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MONKEY BUSINESS IN COPYRIGHT – A CRITICAL ANALYSIS OF NARUTO V. SLATER

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ABSTRACT

Animals, by virtue of the fact that they are not humans, lack locus standi under Copyright Act to sue for copyright infringement.²

In an extraordinary series of events, an unattended camera owned by David Slater and a monkey with a knack for photography gave rise to one of the most intriguing copyright disputes in history. Having labels ranging from “curious” to “absurd”, the case of Naruto v. Fletcher is quite renowned in the intellectual property law sphere. The events of this case lead to the adjudication of unprecedented issues such as an animal’s right to sue, statutory standing of a suit initiated from the “immediate friend of an animal” and many related legal questions. Whilst the judgment of this case sheds light on multiple questions with regard to animals and their claims of copyright, it also interprets the statutes under question with an assumption that a non-human is the plaintiff of the case which would be considered bizarre in many judicial systems. The bench goes to the extent of applying constitutional doctrines with the intention of balancing the rights provided to the animal and non-exploitation of the humans involved in the case. However, despite such elaborate efforts, the bench failed to provide clarity on some aspects of law. The pith of this paper lies in an in-depth analysis of the judgment by finding its particulars, legal revelations and drawbacks.

Keywords - Animal, Copyright, Author, Non-human, Exclusivity

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² Naruto et al v. David Slater., 888 F. 3d 418, 426 (9th Cir. 2018)

INTRODUCTION

Under chapter 1 of the US Copyright Act, 1976, the US copyright law has the following criteria for copyrightable works:

*“To merit copyright protection, a work must be an “**original work of authorship**” fixed in tangible medium of expression.”³*

The concept of "originality" lacks a specific definition in both US and Indian copyright statutes. Nevertheless, the judiciary has progressively formulated various criteria to evaluate the originality of the artistic work under consideration. According to the tests, originality pertains to a creation resulting from intellectual effort. This implies that the author not only refrains from duplicating another's work but also applies “at least some minimal degree of creativity”⁴ in the work. Nonetheless, it is explicitly stated that copyright safeguarding for an original creative work does not encompass any notion, procedure, process, system, operational method, concept, principle, or revelation, irrespective of its mode of articulation.

The definition of the term ‘author’, as given under the U.S. Copyright Law ordinarily refers to the person who creates a copyrightable work. If the copyrightable work is made within the course of employment, the employer of the person creating the work is considered as the author. Joint authorship pertains to a work formed by two or more authors, aiming to merge their contributions into interdependent components of a unified creation. In cases where the work is a result of collaboration among multiple authors, each author assumes the role of a co-owner of the copyright. Thus, it can be assumed that the US copyright regime is moderately clear about who is an “author” and what is “copyrightable” under the act.

Despite these clarifications, the present case highlights the insufficiency of these provisions in determining the eligibility of the creator beyond the specific work they produce. It is noted that the US Copyright Act does not include the term “author” in the definitions section under section 101 (definitions clause). Consequently, there remains uncertainty regarding whether non-human entities like animals or artificial intelligence can assert copyright claims.

On the other hand, the Indian Copyright Act of 1957 clearly employs the term “person” in the definition of author.⁵ Yet, the mention of person does not provide us with certain answers as the current wildlife legislation in India affords rights to animals that are equivalent to those of a

³ 17 U.S.Code. § 102

⁴ Feist Publications v. Rural Telephone 499 U.S. 340 (1991)

⁵ Copyright Act of 1957, Section 2(d)

person. Given the advancement of law pertaining to animals and certain major decisions in the subject, the notion that animals are “persons” in Indian courts appears to be on the rise. The most important of these was the *Jallikattu* decision, *Animal Welfare Board v. A. Nagaraj*,⁶ in which the term “person” in Article 21 was interpreted to cover animals under the protection provided by Article 21. The most recent case in which animals are officially classified as “legal persons” is *Narayan Dutt Bhatt v. Union of India*.⁷

Naturally, multiple questions arise to the legal validity of these animals as creators of work. To answer these questions and more, this case report traces the facts, decisions and effects of the case.

