

Monkey Gets Day in Court

07.26.18 | Linda J. Rosenthal, JD



“A monkey walked into a bar... “

The joke should continue: “Showing the bartender a photo, the primate said: ‘Hey, look at my selfie. I posted it online and it’s already going viral!’”

There was no bar, of course, and monkeys can’t talk. But several years ago in Indonesia, a monkey *did* take a selfie. The selfie was posted online. It went viral. It made money and – because it made money – there was, of course, a lawsuit. Animal-rights group PETA petitioned a federal court in California to act on the monkey’s behalf to claim copyright protection and the proceeds from worldwide circulation.

And that’s no joke.

Monkey Meets Camera

The story begins about six years ago on the Indonesian island of Sulawesi. There, in the Tangkoko Reserve, a crested macaque monkey called Naruto lived peaceably, minding his own business, among others of his endangered species.

David Slater, a British wildlife photographer, makes a living by selling photos of animals around the world in their native habitats. In 2011, he traveled to the Tangkoko Reserve, “shadowing the monkeys” [to] gain their trust.”

I became accepted as part of the troop, they touched me and groomed me ... so I thought they could take their own photograph. It took three days of blood, sweat and tears to get the selfie in which I had to be accepted by the group of monkeys before they would allow me to come close enough to introduce them to my camera equipment.

Mr. Slater explains that he “...set the camera up on a tripod, framed [the shot] up and got the exposure right ... and all you’ve got to do is give the monkey the button to press and lo and behold

you got the picture.”

Monkey Selfie Goes Viral

Images from the Tangkoko trip, including the one with “the charming mug of [Naruto] grinning broadly and buck toothed into the lens” were posted and widely shared online including in 2014 after Slater included it in his book titled *Wildlife Personalities*.

The online site, Wikimedia, also posted and shared the photo but with this credit:

This file is in the public domain, because as the work of a *non-human animal*, it has no human author in whom copyright is vested. (*emph. in orig.*)

Mr. Slater asked the Wikimedia Foundation to remove the image. This request was denied under the reasoning that, since the human photographer did not “press the shutter release,” the “image was not his.”

PETA To The Rescue

This is when nonprofit People for the Ethical Treatment of Animals (PETA) stepped into this international dispute. PETA supported the Wikimedia position of refusing to credit Slater as owner of the rights to Naruto’s image. But the huge animal-rights organization “went further, asserting that the commercial proceeds should benefit Naruto and his similarly situated endangered pals.”

To make the point, PETA filed a lawsuit as “next friend” of Naruto, claiming on the monkey’s behalf that it is Slater who is infringing the copyright of *Naruto*.

The photographer’s reaction: He told the BBC that “the attitude of Peta and Wikipedia ‘stinks’ and is a flagrant breach of his artistic integrity.” He vowed to “vigorously fight for his intellectual property rights in the Naruto photo. Publishing wildlife photos is his way of making a living, ... and he has been losing money because of the alleged violation of his copyright.”

PETA successfully maneuvered jurisdiction and venue rules to steer this copyright infringement lawsuit into federal court in San Francisco and have U.S. copyright law apply to the dispute between Indonesian Naruto and British photographer David Slater.

The lengthy Complaint in *PETA... v. Slater* is also masterful at pleading Naruto’s case in the best possible light, as an almost-human creature with the intellect and dexterity to knowingly and intentionally take a selfie. Excerpts like these are almost convincing:

- Naruto is a free, autonomous six-year-old male member of the *Macaca nigra* species, ... residing in the Tangkoko Reserve....In or around 2011 Naruto took a number of photographs of himself, including one image – the internationally famous photograph known as the ‘Monkey Selfie.’ ***
- The Monkey Selfie is one of a series of photographs ... that Naruto made using a camera left unattended by defendant ... Slater. The Monkey Selfies resulted from a series of purposeful and voluntary actions by Naruto, unaided by Slater, resulting in original works of authorship not by Slater, but by Naruto.
- Slater has publically [sic] admitted that the Monkey Selfies were taken by Naruto.... ****

