

“Selfie” Copyright Does Not Belong To Monkey Who Took It

BY JUDITH GRUBNER OF ARNSTEIN & LEHR ON FEBRUARY 17, 2016

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When is a photographer not the “author” of a photograph for copyright purposes? According to a federal judge in San Francisco, when the photographer is a monkey!

Sometime in 2011, a crested macaque monkey living on the island of Sulawesi, Indonesia, used the camera of [nature photographer David Slater](#) to take a number of self-portraits, which became famous as the “[Monkey Selfies](#).” Slater claimed to be the author and the copyright owner of the Monkey Selfies and self-published a [book](#) through Blurb, Inc. containing copies of the photographs. Slater’s company, Wildlife Personalities, Ltd., also claimed an authorship interest in the Monkey Selfies, through ownership of the U.K. copyright.

In 2015, People for the Ethical Treatment of Animals (“[PETA](#)”) and primatologist [Antje Engelhardt](#) of the Max Planck Society brought suit against Slater for copyright infringement as “Next Friend” for

the Macaca Nigra Project brought suit against Slater for copyright infringement, as Next Friends for a male macaque named “Naruto,” in the U.S. District Court for the Northern District of California in San Francisco. [See Narute Complaint [Part 1](#) and [Part 2](#)] Defendants filed motions to dismiss. On January 28, 2016, Judge William Orrick [dismissed the case](#), finding that Naruto did not have standing to sue under the Copyright Act because animals cannot be “authors” and therefore cannot own copyrights.

PETA contended that the “highly intelligent” Naruto was accustomed to seeing cameras, observing humans handling cameras, hearing camera mechanisms in action, and seeing them being used by humans for his entire life, as the reservation where he lives is next to a human village visited by tourists and photographers. Therefore, PETA argued, Naruto understood what he was doing when he manipulated Slater’s unattended camera to take the Monkey Selfies and was the author of those photographs. PETA asserted that Slater, by claiming to be the author of those photographs and selling copies of the images for profit, was an infringer of Naruto’s copyrights. PETA requested that defendants be enjoined from further publication of the photos and that Naruto be awarded the defendants’ profits from sale of the photos, to be administered and protected by the Next Friends on Naruto’s behalf. PETA wants the funds used “for the benefit of Naruto, his family, and his community, including the preservation of their habitat.”

Although the U.S. Court of Appeals for the Ninth Circuit has previously stated in *Cetacean Cmty. v. Bush* that a “statutorily authorized suit in the name of an animal” can constitute a “case or controversy,” Slater argued that Naruto’s claim could only survive if the monkey established statutory standing under the Copyright Act, meaning a particular plaintiff was granted a right to sue by the specific statute under which suit was brought. Judge Orrick required that Congress plainly express a clear intention to authorize animals to sue under the Copyright Act, which he found they had not done.

The U.S. Copyright Act requires that an original work of authorship must be fixed in a “tangible medium of expression.” That fixing must be done “by or under the authority of the author.” Because the Act does not define “author” or “works of authorship,” PETA argued that the Act has “no definitional limitation” preventing animals from authoring copyrightable works Slater countered that the Act does not expressly confer any rights on animals. Although PETA contended that refusing to grant Naruto a copyright “would depart from well-established norms,” Judge Orrick found no case that defined “authors” to include animals, and that there was no mention of animals anywhere in the Copyright Act, only references to “persons” or “human beings.” The judge relied on the *Cetacean* decision, where the Ninth Circuit examined the Endangered Species Act, Marine Mammal Protection Act, and National Environmental Policy Act and concluded that none of those statutes “intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue.”

Judge Orrick also relied on the (non-binding) [Compendium of U.S. Copyright Office Practices \(3d Ed. December 2014\)](#), which states in § 306 that the work of authorship must be created by a *human being* to be copyrightable, and provides in § 313.2 examples of ineligible works of nature, animals, or plants lacking human authorship The first such example of noncopyrightable work is “A photograph taken by a monkey.”

To PETA’s argument that disqualifying Naruto as an author is “antithetical” to the “tremendous [public] interest in animal art,” the judge indicated that was an argument to be made to Congress and the President, not to him. Although he dismissed the complaint, he granted PETA leave to file an amended complaint within 20 days (by February 18, 2016).

In dismissing PETA’s complaint, Judge Orrick did not rule that Slater owned the copyrights in the Monkey Selfies. That issue is front and center in Slater’s claim that Wikimedia Foundation violated his copyright by posting some of the images to its public domain site, Wikimedia Commons. Wikimedia

contends that the photos are in the public domain because they were taken by an animal and not a person. Slater issued a press release through his Facebook account about winning the PETA case. In response to comments by Facebook fans, he said that he intends to sue Wikimedia for ruining his licensing program for the Monkey Selfies. Slater has taken the position that he owns the copyright because he was the “intellect behind the photos,” that he set up the tripod on which the camera rested, provided settings, and held the tripod during the shoot, while the monkey merely pressed the shutter control.

As a sidelight, Blurb, owner of the website where Slater self-published his book, contended in its motion to dismiss the case that PETA was suing on behalf of the *wrong monkey* because “Naruto” doesn’t exist and PETA has no proof that “he” took the photos. Naruto is allegedly male and Slater’s book describes the monkey who took the photos as “Ella,” a female macaque. Judge Orrick did not consider that issue in his opinion.

U.S. law encourages federal judges to allow a complaint to be amended unless the complaint defects could not possibly be cured. It is difficult to see how PETA could amend its complaint to overcome the standing hurdle when Judge Orrick so completely rejected the rights of animals to standing under the Copyright Act, but the judge chose not to bar them from trying. Naruto/PETA have not yet filed an amended complaint or a notice of appeal. So far, as Slater’s attorney wrote in his motion to dismiss, “Monkey see, monkey sue is not good law – at least not in the Ninth Circuit.”

Although the case has brought notoriety to Slater (and the macaque tribe) and amusement to court watchers, there is serious money involved in this dispute and potential future disputes involving non-human created works. If artificial intelligence progresses to the point where computers or other machines create artistic works, it appears that they, too, would be barred from claiming a copyright in those works. In addition to photographs taken by monkeys, the Copyright Office *Compendium* relied on by Judge Orrick also rejects the copyrightability of murals painted by elephants, songs authored by the Holy Spirit (or other works purportedly created by divine or supernatural beings), and works produced by a machine without any creative input or intervention from a human author. Unless public opinion changes greatly, the likelihood of the U.S. Congress amending the Copyright Act to give author status in such circumstances is low.

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