



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
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**Touro Law Review**

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Volume 34  
Number 4 *Dedicated to Professor Ilene Barshay*

Article 20

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2018

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### **Recommended Citation**

Schneider, David (2018) "Why a Monkey's Action of Taking a Selfie Should Expand the Definition of an Author in the Copyright Act," *Touro Law Review*: Vol. 34: No. 4, Article 20.

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## WHY A MONKEY’S ACTION OF TAKING A SELFIE SHOULD EXPAND THE DEFINITION OF AN AUTHOR IN THE COPYRIGHT ACT

*David Schneider\**

### I. INTRODUCTION

In 2011, wildlife photographer David Slater set up a camera on an island in Indonesia and hoped to capture a picture of the Celebes Crested Macaque, an endangered monkey species indigenous to Indonesia.<sup>1</sup> Naruto, a six-year old Celebes Crested Macaque, came upon Slater’s camera and took multiple pictures of himself.<sup>2</sup> Naruto, considered “highly intelligent,” familiarized himself with the operation of the camera by observing humans who used the camera.<sup>3</sup> Multiple parties, including the parties who filed a lawsuit on Naruto’s behalf, claimed copyright to one particular photograph, informally known as the “Monkey Selfie.”<sup>4</sup> Subsequently, the People for the Ethical Treatment of Animals (hereinafter “PETA”) and Antje Engelhardt filed a complaint against Slater in the United States District Court for the Northern District of California alleging that Slater infringed Naruto’s copyright in the photograph.<sup>5</sup> The court granted Slater’s

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<sup>1</sup> *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, at \*1 (N.D. Cal. Jan. 28, 2016), *aff’d*, 888 F.3d 418 (2018).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Plaintiff alleged that Slater falsely claimed authorship of the photograph, and violated the copyright by displaying, selling, and advertising copies of the photograph.

motion to dismiss because “the Copyright Act [did] not confer standing upon animals like *Naruto*.”<sup>6</sup>

The Copyright Act (hereinafter “the Act”) does not specifically define who is protected by copyright.<sup>7</sup> Rather, the Act broadly states that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”<sup>8</sup> Congress enacted the Copyright Act of 1976 to preserve and promote artistic creations by giving legal recourse to those whose work is copied and exploited.<sup>9</sup> Although the Act does not specifically identify those entitled to copyright protection, based on a combination of case law precedent and the United States Copyright Office’s interpretation of the Act, courts have refused to recognize that higher intelligence animals, such as monkeys, can create original works of authorship fixed in tangible media of expression, such as photographs.<sup>10</sup> However, such interpretation of the Act directly conflicts with Congress’s overall intent when it implemented the copyright system in the United States.<sup>11</sup>

Animals can create new works of art, which should be protected by copyright to prevent humans from exploiting them for personal profit.<sup>12</sup> Because of the combination of ever-increasing public interest in protecting animals and their rights with scientific discoveries based on the intelligence of animals, animals should be afforded similar protections in copyright as humans.<sup>13</sup> Courts should expand the definition of “works of authorship” to include works created by higher intelligence animals, such as monkeys, dolphins, pigs, crows, raccoons, and elephants, who have demonstrated that they

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<sup>6</sup> *Naruto*, 2016 WL 362231, at \*1. The Ninth Circuit agreed with the trial court’s reasoning and affirmed the court’s decision. *Naruto*, 888 F.3d at 420.

<sup>7</sup> See 17 U.S.C. § 101 (2016).

<sup>8</sup> § 102. The United States Constitution provides that Congress shall have the power “[t]o 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.” U.S. CONST. art. I, § 8, cl. 8.

<sup>9</sup> See § 101.

<sup>10</sup> *Naruto*, 2016 WL 362231, at \*3.

<sup>11</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>12</sup> See generally Jason G. Goldman, *Creativity: The Weird and Wonderful Art of Animals*, BBC (July 24, 2014), <http://www.bbc.com/future/story/20140723-are-we-the-only-creative-species>.

<sup>13</sup> *Naruto*, 2016 WL 362231, at \*4.

can communicate with humans in some form or another and understand human technology.<sup>14</sup>

Part II of this Note introduces the case *Naruto v. Slater*, which PETA and Engelhardt brought in the Northern District of California on behalf of Naruto. This Part also discusses the subsequent history of the case, which includes an appeal and settlement. Part III examines the Copyright Act of 1976 and analyzes Congress's intent when it enacted the statute. This Part also explains why courts should interpret the statute to protect original works of authorship in animals. Part IV argues that courts should disregard the Copyright Compendium's interpretation that an author needs to be a human being. Part V discusses the Northern District of California's flawed reasoning in *Naruto*. Part VI discusses recommendations for courts to use in the future when dealing with similar animal rights issues. Part VII evaluates the Copyright Act and provides examples where the Act itself provides protections for animals. Finally, Part VIII concludes that animals should be permitted to bring copyright infringement lawsuits because they can create original works of authorship.

## II. OVERVIEW OF THE CASE

This section discusses the trial court's decision in the Northern District of California, the appeal brought by PETA on Naruto's behalf, and the settlement reached by the parties. The trial court denied Naruto protection under the Copyright Act because it held that human beings have standing under the Act, not animals. After an appeal by PETA, the parties settled favorably for both sides. This section discusses the court's reasoning, the plaintiffs' arguments, and how the parties settled the case.

### A. Trial Court's Decision in the Northern District of California

In 2011, David Slater, a wildlife photographer, set up a camera on a reserve on the island of Sulawesi, Indonesia, to capture a picture of the endangered Celebes Crested Macaque species that are

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<sup>14</sup> *Id.* at \*1; Leyre Castro & Ed Wasserman, *Crows Understand Analogies: What Birds Can Teach Us about Animal Intelligence*, SCI. AM. (Feb. 10, 2015), <https://www.scientificamerican.com/article/crows-understand-analogies/>.

indigenous to Indonesia.<sup>15</sup> Naruto, a six-year old Celebes Crested Macaque, came upon Slater's camera and took multiple pictures of himself.<sup>16</sup> Multiple parties claimed copyright to one particular photograph, which became informally known as the "Monkey Selfie," including parties representing the Celebes Crested Macaque.<sup>17</sup> Naruto, represented by PETA and Antje Engelhardt (Next Friends), brought a copyright infringement claim against Slater and Blurb, Inc., the company that published a book containing the Monkey Selfie.<sup>18</sup> The plaintiffs alleged that the defendants violated sections 106 and 501 of the Copyright Act by displaying, advertising, and selling the Monkey Selfie.<sup>19</sup> The plaintiffs sought damages, in the form of profits from previous uses of the Monkey Selfie, and an injunction to prevent the defendants from any additional use of the selfie.<sup>20</sup> Section 106 states that "the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . to reproduce the copyrighted work in copies or phono records; . . . to distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending."<sup>21</sup> Section 501(a) states:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.<sup>22</sup>

Section 501(b) provides that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it."<sup>23</sup> Under these two sections, the plaintiffs asserted

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<sup>15</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>21</sup> 17 U.S.C. § 106 (2016).

