authorship to be granted to the employer.<sup>33</sup> In the case of third party contractors, the work must be commissioned, and the actual creator must sign an agreement that the work will be deemed a work-made-for-hire for authorship to be granted to the commissioning party.<sup>34</sup>

The authorship requirement was explored by the Supreme Court in its decision in *Burrow-Giles Lithographic Co. v. Sarony*.<sup>35</sup> In *Burrow-Giles*, the Court held that a photograph was entitled to copyright protection despite the fact that it may be considered a mere mechanical reproduction of some object.<sup>36</sup> The Court found that a photograph is a product of the photographer's "intellectual invention" and was produced "entirely from his own original mental conception."<sup>37</sup> Therefore, the photographer was considered the author of an original work. In making

30. See PATRY, *supra* note 28.

31. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

32. 17 U.S.C. § 201(b) (1976) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

33. *Id.*; see also 17 U.S.C. § 101 ("A 'work made for hire' is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.").

34. *Id.*

35. See *Burrow-Giles*, 111 U.S. at 55.

36. *Burrow-Giles*, 111 U.S. at 60; see also *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 318 (S.D. N.Y. 2000). Photographs currently are recognized as copyrightable works under 17 U.S.C. § 102(a)(5), which provides protection for "pictorial, graphic, and sculptural works."

37. *Id.*

this determination, the Court took into account the various creative and expressive actions the photographer took in making a photograph, including the particular posing of the subject in front of the camera, the selection and arrangement of costumes and other accessories, and the lighting.<sup>38</sup> Notably, the Court construed author broadly to mean “he to whom anything owes its origin; originator, maker.”<sup>39</sup>

Perhaps an even clearer definition of the author of a photograph came from Brett, M.R., in *Nottage v. Jackson*,<sup>40</sup> which was quoted with approval by the Court in *Burrow-Giles*.<sup>41</sup> Brett’s opinion described an author as “the person who effectively is as near as he can be, the cause of the picture which is produced, that is, the person who has superintended the arrangement, who has actually formed the picture by putting persons in position and arranging the place where the people are to be.”<sup>42</sup> According to the treatise *Nimmer on Copyright*, the main thrust of this statement is that the author of a photograph simply may be regarded as “the person closest to the actual creative process.”<sup>43</sup> Since *Burrow-Giles*, other courts have identified a number of factors to consider when determining whether a photographer is the “author” of a photograph. These factors include the photographer’s selection of the pose of the subject, the choice of lighting and angle, the choice of which of the subject’s expressions to capture, the choice of the lens and the camera, and “almost any other variant involved.”<sup>44</sup>

Another landmark Supreme Court case regarding originality is *Feist Publications, Inc. v. Rural Tel. Serv. Co.*<sup>45</sup> In *Feist*, a telephone utility company attempted to prevent a publisher of an area-wide telephone directory from copying listings from the utility’s white pages, alleging that they were protected by copyright.<sup>46</sup> To resolve the dispute, the Court had to analyze whether the white pages satisfied the originality requirement for copyright protection.<sup>47</sup> As an initial matter, the Court considered the white pages to be a “compilation” work, meaning that the

38. *Id.* at 55.

39. *Id.* at 57-58.

40. 11 Q. B. Div. 627, an 1883 British case.

41. *Burrow-Giles*, 111 U.S. at 61.

42. *Id.* (quoting *Nottage v. Jackson*, 11 Q. B. Div. 627). The *Burrow-Giles* court also found instructive the *Nottage* opinions of Lord Justice Cotton, who said that “‘author’ involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph,” and Lord Justice Bowen, who said that “‘photography is to be treated for the purposes of the act as an art, and the author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.’”

43. 1-1 DAVID NIMMER, NIMMER ON COPYRIGHT § 1.06.

44. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

45. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

46. *Id.* at 344.

47. *Id.* at 345.

telephone utility merely had collected a series of facts and assembled them together.<sup>48</sup>

Unfortunately for the utility company, the Court deemed that this act alone was insufficient to constitute an original work.<sup>49</sup> Rather, much like *Burrow-Giles*, the Court in *Feist* interpreted original to require only that the author did not copy the work and that the work possess “at least some minimal degree of creativity.”<sup>50</sup> With respect to the telephone utility’s white pages, the Court found that this low threshold had not been satisfied, because there was nothing even remotely creative about an obvious, alphabetical arrangement of names.<sup>51</sup> Since *Feist*, it has become hornbook law that an author is “the person who originates the work by contributing at least a minimal degree of expression to its creation.”<sup>52</sup>

In addition to these holdings, *Feist* also rejected the previously employed “sweat of the brow” doctrine, wherein an author was granted a copyright in his work by virtue of the amount of effort he had put into fixing his creation.<sup>53</sup> The *Feist* Court found that the doctrine had numerous flaws, such as extending copyright protection in a compilation work beyond the author’s particular selection and arrangement of the compiled facts to the facts themselves.<sup>54</sup> This, the Court held, “eschew[ed] the most fundamental axiom of copyright law—that no one may copyright facts or ideas.”<sup>55</sup> Therefore, the Court declared “originality, not ‘sweat of the brow,’ is the touchstone of copyright protection.”<sup>56</sup>

The Court in *Feist* made clear that “the requisite level of creativity is extremely low; even a slight amount will suffice. The 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.”<sup>57</sup> As a result, courts have found the minimal degree of expression requirement to be a very low threshold.<sup>58</sup> In fact, even warning labels found on energy

48. *Id.* at 344-346.

