Monkey Selfie and Authorship in Copyright Law: The Nigerian and South African Perspectives

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Abstract

A photograph taken by a monkey is in the centre of a copyright claim in the famous monkey selfie case in the United States of America. Suing as next friend of the monkey, named Naruto, the People for the Ethical Treatment of Animals contended that copyright in the photograph belongs to the monkey as author of the photograph since the monkey created the photograph unaided by any person. On the motion of the defendants, the case was dismissed by the US district court on the ground that the concept of authorship under US *Copyright Act* cannot be defined to include non-human animals. The dismissal order was confirmed by a three-judge panel of the US Court of Appeal of Ninth Circuit a request for an appeal before a panel of eleven judges of the appellate court was denied. This paper reviews the case in the light of the concept of authorship and ownership, with specific focus on the authorship of photographs, under the Nigerian *Copyright Act* and South African *Copyright Act*. In so doing, it examines and relies on Ginsburg's six principles for testing authorship to test the authorship of photographs under the Acts. It also relies on the concepts of subjective rights and legal personality to explain the implication of conferring copyright ownership on non-human animals. It argues that for authorship of and ownership of the copyright in a photograph to be established under the Nigerian *Copyright Act* and South African *Copyright Act*, a legal person must have created the photograph. Consequently, for the purposes of argument, the paper proceeds on the assumption that the monkey selfie case originated from Nigeria or South Africa. After analysing relevant statutory provisions and case law, the paper finds that the Nigerian *Copyright Act* and the South African *Copyright Act* do not envisage the conferral of authorship in particular, and copyright protection in general, to a non-human animal. It then concludes that the courts in both countries would not reach a different conclusion from the one made by the US courts.

Keywords

Monkey selfie; authorship; copyright; photographs; Nigeria; South Africa.

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1 Introduction

The development of copyright law and policy has been shaped by technological advancement. History shows how the development of the printing press, vinyl/phono records and computer technology, among other things, informed changes in copyright law and policy both at the international and local levels.[1] Although highly unthinkable before now, the possibility of non-human animals[2] claiming copyright protection has recently emerged. Through the help of photograph technology, a monkey took a photograph of itself resulting in a work protectable under copyright law. This led to a chain of events resulting in the celebrated monkey selfie case.[3] The case questions the extent to which the foundational concepts of authorship and the related concept of ownership can be stretched under copyright law. Specifically, it raises the issue whether the author of a work and owner of the copyright under copyright law can be defined to include a non-human animal author.

This paper will review the monkey selfie case against the backdrop of the concept of authorship and ownership under the Nigerian *Copyright Act*[4] and South African *Copyright Act* (SA *Copyright Act*).[5] The Nigerian *Copyright Act* and SA *Copyright Act* share some similarity in that both of them originate from British copyright law because of their colonial history, which is

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1 Adewopo *Nigerian Copyright System* 3-6; Adewopo *According to Intellectual Property*; Oriakhogba and Fenemigho 2014 *NAUJILJ* 179.

2 The expression "non-human animals" is preferred because the phrases "non-human authors or owners of copyright" will give the impression that Nigerian and South African copyright law recognises the authorship and ownership of all non-humans including non-human animals. This paper is meant to show otherwise: ie, copyright law recognises the authorship and ownership only of human beings (natural persons) and corporations (juristic persons), excluding non-human animals.

3 *Naruto v David Slater* (unreported) case number 15-cv-04324-WHO of 28 January 2016 (hereafter, *Naruto v Slater*).

4 *Copyright Act* Cap C28 Laws of the Federation of Nigeria 2004 (hereafter, NCA or Nigerian *Copyright Act*).

5 *Copyright Act* 98 of 1978 (hereafter, SA *Copyright Act*).

adequately recorded elsewhere.[6] In addition, as will be shown in the course of this paper, they appear to share similar standards for determining authorship. To this end, the paper will begin by giving a background of and will briefly analyse the monkey selfie case. It will then examine the concept of authorship in Nigeria and South Africa against the backdrop of Ginsburg's[7] six principles for determining authorship. To give further perspective, the concept of authorship and ownership will be examined through the lens of the concept of subjective rights. The discussion will form the background for determining whether the concepts of authorship and ownership as they relate to photographs can be stretched to include non-human animals assuming that the monkey selfie case arose in Nigeria or South Africa. It will end with some concluding remarks.

The paper does not discuss the question whether copyright subsists in the selfie or whether it belongs to the public domain as argued by Wikimedia Foundation. Guadamuz[8] has already addressed this from a UK and European Union (EU) perspective, and Guadamuz rightly concluded that "there is a very strong argument to be made for the subsistence of copyright in the monkey selfie".[9] Examining the matter only from an EU perspective, Rosati[10] seems to agree with Guadamuz. According to Rosati, while the idea of authorship in copyright law generally refers 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 increasingly sophisticated technologies, under the umbrella of artificial intelligence, would result in the broadening of the understanding of what (rather than who) an author is.[11]

However, Logue[12] had earlier contended that David Slater "would probably fail in his copyright claim" before the Irish courts if the courts apply the EU originality standard (highlighted below), "unless he could show that he processed the [monkey selfie] and that such processing itself was original".[13] Nonetheless, it would be otherwise if the traditional UK sweat of the brow test were applied. The concern here is to determine whether the

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6 For the history of the Nigerian *Copyright Act*, see Adewopo *Nigerian Copyright System*. For the SA *Copyright Act*, see Dean *Handbook of South African Copyright Law* 1-1.

7 Ginsburg 2003 *DePaul L Rev* 1063

8 Guadamuz 2016 *IP Review* 1.

9 Guadamuz 2016 *IP Review*.

10 Rosati 2017 *JIPLP* 973.

11 Rosati 2017 *JIPLP* 973, 977.

12 Logue 2014 *LSG* 26.

13 Logue 2014 *LSG* 26, 29.

authorship and ownership of such a photograph can be conferred on the monkey under the Nigerian *Copyright Act* and SA *Copyright Act,* assuming that the case arose in either country.

2 The "Monkey Selfie" case

David Slater, a British photographer, travelled to the Tangkoko Reserve in North Sulawesi, Indonesia in 2011 to take some pictures. He followed a band of monkeys with the aim of getting close range shots of their faces with the help of a wide-angled lens. As expected, he could not get close to the monkeys as they were shy of him. Even so, he got a few shots that were not close to what he wanted. However, he discovered the monkeys were interested in his photography equipment; so he placed his camera on a tripod. The monkeys came close and clicked the shutter, leading to some photographs of not too good quality.[14]

David Slater then altered the position of the camera, which changed the reflection of the lens and drew the attention of a camera-happy monkey – a six-year-old crested macaque. The clicking of the camera's shutter by the monkey gave birth to the now famous monkey selfie, among others. According to reports, David Slater referred to the picture as "an astounding, once-in-a-lifetime shot that captured an expression of pure joy and self-awareness on the monkey's face".[15]

Upon his return from Indonesia, David Slater got the Monkey Selfie published in the *Daily Mail* from where it went viral online and was picked up by Wikimedia Foundation who published it on its commons site. This gave rise to a dispute between Wikimedia Foundation and David Slater in 2014, as he demanded the removal of the photograph from the site. Wikimedia Foundation did not honour the demand on the basis that since the photograph had been taken by a monkey, copyright protection does not apply, and as such, the picture belonged to the public domain.[16]

David Slater then published and sold a book containing copies of the monkey selfie through his publishing company in the United States of America (US). This drew the attention of People for the Ethical Treatment

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14 Guadamuz 2018 http://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html; Wallis 2015 https://www.independent.co.uk/news/weird-news/monkey-who-took-grinning-selfie-should-received-damages-for-copyright-infringement-says-peta-10513612.html#gallery.