<sup>22</sup> *Id.* § 501(a).

<sup>23</sup> *Id.* § 501(b).

that Naruto is the rightful copyright owner and, thus, Slater and Blurb, Inc. infringed Naruto's copyright.<sup>24</sup>

The court considered Naruto to be "highly intelligent," and familiar with people and tourists because of the location of his habitat on the reserve.<sup>25</sup> Naruto, at the time, was familiar with the way a camera operates.<sup>26</sup> He was also familiar with cameras because he had previously observed humans using the camera.<sup>27</sup> Through observation, Naruto familiarized himself with the mechanisms of the camera and developed a sense of trust towards humans.<sup>28</sup> The trial court opined that Naruto authored the selfie by "independent, autonomous action . . . understanding the cause-and-effect relationship between pressing the shutter release, the noise of the shutter, and the change of his reflection in the camera lens."<sup>29</sup>

Defendant moved to dismiss the claim, asserting that Naruto lacked standing under Article III of the United States Constitution and the Copyright Act of 1976.<sup>30</sup> The trial court did not address the constitutional issue of standing under Article III because it ruled that Naruto lacked standing under the Copyright Act of 1976.<sup>31</sup> However, the trial court noted that in *Cetacean Community v. Bush* "[t]he Ninth Circuit has stated that Article III 'does not compel the conclusions that a statutorily authorized suit in the name of an animal is not a "case or controversy."'"<sup>32</sup> The Ninth Circuit stated that a reading of the text of Article III of the United States Constitution does not explicitly limit the ability to bring a claim in federal court solely to humans.<sup>33</sup> Thus, based on the Ninth Circuit's interpretation of Article III, Naruto would have standing under Article III of the Constitution.<sup>34</sup>

While Naruto may have standing under the Constitution, he lacked standing under the Copyright Act based on the Ninth Circuit's

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<sup>24</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.* at \*1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>30</sup> *Id.* at \*2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (citing *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004)).

<sup>33</sup> *Id.*

<sup>34</sup> *Naruto*, 2016 WL 362231, at \*2.

ruling in *Cetacean Community*.<sup>35</sup> The trial court rejected plaintiff's argument that the Copyright Act is available to anyone and ruled that the Ninth Circuit had already ruled on this issue of animal standing under the Copyright Act in *Cetacean Community*.<sup>36</sup> The Ninth Circuit analyzed the Copyright Act to determine whether animals have standing under the Act, but it was unable to find congressional intent regarding this issue.<sup>37</sup> Since the Copyright Act did not explicitly state animals could claim authorship, and previous courts' rulings had repeatedly referred to humans when determining authorship, the trial court determined that animals did not have standing to bring a claim under the Copyright Act.<sup>38</sup> Finally, the trial court turned to the United States Copyright Office Practices of 2014, known as the Copyright Compendium, which specifically addressed the issue of human authorship regarding the Copyright Act.<sup>39</sup>

Courts had previously looked to, and continue to look to, the Compendium for guidance on issues that are ambiguous in the copyright statutes.<sup>40</sup> As taken from the manual, the purpose of the Compendium was to serve as "the administrative manual of the Register of Copyrights concerning Title 17 of the United States Code and Chapter 37 of the Code of Federal Regulations."<sup>41</sup> The Copyright Compendium "provides guidance to agency staff regarding their statutory duties and provides expert guidance to applicants, practitioners, scholars, the courts, and members of the general public regarding institutional practices and related principles of law."<sup>42</sup> The Compendium covers "the many technical requirements, regulations and legal interpretations of the U.S. Copyright Office . . . [and] provides guidance regarding the contents and scope of particular registrations and records."<sup>43</sup> The Compendium states, "The U.S. Copyright Office will register an original work of authorship, provided

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<sup>35</sup> *Id.* The Ninth Circuit's holding in *Cetacean Community* was binding on the Northern District of California when it decided *Naruto*.

<sup>36</sup> *Naruto*, 2016 WL 362231, at \*2.

<sup>37</sup> *Id.* at \*3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \*4.

<sup>40</sup> *Id.*

<sup>41</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 1 (3d ed. 2014), <https://www.copyright.gov/comp3/docs/compendium.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

that the work was created by a human being.”<sup>44</sup> Further, the Compendium states that works that humans did not create are not copyrightable.<sup>45</sup> Relying on the Compendium, the court granted the defendant’s motion to dismiss because Naruto lacked standing under the Copyright Act.<sup>46</sup> The court reasoned that his photograph was not entitled to copyright because he was an animal.<sup>47</sup> The court explained that the issue of whether an animal has standing under the Copyright Act should be left to Congress through legislation or the President, presumably through executive order.<sup>48</sup>

### B. The Appeal and Settlement

The plaintiffs appealed the decision of the trial court, challenging the decision that human authorship is required for standing to bring a claim under the Copyright Act.<sup>49</sup> However, the parties reached a settlement agreement prior to a decision by the court and requested that the Court of Appeals for the Ninth Circuit dismiss the earlier decision stating that animals cannot own a copyright.<sup>50</sup> Under the settlement agreement, Slater agreed to donate approximately 25% of any future revenue from the photo to groups that are dedicated to protecting the macaques and their reserves in Indonesia.<sup>51</sup> An evaluation of the settlement agreement would suggest that the settlement was more favorable to Naruto.<sup>52</sup> This settlement agreement should serve as a guide for future animal copyright cases.<sup>53</sup> The

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<sup>44</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 4.

<sup>45</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 4.

<sup>46</sup> *Naruto*, 2016 WL 362231, at \*4.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Brief for Plaintiff-Appellant at 4, *Naruto*, 2016 WL 362231, at \*1 (No. 16-15469), 2016 WL 4089357, at \*1.

<sup>50</sup> Jason Slotkin, ‘Monkey Selfie’ Lawsuits Ends with Settlement Between PETA, Photographer, NPR (Sept. 12, 2017, 1:46 PM), <https://www.npr.org/sections/thetwo-way/2017/09/12/550417823/-animal-rights-advocates-photographer-compromise-over-ownership-of-monkey-selfie>. Despite the settlement, the Ninth Circuit answered the questions anyway and affirmed the trial court. *See Naruto v. Slater*, 888 F.3d 418 (2018).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The article does not explicitly state that Naruto won the case, but the terms of the settlement suggest that Naruto won in the end.