49. *Id.* at 364.

50. *Feist*, 499 U.S. at 345.

51. *Id.* at 363-64.

52. PATRY, *supra* note 28, at § 5:3 (citing *Brod v. General Pub. Group, Inc.*, 32 Fed. Appx. 231 (9th Cir. 2002) and *Gillespie v. AST Sportswear, Inc.*, No. 97Civ.1911(PKL), 2001 WL 180147 (S.D. N.Y. 2001)).

53. *Feist*, 499 U.S. at 352-53.

54. *Id.* at 353.

55. *Id.*

56. *Id.* at 359-60.

57. *Id.* at 345.

58. *See, e.g.*, *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988) (“a showing of virtually any independent creativity will do”); *Weissmann v. Freeman*, 868 F.2d 1313, 1321 (2d Cir. 1989) (“only an unmistakable dash of originality need be demonstrated, high standards of uniqueness in creativity are

drink bottles qualify.<sup>59</sup> Still, *Feist* recognized that a “narrow” category of works might not meet the threshold, such as the telephone utility’s listings, where “the creative spark is utterly lacking or so trivial as to be virtually nonexistent.”<sup>60</sup>

## 2. Originality v. Fixation

It should be emphasized that, as the Court noted in *Feist*, originality is the touchstone of authorship—not fixation.<sup>61</sup> The fact that the telephone utility acquired the facts and fixed them in the tangible form of a telephone listing was not enough to qualify the listing as an original work of authorship. Moreover, as *Nimmer on Copyright* puts it, “the originator, rather than the fixer, should be deemed the ‘author.’”<sup>62</sup> This notion seems relatively clear from the language of the Copyright Act, which grants copyright protection to “original works of authorship fixed in any tangible medium of expression.”<sup>63</sup> The use of the passive voice in describing the fixation requirement implies that it is not relevant *who* fixed the work in a tangible medium, only that the work *is* fixed in a tangible medium. Therefore, the author and the “fixer” may or may not be the same person.

Furthermore, the Copyright Act’s definition of fixation only requires that the work be fixed “by or under the authority of the author.”<sup>64</sup> In interpreting the work-for-hire provision of the Copyright Act, courts have recognized that authorship does not always require that the author and the fixer be the same.<sup>65</sup> For example, in *Neri v. Monroe*, the court

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dispensed with”); *Atari Games Corp. v. Oman*, 888 F.2d 878, 882 (D.C. Cir. 1989) (“To constitute a ‘work of authorship,’ the material deposited with the Register must pass a ‘creativity’ threshold, i.e., it must embody ‘some modest amount of intellectual labor.’”).

59. See, e.g., *Innovation Ventures, LLC v. N2G Distrib., Inc.*, 779 F. Supp. 2d 671, 678 (E.D. Mich. 2011) and Stephen McJohn, *Top Tens in 2011: Copyright and Trade Secret Cases*, 10 NW. J. TECH. & INTELL. PROP. 331 (Feb. 2012), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1170&context=njtip> (“Contains about as much caffeine as a cup of coffee. Limit caffeine products to avoid nervousness, sleeplessness, and occasionally rapid heartbeat. You may experience a Niacin Flush (hot feeling, skin redness) that lasts a few minutes. This is caused by Niacin (Vitamin B3) increasing blood flow near the skin.”).

60. *Feist*, 499 U.S. at 359.

61. *Id.* at 347.

62. NIMMER, *supra* note 43, at § 1.06.

63. 17 U.S.C. § 102(a).

64. *Id.* § 101.

65. See, e.g., *Fisher v. Klein*, 1990 WL 10072477 at \*2 (S.D.N.Y. June 26, 1990) (“[U]nder the copyright law . . . authorship, even with sculptors, need not be in the form of the manipulation of the material . . . [A] sculptor . . . might sit in a chair, never moving and never touching the materials, perhaps in part because he might be paralyzed or simply because the materials might be large and heavy. . . . I think it is clear without question that such participation is authorship. Such carrying out of ideas of authorship is recognized as authorship under the copyright law even if the author never places his hand

found that a glassblower who executes instructions to create a glass sculpture cannot undermine the authorial status of a designer who “decided what kind of glass would be created, in what shapes and colors, attached to what armatures, and where the glass elements would go relative to the ceiling and each other.”<sup>66</sup> In arriving at this decision, the court recognized that intellectual property most often is created in stages, and that there could be features of the sculpture added by the glassblower that he may have a copyright claim to.<sup>67</sup> Moreover, in numerous instances it simply is impractical for an author to fix his work in a tangible form. As one court explained, authors of poems, essays, and novels can have copyrights, “even if they do not run the printing presses or process the photographic plates necessary to fix the writings into book form.”<sup>68</sup> Simply put, an author of a copyrightable work does not need to be the one who physically fixes the requisite original expression.<sup>69</sup>

