

COPYRIGHT EXPLAINER

CAN AN ANIMAL MAKE A COPYRIGHTED WORK?

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Imagine Bridget is a visual artist who creates paintings expressing our connections with the natural world. One of her works is a photo of the New York City skyline with feline paw prints that she stamped over it. Then imagine she left a duplicate skyline photo on the floor of her studio with her paint palate nearby. Her cat, Napoleon, happened to walk through her studio, step in the paint and leave his paw prints on the photo. The first work, the one on which Bridget stamped paw prints, is almost certainly a work she can copyright. What about the photo Napoleon stepped on? Can it be copyrighted, and if so, who owns it?



<https://commons.wikimedia.org/wiki/>

Despite a decent amount of scholarly commentary on this question,¹ the answer from prevailing precedent is that animals cannot own copyrights because the Copyright Act

does not anticipate non-human owners. This decision stems from the curiosity (or perhaps vanity?) of a crested macaque later dubbed Naruto, a wildlife photographer, left his camera unattended in Indonesia. Naruto took some photographs of his own (I have not seen any of them, but he is clearly focused with skill that I have yet to attain), and published them in a book of his wildlife photography.²

Naruto's Selfie

“The Copyright Act does not anticipate non-human actors.”

At some point, the copyright in the photos became an issue. PETA jumped in, ostensibly to represent Naruto (who, if he is still alive, has no idea what legal wrangling his actions have wrought), and the case ended up before a panel of the Ninth Circuit. I have skipped over the procedural bits and arguments over whether PETA has standing to focus on the interesting part: can Naruto own copyright in his infamous selfies?

There are a number of arguments against animals owning copyrights the *Naruto* panel could have adopted—for instance, animals cannot display sufficient creativity to warrant copyright, or animals do not benefit from the economic incentives to create provided by copyright—but the panel relied on a line of cases holding that statutes are presumed not to apply to animals. The Copyright Act does not rebuke that presumption with a provision making it expressly applicable to animals, so animals do not have statutory standing to sue for copyright infringement.³

1. For plenty of interesting animal art examples and pre-Naruto arguments on whether they are copyrightable, check out Vania Gauthreaux, *Far from Fauvists: The Availability of Copyright Protection for Animal Art and Concomitant Issues of Ownership*, 7 J. Animal L. 43 (2011); Dane E. Johnson, *Statute of Animals: Should Copyright Protect Sentient Nonhuman Creators?*, 15 Animal L. 15 (2008); Holly C. Lynch, *What Do an Orangutan and a Corporation Have in Common?: Whether the Copyright Protection Afforded to Corporations Should Extend to Works Created by Animals*, 42 Ohio N.U.L. Rev. 267 (2015); Jennifer L. Muse, *Monkeys and Elephants and Koalas, Oh My!: Is Originality Still the Touchstone of Authorship In United States Copyright Law?*, 97 J. Pat. & Trademark Off. Soc'y 736 (2015); Neal F. Burstyn, *Creative Sparks: Works of Nature, Selection, and the Human Author*, 39 Colum. J.L. & Arts 281 (2015); and Stephen Schahrer, *First, Let Me Take a Selfie: Should a Monkey Have Copyrights to His Own Selfie*, 12 Liberty U. L. Rev. 135 (2017).
2. An example is at <http://www.webcitation.org/6WWR2kwbP>.
3. *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018).

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Also, the court noted that the Copyright Act mentions that copyright holders then pass their rights to their heirs. Animals do not marry or have heirs, which indicates that the Act was not written to apply to them. This conclusion is also consistent with the Copyright Office's interpretation; it specifically mentions a monkey taking photos as an example of a copyright it would refuse to register.⁴ The Naruto District Court cited the Office's interpretation,⁵ but the Ninth Circuit did not mention it.

Napoleon the cat, then, does not have any rights in his creation. Neither, it would seem, does Bridget, as Napoleon's caretaker. Does this result seem just to you? If you had your druthers, would animals or their owners be able to have copyrights in works by animals? What you think about copyright and animals may influence your thoughts on the topic for my next column, copyright in works by other non-humans, especially artificial intelligences.⁶//

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4. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 313.2 (3d. ed. 2017).
 5. *Naruto v. Slater*, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016).
 6. A poster on copyright and non-humans I presented at the 2018 AALL Annual Meeting is available at <http://hdl.handle.net/1805/17061>.