15 Guadamuz 2018 http://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html.

16 Logue 2014 *LSG* 26; Guadamuz 2018 http://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html.

of Animals (PETA),[17] which claimed that copyright in the photograph belonged to the monkey as its author, since the monkey created it through "a series of purposeful and voluntary actions [...] unaided by Slater".[18] PETA identified the monkey as Naruto and instituted a copyright infringement suit under the US *Copyright Act*, 1976, as Naruto's next friend, in the US District Court of San Francisco in 2015 in the case of *Naruto v David Slater*.[19] According to Guadamuz:[20]

> [The] case is not isolated, it seems to be part of a wider campaign by PETA to try to establish rights for animals, but it is still possible to analyse the litigation at face value as a copyright case, even though we suspect that the intention is not at all about to establish animal ownership rights.

Whatever may be PETA's motivation for the suit, the primary concern here is the copyright claim. The facts of the case are now already apparent from the discussion so far. Specifically, the plaintiffs assert that the defendants contravened sections 106 and 501 of the US *Copyright Act* "by displaying, advertising, reproducing, distributing, offering for sale, and selling copies of the monkey selfies".[21] They also claimed that Naruto is entitled to the defendants' profits from the infringement, and sought to permanently enjoin the defendants from copying, licensing, or otherwise exploiting the monkey selfies and to permit the Next Friends to administer and protect Naruto's authorship of and copyright in the photograph.[22] In their response, the defendants filed a notice to dismiss because not being human, Naruto does not have standing and cannot make a claim under the US *Copyright Act*.

To demonstrate standing under article III of the US *Constitution*, a plaintiff must show that:[23]

> (i) It has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (ii) the injury is "fairly traceable" to the challenged action of the defendants; and (iii) a favourable decision will be likely to redress the injury.

17 For information about PETA, see PETA 2018 https://www.peta.org/about-peta/.
18 Wallis 2015 https://www.independent.co.uk/news/weird-news/monkey-who-took-grinning-selfie-should-received-damages-for-copyright-infringement-says-peta-10513612.html#gallery.
19 See *Naruto v Slater*.
20 Guadamuz 2016 *IP Review*.
21 *Naruto v Slater* 2.
22 *Naruto v Slater* 2.
23 *Naruto* v *Slater* 3.

The district court did not determine if Naruto fulfilled these requirements. It held that it was important to first determine whether Naruto has standing under the US *Copyright Act*.[24]

The district court agreed with the defendants and dismissed the suit. In reaching this judgment, the district court referred to sections 101 and 102 of the US *Copyright Act*. Section 102 confers protection on an original work of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. On the other hand, section 101 requires that the fixing of a work can be by, or on the authority of, the author. The district court recognised the fact that the US *Copyright Act* does not define "author" and "works of authorship". It held that this was done with the purpose of allowing some flexibility in the definition of the term.[25] Even so, the district court held that the legislature did not intend to extend the definition of author to non-human animals and that even the US courts have interpreted the concept limitedly to include only persons or human beings. It took further cognisance of the practice of the US Copyright Office to the effect that works created by non-human animals are not protected under the US *Copyright Act*.[26] The district court made the following pronouncement, through Orrick J:

> Naruto is not an 'author' within the meaning of the [US Copyright Act]. [Plaintiffs] argue that this result is 'antithetical' to the 'tremendous [public] interest in animal art.' Perhaps. But that is an argument that should be made to Congress and the President [...]. The issue [...] is whether [Plaintiffs] have demonstrated that the [US Copyright Act] confers standing upon Naruto. In light of the plain language of the [US Copyright Act], past judicial interpretations of the [US Copyright Act]'s authorship requirement, and guidance from the [USCO], they have not.[27]

PETA filed an appeal before the Ninth Circuit of the US Court of Appeal. However, PETA and David Slater settled the matter before the appellate court could hear the appeal. They then filed a joint motion urging the appellate court to dismiss the appeal and vacate the district court's order. As part of the settlement, David Slater agreed to donate 25 per cent of:

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24 *Naruto* v *Slater* 3.

25 *Naruto v Slater* 4.

26 *Naruto v Slater* 5-6. Also see USCO 2014 https://copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf 306.

27 *Naruto v Slater* 6.

> Any future gross revenue that he derives from using or selling any or all of the monkey selfies to registered charities dedicated to protecting the welfare or habitat of Naruto and other crested macaques in Indonesia.[28]

In their joint statement announcing the settlement, the parties agreed that the case "raises important, cutting-edge issues about expanding legal rights for non-human animals". Also, that for Naruto "and all other animals", "appropriate fundamental legal rights" should be recognised "for them as our fellow global occupants and members of their own nations who want only to live their lives and be with their families."[29]

According to Pavis,[30] despite the settlement, the door for litigation on the monkey selfie is still left open for two reasons. First, the appellate court had not dismissed the appeal at the time of the agreement. Secondly, the "statement makes no mention of a reconciliation between the parties on who they regard to be the author of the photograph and owner of its copyright."[31] Another reason may be that, being a dismissal order, and not a judgement on the merit, it appears the district court's pronouncement on the issue of non-human animal's authorship may not be regarded as a conclusion of the matter. This is so because the district court did not declare David Slater as the author and owner of the photograph. The district court only focused on the motion filed by David Slater.[32] Moreover, the district court seemed to acknowledge that Naruto may have some right in the Monkey Selfie since Naruto created the photograph

> by 'independent, autonomous action' in examining and manipulating Slater's unattended camera and 'purposely pushing' the shutter release multiple times, 'understanding the cause-and-effect relationship between pressing the shutter release, the noise of the shutter, and the change to his reflection in the camera lens'.[33]

Most importantly, the appellate court declined to dismiss the appeal for several reasons.[34] The appellate court took cognisance of the fact that

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28 Perle 2017 https://www.peta.org/media/news-releases/peta-statement-monkey-selfie-case-settled/; Pavis 2017 http://ipkitten.blogspot.co.za/2017/09/the-selfie-monkey-case-end.html; Osborne 2017 https://www.independent.co.uk/news/world/americas/monkey-selfie-david-slater-photographer-peta-copyright-image-camera-wildlife-personalities-macaques-a7941806.html.