### 3. Idea-Expression Dichotomy

Under the Copyright Act, copyright protection never can extend beyond the author’s creative expression to include “any idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>70</sup> This often is referred to as the “idea-expression dichotomy.”<sup>71</sup> It ensures that, while authors may be entitled to protect their creative, expressive works from being copied, the underlying ideas on which the expression is founded cannot be taken out of the public domain in violation of the First Amendment.<sup>72</sup>

As explained by Register of Copyrights, Abraham Kaminstein, in a 1961 report:

Copyright does not preclude others from using the ideas or information revealed by the author’s work. It pertains to the . . . artistic form in which the author expressed intellectual concepts [and] enables him to prevent others from reproducing his individual expression without his consent. But anyone is free to create his own expression of the same concepts, or to make practical use of them,

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on the material.”).

66. *Neri v. Monroe*, 726 F.3d 989, 992 (7th Cir. 2013).

67. *Id.*

68. *Andrien v. S. Ocean County Chamber of Commerce*, 927 F.2d 132, 135, (3d Cir. 1991).

69. *See, e.g.*, PATRY, *supra* note 28, at § 5:3.

70. 17 U.S.C. § 102(b).

71. *See, e.g.*, PATRY, *supra* note 28, at § 4:44.

72. *See id.*

as long as he does not copy the author's form of expression.<sup>73</sup>

The prohibition on copyrighting ideas furthers the primary objective of copyright law, which is to promote the progress of science by encouraging others to build upon the ideas conveyed by a work without risking infringement.<sup>74</sup> As the court in *Feist* recognized, this same prohibition extends to facts, for the reason that facts lack authors.<sup>75</sup> More specifically, *Feist* highlighted the distinction between creation of original expression and discovery of facts, noting that “[t]he first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”<sup>76</sup> Discoveries, like ideas, statutorily are prohibited from receiving copyright protection, for the same reason of encouraging progress.<sup>77</sup>

### *B. The U.S. Copyright Office Weighs In*

In the wake of the monkey selfie controversy, the United States Copyright Office released a public draft of the Third Edition of the Compendium of U.S. Copyright Office Practices (Compendium III).<sup>78</sup> The Compendium is a manual establishing various guidelines for obtaining a copyright and explaining the Office's practices based on the statutory requirements and relevant case law. In an apparent response to the controversy, the Compendium III clarifies that the Office's prohibition on copyright protection for “works of nature” bars protection for “a photograph taken by a monkey.”<sup>79</sup> Other exemplary unprotected works of nature include “a mural painted by an elephant,” and “driftwood that has been shaped and smoothed by the ocean.”<sup>80</sup>

To support its “human authorship” requirement and prohibition on works of nature being copyrighted, the Copyright Office cited *Burrow-Giles* and other Supreme Court precedent observing that copyright protection extends only to “the fruits of intellectual labor” that are “founded in the creative powers of the mind” and “original intellectual

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73. REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3 (Comm. Print 1961).

74. *Feist*, 499 U.S. at 349-50.

75. *Id.* at 345 (“No author may copyright his ideas or the facts he narrates.”).

76. *Feist*, 499 U.S. at 347.

77. *See* 17 U.S.C. § 102(b).

78. *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, Third Edition, <http://copyright.gov/comp3/> (last visited Feb. 14, 2015) [hereinafter COMPENDIUM II]. The Compendium III is the first update since the second edition (Compendium II) was released in 1984. Prior to the publication of this comment, the Compendium III went into effect on December 22, 2014.

79. *Id.* at § 306, § 313.2.

80. *Id.* at § 313.2.

conceptions of the author.”<sup>81</sup> As a result, the Copyright Office maintains that it will refuse to register any works which it determines were not created by a human being.<sup>82</sup> The Copyright Office’s logic in reaching this conclusion is not entirely clear, as the cited cases do not explicitly mention the word “human” or mandate any sort of human authorship requirement. Regardless of its reasoning, the Copyright Office ignores a work’s potential to be created in part by nature while still being an original conception of an author, the fruit of his intellectual labor, and founded in the creative powers of his mind. The Copyright Office’s strict interpretation of the case law therefore would leave the human participants of such works completely vulnerable to copiers.