<sup>53</sup> *Id.* The agreement reached between the parties seems to be a fair compromise to all parties involved and should serve as a guideline for future cases. The settlement considers the interest that would be most beneficial to Naruto and the species as a whole, and did not deprive



settlement agreement seemingly provided animals with certain rights that the courts generally have not enumerated. Further, both parties apparently disagreed with the decision of the court to deny copyright protection to the plaintiff. This settlement agreement provides a perfect balance between fairness and logic. Animals do not intend to create art because they do not understand the concept; however, without human intervention, their art would never be seen by others even though its creation may have been unintentional. Animals are not known to put their “art” on display; thus, a human would be required to put that “art” on display for the world to see. As such, this settlement agreement provides both sides with fair compensation, because both parties were involved in the creation and popularization of the image.

### III. UNDERSTANDING THE COPYRIGHT ACT AND WHY IT SHOULD INCLUDE ANIMALS

Congress enacted the Copyright Act to protect “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>54</sup> The initial ownership clause of the Act states that a “[c]opyright in a work . . . vests initially in the *author* or *authors* of the work.”<sup>55</sup> The Act does not define the term “author” or “authors,” but the Supreme Court has previously defined the term “author” with respect to copyrights.<sup>56</sup>

It is well established in the case law developed by the Supreme Court that the determination of the author of a work protected by copyright should be in the broadest terms possible.<sup>57</sup> Under this definition, Naruto, and thus animals in general, can be authors of original expressions of work, because Naruto, as well as animals in general, are capable of creating works of authorship fixed in tangible

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Slater of all his income from the photo. Slater’s claim to the copyright was based on the facts that the photograph was taken with his camera and Naruto is an animal.

<sup>54</sup> 17 U.S.C. § 102(a) (2016).

<sup>55</sup> *Id.* § 201(a).

<sup>56</sup> *See generally id.* § 101. The definition of the word “author” is absent from the definition section of the statute, but it is used throughout the section.

<sup>57</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). The case does not specifically define what the Court meant by “broad” but it stated, “We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.” *Id.*

media.<sup>58</sup> Naruto, by explicitly stating that he is the author of the photograph, has been declared the author of the Monkey Selfie.<sup>59</sup> Thus, the only question that remains is whether the Act provides an animal with copyright protection.<sup>60</sup> Although the statute does not provide whether an animal can be an author entitled to copyright protection, the courts' broad construction of author supports such an interpretation.<sup>61</sup>

In 1884, the Supreme Court of the United States ruled that the term "author," in the context of copyright, should be interpreted as broadly as possible.<sup>62</sup> The Supreme Court was tasked with determining whether the defendant, a photographer, infringed the copyright of the plaintiff, a lithographer, regarding a photograph.<sup>63</sup> In *Burrow-Giles Lithographic v. Sarony*, the Court reasoned that the "'author,' 'inventor,' and 'designer,' as used in the art of photography . . . mean the person who so produced the photograph."<sup>64</sup> The Court elaborated that "[a]n author in that sense is 'he to whom anything owes its origin; originator; maker, one who completes a work of science or literature.'"<sup>65</sup> The Supreme Court in this case explicitly did not use the word "human" or "person" to describe an author but instead used the words "originator" and "maker."<sup>66</sup> As seen throughout the entire opinion, the Supreme Court never made a reference to the fact that a human is required.<sup>67</sup> The Court used gender pronouns to describe authors, but these gender pronouns can be applied to monkeys as well as humans.<sup>68</sup>

In 1973, the Supreme Court affirmed this concept of a broad interpretation of authorship in *Goldstein v. California*,<sup>69</sup> by stating "[w]hile an author may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been

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<sup>58</sup> See generally *id.* The Supreme Court does not explicitly exclude animals from being considered authors.

<sup>59</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>60</sup> *Id.* at \*2.

<sup>61</sup> See generally *Burrow-Giles Lithographic Co.*, 111 U.S. at 53.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 54.

<sup>64</sup> *Burrow-Giles Lithographic Co.*, 111 U.S. at 55.

<sup>65</sup> *Id.* at 57-58.

<sup>66</sup> *Id.* at 58.

<sup>67</sup> See generally *id.* at 53.

<sup>68</sup> *Id.* at 58-60.

<sup>69</sup> 412 U.S. 546 (1973).

construed to mean an originator, he to whom anything owes its origin.”<sup>70</sup> In 1989, the Supreme Court once again affirmed its expansive definition of the term “author” in *Community for Creative Non-Violence v. Reid*.<sup>71</sup> The Supreme Court, quoting the Copyright Act of 1976, stated that “ownership vests initially in the author or authors of the work.”<sup>72</sup> The Court also quoted the Copyright Act stating, “[a]s a general rule, the author is the party who actually creates the work.”<sup>73</sup> The Court once again explicitly avoided using human and instead defined authors as parties.<sup>74</sup> This broad definition of authorship, which the Supreme Court tends to favor, supports the argument that animals should be included in the broad definition. Under the Copyright Act, Naruto, and all animals who create new artistic expression, should have standing to survive a motion to dismiss their claims based on lack of standing.<sup>75</sup> Because the Supreme Court did not explicitly exclude animals from being considered authors in its decisions in *Burrow-Giles* and *Goldstein*, the Court demonstrated its acceptance that humans should not be the only class of animals for which their works of authorship can be protected by copyright.<sup>76</sup> Courts interpret statutes and often turn to the legislative intent behind statutes when a term is unclear from the plain language of the statute.<sup>77</sup>

The Supreme Court has long established the authority to determine the legislative intent of Congress when a statute’s terms are unclear.<sup>78</sup> In one of the most important and defining cases of American history, the Supreme Court ruled in *Marbury v. Madison*<sup>79</sup> that the Court has the authority to review laws passed by Congress to determine if they conflict with the Constitution.<sup>80</sup> In *Transamerica Mortgage Advisors, Inc. v. Lewis*, the Supreme Court reasoned that

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<sup>70</sup> *Id.* at 562. Petitioners were charged with copying several musical performances from commercially sold recordings without permission of the owner.

<sup>71</sup> *See generally* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

<sup>72</sup> *Id.* at 735.

<sup>73</sup> *Id.* at 737.

<sup>74</sup> *Id.* at 736-37. While the Court was not contemplating animals in this decision, their word choice suggests that they desired a broad definition of authorship.

<sup>75</sup> 17 U.S.C. § 101 (2016). The Copyright Act does not explicitly state animals should have rights to a copyright; however, it does not limit the reach of its protection to just humans. *Id.*

<sup>76</sup> *See generally* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); *see also* *Goldstein v. California*, 412 U.S. 546 (1973).

<sup>77</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 602-03 (2008).

<sup>78</sup> *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 179-80.