29 Perle 2017 https://www.peta.org/media/news-releases/peta-statement-monkey-selfie-case-settled/.

30 Pavis 2017 http://ipkitten.blogspot.co.za/2017/09/the-selfie-monkey-case-end.html.

31 Pavis 2017 http://ipkitten.blogspot.co.za/2017/09/the-selfie-monkey-case-end.html.

32 Guadamuz 2016 *IP Review*.

33 See *Naruto v Slater* 2.

34 *Naruto v David Slater* (unreported) case number 16-15469, ID: 10835881, DktEntry: 59 of 13 April 2018 (hereafter, *Naruto v Slater II*). Also see Jeong 2018

Naruto is not a party to the settlement between PETA and David Slater. Thus, according to the appellate court, "it appears the settlement agreement would not bar another attempt to file a new action".[35] Several other reasons were advanced by the appellate court, per Hon. Robreno DJ (District Judge), for denying the joint motion. First, the appellate court held that a motion to dismiss an appeal on settlement reached by parties is not mandatory and the order is not granted as a matter of course because in certain instances it is inadvisable.[36] Secondly, a substantive ruling "in this developing area of the law would help guide the lower courts".[37] Thirdly, the case had:

> Been fully briefed and argued by both sides and the court has expended considerable resources to come to a resolution. Denying the motion to dismiss ensures that the investment of public resources already devoted to this litigation will have some return.[38]

Finally, refusing the "motion to dismiss and declining to vacate the lower court judgment prevents the parties from manipulating precedent in a way that suits their institutional preferences."[39]

Indeed, the appellate court handed down a substantive ruling on the matter shortly after it declined to dismiss the appeal.[40] Through a three-judge panel, the appellate court confirmed the ruling of the district court. The appellate court held that Naruto had standing under article III of the US *Constitution* because the case shows the existence of a controversy based on the plaintiff's allegation that Naruto was the author and owner of the monkey selfie and that Naruto had suffered concrete and particular harm.[41] However, the appellate court held that the allegations are not enough to confer standing on Naruto since the US *Copyright Act* did not expressly vest non-human animals with standing to sue for copyright infringement. According to the appellate court, per Bea CJ (Circuit Judge),

> [I]f an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing. The Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute.

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http://www.theverge.com/platform/amp/2018/4/13/17235486/monkey-selfie-lawsuit-ninth-circuit-motion-to-dismiss-denied?_twitter_impression=true.

35 *Naruto v Slater II* 5.

36 *Naruto v Slater II* 1.

37 *Naruto v Slater II* 2.

38 *Naruto v Slater II* 3.

39 *Naruto v Slater II* 4.

40 *Naruto v David Slater* (unreported) case number 16-15469, ID: 10845881, DktEntry: 62-1 of 23 April 2018 (hereafter, *Naruto v Slater III*).

41 *Naruto v Slater III* 10.

> Therefore. [...] the district court did not err in concluding that Naruto—and, more broadly, animals other than humans—lack statutory standing to sue under the Copyright Act.[42]

In addition to the above reason, the appellate court upheld the ruling of the district court on the ground that PETA does not have a sufficient relationship with Naruto to sue as Naruto's next friend under US law. Moreover, US law does not allow the representation of a non-human animal by a next friend.[43]

Shortly after the ruling, a judge made a request for a vote by the appellate court on whether to hear the case *en banc*.[44] An *en banc* hearing ordinarily means a hearing by a full court. However, since the appellate court in this case is very large, it usually undertakes *en banc* hearings by a panel of 11 judges.[45] Based on the request, the appellate court ordered parties to the case to "file simultaneous briefs setting forth their respective positions on whether the case should be reheard *en banc*".[46] On 31 August 2018, the vote denied an *en banc*.

3 Authorship under the Nigerian Copyright Act and the SA Copyright Act

At some point in the evolution of copyright law, authorship was viewed as a process of inspiration or motivation of creativity by some forces on the author. It was seen as the expression of the author's personality and identity through the works produced by the author.[47] According to this view, authors are geniuses who create works without drawing from the existing culture and knowledge in the society in which they live. However, the modern view sees authorship as a creative process that flows from facts, experiences and knowledge existing in the author's society.[48] A discussion of the concept of authorship must of necessity involve answering the question: who is an author?

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42 *Naruto v Slater III* 16-18.

43 *Naruto v Slater III* 7-15.

44 *Naruto v David Slater* (unreported) case number 16-15469, ID: 10886635, DktEntry: 63 of 25 May 2018 (hereafter, *Naruto v Slater IV*).

45 See Masnick 2018 https://www.techdirt.com/articles/20180525/23110739918/monkey-selfie-lawsuit-will-never-ever-die-appeals-court-judge-wants-do-over.shtml.

46 *Naruto v Slater IV*.

47 Kwall 2007 *Hous L Rev* 871; Campbell 2006 http://eprints.rclis.org/8569/1/Campbell_ASIST_06_final.pdf.

48 Yen "Interdisciplinary Future" 159-174; Ng 2008 *HCELJ* 377.

The author is the foundation and the heart of modern copyright law.[49] The subsistence and life span of copyright is determined by reference to the author.[50] Entitlements to copyright are rooted in the author. The right to first and subsequent ownership of a work generally derives from the author. The author and owner of a copyright work are often the same person. The author is generally regarded as the first owner of a copyright work, but the author is not always the owner of a work.[51] The distinction lies in the difference between one who expresses an idea in a material form and the other who invests in the trading of the material form in which an idea is expressed.[52]

There is no generally accepted answer to the author question. Although authors are recognised as the centrepiece of copyright protection at the international level, copyright treaties appear to reserve the author question for determination in national laws. Article 7 of the *Berne Convention* recognises the author as the reference point for the determination of the duration for copyright protection.[53] However, the *Berne Convention* merely states in Article 15 that the appearance of a person's name on a work is sufficient to regard such a person as an author in order to clothe him/her with the entitlement to institute copyright infringement proceedings. WIPO attempted to answer the author question in 1990.[54] WIPO's draft model copyright law attempted a definition, which would incorporate the divergent views of what would amount to authorship. Although the attempt failed due to disagreements among member states, the definition proffered by the expert committee on the draft law provides some insights pertaining to answering the question. According to the expert committee, an author is:

> The physical person who has created the work. Reference to 'author' includes, in addition to the author, where applicable, also the successors in title of the author and, where the original owner of the rights in the work is a person other than the author, such person.[55]

From a critical look at this definition, it would be easy to guess why WIPO's attempt failed. First, it seems to conflate authorship with ownership by including successors in title of the copyright in a work within the scope of its definition. One does not become an author merely by being a successor in

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49 Dean *Handbook of South African Copyright Law* 1-31 para 4.1; Ginsburg 2003 *DLR* 1063; Cornish 2002 *CJLA* 2; Ng 2008 *Hastings Comm & Ent LJ* 377.

50 Sections 1, 2 and First Schedule of the Nigerian *Copyright Act*; ss 2 and 3 of the SA *Copyright Act.*

51 Section 10 of the Nigerian *Copyight Act*; s 21 of the SA *Copyright Act*.

52 Ng 2008 *Hastings Comm & Ent LJ* 377.

53 *Berne Convention for the Protection of Literary and Artistic Works* (1886).

54 *WIPO Draft Model Law on Copyright* (1990).

55 *WIPO Draft Model Law on Copyright* (1990) 19-21.

title to a deceased author. Authorship, as will be shown shortly, requires some positive acts. Secondly, it also tends to include juristic persons within its definitional scope without limiting the extent to which and the particular works for which juristic persons may properly be clothed with authorship.