### C. Kelley v. Chicago Park District

In *Kelley v. Chicago Park District*, the Seventh Circuit held that an artist’s wildflower garden was not protectable by copyright because, although original, the garden “lack[ed] the kind of authorship and stable fixation normally required to support copyright.”<sup>83</sup> Fixation issues aside, the gardener-artist failed to satisfy the authorship requirement.<sup>84</sup> The court found that gardens categorically are “planted and cultivated,” rather than authored.<sup>85</sup> Moreover, the court announced that “authorship is an entirely human endeavor,” quoting a passage on authorship from the well-known treatise, *Patry on Copyrights*.<sup>86</sup> In making this statement, the court also looked to the U.S. Copyright Office, Compendium II: Copyright Office Practices § 503.03 (Compendium II) for the proposition that “a work must be the product of human authorship” and not the forces of nature.<sup>87</sup>

In its analysis, the *Kelley* court posited that a garden “owes most of its form and appearance to natural forces,” because the majority of things found in a garden originate in nature and not in the mind of the gardener.<sup>88</sup> Specifically, the court was referring to the “colors, shapes, textures, and scents of the plants” in the garden; it did not consider the selection and arrangement of the plants or the overall configuration of the garden itself to be the garden’s more prominent features.<sup>89</sup>

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81. *Id.* at § 306 (quoting Trade-Mark Cases, 100 U.S. 82, 94 (1879) and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).

82. *Id.* at § 313.2.

83. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303-04 (7th Cir. 2011).

84. *Id.*

85. *Id.* at 304.

86. *Id.* (quoting PATRY § 3.19).

87. *Id.* (quoting U.S. Copyright Office, Compendium II: Copyright Office Practices § 503.03).

88. *Kelley*, 635 F.3d at 304.

89. *Id.*

The artist filed a petition for writ of certiorari to the Supreme Court, but it was denied.<sup>90</sup> However, the artist made a number of compelling arguments in his petition. For example, the petition noted the incongruity of the Seventh Circuit's finding that the garden was an original work by the artist, while nevertheless concluding that it lacked the requisite "kind" of authorship simply because it incorporated living elements.<sup>91</sup> The petition further mentioned that there is no legal support for a "correct" or "incorrect" kind of authorship test, noting that the treatise cited by the court merely stands for "the unexceptional position that materials produced *solely* by nature, by plants, or by animals are not copyrightable . . . not that authorship requires every single element of a work to have been created by the author (and not by nature)."<sup>92</sup> To bolster its position, the artist also identified a number of floral, fruit, and sand sculptures that have been afforded copyright protection as evidence that works that incorporate natural elements are not barred categorically from copyright.<sup>93</sup> Ultimately, however, the Supreme Court declined to hear the case.<sup>94</sup>

### III. DISCUSSION

Slater has a number of strong arguments that he could advance to prove that he owns a valid copyright in the monkey selfies. For example, he can argue that he qualifies as the author of the works under both the *Burrow-Giles* and *Feist* tests. Moreover, he can argue against the *Kelley* court's finding that authorship must be "an entirely human endeavor" and show that both he and the monkeys contributed to the creation of the photographs. Finally, Slater can argue that his photographs, and other "quasi-" works of nature, should be entitled to copyright protection as a matter of policy and should not be categorically denied protection in the way that true works of nature are.

#### A. Authorship Analysis

Harkening back to *Burrow-Giles*, the question of authorship turns on whether the work owes its origin to anyone. It is, in a way, a "but for" analysis. In *Burrow-Giles*, but for the photographer's particular arrangements and selections, the resulting photograph would not have

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90. *Kelley v. Chicago Park Dist.*, 132 S. Ct. 380 (2011).

91. Petition for Writ of Certiorari at 12-13, *Kelley v. Chicago Park Dist.*, 132 S. Ct. 380 (2011) (No. 11-101), 2011 WL 3099722.

92. *Id.* at 18 (emphasis in original).

93. *Id.* at 20-21.

94. *Kelley*, 132 S. Ct. at 380.

come into existence.<sup>95</sup> Accordingly, the photograph owed its origin to the photographer. In the case of the monkey selfies, the photographs owe their origins to the two players involved: the monkey and David Slater. Obviously, certain aspects of the photographs were subject simply to the monkey's positioning. However, the photographs clearly owe their origin to Slater, as well. But for Slater's creative decision to place his camera on a tripod for use by the monkeys, the photographs would never have come into being.

In addition, Slater made a number of other creative contributions to the photographs: the type of lens used, the type of film used, the type of camera used, the camera's configuration settings, the film exposure, and the framing of the shots with the backdrop of the Indonesian forest. These contributions are much like the factors that have been identified by courts as relevant in determining whether a person is the author of a photograph, such as the choice of lighting and other similar variants. Therefore, based on the definition of authorship espoused in *Burrow-Giles*, Slater's photographs should be granted copyright protection. Moreover, similar to the authorship at issue in *Nottage*, Slater was the "cause" of the monkey selfie produced and certainly the *person* closest to the actual creative process.

Slater's photographs also pass muster under *Feist*, which looks to whether Slater truly originated the works by contributing at least a minimal degree of expression to their creation. As previously stated, this is a very low threshold that most works easily pass. Obviously, Slater's creative input was essential to the creation of the photograph. Monkeys do not purchase cameras, select and insert a particular type of film into those cameras, bring the cameras back to their natural habitat, and arrange a photo shoot. Rather, these were all steps that Slater took, exclusively. In addition, at least some minimal degree of expression permeates each of the steps Slater took toward the creation of the photographs. Therefore, the photographs satisfy the low threshold set by *Feist*.