The Complaint allegations continue in Paragraph 6: “Slater himself admits ... in his book: ‘The recognition that animals have personality and should be granted rights to dignity and property would

be a great thing ... [and] macaques such as Naruto are intelligent-artistic-complex.”
In Paragraphs 25 – 27 of the Complaint, there are additional points:

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Naruto and all crested macaques are highly intelligent, capable of advanced reasoning and learning from experience, [and along with] other primates, including humans, [have] stereoscopic color vision with depth perception and are vision dominant...; seeing their reflection in a motor bike mirror or camera lens, are intensely interesting experiences for them. [Also, like humans, they have] grasping hands and opposing thumbs with the ability to move ... fingers independently....As such, Naruto’s use of his hands in any activity results from his intentional, purposeful, and concentrated action, not mere happenstance or accident.

You see where this is going.

The coup de grace: The Tangkoko Reserve is not, as you may have assumed, in the middle of nowhere. It occupies “a range ... immediately adjacent to a human village ... with attendant cars, motorbikes, tourists, and wildlife photographers and videographers as the Reserve has become an increasingly popular destination for people wanting to see macaques in their natural homeland environment.”

So Naruto and his pals know all about cameras and selfies, and it was the most natural thing in the world for them to want to take some of their own.

A Settlement

Notwithstanding the creative and entertaining allegations in the Complaint, the federal judge in California was not biting. He [ruled in January 2016](#) that U.S. copyright laws are predicated on humans creating works for which copyright protection may apply. Non-humans, apparently, need not apply. PETA [filed an appeal](#) to the Ninth Circuit, arguing that “in every practical (and definitional) sense, he [Naruto] is the ‘author’ of the works”.

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Had the monkey selfies been made by a human using Slater's unattended camera, that human would undisputedly be declared the author and copyright owner of the photographs.

Nothing in the Copyright Act limits its application to human authors... [P]rotection under the Copyright Act does not depend on the humanity of the author, but on the originality of the work itself.

In August 2017, with the appeal pending, the parties came to an agreement. PETA, on Naruto's behalf, would not continue to prosecute the case in court, in return for a promise by Slater to pay over 25% of the proceeds from the world's first and only Monkey Selfie. The money will be applied by PETA for the benefit of Naruto and other members of his endangered species.

At the time the settlement was announced, it was hailed as "potentially a huge victory for animals and advocates, a toehold toward more full rights for animals, or at least higher order animals as judged from a homocentric perspective."

Another Chapter in this Tale

The settlement is not the end of this story, though. Defeat was duly snatched from the jaws of victory.

Why? Because instead of leaving well enough alone, Naruto (by PETA) asked the Ninth Circuit Court of Appeals to drop Naruto's suit and – here's the key part – vacate the trial court's ruling that Naruto had no rights of ownership to the intellectual property.

In April 2018, the Ninth Circuit issued its 41-page ruling, here. The court refused to dismiss the lower court ruling that Naruto was not entitled to protection under the U.S. copyright laws; the matter "had taken up enough of the system's time and was in sufficient legal doubt that the appellate court, rather than simply dismissing the case following the settlement, chose to render a decision."

In a nutshell, the three-judge panel *affirmed* the lower court ruling that Naruto had constitutional (that is, "Article 3") standing to bring the claim, but the federal copyright law – the governing statute – does not "expressly authorize animals to file copyright infringement suits."

In an interesting twist, the court found that People for the Ethical Treatment of Animals had "failed to establish that it had a significant relationship" with Naruto and so did not qualify as "next friend." Nevertheless, the standing issue was "not dependent on the sufficiency of [PETA] as a guardian or "next friend."

In a concurring opinion, though, one of the judges wrote that "PETA's real motivation in this case was to advance its own interests, not Naruto's." To add insult to injury, the court awarded attorney's fees to the photographer. Ouch!

Conclusion

Last year, when the settlement was reached, the Nonprofit Quarterly's editor Ruth McCambridge made the important point that it is "potentially a huge victory for animals and advocates, a [small step] toward more full rights for animals," and "may have profound impact on animal rights practices and cases internationally."

Indeed, that the Ninth Circuit ruled that Naruto had constitutional standing to a bring a claim may turn out to be a "significant transformation of the legal landscape."