Dean regards an author as a "person who is responsible for the creation of the material embodiment" of a work through an activity that involves the "application of intellectual effort or skill".[56] He contends further that while only natural persons can be regarded as authors in relation to some works like literary, artistic and musical works, it is possible to have juristic persons as authors in relation to cinematograph films and sound recordings.[57] This definition seems to accord with that of Asein,[58] who believes that "the author of a work is the person who created the work or made the production of the work possible and he need not always be a human beneficiary." However, Ginsburg[59] prefers to look at "author" differently as follows:

> an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision [...], she is entitled not only to recognition and payment, but to exert some artistic control over it.

By Ginsburg's definition, there is no room for juristic persons in the definition of authors. She takes this stance because according to her it would lead to considerable incoherence as regarding juristic persons, as it would mean equating authorship with ownership.[60] Nonetheless, the author developed six principles for resolving the author question. As shown in the discussion of her principles below, a juristic person can qualify as an author in appropriate circumstances. The principles will be useful in determining the author question in relation to the monkey selfie from the Nigerian and South African perspectives.

3.1 Ginsburg's principles

Ginsburg's six principles for determining authorship are very apt because the scholar formulated them after examining the copyright laws and judicial authorities from several jurisdictions in Europe and America, including the UK, which shaped the Nigerian and South African copyright laws. The principles have been adopted elsewhere as appropriate guides for the

56 Dean *Handbook of South African Copyright Law* 1-32 para 4.3.
57 Dean *Handbook of South African Copyright Law* 1-35 para 4.6.
58 Asein 2007 *IIC* 299.
59 Ginsburg 2003 *DePaul L Rev* 1063.
60 Ginsburg 2003 *DePaul L Rev* 1063.

purpose of determining the author question.[61] According to the Ginsburg, the six principles may not apply at once. Rather, "although the first three may seem coherent, discrepancies, dissonances, and significant incompatibilities appear not only across the remaining three, but also even within each principle enunciated."[62]

The first principle of authorship is that which places "mind over muscle".[63] According to Ginsburg, the person who conceptualises and directs the development of the work is the author, rather than the person who simply follows orders to execute the work.[64] An author conceives of the work and supervises or otherwise exercises control over its execution.[65] The second principle of authorship "vaunts mind over machine". The participation of a machine or device, such as computers, in the making of a work need not deprive its creator of authorship status. However, the degree of involvement of the machine in the making of the work is an important consideration. Is the machine merely a tool in the process? Alternatively, is the machine responsible mainly for shaping the content and form of the work? The "greater the machine's role in the work's production, the more the 'author' must show how her role determined the work's form and content."[66]

The third principle equates authorship with originality, while the fourth principle relates to the determination of the level of effort or labour exerted by the person in creating the work. According to Ginsburg, "the author need not be creative, so long as she perspires."[67] Both the third and fourth principles relate to the concept of originality, which will be briefly discussed shortly. The fifth principle was influenced by Nimmer's work.[68] The principle introduces intent to be an author as a condition for ascribing authorship to the person. Accordingly, "only those who [...] intend to impress the stamp of their own personalities on their literary and artistic efforts should be entitled to authorship status; all the rest are merely craftsmen, not true creators."[69] Ginsburg contends that intent does not make a person more or less creative but "it may supply a means to set out the equities of ownership in cases in which more than one contender is vying for authorship status."[70] The sixth

61 Oriakhogba 2015 *SAIPLJ* 40; Ng 2008 *Hastings Comm & Ent LJ* 377.
62 Ginsburg 2003 *DePaul L Rev* 1063.
63 Ginsburg 2003 *DePaul L Rev* 1063.
64 Ginsburg 2003 *DePaul L Rev* 1063.
65 Ginsburg 2003 *DePaul L Rev* 1063.
66 Ginsburg 2003 *DePaul L Rev* 1063.
67 Ginsburg 2003 *DePaul L Rev* 1063.
68 Nimmer 2001 *Hous L Rev* 1.
69 Ginsburg 2003 *DePaul L Rev* 1063.
70 Ginsburg 2003 *DePaul L Rev* 1063.

principle is the presumption of authorship in favour of the person who provides the money, resources and platform for the creation of the work. The principle raises a justification for the "employer/commissioning party authorship" especially for jurisdictions that have the work-for-hire rule in their copyright law.[71]

3.2 Authorship under the Nigerian Copyright Act

The Nigerian *Copyright Act* does not generally define the term author but merely proffers pointers to whom an author is in relation to particular works. Under the Nigerian *Copyright Act*, the author of a literary, artistic or musical work is the person who creates the work.[72] The Nigerian *Copyright Act* defines the author of a cinematographic film as the person who arranges for the making of the film or sound recording. However, the parties to the making of the film or sound recording may, by agreement, confer authorship on another person.[73]

Similarly, the Nigerian *Copyright Act* defines author in respect of a sound recording to mean the person who made arrangements for the making of the sound recording. However, where the sound recording is from a musical work, the author is the artist in whose name the recording was made. According to Asein, "this is a pro-author provision"[74] and it is aimed at protecting a performer who is also the composer of the musical work contained in the sound recording. In either case, the parties to the making of the sound recording may, by agreement, confer authorship of the sound recording on a person who is neither the artist nor made arrangements for making the sound recording.

Furthermore, under the Nigerian *Copyright Act*, the author of a broadcast means the person by whom arrangements for the making of the broadcast or transmission were undertaken.[75] A computer programme is protected under the Nigerian *Copyright Act* as a literary work.[76] Thus, the definition of the author of a literary work applies to the authors of computer programmes in Nigeria. Authorship relating to photographs will be discussed shortly in the sixth part below.

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71 Ginsburg 2003 *DePaul L Rev* 1063.
72 Section 51(1) of the *NCA*.
73 Section 51(1) of the *NCA*.
74 Asein *Nigerian Copyright Law and Practice* 122
75 Section 51(1) of the Nigerian *Copyright Act*.
76 Section 51(1) of the Nigerian *Copyright Act*.

3.3 Authorship under the SA Copyright Act

Like the Nigerian *Copyright Act*, the SA *Copyright Act* does not provide a general definition of the term "author". Instead, it defines author in terms of the works falling under copyright protection. In other words, author is defined by reference to specific works protected under the SA *Copyright Act*. In this regard, the author of a literary, artistic or musical work is defined as the person who creates the work.[77] Also, the SA *Copyright Act* regards the author of a cinematograph film and a sound recording as the person by whom the arrangements for the making of the film or sound recording were made.

The SA *Copyright Act* simply regards the author of a broadcast as the broadcaster,[78] while it defines the author of a computer programme as the person who exercised control over the making of the computer programme. Similarly, the SA *Copyright Act* defines an author of a computer-generated work to mean the person by whom arrangements necessary for the creation of the work were undertaken.[79] The definition of the author of photographs under the SA *Copyright Act* will be examined in the sixth part below.

3.4 Resolving the authorship question

The foregoing definitions still do not completely resolve the authorship question within the Nigerian and South African context. For instance, it seems easy to determine the author of a cinematographic film. This is so because arrangements for the making of a cinematographic film or sound recording have been held to essentially relate to financial arrangements.[80] Thus, the person who makes financial arrangements will be regarded as the author of such a work. However, it would not be easy to determine how a person qualifies as a maker or creator of a literary or musical work under the Nigerian and SA *Copyright Acts*. As will become apparent in the sixth part below, the author of photographs cannot also be easily defined under both Acts.

