

“Copyright and Artificial Intelligence”

By Edward Klaris

Managing Partner of KlarisLaw and KlarisIP

Lecturer-in-Law at Columbia Law School

edward.klaris@klarisip.com

917-822-7468

Recently, a photographer whose camera was used by a monkey to take a selfie [settled](#) a two-year legal battle against an animal rights group about copyright over the image. The lower court had denied the monkey a copyright, but the photographer did not want to face the appeals court.

Whether monkeys can create copyrighted works is not exactly a pressing question for our time. But the important issues raised by this case and others about who owns creative work in an increasingly automated world are crucial to the future of copyright.

With the advent of AI software, computers -- not monkeys -- will potentially create millions of original works that may then be protected by copyright, under current law, for more than 100 years.

In the 2013 movie “Her,” set in a not-too-distant-future, Samantha, an operating system (OS), can learn your desires and help you act on them. Samantha (voiced by Scarlett Johansson) selects and compiles the letters written by the main character Theodore (played by Joaquin Phoenix), and succeeds in having them published as a book. This is something Phoenix’s character had wanted to do but never tried to accomplish. The OS does it for him. Should the copyright for that book, which will be published under Theodore’s name, belong to human Theodore or OS Samantha or no one at all?

Such scenarios are no longer far-fetched. I am increasingly dealing with actual cases in which people can build strikingly accurate avatars of themselves -- scanning their own faces, adjusting the physical dimensions, designing personality traits. Should they own the copyright to these resulting avatars or should the copyright belong to the platform-owning companies that enabled the avatars’ creation? Or should they be owned by no one at all because a piece of software created the avatars and there is not enough human intervention to satisfy a court?

The concept of encouraging the production of creative work by protecting it -- incentivizing authors financially -- is embedded in our Constitution. The Intellectual Property Clause expressly aims “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

In drafting the black-and-white clarity of this clause, our framers could hardly have anticipated the highly gray area of bots making copyrighted works. You don't have to incentivize a bot; a machine simply does what it was programmed to do without any need for financial motivation. That is why the court [declined](#) to award a copyright in a work created by a monkey. Monkeys are not financially incentivized to create works, and even if they were, the monopoly afforded copyright holders was not intended for animals.

In a world where bots may eventually dominate the creative space -- manipulating, arranging, color-correcting, filming, and ordering literary, audio and visual content -- courts may decide that works created without human input belong in the public domain with no protection. Or, if copyright is granted, bots' output would be protected for potentially more than 100 years under current copyright law. Which is better? What path best promotes our country's fundamental interest in "the progress of science and useful arts"? And, should copyright subsist for fewer years under certain circumstances?

The UK proactively attempted to address such questions as early as 1988, when its Copyright, Designs, and Patents Act recognized a "computer-generated" work as one without a "human author" and specifically granted such work copyright protection. And this past February, the European Parliament advocated granting autonomous robots the legal status of "electronic persons" for purposes of copyright protection.

On September 28, the Delegation of the European Union to Japan met in Tokyo to grapple with, among other issues, whether works generated by artificial intelligence are eligible for copyright protection under Japanese and European statutes.

In today's world, what does it mean to have a hand in creating a work? I would argue that the hand belongs to the person who created that work. If a software engineer programs a bot which can generate music, for example, the copyright belongs to the person who created a song by controlling the bot, not the engineer who fabricated the software, nor the bot itself. The monkey may have pushed the camera button, but the photographer owns the copyright. That's got to be the rule even in a world where the bot may be operating more on its own and with increasing artificial intelligence. United States law needs to evolve to recognize that, although a person may rely even 100 percent on a machine to produce original work, the person is the author worthy of Constitutional protection.

Of course, there may well be cases that test this position going forward. But, in an increasingly mechanized world, we must hold fast to the original

principles of promoting “the progress of science and useful arts” by protecting human creativity and innovation.