This is not to say that the defunct "sweat of the brow" doctrine secretly is at work here. This is not a case of a would-be author going to great lengths to compile various facts, ideas or works that already exist into a predictable arrangement that lacks any degree of expression or creativity. Rather, Slater clearly contributed at least a minimal—and, arguably, a very large—degree of expression to the monkey's photographs, as evidenced in part by the rare nature of his actions and the lack of similar works. Granting copyright protection to Slater's photographs would not prohibit others from copying his technique, or

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95. See generally *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

the “idea” of orchestrating the act of a monkey taking a picture of itself. Rather, only those who copy the actual photographs that he engineered would be liable for infringement.

*B. Authorship Not Required to be an “Entirely” Human Endeavor*

The *Kelley* court and, indeed, *Patry on Copyrights*, misrepresent the human authorship requirement as stated in the Compendium II. To be clear, the *Kelley* court took the statement “authorship is an entirely human endeavor” directly from *Patry*.<sup>96</sup> However, the authorities cited by *Patry* fail to fully support this proposition. For example, *Patry* cites the Compendium II § 202.02(b).<sup>97</sup> However, this section’s full text reads: “[t]he term ‘authorship’ implies that, for a work to be copyrightable, it must owe its origin to a human being. Materials produced *solely* by nature, by plants, or by animals are not copyrightable.”<sup>98</sup> The Compendium II does not prohibit copyright protection for a work produced “jointly” by nature and a human author, thereby owing its origin to both. In fact, it is silent on this issue. The drafters of the Compendium II easily could have left out the word “solely,” or adopted language as broad as that used by *Patry*, but they did not. Therefore, the Compendium II creates no “entirely human endeavor” requirement, but, rather, it leaves room for copyright protection for works owing their origin to both nature and a human author.

Furthermore, § 503.03(a) of the Compendium II, also cited by *Patry*, more precisely states “a work owing its form to the forces of nature *and lacking human authorship* is not registrable.”<sup>99</sup> Under the canons of statutory construction, every word of this section must be given effect. It should be recognized that the Compendium II does not read “a work owing its form to the forces of nature and ‘thereby’ lacking human authorship.” Rather, it leaves wide open the possibility that a work may owe its form to the forces of nature while also having human authorship. Clearly, if a work owing its form to the forces of nature automatically implies that the work also lacks human authorship, the above italicized portion is redundant. There must be some circumstances in which a work may owe its form to nature and also involve some form of human authorship. The monkey selfies are precisely such a situation.

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96. *Kelley*, 635 F.3d at 304 (quoting PATRY § 3.19).

97. PATRY, *supra* note 28, at § 3.19 n. 1.

98. COMPENDIUM OF COPYRIGHT OFFICE PRACTICES, Second Edition, <http://www.copyrightcompendium.com/> (last visited Feb. 14, 2015) (emphasis added) [hereinafter COMPENDIUM II].

99. *Id.* (emphasis added).

An analogy may be drawn between works owing their form to both nature and human authorship and works created by mechanical processes or random selection. The Compendium II prohibits copyright protection for such works produced “without any contribution by a human author,” impliedly permitting protection for works created by mechanical processes *with* human contribution.<sup>100</sup> Indeed, a vast number of protected works, such as books, are created by mechanical processes, but are copyrightable because their creation requires some degree of human contribution. The remaining sources cited by *Patry* all involve claims to copyright in works produced by “otherworldly figures,”<sup>101</sup> and even there, *Patry* concedes that human beings who “materially contribute” to the structure, arrangement, and organization may provide the necessary creativity to qualify as authors with respect to those aspects.<sup>102</sup> The common thread among these prohibitions is that a human author must contribute to a work for the work to be protected by copyright; the work need not be an entirely human endeavor.

In addition to the fallacies in *Patry*’s reasoning, the gardens in *Kelley* are distinguishable from Slater’s photographs. A primary concern of the *Kelley* court was that gardens “are planted and cultivated,” such that they owe their form and appearance to “natural forces.”<sup>103</sup> Breaking down the “natural forces” to which the *Kelley* garden owed its form and appearance, the court was referring to those forces that impact the “form, growth and appearance” of the individual seeds or seedlings, such as sunlight, water, weather, soil, and the natural qualities of the seeds or seedlings themselves.<sup>104</sup> However, the monkey selfie does not owe its form and appearance to such natural forces. Rather, the photograph owes its origin to the contributions of both the monkey and Slater. While the monkey ultimately may have been responsible for facing the camera lens and pressing the button, Slater facilitated the photo shoot by selecting the camera and the type of film, loading the film into the camera, and processing the photographs. Most of “what we see and experience” when looking at the monkey selfies originated with

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100. *Id.*

101. PATRY, *supra* note 28, at § 3:19 (citing *Michael Foundation, Inc. v. Urantia Foundation*, 61 Fed. Appx. 538 (10th Cir. 2003); *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997); *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, No. 96 CIV.4126(RWS), 2000 WL 1028634 (S.D. N.Y. July 25, 2000), vacated by 2004 WL 906301 (S.D. N.Y. 2004); *Garman v. Sterling Pub. Co., Inc.*, No. C-91-0882 SBA (ENE), 1992 WL 12561293 (N.D. Cal. Nov. 5, 1992); *Urantia Foundation v. Burton*, No. K 75-255 CA 4, 1980 WL 1176 (W.D. Mich. Aug. 27, 1980)).

