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Recalibrating Copyright

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THE “MONKEY SELFIES”

- Photographer David Slater went to Indonesia to capture photographs of endangered crested macaques
- After days in the jungle without success, he set up his tripod, arranged his lenses and filters, and attached a lead that would allow the macaques to press the shutter
- The macaques eventually figured it out, and reveled in taking their own pictures
- Slater then self-published the now-famous “monkey selfies” in a book using Blurb’s online publishing platform

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IT'S A JUNGLE OUT THERE

- Wikipedia published the monkey selfies on its own website, claiming they were public domain because: (1) the macaques, rather than Slater, pressed the shutter; and (2) animals cannot own copyrights
- PETA and a primatologist then sued Slater and Blurb for copyright infringement in the name of Naruto, whom they claimed was the real author and copyright holder
  - The primatologist claimed to have known Naruto since birth and to recognize him in the photographs

PROCEDURAL BACKGROUND

- Motion to dismiss raised three main issues:
  - Can a monkey (or other non-human) own a copyright?
  - Do non-humans have standing to sue under the Copyright Act?
  - Were PETA and the primatologist appropriate parties to act on Naruto's behalf?
- District court dismissed for lack of standing, finding the Copyright Act does not contain explicit approval for animal lawsuits, as required under *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004).
- PETA (but not the primatologist) appealed to the Ninth Circuit

THE OPINION

Naruto v. Slater,

888 F.3d 418 (9th Cir. 2018)

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DISMISSAL AFFIRMED ON LACK OF STANDING

- Majority: "Under *Cetacean*, the complaint includes facts sufficient to establish Article III standing":
  - Concrete and particularized economic harms
  - Redress is available
  - Naruto is alleged author and owner
- However, PETA cannot act as next friend:
  - "PETA seems to employ Naruto as an unwitting pawn in its ideological goals. Yet this is precisely what is to be avoided by requiring next friends to have a significant relationship with, rather than an institutional interest in, the incompetent party." 888 F3d at 421 n.3.
  - "[W]e decline to recognize the right of next friends to bring suit on behalf of animals, absent express authorization from Congress." *Id.* at 422.

NARUTO LACKS STATUTORY STANDING UNDER THE COPYRIGHT ACT

Article I, Section 8, Clause 8 of the U.S. Constitution

- [Congress shall have power] “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.”

COPYRIGHT ACT

- No *express* authorization of standing for animals
  - Copyright Act does not define “author” or “authorship”
  - “Copyright owner” is merely defined as “the owner” of “any one of the exclusive rights comprised in a copyright,” e.g., to copy, distribute, create derivative works.
  - A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

COPYRIGHT ACT

- No *implied* authorization for animal standing, when evaluating the statute's language as a whole
  - Defines "children" as a person's "immediate offspring, whether legitimate or not, and any children legally adopted by that person"
  - "Widow" and "widower" are defined as surviving spouse
  - These concepts are uniquely human

COPYRIGHT ACT

- Rejected PETA's argument that Copyright Act contemplates standing for animals because it permits corporations to be authors and own copyrights (e.g. works for hire)
  - Supreme Court has repeatedly held that corporations are "persons"
  - They are formed and owned by humans, not animals

COPYRIGHT COMPENDIUM

Ninth Circuit did not address the Compendium's "Human Authorship Requirement":

- "[C]opyright law only protects 'the fruits of intellectual labor' that 'are founded in the creative powers of the mind.'"
- Limited to "original intellectual conceptions of the author"
- "To qualify as a work of 'authorship' a work must be created by a human being. Works that do not satisfy this requirement are not copyrightable."
    - E.g., "a photograph taken by a monkey"

NOT WITHOUT A HUMAN AUTHOR

- The Copyright Office recently reaffirmed the requirement of human authorship just last month, upholding a refusal to register artwork entirely created by an AI machine
  - Noted AI inventor Stephen Thaler applied to register the work in 2018, listing “Creativity Machine” as the author and himself as the machine’s owner
  - Application stated that the artwork had been autonomously created by a computer algorithm running on a machine
  - Thaler sought to register the work as a “work-for-hire”

“A RECENT ENTRANCE TO PARADISE”

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HUMAN AUTHORSHIP REQUIREMENT

- The Copyright Office rejected the initial application, citing its Compendium:

> [T]he Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author. The crucial question is "whether the 'work' is basically one of human authorship, with the computer [or other device] merely being an assisting instrument, or whether the traditional elements of authorship in the work (literary, artistic, or musical expression or elements of selection, arrangement, etc.) were actually conceived and executed not by man but by a machine." U.S. COPYRIGHT OFFICE, REPORT TO THE LIBRARIAN OF CONGRESS BY THE REGISTER OF COPYRIGHTS 5 (1966).

HUMAN AUTHORSHIP REQUIREMENT

- The Review Board then stood firm through two rounds of requested reconsideration:
  - "[H]uman authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered."
  - "[C]opyright law only protects 'the fruits of intellectual labor' that 'are founded in the creative powers of the [human] mind.'"
- The Review Board rejected Thaler's argument that the work constitutes a work-for-hire insofar as the Copyright Act allows "non-human, artificial persons such as companies" to be authors:
  - Machines cannot enter binding contracts
  - Work-for-hire goes to ownership, not underlying question of copyrightability
  - Corporations are comprised of humans

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Prepared Questions

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What does the future of fair use look like?

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What are creators' expectations regarding what rights they have in what they've created, how do those expectations relate to the reality of what the law is, and how might those expectations shape the future of creation?

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Is copyright currently holding us back from creating in new ways and/or finding innovative ways to circulate artistic work? If so, how do you envision copyright evolving to eliminate these roadblock and/or provide better incentives for contemporary artists?

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Audience Q&A

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