Indeed, the Nigerian and SA *Copyright Acts* do not provide concrete criteria for a general definition of the concept of authorship. However, it is clear from

77 Section 1(1) of the SA *Copyright Act*.
78 Section 1(1) of the SA *Copyright Act*.
79 Section 1(1) of the SA *Copyright Act*.
80 See *Century Communications Ltd v Mayfair Entertainment UK Ltd* 1993 EMLR 335; *Adventure Film Productions v Tully* 1993 EMLR 376.

the definitions, and this is confirmed by case law,[81] that the authorship question is generally limited to natural and juristic persons.[82] In addition, the authorship question is a matter of law and fact,[83] and a copyist would not be regarded as an author.[84] To be identified as an author, a person must show that the copyright work in question is original to him.[85] The question of originality in relation to authorship is another matter entirely. This will be briefly discussed in the sixth part in relation to the authorship of photographs in Nigeria and South Africa against the backdrop of the monkey selfie case.

Ginsburg's principles can be relied upon when considering the authorship question within the Nigerian and South African contexts. This will become apparent in the sixth part below when the provisions of the Nigerian *Copyright Act* and SA *Copyright Act* relating to the authorship of photographs will be examined. However, it is important to briefly determine the related concept of copyright ownership, and subjective rights.

4 Copyright ownership under the Nigerian Copyright Act and SA Copyright Act

Copyright ownership rights have both internal and external effects. The internal effect of copyright ownership reflects in the power of authors to "control the integrity of their works and benefit from their exploitation".[86] On the other hand, the external effect is manifest in the ability to control the manufacture and distribution of a copyright work, which in turn attracts investments and helps to optimise the economic benefits from the exploitation of the work.[87]

The inquiry into the concept of copyright ownership would lead to an analysis of the Nigerian *Copyright Act* and the SA *Copyright Act*. This is so because these statutes determine the extent of the ownership of copyright in a work. Even so, as has now been already too frequently repeated, the author is generally vested with the first ownership of copyright in a work.

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81 *Feldman v EMI Music SA (Pty) Ltd/ EMI Music Publishing SA (Pty) Ltd* 2010 1 SA 1 (SCA); *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd* 2006 4 SA 458 (SCA) (hereafter, *Haupt v BMI*).

82 Also see ss 2 and 3 of the Nigerian *Copyright Act*; ss 3 and 4 of the SA *Copyright Act*.

83 Asein *Nigerian Copyright Law and Practice* 113.

84 See *ICIC (Directory Publishers) Ltd v Ekko Delta (Nig) Ltd* 1977-1989 2 IPLR 32; *Haupt v BMI*.

85 Oriakhogba 2015 *SAIPLJ* 40.

86 Seignette "Authorship, Copyright Ownership" 115.

87 Seignette "Authorship, Copyright Ownership" 115.

Every other person derives ownership from the author. Ownership may be vested by agreement in the form of assignments, and exclusive or non-exclusive licences between the author and the subsequent owner.[88] Also, the ownership of copyright may pass by way of succession: that is, from the author to the beneficiaries of his estate.[89] Furthermore, it may vest depending on the relationship between the author and the person deriving ownership from the author. Such a relationship may be that of employer/employee or commissioner/independent contractor. In such circumstances, the vesting of ownership varies from jurisdiction to jurisdiction.

For instance, the Anglo-American approach is to vest the ownership of works created by an author in the course of his employment or in the course of carrying out a commissioned work on the author's employer or the person who commissioned the work, except where the author has agreed otherwise with his employer or the person who commissioned the work as the case may be.[90] This same approach also seems prevalent in Africa.[91] It may be said that in the jurisdictions with this approach, placing ownership of copyright in works made in the course of employment or pursuant to a commission on the employer or commissioning party seems to be the general rule. The justification of this approach may be found in the presumption that in such circumstances, the employer or commissioning party is the person who bears the risks involved in the "creation, production, aggregation, marketing and presentation of the work"[92] and, as such, should be conferred with ownership. However, Asein has dismissed the approach as unfair to the author because it "goes against the spirit of creativity and could result in a veiled rip-off on the author who is supposed [...] to be the primary object of the protection provided by the copyright system."[93] Even so, the approach does not affect the moral rights of authors; neither does it change the fact that the subsistence of copyright must be determined in relation to the author.[94]

88 Section 11 of the Nigerian *Copyright Act*; s 22 of the SA *Copyright Act*.
89 Section 11 of the Nigerian *Copyright Act*; s 22 of the SA *Copyright Act*.
90 For instance, see s 11 of the UK *Copyright, Designs and Patents Act,* 1988; s 201 of the US *Copyright Act,* 1976; ss 35(5) and (6) of the Australian *Copyright Act* 63 of 1968; s 13(3) of the Canadian *Copyright Act* c C-42, RSC 1985.
91 For instance, see s 11 of the Gambian *Copyright Act,* 2004; s 7 of the Ghanaian *Copyright Act,* 2005; s. 31(1) of the Kenyan *Copyright Act,* 2001; s 15(4) of the Tanzanian *Copyright Act,* 1999; s 10(3) of the Zambian *Copyright and Performance Act* 1994; s 14(5) of the Zimbabwean *Copyright and Neighbouring Rights Act,* 2000.
92 Seignette "Authorship, Copyright Ownership" 115.
93 Asein 2007 *IIC* 299.
94 Dean *Handbook of South African Copyright Law* 1-42 para. 5.3.11.

South Africa also adopts the Anglo-American approach. Specifically, it is contained in section 21 of the SA *Copyright Act* and it is firmly established.[95] However, special provisions are made in respect of the ownership of copyright in works produced from publicly or state financed research and development in South Africa. These provisions are contained in the *Intellectual Property Rights from Publicly Financed Research and Development Act* 51 of 2008 (PFRD Act). An in-depth analysis of the PFRD Act is beyond the scope of this work.[96] However, the PFRD Act dictates the ownership of copyright in works created from state-financed research.[97] It does not apply to the ownership of copyright works like theses, dissertations, articles, handbooks, or any other publication, which is associated with conventional academic work in the ordinary course of business.[98] According to Dean, copyright ownership in the works falling within the purview of the PFRD Act is

> conferred on the person (including a juristic person) receiving the funding. That person [...] is not necessarily the author of the work, and in most instances would be the institution at which, or under the auspices of which, the author is engaged in study or research.[99]

The position in Nigeria is different from the Anglo-American approach. Here, the pre-eminence of the author as far as copyright ownership goes seems to be maintained. Put differently, author-ownership of copyright seems to be the general rule under the Nigerian *Copyright Act*.[100] Accordingly, in Nigeria, the ownership of copyright in both commissioned works and works authored in the course of employment vests in the author.[101] The author may waive this right by a written stipulation in the contract between him and his employer or the party commissioning the work.[102]

Apart from this distinction, Nigeria and South Africa have the same approach to the ownership of copyright works published in newspapers,

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95 See *King v South African Weather Services* 2009 3 SA 13 (SCA); *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* 2014 2 All SA 461 (GJ).