102. PATRY, *supra* note 28, at § 3:19 (citing *Urantia Foundation v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997)).

103. See *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011).

104. *Id.*

Slater, not with some random force of nature.

### C. Animal-Generated Art

Monkey selfies may be categorized broadly as a product of “animal-generated” art. This type of art is quite popular, particularly with respect to paintings made by various animals, oftentimes in zoos.<sup>105</sup> Some of these works have been known to command thousands of dollars when sold.<sup>106</sup> Usually, trained animals that follow a painting routine, taught to them by their human instructors, create these works.<sup>107</sup> In Slater’s case, he has characterized the monkey as his “assistant.”<sup>108</sup> There is no reason why such animal-generated art should be treated any differently than analogous machine-generated art, where a machine under human instruction manufactures a work. Such works unquestionably are covered by copyright protection so long as the requisite degree of expression is met. The monkey, like a printing press or even the camera it used, is simply a part of the process Slater used to create the photographs. After all, originality—not fixation—is the touchstone of authorship. The medium and tools used by an author in creating a work are completely irrelevant to the copyrightability analysis.<sup>109</sup> Therefore, it should not matter whether Slater employed the use of a monkey in the creation of the photographs any more than it matters that he used a camera to take the photographs.

Furthermore, photography triggered by animals has been copyrighted in the past. For example, Steve Winter, a National Geographic photographer and 2008 Wildlife Photographer of the Year, used motion sensor triggered cameras that automatically released the shutter to capture his now-famous nighttime photo of a snow leopard in the Himalayas.<sup>110</sup> Slater even has pointed this out to news outlets, asking if Wikipedia also will “steal that image off National Geographic or Steve Winter, [and] put it [into the] public domain?”<sup>111</sup> At least in Slater’s case, the monkey snapped the photographs “under [his] authority,” as required by statute.

105. See, e.g., Aaron Sankin, *Monkeys can’t own selfies but what about paintings?*, THE DAILY DOT (Aug. 6, 2014, 4:05 PM), <http://www.dailydot.com/politics/animal-artists-copyright/>.

106. See *id.*

107. See *id.*

108. See Simmons, *supra* note 13.

109. See H.R. REP. 101-514, H.R. REP. NO. 514 (101st Cong., 2nd Sess.), reprinted in 1990 U.S.C.C.A.N. 6915, 6921 (stating, “[a]rtists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.”).

110. Stewart, *supra* note 1; see also U.S. Copyright Registration No. VA0001823545.

111. *Id.*

*D. Policy Reasons Support Granting Copyrights to the Monkey Selfies*

Copyright law best would be served if a distinction were made between true works of nature and what may be considered partial or quasi-works of nature. True works of nature are those that exist without human involvement of any kind; they are works that nature has singlehandedly and independently produced. Quasi-works of nature, on the other hand, are those that are the result of the combined efforts of both a human author and a natural force. These works may be, for example, a manipulation of a natural thing by a human. Moreover, these quasi-works of nature should be copyrightable so long as the human author has satisfied the minimal degree of creativity requirement. Drawing this distinction between uncopyrightable true works of nature and copyrightable quasi-works of nature would serve the public interest and would comport with the policies and goals of copyright law in the United States.

As explicitly set forth in the United States Constitution, copyright law serves to promote the progress of science.<sup>112</sup> It seeks to accomplish this goal by offering an incentive to authors in the form of an exclusive right to their works, such that an author may exclude others from copying his original work. Absent such protection from copiers, the drafters of the Constitution feared that would-be authors might decline to create works, and scientific progress would be stifled. After all, there is less motivation to create a work if the ability to achieve recognition or financial benefit is undermined by others who freely duplicate and leech off of the work's success. For this reason, copyright protection is considered vital to encouraging authors to create original works.

In light of this, the reasoning behind the prohibition of copyright protection for works of nature is simple: there is no way to encourage the creation of a work that already exists in nature. Nature will produce its own works regardless of the state of copyright law. Therefore, the driftwood shaped by the ocean and the cut marks or defects found in a stone will come into being regardless of any copyright protections. This simply is not so in the case of the monkey selfie. Monkeys do not naturally photograph themselves, and monkey selfies are not “works of nature” in the traditional sense that nature will produce them on its own. Rather, they are works incorporating both characteristics of nature and human creativity—quasi-works of nature—and their existence depends at least partially on whether copyright law will protect them.

