Monkeys do not have standing under US Copyright Act

Naruto, a Crested Macaque, by and through his Next Friends, People for the Ethical Treatment of Animals, Inc v David John Slater; Blurb, Inc; Wildlife Personalities, Ltd [US CA 9th Circuit, Unreported, 2018]

# Abstract

*Naruto, a Crested Macaque, by and through his Next Friends, People for the Ethical Treatment of Animals, Inc v David John Slater; Blurb, Inc; Wildlife Personalities, Ltd* [US CA 9th Circuit, Unreported, 2018] affirmed the dismissal by the district court of claims for copyright infringement brought for and on behalf of Naruto, a crested macaque, on the majority basis that the Copyright Act does not specifically authorise animals to file suits for copyright infringement.

# Single Sentence Summary

*Naruto v Slater [unreported, USCA 9th circuit 2018]* dismissed claims for copyright infringement on the basis that animals lack authority to issue such claims.

# Legal context

Following the *Cetacean* case (*Cetacean Cmty v Bush*, 386 F.3d 1169, (9th Cir. 2004)), in which the Court of Appeal found that the Constitution does not expressly deny that animals have standing under Article III, the Court in this case is bound to accept that position unless overturned by an *en banc* hearing. This case then turned on whether PETA met the requirements to be a Next Friend for Naruto, and whether Naruto had standing to sue under the Copyright Act. A Next Friend acts in a situation where a petitioner is unable to litigate their own case, whether through mental incapacity, lack of access to court, or some other similar disability and the next friend has some significant relationship with, and is truly dedicated to the best interests of the petitioner (*Coalition of Clergy v. Bush*, 310 F.3d 1153, 1159–60 (9th Cir. 2002) (*quoting Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001)). Furthermore, the Court had to consider whether Naruto had standing to sue for copyright infringement under the Copyright Act, or whether the provisions of the Act applied only to humans.

# Facts

In 2011, wildlife photographer David Slater spent a period of time with a colony of crested macaques, including Naruto, a seven-year old male, in a reserve on the island of Sulawesi, Indonesia. One of the macaques, allegedly Naruto, took several photos using the camera. Those photographs were later published by Slater and Wildlife Inc in a book which they created through Blurb Inc’s website. The book identified Slater and Wildlife Inc as the owners of the copyright in the photos. In 2015, Dr Antje Engelhardt, and PETA filed a suit for copyright infringement, as next friends on behalf of Naruto, against Slater, Wildlife, and Blurb. The complaint stated that Dr Engelhardt had known, studied, and monitored Naruto since his birth as part of his study of Sulawesi crested macaques for over a decade. It did not allege any specific relationship between PETA and Naruto. The suit was dismissed by the District Court following a motion filed by the defendants that the suit did not demonstrate standing under Article III of the Constitution or the Copyright Act. After submitting a valid appeal, Dr Engelhardt withdrew from the suit, leaving PETA as the sole next friend.

# Analysis

The majority opinion, authored by Bea CJ, considered the sufficiency of PETA’s Next Friend status. Taking the requirements for a Next Friend from *Massie v Woodford (Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001), the Court found that PETA failed the second arm of the test, that it could not show a significant relationship with the petitioner above that which it has with any animal. Therefore, it lacked the ability to stand as next friend. The opinion goes on to assert that even if PETA did have a significant relationship with Naruto (as, indeed, Dr Engelhardt did), this would still not be sufficient to assert Next Friend status. Following *Whitmore v. Arkansas*, 495 U.S. 149 (1990), it asserted that the limits of Next Friends should not be expanded beyond those which are specifically considered in the statute.

Nonetheless, the opinion moved on to consider the standing of the applicant, stating that a finding of no next friend status was not enough to destroy Naruto’s standing to sue (*Naruto*: 10). The Court then established that it found itself bound by *Cetacean Community*, and thus was forced to accept that animals have Article III standing to sue, regardless of the fact that they disagreed with the decision. Unless and until it is overturned by the Supreme Court or an *en banc* hearing of the Court of Appeal (*Miller v Gammie*, 335 F.3d 889, 899 (9th Cir. 2003), the finding stands.

The Court then continued to consider whether Naruto had standing under the Copyright Act. In doing so, it considered the finding of *Cetacean* (386 F.3d 1169, (9th Cir. 2004)), which asserted that if an Act of Congress does not specifically state that animals have standing, then animals do not have standing (*Naruto*: 17). It backed up this finding by pointing to specific parts of the Act which allude to human characteristics, such as ‘children … whether legitimate or not’, ‘widow or widower’ and ‘grandchildren’ (17 U.S.C. §§ 101, 201, 203, 304). Based on the finding of *Cetacean*, and given that monkeys do not marry or have heirs, it affirmed the decision of the lower court, agreeing that Naruto – and more broadly, animals in general – did not have standing under the Copyright Act (*Naruto:* 18).

Smith J concurred in part with the majority opinion, agreeing with the decision of the Court of Appeal to affirm the lower court’s dismissal of the case. However, he disagreed with the discussion of the standing of Naruto under the Constitution and the Copyright Act, asserting that a finding of insufficient standing for PETA as a Next Friend would discharge the Court of its burden, and thus the further discussion was irrelevant. He also asserted that, to reach its conclusion, the majority opinion erred in its application of *Cetacean* as precedent, advocating that the decision of the District Court should be vacated as it was ultra vires (*Naruto*: 19).

# Practical Significance

The conclusion of this case is not shocking. However, it does throw into the public sphere a debate about what constitutes authorship and whether, in light of the development of ever more sophisticated artificial intelligence and technology, as well as the creation of photographs and videos taken with animal interaction – from BBC television shows to thrillseekers placing cameras on their pets’ collars - there is certainly great scope for thoughtful discussion of the intellectual property rights associated with works created or authored by non-humans.