96 Generally, see Dean *Handbook of South African Copyright Law* 1-45 – 1-48, para 5.6; Tong 2010 *JIPLP* 409; Ncube *et al* "Effects of the South African IP Regime" 282; Hobololo 2015 *SAIPLJ* 1; Bansi and Reddy 2015 *Procedia* 185.

97 Sections 3 and 4 of the PFRD Act.

98 Section 1 of the PFRD Act.

99 Dean *Handbook of South African Copyright Law* 1-46 para 5.6.4.

100 It should be noted that this has not always been the case in Nigeria. S 9 of the defunct *Copyright Decree* of 1970 adopted the Anglo-American approach. See *Sonora Gentil v Tabansi Agencies Ltd* 1977-1989 2 IPLR 1-31; *Joseph Ikhuoria v Campaign Services Ltd & Anor* 1977-1989 2 IPLR 316-335.

101 Sections 10(2)(a) and (b) of the Nigerian *Copyright Act*.

102 Sections 10(2)(a) and (b) of the Nigerian *Copyright Act*.

magazines and periodicals. In such circumstances, the proprietor of the newspaper, magazine or periodical is conferred with the ownership of the copyright in the work

> in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work.[103]

Another similarity shared by the copyright systems of both countries relates to the ownership of copyright works created under the direction or control of the government or prescribed international bodies. In such circumstances, the ownership of copyright vests in the government of the respective countries or the particular prescribed international body as the case may be.[104]

5 Copyright ownership and the concept of subjective rights

From the discussion so far, it is apparent that the author of a work is the default owner of copyright in a work under the Nigerian *Copyright Act* and the SA *Copyright Act*. Also, the author must be either a natural or a juristic person as the case may be. As seen from the discussion so far, the requirement of a natural or juristic person as author is linked to issues of transfer and succession in respect of copyright ownership as these can be resolved only by reference to the human author or the juristic author as the case may be.[105] Moreover, ownership derived by way of employment contracts or commissions can be made possible only by reference to the human author. Thus, ascribing authorship to non-human animals will have serious implications on the exercise of ownership rights over copyright works.

The implications may be better explained through the lens of the concept of subjective rights. The concept of subjective rights connotes the relationship or correlation between a legal subject and a legal object.[106] A legal subject can be either a natural or a juristic person, but it cannot be a non-human

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103 Section 21(1)(b) of the SA *Copyright Act*; s 10(3) of the Nigerian *Copyright Act*. See *Peter Obe v. Grapevine Communications Ltd* 2003-2007 5 IPLR 354-384.

104 Sections 5 and 21(2) of the SA *Copyright Act*; ss 4 and 10(5) of the Nigerian *Copyright Act*; *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 2002 ZASCA 11 (25 March 2002).

105 *Naruto v Slater III* 16-18.

106 *Universiteit van Pretoria v Tommie Meyer* 1977 4 SA 376 (T); *Kain v Kahn* 1986 4 SA 251 (C).

animal. On the other hand, legal objects are things: movable or immovable (including non-human animals); corporeal or incorporeal.[107] The meaning of the concept of subjective rights is two-fold. First, it is the right or entitlement which a legal subject, supported by a legal regime, possesses over a legal object. This right empowers the legal object to use, enjoy and/or dispose the legal object within the boundaries of the law conferring the right. Secondly, and flowing from the first, the concept connotes the capacity of the legal object to sue third parties against undue interference with the object, or to authorise third parties to use the object.[108]

Although the subjective rights concept is firmly established in South African law, it is also relevant within the Nigerian context especially as it relates to copyright ownership and suing for copyright infringement. Generally, only natural and juristic persons have legal personality in Nigeria. Thus, only such persons can validly initiate legal action in Nigerian courts. Non-juristic persons, such as non-human animals, do not have right of action. Neither can an action be instituted against them.[109] Specifically, sections 16 and 19 of the Nigerian *Copyright Act* limit rights of action for copyright infringement to owners, assignees and exclusive licensees of the copyright, and collecting societies approved by the Nigerian Copyright Commission.

Moreover, the subjective rights concept aligns with the theories that have been advanced for the justification of intellectual property generally, and copyright in particular. From a review of authoritative literature, Fisher[110] summarised the theories into the natural rights theory, utilitarian theory, economic theory and the social planning theory. A discussion of these theories is beyond the scope of this work. It suffices to note that the theories, taken together, identify the personality of the author[111] (a natural or juristic person) as the centre-point of copyright law. Thus, copyright is justified as a means of enabling authors to derive some reward or compensation for their skill and labour, while promoting creativity for the greater societal good.

In effect, within the context of copyright law, the concept of subjective rights implies the entitlement or power of the author (a legal subject) to claim

107 Generally, see Du Plessis *Introduction to Law*.

108 Van der Merwe 2013 *De Jure* 1039; Du Plessis *Introduction to Law*.

109 See *Fawehinmi v NBA (No 2)* 1989 2 NWLR Pt 106 558; *Access Bank v Agege Local Government* 2016 LPELR-40491 (CA).

110 Fisher Date Unknown https://cyber.harvard.edu/people/tfisher/iptheory.pdf.

111 For a discussion within the context of the Monkey Selfie case, see Bakhariev 2015 https://www.law.lu.se/webuk.nsf/(MenuItemById)/JAMR32exam/$FILE/The%20Changing%20Concept%20of%20Authorship.%20Case%20of%20A%20Monkey%20Selfie,%20Iegor%20Bakhariev.pdf.

ownership over the copyright a (legal object) in the copyright works. Subject to relevant copyright exceptions,[112] the power of the author includes the right of the author to grant third parties access to the copyright works and to sue third parties for the infringement of copyright in the works.[113] The power also includes the capacity of the author to transfer the ownership of the copyright by way of assignment, licences, or testament. If the author dies intestate, such ownership can pass to the beneficiaries of the author by the operation of law.[114] Furthermore, the author's power over the copyright in a work extends to the author's moral rights over the work. Moral rights are the inalienable rights of an authors to be identified as such in their works, and to prevent unauthorised changes of their works that are prejudicial to their honour and reputation.[115]

6 Authorship of photographs under the Nigerian Copyright Act and the SA Copyright Act

It was asserted above that for one to successfully claim authorship, it must be shown that the work under consideration is original to that person. A detailed examination of the concept of originality is beyond the scope of this paper.[116] It suffices now to state that the Nigerian *Copyright Act* and the SA *Copyright Act* do not define originality.[117] The Nigerian Copyright Act gives only an inkling by stating that sufficient effort must have been expended in creating the work.[118] Nonetheless, existing authorities suggest that the concept of originality under the Nigerian *Copyright Act* follows the traditional UK style objectivist or "sweat of the brow" standards, which requires substantial skill and labour for originality.[119]

The same can be said of the SA *Copyright Act*,[120] although recent case law shows that the South African courts may be willing to plot a middle course

112 For copyright exceptions, see Second Schedule to the Nigerian *Copyright Act*; s 12-19B of the SA *Copyright Act*.

113 Sections 15-16 of the Nigerian *Copyright Act*; ss 23-25 of the SA *Copyright Act*.

114 Section 11 of the Nigerian *Copyright Act*; s 22 of the SA *Copyright Act*.

115 Section 12 of the Nigerian *Copyright Act*; s 20 of the SA *Copyright Act*.

116 See Harms 2013 *PELJ* 488; Abrams 1992 *LCP* 3; Gervais 2002 *J Copyright Soc'y USA* 949; Drassinower 2003-2004 *UOLTJ* 105.