“the language and focus of the statute, its legislative history, and its purpose are ones traditionally relied upon in determining legislative intent.”<sup>81</sup> This power, which has been upheld until the present day,<sup>82</sup> was further expanded in *District of Columbia v. Heller*, in which the Supreme Court ruled that in cases of ambiguity regarding congressional and legislative intent, the Court may determine the intent of the framers of the law or statute.<sup>83</sup>

The power of determining legislative intent has long been vested in the powers of the court system.<sup>84</sup> On multiple occasions, the Court has had the opportunity to address this issue of whether a non-human can hold a copyright, but has declined every time.<sup>85</sup> The lower courts have also avoided addressing the issue of a non-human holding a copyright. In particular, the Ninth Circuit was asked to determine whether a copyright owner can bring an infringement claim for a book consisting of revelations allegedly received from celestial beings.<sup>86</sup> The court analyzed the issue of whether the Urantia Foundation could be considered the copyright owner of a book called the Urantia Book, which was compiled and collected by humans, but claimed to be authored by celestial beings.<sup>87</sup> The Urantia Foundation brought suit against Kristen Maaherra, alleging that Maaherra infringed Urantia’s copyright when she redistributed the Foundation’s book on disk.<sup>88</sup> The district court ruled in favor of Maaherra because Urantia failed to properly renew its copyright.<sup>89</sup> On the renewal form, Urantia claimed that the book fell under the “made for hire” provision of the Copyright Act, which stated that the employer owns the copyright if made by an employee during his employment.<sup>90</sup> Essentially, Urantia was claiming that the celestial being was an employee of the foundation.<sup>91</sup> The court granted Urantia’s claim for copyright protection and denied ruling on the issue that the book was not “made for hire” because Urantia would

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<sup>81</sup> *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979).

<sup>82</sup> The Supreme Court has not overturned *Marbury v. Madison*.

<sup>83</sup> *See generally Heller*, 554 U.S. at 570.

<sup>84</sup> *See generally Marbury*, 5 U.S. at 137. *Marbury* has been upheld since its ruling in 1804.

<sup>85</sup> *See generally Burrow-Giles Lithographic Co.*, 111 U.S. at 53; *see also Goldstein*, 412 U.S. at 546; 17 U.S.C. § 101 (2016).

<sup>86</sup> *See generally Urantia Found. v. Maaherra*, 114 F.3d 955 (9th Cir. 1997).

<sup>87</sup> *Id.* at 956.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 957.

<sup>91</sup> *Urantia*, 114 F.3d at 957.

have succeeded on the merits even if such claim was false.<sup>92</sup> Thus, the court held that Urantia's copyright claim was valid.<sup>93</sup>

More importantly, the Ninth Circuit addressed Maaherra's claim that Urantia did not have a valid copyright in the Urantia Book because "it lacks the requisite ingredient of human creativity, and that therefore the Book is not a 'work of authorship' within the meaning of the Copyright Act."<sup>94</sup> The court stated that the copyright laws "do not expressly require human authorship, and considerable controversy has arisen in recent years over the copyrightability of computer-generated work."<sup>95</sup> The court further stated that "at the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity."<sup>96</sup> The court in this case recognized that authorship does not need to be human in order to be protectable under the Copyright Act but must be a worldly entity, a term which the court did not define.<sup>97</sup> By analogy, a monkey-generated artistic expression is similar to a computer-generated artistic expression because both a computer and a monkey are worldly entities.<sup>98</sup> The court's hesitation to declare that an animal, or in general, a non-human, has no standing under the Copyright Act showed, in part, that an animal can have standing.<sup>99</sup> The lack of making such a decision explicitly demonstrates that the court, which had the power to determine congressional intent, did not fully agree that the Copyright Act applies to only humans.<sup>100</sup> If Congress intended for humans to be the only entities whose works could be protected by copyright, then it would have explicitly stated so in the statutes, or

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<sup>92</sup> *Id.* at 962-63. Made for hire work is work that is created by an employee as part of their employment. Even if Urantia's claim that the celestial being was an employee of the foundation was false, the Court still would have ruled in their favor based on the merits of the case.

<sup>93</sup> *Id.* at 963.

<sup>94</sup> *Id.* at 958.

<sup>95</sup> *Id.*

<sup>96</sup> *Urantia*, 114 F.3d at 958.

<sup>97</sup> *Id.*

<sup>98</sup> *Entity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/entity> (last visited June 28, 2018). The Merriam-Webster dictionary defines entity as "being, existence; especially; independent, separate, or self-contained existence. The existence of a thing as contrasted with its attributes. Something that has a separate and distinct existence and objective or conceptual reality." *Id.*

<sup>99</sup> See generally H.R. REP. NO. 94-1476, at 1476 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659.

<sup>100</sup> *Id.*

courts would have expressly ruled so in accordance with congressional intent when it enacted the Act.<sup>101</sup>

The courts have addressed a similar situation in which the copyright owner is unable to make decisions, such as minors who, by law, are deemed unable to make sound, legal decisions.<sup>102</sup> The United States District Court of Arizona analyzed the issue of whether a minor could own a copyright.<sup>103</sup> Barbara Mason was seventeen years old when she authored her own song and composition.<sup>104</sup> Although Mason was a minor at the time that the copyright was granted, the court concluded that she was the rightful owner of the copyright.<sup>105</sup>

In 2015, in *I.C. ex rel Solovsky v. Delta Galil USA*,<sup>106</sup> the Southern District of New York ruled that a minor could allege copyright infringement of an original artistic expression.<sup>107</sup> I.C. submitted a design for a girl's clothing brand for a contest that was based on the originality of a design.<sup>108</sup> I.C. won the contest but never received any compensation based on her design.<sup>109</sup> The court shed light on the issue of when a copyright is denied by the U.S. Copyright Office and the protections afforded to a denied copyright.<sup>110</sup> The court ruled that when the Copyright Office denies a copyright, there are two possible courses of action.<sup>111</sup> The denied party can seek to overturn the Copyright Office's denial or may proceed under the Copyright Act § 411(a), which allows reevaluation of validity.<sup>112</sup> In this case, whether the copyright was valid or not, protection was afforded to non-minors and minors.<sup>113</sup> This situation is analogous to animal copyrights because, similar to minors, animals are unable to bring claims on their

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<sup>101</sup> See generally *id.* Artificial intelligence can be considered a "worldly entity" by definition. An animal can also be considered to be a worldly entity and, therefore, able to hold a copyright under this definition.

<sup>102</sup> See generally *Mason v. Jamie Music Publ'g Co.*, 658 F. Supp. 2d 571 (S.D.N.Y. 2009).

<sup>103</sup> *Id.* at 574-75.

<sup>104</sup> *Id.* at 575.

<sup>105</sup> *Id.* at 587.

<sup>106</sup> 135 F. Supp. 3d 196 (S.D.N.Y. 2015).

<sup>107</sup> *Id.* at 215.

<sup>108</sup> *Id.* at 203.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 206.

<sup>111</sup> *Delta Galil*, 135 F. Supp. 3d. at 213.

<sup>112</sup> *Id.* Section 411(a) states that when registration is refused, the alleged owner is entitled to institute a civil action for infringement. The Register may become a party to the action with respect to the issue of registrability of the copyright. 17 U.S.C. § 411(a) (2016).