The reasoning behind the Copyright Office's prohibition on copyright protection for works of nature is analogous to its prohibition on

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112. U.S. CONST. art. I, § 8, cl. 8.

copyright protection for facts: nature's creations, like facts, may be discovered, but they cannot be "authored." However, use of facts in an expressive form can warrant copyright protection, and, similarly, use of a creation of nature in an expressive form also should warrant protection. For example, in Slater's case, his utilization of a monkey to create an original work with the requisite degree of expression on his part should warrant protection.

Granting copyright protection to quasi-works of nature would further the goal of copyright law to promote progress by ensuring that these kinds of works are created. While driftwood shaped by the ocean may be created whether it is cast into the sea by an avalanche or by an artist seeking new ways to express himself, one thing is certain: monkeys do not own cameras and are not taking selfies on their own. Without some level of human involvement, these works would not exist. And without copyright protection, Slater's monkey selfies, elephant paintings, and other similar works are left vulnerable to copying without compensating the human artists who facilitated their creation. If the language of the Compendium III draft is adopted as it stands, it is unlikely that a photographer would follow Slater's lead and allow his camera to be used by a wild animal. The risks involved surely are not worth the end result of producing a variety of incredible photographs that the photographer can assert no ownership rights over. It is likely that similar works may never again be produced.

It might be said that Slater's monkey selfies are unimportant, lack any significant value, and do not really serve to further the constitutional goal of copyright law, such that prohibiting monkey selfies from receiving copyright protection and risking that similar works might not be created is of little or no consequence. After all, monkey selfies are not usually the kind of works that come to mind when considering the promotion of "science and [the] useful arts."<sup>113</sup> However, in addition to monkey selfies being a source of amusement for the Internet masses, these photographs may reveal interesting behavioral habits of the particular monkey or perhaps its entire species.

It further may be said that such works are less deserving of copyright protection than works that relate to the advancement of science, but such statements would be legally unfounded. It is axiomatic that copyright law does not consider the artistic merit of a work when determining its copyrightability.<sup>114</sup> Neither the Copyright Office nor the courts are

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113. *Id.*

114. *See, e.g.,* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . [I]f they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of

permitted to insert into the analysis their own subjective opinions on what art is valuable and what art, in their view, is not important enough to warrant copyright protection.<sup>115</sup> Rather, as set out in *Feist*, the work must possess only some minimal degree of creative expression. What that expression is “worth” is irrelevant. Moreover, the ability of the monkey selfies and other animal-generated art to sell for large sums of money implies that these kinds of works are valuable.<sup>116</sup>

Looking to other kinds of works protected by copyright, it is even more obvious that Slater’s monkey selfies should be copyrightable. For example, a category of works referred to as “works based on nature” has widely been recognized as being subject to copyright protection.<sup>117</sup> In general, these works refer to photographs, paintings, sculptures, or videos of natural subjects such as animals, trees, or anything else that is naturally occurring. Because protecting these works under copyright law led to some confusion over which aspects of the work the artists had exclusive rights to, the Supreme Court clarified that the author only has exclusive rights to his work. The result is that “anyone may go back to the same source in nature and create a second work with the same theme. One is forbidden only from outright copying of the previous artist’s version.”<sup>118</sup>

Slater’s monkey selfies are analogous to works based on animals. In particular, wildlife photographers are deemed to contribute the requisite degree of expression despite the fact that they do not contribute to an animal subject’s pose.<sup>119</sup> Moreover, producers of wildlife documentaries unquestionably own copyrights over their film footage, despite having little, if any control, over the movements of their subjects.<sup>120</sup> How can a photographer, who coaxes an animal subject into taking a photograph of itself, be said to have given less creative input into his work than a cameraman who merely captures the natural movements of an animal subject on film?

This leads to another interesting hypothetical: if Slater had set his camera to record video and began recording prior to giving the monkey

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any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiff’s rights.”)

115. PATRY, *supra* note 28, at § 3:36.

116. See *Bleistein*, 188 U.S. at 251.

117. In *Bleistein*, the Court rejected the argument that paintings or engravings were not protectable because they are based on natural subjects. *Id.* at 249.

118. PATRY, *supra* note 28, at § 3:38:50.

119. See, e.g., U.S. Copyright Registration No. VA0001823545.

120. See, e.g., U.S. Copyright Document No. V3481D096 (titled “American bison: the return of the buffalo; education documentary television program / Produced by National Wildlife Productions, Inc.”).

the camera, he almost certainly would own a valid copyright in the entire video, including the resulting still shots of the monkey facing the camera. If the difference between Slater having a copyright and having no copyright rests on the camera setting and who pulled the trigger, then fixation is being wrongly applied as the controlling factor. As previously stated, *who* fixed the expression does not matter; it only matters that the expression *is* fixed in a tangible form, under the author's authority.<sup>121</sup>

Considering jointly authored works, where two authors contribute requisite degrees of expression to a single work,<sup>122</sup> makes it more obvious that copyright protection should be granted to Slater's photographs. After all, how can it be that when two competing interests exist between joint human authors, each receives a copyright over the entire work as a whole, but when the work owes its existence to the combined efforts of nature and an independent human author, no copyright is granted over the work? The only valid interest in the latter case belongs to a human author, and no other party has grounds for a competing interest against his.