FACTUAL BACKGROUND

In the year 2011, photographer David J. Slater, while capturing wildlife, left his camera unattended in an Indonesian reserve forest. Naruto, a curious male crested black macaque who was kept under the supervision of PETA, snatched the camera and began shooting pictures with the device after finding it interesting. It took photos of the forest floors, a few other macaques, and himself, one of which resulted in the iconic “monkey selfie.”

In December 2014, the defendant (Slater and Wildlife Personalities Ltd.) released the selfies in a book made by David Slater which was available on the Blurb Inc. website. Here, the defendants are listed as the copyright owners of the Monkey Selfies featured in the book. However, the defendant expressly admitted throughout the book that the images in question were taken by Naruto, the monkey.

In a U.S. federal court in San Francisco, a lawsuit was filed by People for Ethical Treatment Towards Animals (PETA), a non-profit organization dedicated to advocating for animal rights, against the photographer David Slater, acting as Naruto’s ‘next friend’ (or representative). The lower panel held that Naruto was the actual author and owner of the photographs.

Consequently, Wildlife Personalities Ltd. and Blurb, Inc., the San Francisco-based publishing company that published a collection of Slater’s photographs featuring two selfies taken by Naruto, alleged copyright infringement for the photographs taken by Naruto. Slater, Wildlife, and Blurb filed motions to dismiss in the District Court under Fed. R. Civ. P. 12(b) (1) and 12(b) (6) on the grounds that the complaint did not possess sufficient standing under Article III or statutory standing under the Copyright Act.

Ultimately, the district court granted the motion to dismiss by holding that Naruto the monkey had failed to establish statutory standing under the Copyright Act. This was followed by a timely

⁶ (2014) 7 SCC 547

⁷ 2018 SCC OnLine Utt 645.

appeal by PETA and Dr. Engelhardt. However, after the filing of the appeal, Dr. Engelhardt withdrew from the case. Therefore, On July 12, 2017, the parties submitted a joint motion to dismiss the appeal and vacate the lower court's verdict.

On September 8, 2017, the parties told the court that Slater and PETA had reached a settlement agreement. The US Court of Appeals for the Ninth Circuit, however, declined to reject the appeal. It reasoned that because this issue addressed a “growing area of the law,” a judgment in this case would prove to be useful to lower courts.

ISSUES

The following issues were discussed by the court,

- Whether an animal can sue people for injunctive relief and damages for claims of copyright infringement
- Whether a representative can sue on behalf of a non-human

DECISION

In the month of April 2018, the Ninth Circuit Court of Appeals rejected the motions to dismiss the case and made observations on the following issues,

I. Whether an animal can sue people for injunctive relief and damages arising from claims of copyright infringement

It was argued by the defendants that Naruto had endured economic injuries because of the appellant’s infringing behavior and that the only way it can be remedied was if the court passed a decision establishing Naruto as the author and copyright owner of the pictures in question. In order to sue humans for injunctive relief and further damages for these claims of infringement, it was to be ascertained whether an animal has firstly, Constitutional Standing under the US constitution and secondly, statutory Standing under the US Copyright Act.

i. Constitutional standing:

Article III of the US Constitution consists of the pre-requisite of “case or controversy”⁸ which allows an individual to act as a plaintiff. The alleged loss faced by the copyright infringement fulfilled this prerequisite and it was held that the monkey has the

⁸ U.S. Constitution. Art. III, § 2, Cl. 1.

constitutional ground to sue. The court decided to adopt an inclusive approach for the present case by highlighting that Article III does not categorically mention that a statutorily authorized suit in the name of an animal is not a ‘case or controversy’. Thus, the suit contained sufficient information to establish Naruto’s constitutional standing under Article III. However the animal’s right to sue was not final without assessing whether Naruto in this case also had the statutory standing to sue under the US Copyright Act.

ii. Statutory standing:

To ascertain the statutory standing of the monkey in case, the court relied on a simple rule of statutory interpretation, i.e. when a particular legislation expressly declares animals to have statutory standing, then the animals possesses it under that particular act. Otherwise, it cannot be assumed that animals have a statutory standing. Since the US Copyright Act clearly prohibits animals from filing copyright infringement lawsuits, Naruto in the present case has no statutory standing.