<sup>113</sup> See generally *Delta Galil*, 135 F. Supp. 3d at 196. The court ruled on the basis of unjust enrichment.

own without assistance of a non-minor.<sup>114</sup> Minors and animals share many similar characteristics regarding copyrights.<sup>115</sup> Minors and animals both have the capabilities of creating original works of artistic expression, both require an adult human being to bring suit on their behalf, and both classes are worldly entities.<sup>116</sup> Based on these similarities, animals should be afforded the same copyright protections as minors.<sup>117</sup>

#### IV. THE COURTS SHOULD DISREGARD THE COMPENDIUM'S INTERPRETATION THAT AN AUTHOR NEEDS TO BE HUMAN

The Copyright Compendium is not the governing law when determining the eligibility of a worldly entity to hold a copyright. As previously stated, the Copyright Compendium is released by the United States Copyright Office to provide legal guidance regarding copyright law and related copyright matters.<sup>118</sup> In the “Standard of Deference” section of the Compendium, the drafters admit that “the Compendium does not override any existing statute or regulation.”<sup>119</sup> The drafters recognized that the “policies and practices set forth in the Compendium do not in themselves have the force and effect of law and are not binding upon the Register of the Copyrights or U.S. Copyright Office staff.”<sup>120</sup> The Compendium states that “[t]he Supreme Court recognized that courts may consider the interpretations set forth in administrative manuals, policy statements, and similar materials to the extent that those interpretations have the power to persuade.”<sup>121</sup> Finally, the drafters state “[t]he weight of the agency’s judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier

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<sup>114</sup> *Naruto*, 2016 WL 362231, at \*1. As discussed, this suit was brought on Naruto’s behalf by PETA and Engelhardt.

<sup>115</sup> See generally *Mason v. Jamie Music Publ’g Co.*, 658 F. Supp. 2d 571 (S.D.N.Y. 2009).

<sup>116</sup> See FED. R. CIV. P. 17(c)(1)(A)-(D) (stating “The following representatives may sue or defend on behalf of a minor or an incompetent person: (A) a general guardian; (B) a committee; (C) a conservator; or (D) a like fiduciary”).

<sup>117</sup> Both minors and animals require a guardian because they lack the basic competency needed to initiate a lawsuit.

<sup>118</sup> See discussion of the Copyright Compendium *supra* Part I.

<sup>119</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2.

<sup>120</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2.

<sup>121</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2 (citing *Christensen v. Harris Cty.*, 529 U.S. 576 (2000)).

and later pronouncements, and all those factors to which it gives power to persuade.”<sup>122</sup>

The Compendium lists numerous copyright cases where the courts have given the Compendium deference.<sup>123</sup> The cases listed range from disclaiming preexisting works, registration requirements for databases, registration requirements for collective works, and publication regulation.<sup>124</sup> The Compendium cites to the Southern District of Texas court’s view in the case *Rogers v. Better Business Bureau of Metropolitan Houston, Inc.*<sup>125</sup> Citing to this case, the Compendium states that “policy statements, agency manuals, and enforcement guidelines do not carry the force of law but they are entitled to some deference given the specialized experience and broader investigations and information of the agency.”<sup>126</sup> In this section, courts give great weight to the Compendium for registration requirements, but courts have not cited to any case law in which the Compendium has been used to determine legislative intent.<sup>127</sup> Congress enacts each statute with a specific legislative intent, and it is up to the courts to interpret Congress’s intent when a statute is unclear.<sup>128</sup>

The U.S. Copyright Office exceeded its administrative power by interpreting the legislative intent of the Copyright Act, which should have been left to the courts.<sup>129</sup> The power to determine statutory interpretation has already been conferred on the judicial branch of the United States in *Marbury*.<sup>130</sup> In *Marbury*, Justice Marshall stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>131</sup> The power of legislative interpretation lies within the judicial branch, but the Compendium has weakened the power of the courts by improperly interpreting statutes as an

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<sup>122</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2.

<sup>123</sup> See COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2.

<sup>124</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2.

<sup>125</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2 (citing 887 F. Supp. 2d 722, 732 (S.D. Tex. 2012)).

<sup>126</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2 (quoting *Rogers*, 887 F. Supp. 2d at 732).

<sup>127</sup> See generally COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41, at 2.

<sup>128</sup> See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>129</sup> See generally 17 U.S.C. § 101 (2016).

<sup>130</sup> *Marbury*, 5 U.S. at 177-78.

<sup>131</sup> *Id.* at 177.



administrative entity as opposed to a judicial entity.<sup>132</sup> The Supreme Court has given some weight to administrative statutory interpretation, but only pertaining to cases of ambiguity.<sup>133</sup>

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>134</sup> the Supreme Court was asked to determine whether the “EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping . . . is based on a reasonable construction of the statutory term ‘stationary source.’”<sup>135</sup> The Court ruled that “[w]hen Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”<sup>136</sup> The Court further ruled that “any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”<sup>137</sup> The courts have “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”<sup>138</sup> The Court reasoned that

it can still be apparent from the agency’s general conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about one which Congress did not actually have an intent as to a particular result.<sup>139</sup>

Because the statute is not ambiguous, the court in *Naruto* improperly deferred to the agency’s determination on the issue of whether an animal can own a copyright.<sup>140</sup> As stated previously, the

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<sup>132</sup> See generally *id.* at 137. Despite the Court’s clear ruling that the power to determine legislative intent lies within the judiciary, the Copyright Office improperly seeks to interpret legislative intent in the Compendium.

<sup>133</sup> *City of Arlington v. FCC*, 569 U.S. 290, 304-05 (2013).

<sup>134</sup> 467 U.S. 837 (1984).

<sup>135</sup> *Id.* at 840.

<sup>136</sup> *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron*, 467 U.S. at 843-44.)

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 227-28.

<sup>139</sup> *Id.* at 229.

<sup>140</sup> See generally *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). Author should be defined as broadly as possible. *Id.* Since the term author should be defined as broadly as possible, there should not be any ambiguity and the term should include all authors.

