

The Copyright Circus Has Finally Left Town

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by J. Michael Keyes



Last Friday, the 9th Circuit Court of Appeals finally put to bed a copyright dispute that many viewed as nothing short of bananas.

Naruto v. Slater—dubbed the “Monkey Selfie” case—raised the novel (if not bizarre) question of whether a non-human primate has standing to sue for infringement under the U.S. Constitution and the

Copyright Act.

In case you have been monkeying around and have not kept up on this case, here is a quick snapshot of what happened and how we got here: Naruto is a “crested macaque,” which as near as I can tell means Naruto is a monkey. At all times relevant hereto, Naruto lived in a wildlife reserve in Indonesia. Back in 2011, Wildlife photographer David Slater—with camera in hand—visited Naruto’s island habitat. Slater left his camera unattended. It was then snatched up by Naruto who ended up taking a number of “selfies.” Slater returned to the U.K. and published a book containing the Naruto selfies. We eventually come to find out that Slater did not obtain a copyright assignment or even a license from Naruto! PETA catches wind of this and, as a “next friend” of Naruto, sues Slater on Naruto’s behalf for copyright infringement in the U.S. District Court for the Northern District of California. Naruto sought injunctive relief, disgorgement of profits, actual damages, and attorneys’ fees. (Side note: Naruto was overreaching a bit on the request for attorneys’ fees because he did not register his selfies before the act of alleged infringement by Slater).

The trial court found the copyright claim to be too far of a walk in the wild, and dismissed the case. The 9th Circuit affirmed. The majority analyzed three issues: (1) whether PETA had standing to bring the case on behalf of Naruto (answer: “no”); (2) whether

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Naruto himself had Article III standing (answer: “yes”); and (3) whether Naruto had statutory standing under the Copyright Act to bring the claim (answer: “no”). In addressing this final issue of standing under the Copyright Act, the majority noted there were “several provisions” of the Act regarding copyright transfers from the “author” to “children” that suggested that animals don’t have standing. There are arguably several other provisions the majority could have cited. For example, each copyright application needs to be “certified” by the claimant. See 17 U.S.C. § 409. How exactly would Naruto go about making such a certification? Moreover, a copyright plaintiff (in certain circumstances) is entitled to elect between statutory damages and actual damages. See 17 U.S.C. § 504(c). How would we know if Naruto made such an election?

In any event, the concurring opinion argued that the whole case was nothing short of a circus and because PETA had no “next friend” standing the case was frivolous and should have been dismissed without any further discussion or analysis.

That might have been the end of the matter for the 9th Circuit, but an “unnamed Ninth Circuit judge” requested a rehearing en banc, which was ultimately denied on Friday by a vote of the entire Court. With that final act, it is now safe to say that “monkey see, monkey sue,” simply will not do at least in the 9th Circuit. But as George Carlin once said, “Just because you got the monkey off your back doesn’t mean the circus has left town.” For all we know, the circus just might be headed to Washington D.C.