117 Section 2(1) of the SA *Copyright Act*.

118 Section 1(2)(a) of the *NCA*.

119 Ekpa 2014 *KSUBJPL* 76; Ugbe 2002 *UniMaid LJ* 23; *Yemitan v Daily Times* 1977-1989 2 IPLR 141; *Ifeanyi Okoyo v Prompt and Quality Services* 2003-2007 5 IPLR 117; *Yeni Anikulapo-Kuti v Iseli* 2003-2007 5 IPLR 53.

120 Harms 2013 *PELJ* 488; *Kalamazoo Division (Pty) Ltd v Gay* 1978 2 SA 184 (C); *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 4 SA 123 (C); *Saunders Valve Co Ltd v Klep Values (Pty) Ltd* 1985 1 SA 646 (T); *Waylite Diaries CC v First National Bank Ltd* 1995 1 SA 645 (A).

towards a "skill, judgment and labour" standard in the definition of originality,[121] just like their Canadian counterparts.[122] This is deducible from the reliance by the South African Supreme Court of Appeal (SCA) in the case of *Haupt v Brewers Marketing Intelligence*[123] on the Canadian case of *CCH Canadian Ltd v Law Society of Upper Canada*.[124] However, it is arguable that the SCA merely referred to the Canadian case only to the extent that the Canadian case emphasised that creativity was not required to show originality.

The foregoing discussion is important here. As opposed to other copyright works such as literary works, it appears that photographs can be produced automatically, mechanically, and without any effort or mental input reflecting true originality by merely clicking the shutter.[125] However, modern photography suggests that the creation of a photograph involves some intellectual and/or creative element,[126] and as such would require a higher standard than the originality standard under the Nigerian *Copyright Act* and SA *Copyright Act*. Even so, cases decided based on such higher standards may afford useful guides when determining the authorship of a photograph under the SA *Copyright Act* in particular, because of the wording used in connoting authors of photographs. The cases will be discussed shortly. For now, it is important to highlight the provisions of the Nigerian *Copyright Act* and the SA *Copyright Act* relating to photographs.

The Nigerian *Copyright Act* protects photographs, irrespective of artistic quality, as artistic works.[127] Even so, it does not specifically define photographs. It merely excludes photographs comprised in a cinematograph film from protection as artistic works.[128] However, the author of a photograph under the Nigerian *Copyright Act* is defined as the person who took the photograph.[129]

Unlike the Nigerian *Copyright Act*, the SA *Copyright Act* defines a photograph to mean "any product of photography or of any process analogous to photography, but does not include any part of a cinematograph

121 *Haupt v BMI*.
122 See *CCH Canadian Ltd v Law Society of Upper Canada* 2004 1 SCR 339 (hereafter, *CCH*).
123 *Haupt v BMI*.
124 *CCH*.
125 Harms 2013 *PELJ* 488; Guadamuz 2016 *IP Review*.
126 Harris 2014 http://documents.jdsupra.com/60a4e7eb-5cc8-490e-83b4-f9815553a294.pdf.
127 Section 51(1) of the *NCA*.
128 Section 51(1) of the *NCA*.
129 Section 51(1) of the *NCA*.

film".[130] However, like the Nigerian *Copyright Act*, the SA *Copyright Act* protects photographs as artistic works, irrespective of their artistic quality.[131] Under the SA *Copyright Act*, the author of a photograph is the person responsible for the composition of the photograph.[132]

A major distinction between the SA *Copyright Act* and Nigerian *Copyright Act* is apparent from the foregoing. The threshold for authorship of photographs under the Nigerian *Copyright Act* appears lower than that of the SA *Copyright Act*. This is underscored by the apparent difference between "composing" and "taking" a photograph. As shown in the cases examined below, "composing" a photograph connotes taking deliberate steps to arrange the visual elements, lighting, angle and ambience of an image. It is a calculated intellectual act with an anticipated outcome. It also involves the process of selection after initial composition and taking. On the other hand, "taking" a photograph would mean simply clicking or pressing the shutter of the camera.[133] Furthermore, the cases examined below evince the dynamics of modern photography, which goes beyond the mere "taking" of a photograph to include the more intellectual act of "composing" the photograph.

First is the case of *Painer v Standard Verlags GmbH* decided by the Court of Justice of the European Union (CJEU).[134] The case concerns the portrait photograph of an Austrian teenage girl who was kidnapped and held captive for more than 8 years by her captors. Shortly after the girl was released, the press in Austria and Germany published the portrait photograph, which was taken by the claimant before the girl's kidnapping. The claimant objected to the publication of the portrait photograph on the grounds that she owned the copyright in the photograph. In their defence, the press claimed that that copyright did not subsist in the photograph, since it was merely a standard school portrait, and that it was not an original work. After restating the EU standard for originality, which is that the work must be the "author's own intellectual creation",[135] the CJEU held that copyright exists in a photograph

130 Section 1 of the SA *Copyright Act*.
131 Section 1 of the SA *Copyright Act*
132 Section 1 of the SA *Copyright Act*
133 See Naryskin 2018 https://photographylife.com/what-is-composition-in-photography/; Wienand 2012 http://www.farrer.co.uk/Global/Briefings/10.%20Media%20Group%20Briefing/Copyright%20protection%20in%20photographs.pdf; Reischl 2012 *YEEH* 533; *Temple Island Collection Ltd v New English Teas Ltd* 2012 EWPCC 1; Harms 2013 *PELJ* 488.
134 *Painer v Standard Verlags GmbH* (unreported) case number C-145/10 of 1 December 2011 (hereafter *Painer v Standard*).
135 *Painer v Standard* para 87.

if "the author was able to express his creative abilities in the production of the work by making free and creative choices."[136] The CJEU further gives an indication of what "creative choices" in respect to photography involve, as follows:

> In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a [...] photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.[137]

According to Logue, the CJEU

> focused on the preparation and execution of the photograph [...] but left open the possibility that post-photograph processing, including digital processing, could be sufficient to give rise to copyright in a photograph.[138]

Nonetheless, the reasoning in the second case, *Temple Island Collection Ltd v New English Teas Ltd*,[139] which applied the same standard as the first, further demonstrates modern photography. The case came before the UK Patent County Court. It involves a largely black and white image of the UK Parliament and Big Ben with a bright red bus travelling across Westminster Bridge. The photograph, owned by the claimant, was used on London souvenirs. The defendant, a tea company, made a similar picture for a publicity campaign. The court had to determine whether copyright existed in the photograph. The court gave judgment in favour of the claimant. In this regard, it held, per Birss QC, that:

> The claimant's work is original. It is the result of [the photographer's] own intellectual creation both in terms of his choices relating to the basic photograph itself: the precise motif, angle of shot, light and shade, illumination, and exposure and also in terms of his work after the photograph was taken to manipulate the image to satisfy his own visual aesthetic sense. The fact that it is a picture combining some iconic symbols of London does not mean the work is not an original work in which copyright subsists. The fact that, to some observers, icons such as Big Ben and a London bus are visual clichés also does not mean no copyright subsists. It plainly does.[140]

It should be emphasised that the originality standards applied in the above cases differ from and are higher than the "sweat of the brow" standard that the Nigerian *Copyright Act* and SA *Copyright Act* align with. Still, it is

136 *Painer v Standard* para 89.
137 *Painer v Standard* paras 90-91.
138 Logue 2014 *LSG* 26.
139 *Temple Island Collection Ltd v New English Teas Ltd* 2012 EWPCC 1 (hereafter *Temple Island*).
140 *Temple Island* 51.

arguable that the courts in South Africa would be willing to adopt the reasoning in the cases in relation to the authorship of a photograph. This may not be so in the case of Nigeria. This is because as the above cases show, modern photography includes "composing" (SA *Copyright Act*), and goes beyond the mere "taking" (Nigerian *Copyright Act*) of a photograph.