Supreme Court has determined in *Burrow-Giles Lithographic* that the term “author” should be interpreted as broadly as possible; thus, it is clear that the Supreme Court has already determined who an author is under the Copyright Act.<sup>141</sup> The Court specifically limited the power of the U.S. Copyright Office to interpret a statute or regulation if it is ambiguous.<sup>142</sup> This determination was further developed in 2013.<sup>143</sup>

In *City of Arlington v. F.C.C.*, the Supreme Court was asked to determine “whether an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority is entitled to deference under *Chevron*.”<sup>144</sup> The Court ruled that “if the agency’s answer is based on a permissible construction of the statute, that is the end of the matter.”<sup>145</sup> The Court explained that statutory interpretation should only be evaluated by an agency if congressional intent is unclear.<sup>146</sup> It is clear that Congress has repeatedly refused to define “author” since the enactment of the statute.<sup>147</sup> Consequently, courts, like the Court in *Burrow-Giles Lithographic*, have not explicitly held that “author” under the Copyright Act covers humans only.<sup>148</sup> Therefore, there is no ambiguity present that would trigger a need for an agency to interpret the statute under *Chevron*. Because the agency lacked the authority to interpret the statute, courts should interpret the term “author” as broadly as possible, which would protect Naruto’s copyright in the Monkey Selfie.<sup>149</sup>

The House of Representatives intended for the definition of author to remain broad when it reviewed the original Copyright Act of 1909 for amendments in 1976.<sup>150</sup> The purpose of this review was to provide for general revisions of the United States copyright laws.<sup>151</sup> In the sectional analysis and discussion, the House of Representatives addressed section 102, which provides for the general subject matter

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<sup>141</sup> *Id.* Because the Court used the term as “broadly” as possible, it should be read to include every worldly entity, including animals.

<sup>142</sup> *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)

<sup>143</sup> *See generally* *City of Arlington v. FCC*, 569 U.S. 290, 290 (2013).

<sup>144</sup> *Id.* at 293.

<sup>145</sup> *Id.* at 307.

<sup>146</sup> *Chevron*, 467 U.S. at 842-43.

<sup>147</sup> *See generally* *Burrow-Giles Lithographic Co.*, 111 U.S. at 53. *Burrow-Giles Lithographic Co.* has not been overturned since its ruling.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> H.R. REP. NO. 94-1476, at 51 (1976).

<sup>151</sup> *Id.* at 47.

of copyright, more specifically, original works of authorship.<sup>152</sup> The House intentionally left the phrase “original works of authorship” undefined to incorporate, without change, the standard originally established by the courts under the previous statute.<sup>153</sup> The standard of originality did not include requirements of novelty, ingenuity, or esthetic merit, and there was no intention to change the standard to require more.<sup>154</sup> The House further expressed that copyright law has been one of “gradual expansion” for new types of works that are afforded protection under the Act.<sup>155</sup> The House stated that “the bill does not intend to either freeze the scope of copyrightable subject matter at the present stage of communication technology or to allow unlimited expansion into areas completely outside the present congressional intent.”<sup>156</sup> The scope of the bill is to protect all original works of authorship, and not to exclude any potential author from obtaining a copyright. The House ended this section stating that although the coverage is very broad in its present state, “there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.”<sup>157</sup>

Throughout the entire House Committee Notes, the House never used words “human” or “animal.”<sup>158</sup> As previously stated, the purpose was to make amendments to the Copyright Act to clarify certain terms; however, the House purposefully and specifically did not clarify that an author must be a human.<sup>159</sup> Therefore, the House seemingly left the term undefined to incorporate any possible author, including animals.<sup>160</sup> If Congress intended for humans to be the only authors protected under the Copyright Act, it had ample opportunity to amend or clarify its position. Instead, it has demonstrated its intent that the term author be left undefined to encompass all animals.

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<sup>152</sup> *Id.* at 51.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> H.R. REP. NO. 94-1476, at 51.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 52.

<sup>158</sup> *See generally id.*

<sup>159</sup> *Id.* at 47.

<sup>160</sup> *See generally* H.R. REP. NO. 94-1476.

**V. THE TRIAL COURT ERRED IN ITS DISCRETION BY FOLLOWING THE RULING IN *CETACEAN COMMUNITY V. BUSH***

In *Naruto*, the trial court relied on the decision in the Ninth Circuit case *Cetacean Community v. Bush*.<sup>161</sup> The court refused to address the merits of the statutory violations because *Naruto* first needed to establish standing.<sup>162</sup> The court claimed that Congress had not granted *Naruto* statutory standing because *Cetacean Community* ruled that animals do not have standing under the Copyright Act.<sup>163</sup> The judge erred in his decision because he mistakenly relied on the Ninth Circuit's reasoning in *Cetacean Community*, which involved statutes that specifically required a human petitioner.<sup>164</sup>

*Cetacean Community* was decided on October 20, 2004 by the Ninth Circuit.<sup>165</sup> The sole plaintiff in this case was a self-appointed attorney representing all of the world's whales, porpoises, and dolphins.<sup>166</sup> The plaintiff alleged that the Navy had violated or would violate the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act.<sup>167</sup> The court ruled "it is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being."<sup>168</sup> The court followed with "[b]ut we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal."<sup>169</sup> The court compared animals to the likes of "infants, juveniles, and mental incompetents."<sup>170</sup> The court then went through each of the alleged statutes that the plaintiff claimed the Navy violated.<sup>171</sup>

The court denied the plaintiff's standing under the Endangered Species Act because the citizen-standing provision stated "any person may commence a civil suit on his own behalf."<sup>172</sup> The plaintiff in this matter was a human, but was not commencing the suit on his own

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<sup>161</sup> *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, at \*1 (N.D. Cal. Jan. 28, 2016), *aff'd*, 888 F.3d 418 (2018).

<sup>162</sup> *Id.* at \*2-3.

<sup>163</sup> *Id.* at \*3.

<sup>164</sup> *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171-72 (9th Cir. 2004).

<sup>165</sup> *See generally id.*

<sup>166</sup> *Id.* at 1171.

<sup>167</sup> *Id.* at 1171-72.

<sup>168</sup> *Id.* at 1176.

<sup>169</sup> *Cetacean Cmty.*, 386 F.3d at 1176.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1176-78.

<sup>172</sup> *Id.* at 1177.

behalf.<sup>173</sup> The court then denied that the plaintiff had standing under the Administrative Procedure Act because section 10(a) of the statute required that the claim be brought by “[a] person suffering legal wrong.”<sup>174</sup> The court finally denied that the plaintiff had standing under the Marine Mammal Protection Act because the statute permitted “judicial review to any permit application, and to a ‘party’ opposed to such a permit.”<sup>175</sup> When analyzing standing under the National Environmental Policy Act, the court deferred to the APA for its standing provisions because the statute lacked a provision regarding enforcement.<sup>176</sup> The court had already determined that the plaintiff lacked standing under the APA, so it held the same way under the National Environmental Policy Act.<sup>177</sup> The court rejected the plaintiff’s argument that it had standing to bring the suit as an association under the APA because the Cetaceans failed to establish first-party organizational standing.<sup>178</sup>

The court concluded that “if Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.”<sup>179</sup> This conclusion by the court fails for one reason.<sup>180</sup> Because Congress and the President did not plainly and explicitly state that animals lacked standing, they did not intend to limit the ability of animals to have standing.<sup>181</sup> In fact, had Congress and the President intended to limit standing to persons only, they could have easily followed the language of the Endangered Species Act, which specifically limited standing to persons only.<sup>182</sup>

Although *Cetacean Community* and *Naruto* both involved standing for animals that bring lawsuits, the facts of *Naruto* differ in such a way that *Cetacean Community* should not have been the basis for the trial court’s decision.<sup>183</sup> First, *Naruto* is one Silver Crested

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<sup>173</sup> *Id.*

<sup>174</sup> *Cetacean Cmty.*, 386 F.3d at 1176.