When no other competing interest exists, the "default" competing interest is usually that of the general public, which would lose unrestricted access to a work by granting a copyright to its human author. In this case however, the general public has not lost anything from the public domain because nothing is being taken away from them. Granting a copyright to Slater leads to the same result as granting any other author a copyright in their work: the ability to exclude the rest of the world from copying that work. The public is not harmed by a copyright that excludes them from copying a work that did not exist prior to the author's creation.

Removing monkey selfies from the public domain and giving exclusive rights to the photographer who facilitated their very existence is not analogous to the injustice that would result from granting a copyright in a particular rock, tree, or plant, which the public would have been previously free to replicate. The public would be forbidden from outright copying of Slater's monkey selfies, but no one would be enjoined from returning to the same Indonesian forest, finding the same monkey, and inducing it to take similar photographs. Hence, the public does not lose anything that it previously had access to.

Granting copyright protection to these quasi-works of nature also would serve to encourage honesty among artists. Slater himself has pointed out that if he had lied and simply claimed he took the

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121. See, e.g., PATRY, *supra* note 28, at § 5:3.

122. See 17 U.S.C. § 101 (2010).

photographs himself, he “would potentially be a lot richer,” because no one would question the validity of his copyright.<sup>123</sup> Additionally, it is unlikely that anyone could prove that he did not take the photographs himself. While such dishonesty may have detracted from some of the value of the photographs—after all, part of the appeal is that they are “selfies”—Slater likely would have reaped significant financial gains if he held a copyright on the photos, because the photos are clear, close-up shots of a rare and critically endangered species of monkey that is difficult to photograph. Allowing copyright registration for quasi-works of nature would encourage those who have collaborated with some force of nature in the creation of a work to openly acknowledge nature’s involvement, rather than dishonestly claim sole authorship.

Finally, many registered works already owe their existence to both a human author and a force of nature. For example, nearly any sculpture carved from wood or formed from clay might be considered a quasi-work of nature, and, yet, such works are already unquestionably copyrightable.<sup>124</sup> Even a floral arrangement may be registered for copyright protection.<sup>125</sup> More analogous to Slater’s monkey selfies is the previously mentioned snow leopard photograph.<sup>126</sup> In light of all of these arguments, it would be helpful for both would-be authors and would-be copyright infringers if either the courts or the Copyright Office were to clearly distinguish between uncopyrightable true works of nature and copyrightable quasi-works of nature. In denying certiorari to the artist in *Kelley*, the Supreme Court missed an opportunity to draw a distinction between true works of nature that are not subject to copyright protection, and works that are a product of the combined efforts of nature and human creativity.

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123. Abby Phillip, *If a monkey takes a selfie in the forest, who owns the copyright? No one, says Wikimedia*, WASH. POST (Aug. 6, 2014), <http://www.washingtonpost.com/news/the-intersect/wp/2014/08/06/if-a-monkey-takes-a-selfie-in-the-forest-who-owns-the-copyright-no-one-says-wikimedia/>.

124. See, e.g., U.S. Copyright Registration No. VAu000309326 (titled “Horse”) (carved wood sculpture); Registration No. VAu000434894 (entitled “Cougar lady”) (wood carved violin); Registration No. VA000309328 (entitled “Possum”) (carved wood sculpture); Registration No. VAu000352281 (titled “Bear family”) (clay sculpture).

125. See, e.g., U.S. Copyright Registration No. VAu000398457 (titled “Seashell wreath with flower decoration”); Registration No. VAu000028223 (titled “Country classic bouquet”) (dried floral arrangement); Registration No. VAu000028224 (titled “Golden harvest bouquet”) (dried floral arrangement).

126. Winters’ photograph of the snow leopard is registered as U.S. Copyright Registration No. VA0001823545.

## IV. CONCLUSION

In the ever-expanding field of copyright law, there is plenty of room for Slater's monkey selfies to be granted protection. Under the authorship requirements set forth by the Supreme Court in *Burrow-Giles* and *Feist*, Slater contributed the requisite degree of creative expression to qualify as an author. The Seventh Circuit in *Kelley* wrongly found that authorship is an entirely human endeavor as the statute and Compendium II leave open the possibility of copyright protection for works created jointly by nature and a human author. Moreover, so long as the human author contributes the necessary original expression, it is irrelevant who fixes the expression in a tangible form. Finally, the state of the copyright law best would be served if a clear distinction were drawn between those true works of nature that the law seeks to prohibit from copyright protection and quasi-works of nature that would benefit greatly from protection and encourage the creation of more original works such as Slater's photographs. Therefore, David Slater ultimately should prevail in his dispute with Wikimedia and other unlicensed users of his monkey selfies.