Even so, it appears that the courts in both countries may find a better guide in the case of *Antiquesportfolio Com Plc v Rodney Fitch and Company Ltd*,[141] where Neuberger J reasoned that

> [o]riginality presupposes the exercise of substantial independence, skill, labour, judgment and so forth. […] It will be evident that in photography there is room for originality in three respects. First, there may be originality which does not depend on creation of the scene or object to be photographed, or anything remarkable about its capture, and which resides in such specialities as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques […]. Secondly, there may be creation of the scene or subject to be photographed […] Thirdly, a person may create a worthwhile photograph by being at the right place at the right time. Here his merit consists of capturing and recording a scene unlikely to recur.[142]

6.1 Ginsburg's principles and authorship of photographs under the Nigerian Copyright Act and SA Copyright Act

The judicial pronouncements in the cases examined above seem to resonate with Ginsburg's six principles of authorship. The preparation for the photograph as regards the setting of the camera to get a good ambience, light and shade, and general composition for the photograph are issues that place mind over muscle and machines (the first and second principles). Further, the preparation for the photograph along with the selection process after taking the photograph speaks to the issue of creativity. It is immaterial that the selection was done with the aid of computer software and other equipment (the fourth principle). In addition, although this is not always the case, the effort and creativity exerted in creating the photograph may presume the intent of authorship in favour of the photographer (the fifth principle). Such a presumption can be raised in favour of the person who generally arranges for the creation of the photograph even though the person did not click the shutter of the camera (the sixth principle). Importantly, the photograph must be shown to be original to the person (the third principle) and, as stated above, Neuberger J's reasoning above may form a better guide for Nigerian and South African

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141 *Antiquesportfolio Com Plc v Rodney Fitch and Company Ltd* 2001 ECDR 5 (hereafter *Antiguesportfolio*).

142 Harms 2013 *PELJ* 488, 493.

courts in determining the originality of photographs under the Nigerian *Copyright Act* and SA *Copyright Act* respectively.

In effect, assuming the monkey selfie case arose in Nigeria or South Africa, it is apparent that Naruto would not be regarded as the author of the photograph. The whole idea of authorship under the Nigerian *Copyright Act* and *SA Copyright Act* centres on a legal person (a human being or a corporation). The photograph must be a creation of the mind and the direct effort of a person who arranges for the photograph to be taken and actually clicks the shutter, or the indirect effort in the form of arranging for the photograph to be created. Granted, the threshold for authorship under the Nigerian *Copyright Act* is low, as shown above, such that it may seem that the clicking of the shutter by Naruto, as in the monkey selfie case, is enough to confer authorship upon it. However, the fact that the Nigerian *Copyright Act* relates to legal persons alone would displace any possible argument in favour of Naruto in Nigerian courts.

Moreover, as shown above, the concepts of subjective rights in South African law and legal personality in Nigerian law connote the existence of a relationship between a legal subject (a natural or juristic person) and a legal object (a moveable or immovable property). In terms of copyright law, this relationship can exist only between a natural or juristic person and the copyright in a work. This is so because only a natural or juristic person can exercise and enjoy the ownership rights over copyright work. Only a natural person can transfer copyright, pass copyright on by way of succession, and initiate action for the enforcement of copyright against an alleged infringer. These rights cannot be exercised or enjoyed by a non-human animal such as Naruto in the monkey selfie case.

7 Conclusion

The parties in the monkey selfie case reached settlement. Still, it cannot not be said for sure that there is no possibility for future litigation on the monkey selfie. The case was not heard on the merit. It was truncated by a dismissal order because the US legislature never intended copyright protection under the US *Copyright Act* to extend to non-human animals. The dismissal order was recently confirmed by a three-judge panel of the appellate court. A judge of the appellate court called for the case to be heard *en banc*: that is, by an eleven-judge panel of the appellate court, which was denied.

There is no general statutory definition of authorship under the Nigerian *Copyright Act* and the SA *Copyright Act*, but Ginsburg's six principles of

testing authorship are a very useful guide for this purpose. The principles are in tune with authorship in modern photography. For authorship of a photograph to be established under the Nigerian *Copyright Act* and the SA *Copyright Act*, it must be shown that a legal person (a human being or a corporation) created the photograph. The standard for establishing such authorship under the Nigerian *Copyright Act* is lower than it is under the SA *Copyright Act*. The Nigerian *Copyright Act* grants the authorship of a photograph to the person who "takes" it, while the SA *Copyright Act* confers authorship on the person who composed the photograph.

Authors are owners of copyright by default under the Nigerian *Copyright Act* and the SA *Copyright Act*. Such authors must be natural or juristic persons depending on the nature of the copyright work in question. In effect, only natural or juristic persons can own the copyright in a photograph under the Nigerian *Copyright Act* and the SA *Copyright Act*.

Therefore, assuming the monkey selfie case originated from Nigeria or South Africa, the courts in the countries would not reach a different conclusion from the one made by the district court in the dismissal hearing. Indeed, the Nigerian *Copyright Act* and the SA *Copyright Act* do not envisage the conferral of authorship in particular, and copyright ownership in general, to a non-human animal.

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List of Abbreviations

CJEU	Court of Justice of the European Union
CJLA	Columbia Journal of Law and the Arts
DePaul L Rev	DePaul Law Review
EU	European Union
Hastings Comm & Ent LJ	Hastings Communication and Entertainment Law Journal
Hous L Rev	Houston Law Review
IIC	International Review of Intellectual Property and Competition Law
IP Review	Internet Policy Review
J Copyright Soc'y USA	Journal of the Copyright Society USA
JIPLP	Journal of Intellectual Property Law and Practice
KSUBJPL	Kogi State University Bi-Annual Journal of Public Law
LCP	Law and Contemporary Problems
LSG	Law Society Gazette
NAUJILJ	Nnamdi Azikiwe University Journal of International Law and Jurisprudence
PELJ	Potchefstroom Electronic Law Journal
PETA	People for the Ethical Treatment of Animals
PFRD Act	Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008
SAIPLJ	South African Intellectual Property Law Journal
UK	United Kingdom
UniMaid LJ	University of Maiduguri Law Journal

UOLTJ	University of Ottawa Law and Technology Journal
US	United States of America
USCO	United States Copyright Office
WIPO	World Intellectual Property Organisation
WIPO Magazine	World Intellectual Property Organisation Magazine
YEEH	Yearbook of Eastern European History