<sup>175</sup> *Id.* at 1178.

<sup>176</sup> *Id.* at 1176-77.

<sup>177</sup> *Id.* at 1179.

<sup>178</sup> *Id.* First-party organizational standing is a form of association standing, which gives people standing to sue for another if they would have had the right to sue themselves.

<sup>179</sup> *Cetacean Cmty.*, 386 F.3d at 1179.

<sup>180</sup> See generally H.R. REP. NO. 94-1476.

<sup>181</sup> See generally *id.*

<sup>182</sup> See generally *Cetacean Cmty.*, 386 F.3d 1169. Each of the acts contains provisions that specifically limit standing to humans. *Id.*

<sup>183</sup> Compare *Naruto*, 2016 WL 362231, at \*1, with *Cetacean Cmty.*, 386 F.3d at 1169.

Macaque, whereas the plaintiff in *Cetacean Community* sought to represent the entire world's population of a species of animals with which he did not have a direct connection.<sup>184</sup> In *Naruto*, the plaintiff had a personal connection with the monkey and sought to protect his rights only.<sup>185</sup> Antje Englehardt personally knew and interacted with Naruto for Naruto's entire life.<sup>186</sup> PETA was an organization that promoted the ethical treatment of animals in four specific industries, one of which was the entertainment industry.<sup>187</sup> Both parties that sued on behalf of Naruto were involved with animal protection and, specifically, with Naruto's protection.<sup>188</sup>

The court in *Cetacean Community* relied on the words of the statutes to deny the plaintiff in the case standing under the violated acts.<sup>189</sup> The language of the Copyright Act does not limit statutory standing to just persons but instead expands it to all "authors."<sup>190</sup> The court in *Naruto*, citing the court in *Cetacean Community*, stated "Congress must make its intentions clear before the courts will construe a statute to confer standing on a particular plaintiff."<sup>191</sup> Congress's intention was clear in that it did not specifically deny standing to animals, thereby giving animals standing to bring lawsuits under the Copyright Act.<sup>192</sup> However, the court in *Naruto* followed *Cetacean Community* and held that "the Copyright Act does not plainly extend the concept of authorship or statutory standing to animals."<sup>193</sup> In fact, the statute does not plainly confer the right to humans either, as the Ninth Circuit observed when it noted that the drafters of the statute intentionally left the term "author" and "works of authorship" "undefined to provide for some flexibility."<sup>194</sup> If courts were to follow the Ninth Circuit's ruling in *Cetacean Community*, no person or animal would have standing because Congress has not plainly conferred the protection to either party according to the plain meaning of the

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<sup>184</sup> *Naruto*, 2016 WL 362231, at \*1; *Cetacean Cmty.*, 386 F.3d at 1171.

<sup>185</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>186</sup> Brief for Plaintiff-Appellant, *supra* note 49, at \*7.

<sup>187</sup> *About PETA*, PETA, <https://www.peta.org/about-peta/> (last visited June 28, 2018).

<sup>188</sup> *Naruto*, 2016 WL 362231, at \*1.

<sup>189</sup> *See generally* 17 U.S.C. § 101 (2016).

<sup>190</sup> *Id.*

<sup>191</sup> *Naruto*, 2016 WL 362231, at \*2 (citing *Cetacean Cmty.*, 386 F.3d 1169).

<sup>192</sup> *See generally* 17 U.S.C. § 101 (2016).

<sup>193</sup> *Naruto*, 2016 WL 362231, at \*2.

<sup>194</sup> *Id.*

statute.<sup>195</sup> This notion does not make sense because people do have protection, which exemplifies the court's flawed reasoning in *Cetacean Community*.

The judge in *Naruto* failed to properly evaluate the ruling in *Cetacean Community* and distinguish the facts in that case from the facts in *Naruto*.<sup>196</sup> In *Cetacean Community*, the actual language of the acts stated that a person is required for standing to be granted.<sup>197</sup> The plain language of the Copyright Act does not limit standing to just humans.<sup>198</sup> Instead, the court relied on the Compendium, which is persuasive at best, and not binding.<sup>199</sup>

Rather than following the flawed reasoning of the court in *Cetacean Community*, the court in *Naruto* should have followed the ruling in *Defenders of Wildlife v. Gutierrez*.<sup>200</sup> In this case, agencies representing the interest of the endangered right whale brought suit against the United States Department of Commerce seeking to reduce boat traffic in certain areas.<sup>201</sup> Right whales were endangered due to over hunting and were protected by the United States government.<sup>202</sup> Heavy shipping traffic infiltrated the natural critical habitats for the right whales identified by the National Marine Fisheries Services.<sup>203</sup> Shipping traffic was the number one cause of right whale mortality and was causing the species to become extinct.<sup>204</sup> The Defenders of Wildlife sued the Coast Guard, which was responsible for protecting the habitats of the right whales, for violation of the act that protected the endangered right whale.<sup>205</sup> Specifically, the Coast Guard was accused of failing to consult with the Secretary of Commerce on effective means to protect the remaining population, and the Coast Guard failed to carry out programs that were designed to conserve the right whale population.<sup>206</sup> Plaintiffs were granted standing on the basis

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<sup>195</sup> *Cetacean Cmty.*, 386 F.3d at 1179.

<sup>196</sup> See generally *Naruto*, 2016 WL 362231. The Court did not look at the standing required for each claim. *Id.*

<sup>197</sup> *Cetacean Cmty.*, 386 F.3d at 1176-78.

<sup>198</sup> 17 U.S.C. § 101 (2016).

<sup>199</sup> See generally COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41.

<sup>200</sup> *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 927 (D.C. Cir. 2008).

<sup>201</sup> *Id.* at 914.

<sup>202</sup> *Id.* at 914-15.

<sup>203</sup> *Id.* at 915.

<sup>204</sup> *Id.*

<sup>205</sup> *Defs. of Wildlife*, 532 F.3d. at 914.

<sup>206</sup> *Id.* at 917.

of causation and redressability.<sup>207</sup> They successfully argued that the Coast Guard had the authority to take into account right whales when devising shipping traffic schemes, and thus a district court order could redress the plaintiff's injury.<sup>208</sup>

The injury in *Naruto* was the exploitation of Naruto's original work of art.<sup>209</sup> Similar to *Defenders of Wildlife*, the court should have found that the claim brought on behalf of Naruto satisfied all three elements of standing.<sup>210</sup> The causation of the injury was clearly from Slater and Blurb, Inc.'s publishing Naruto's work of art without his permission.<sup>211</sup> Courts could have easily resolved the issue of redressability by granting Naruto copyright protection of his work of art.<sup>212</sup>

#### **VI. FUTURE COURTS SHOULD LOOK TOWARDS THE UNDERLYING MESSAGES CONVEYED IN THE SETTLEMENT REACHED BETWEEN THE PARTIES**

On September 11, 2017, Slater and PETA reached a settlement agreement which ended the lawsuit filed on Naruto's behalf.<sup>213</sup> The settlement included three aspects.<sup>214</sup> First, Slater agreed to donate twenty-five percent of future revenue from the photos to groups that protect crested macaques and their habitat.<sup>215</sup> Second, both parties appealed to the Ninth Circuit to dismiss its decision in *Cetacean Community* that animals cannot own a copyright.<sup>216</sup> The third aspect of the settlement was not released to the public.<sup>217</sup>

This settlement agreement is important for many reasons.<sup>218</sup> First, both parties agreed, in the end, that Naruto was entitled to a share

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<sup>207</sup> *Id.* at 924-25.

<sup>208</sup> *Id.* at 917.

<sup>209</sup> *See generally Naruto*, 2016 WL 362231. Defendant is profiting from the labor of the plaintiff without consent. *Id.*

<sup>210</sup> *Defs. of Wildlife*, 532 F.3d at 923. Standing requirements are injury in fact, causation, and redressability. *Id.*

<sup>211</sup> *See generally Naruto*, 2016 WL 362231.

<sup>212</sup> *Naruto*, 2016 WL 362231, at \*1. Plaintiffs only sought to protect Naruto's copyright; therefore, this injury could have been redressed by granting him the protection he deserved.

<sup>213</sup> Slotkin, *supra* note 50.

<sup>214</sup> Slotkin, *supra* note 50.

<sup>215</sup> Slotkin, *supra* note 50.

<sup>216</sup> Slotkin, *supra* note 50.

<sup>217</sup> Slotkin, *supra* note 50.

<sup>218</sup> Slotkin, *supra* note 50.



of the revenue.<sup>219</sup> Second, both parties agreed that animals should have the ability to own a copyright.<sup>220</sup> This settlement exemplifies the parties' acceptance that an animal can own a copyright. A settlement of the same structure could be adopted to be used in mediation, arbitration, and litigation. If courts, the legislature, and the administrative agencies refuse to identify animals as parties that can seek copyright protection, this settlement structure can be offered as a model, and hence a workaround, to prevent the exploitation of animals while limiting the liability of humans.<sup>221</sup> Unfortunately, the Ninth Circuit does not share this same sentiment.

On April 23, 2018, the Ninth Circuit affirmatively ruled against *Naruto*.<sup>222</sup> The Court determined that *Naruto* does not have standing under the Copyright Act for various reasons. First, several provisions of the Copyright Act persuaded the court "that animals [do not] have statutory standing to sue under the Copyright Act."<sup>223</sup> Second, the court reasoned that the use of the words "'children', 'grandchildren', 'legitimate', 'widow' and 'widower' all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law."<sup>224</sup> This reasoning by the Ninth Circuit is overly narrow, as animals can have children, grandchildren, and have been known to mate for life.<sup>225</sup> The court held that the "district court did not err in concluding that *Naruto*—and, more broadly, animals other than humans—lack statutory standing to sue under the Copyright Act."<sup>226</sup>

## VII. THE COPYRIGHT ACT PROVIDES A WAY FOR REGISTRATION OF A COPYRIGHT FOR AN ANIMAL

The Copyright Act includes a provision for unknown or anonymous authors of a work.<sup>227</sup> Section 409 of the Copyright Act

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<sup>219</sup> Slotkin, *supra* note 50.

<sup>220</sup> Slotkin, *supra* note 50.

<sup>221</sup> Slotkin, *supra* note 50.

<sup>222</sup> *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

<sup>223</sup> *Id.* at 426.

<sup>224</sup> *Id.*

<sup>225</sup> Penguins have been known to mate for life, which is significantly similar to marriage.

<sup>226</sup> *Naruto*, 888 F.3d at 426.

<sup>227</sup> 17 U.S.C. § 409 (2016).

describes the requirements for the application for copyright registration.<sup>228</sup> This section states:

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include:

- (1) the name and address of the copyright claimant;
- (2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their death;
- (3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;
- (4) in the case of a work made for hire, a statement to this effect;
- (5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;
- (6) the title of the work, together with any previous or alternative titles under which the work can be identified;
- (7) the year in which creation of the work was completed.<sup>229</sup>

Specifically, subsections 2 and 3 provide ways for registration for works of art that are anonymous as long as the nationality or the domicile of the author is provided.<sup>230</sup> Further, a person close to Naruto could file on his behalf under subsection 5 by claiming it is filing on behalf of the original owner who wishes to remain anonymous.<sup>231</sup> All the other information such as the year of creation and title of the creation are known to the parties.<sup>232</sup> The Copyright Act protects registration of works by anonymous authors. Therefore, Naruto should have been granted a copyright under 17 U.S.C. § 409 (2) and (3).<sup>233</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> § 409(1)-(7).

<sup>230</sup> § 409(2)-(3).

<sup>231</sup> § 409(5).

<sup>232</sup> § 409.

<sup>233</sup> *Id.*

### VIII. CONCLUSION

Should an animal, regardless of its intelligence, be afforded the same copyright protections as those conferred on a human? The Copyright Act does not explicitly exclude an animal from being considered an author.<sup>234</sup> The Supreme Court has had many opportunities to limit the definition of “author” to humans only, but it has consistently refused to limit the definition.<sup>235</sup> Furthermore, the House of Representatives specifically stated that it left the term “author” undefined to broadly encompass all. Why should a court reject an animal’s ability to own a copyright if Congress itself has not expressly denied such a right? The simple, logical, and just answer is that courts should not deny such protection to animals.

There are complexities when deciding the proper remedies for an animal whose copyright has been violated.<sup>236</sup> Animals can be analogized to minors based on their incompetency, and the animal’s rights could be protected in a similar manner to a minor’s rights by a court-appointed guardian for the animal. A court would have to appoint a guardian, but generally speaking, the guardian could be the party that moved to defend the animal’s rights. The settlement reached by the parties in *Naruto*<sup>237</sup> may reflect a societal sentiment that animals should have copyright protection of their works of art. Courts could grant animals partial compensation to be used either for the animals’ benefit or for the benefit of the entire species. There is no reason why an animal, regardless of its intelligence, should not be granted the same protection afforded to a human. As such, *Naruto* deserved the protection that it received in the settlement, and the courts and the legislatures should explicitly recognize the validity of such protection.

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<sup>234</sup> See generally *id.* § 101.

<sup>235</sup> COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 41.

<sup>236</sup> While animals and humans are similar, animals cannot manage their money. Most animals do not have a need for money, a common remedy in a lawsuit. The money they do win can be used to benefit their species, but still requires a person to handle its management of that money.

<sup>237</sup> Slotkin, *supra* note 50.