II. Whether a representative can sue on behalf of a non-human

In the present case, it was held that under the essentials under the “next-friend doctrine” were not met by PETA for the representation of Naruto in this case.

Moreover, the next-friend standing doctrine being applied for representing animals is barred by the US Supreme Court in a well-known precedent.⁹

FINAL OBSERVATIONS

On 23rd of the same month, the court ruled in the favor of David Slater, asserting that animals do not possess the legal authority to make them eligible plaintiffs in Copyright claims. The court expressed reservations about PETA’s motives and their actions in the course of the case, suggesting that their efforts seemed geared towards advancing their own interests rather than safeguarding Naruto's rights. Furthermore, the court found PETA’s attempt to withdraw the case subsequent to the organization learning of its potential significance in establishing a precedent to be concerning.

The judges acknowledged that their decision needed consideration in light of the 2004 case *Cetacean Community v. Bush*,¹⁰ heard by the very Ninth Circuit, which determined that, in specific

⁹ Town of Greece v. Galloway, 134 S. Ct. 1811, 1818–19 (2014)

¹⁰ Cetacean Community v. Bush, 386 F. 3d 1169 (2004)

circumstances, animals might have a standing to pursue legal action. A recommendation was made to the Ninth Circuit that a *en banc* hearing should be held to reevaluate their ruling in Cetacean in light of the monkey selfie case. On May 25th, a judge from the Ninth Circuit called for an *en banc* hearing to potentially overturn the precedent set by Cetacean Community. The court asked both the parties involved to submit briefs within 21 days regarding whether the *en banc* hearing should be granted. However, on August 31st, they decided not to review the case.

THE DECISION AND THE PRINCIPLES OF COPYRIGHT

I. SPECIFIC INTERPRETATION OF ORIGINALITY

In the present case, the tests of originality under the copyright law are considered with the assumption that the nature of the work i.e. the photograph in case to be of prime importance. In the landmark case of *Macmillan v. Cooper*,¹¹ it was held that for a work to be considered original, it should be the product of labor, skills, and capital. Additionally, in the case of *Feist Publications v. Rural Telephone*,¹² the work had to possess a minimum standard of creativity.

As observed from the established standards in copyright it would *prime facie* seem in the present case that since the monkey took the picture, the tests of “skill and labor” and “modicum of creativity” will not be fulfilled. However, it was held in *Temple Island Collections v. New English Teas*,¹³ that when it comes to photographs, the composition is of prime importance, which is essentially the angle, view, and “bringing together different elements at the right place and the right time” to get copyrighted. There was adequate labor put in by Slater for setting up a specific set of steps for the monkey to follow, without which the final picture would have never been clicked. Thus, under this interpretation, Slater’s win is justified.

II. EXCLUSIVITY OF HUMAN AUTHORSHIP

In the midst of the dispute, the U.S. Copyright Office issued a clarification within the compendium of US Copyright Office Practices.¹⁴ The clarification made it abundantly clear that “human authorship,” which is “found in the creative and original intellectual conceptions

¹¹ *Macmillan v. Cooper*, AIR 1924 PC 75

¹² *Feist Publications v. Rural Telephone* 499 U.S. 340 (1991)

¹³ *Temple Island Collections v. New English Teas* [2012] EWPCC 1

¹⁴ Compendium of U.S. Copyright Office Practices, 3rd Edition, Chapter 300, p.306.

of the author" is exclusively eligible for copyright protection under the existing legal regime. It refused to register any work that was deemed not to be a work of human authorship.

LIMITATIONS IN THE JUDGMENT

Although the judgment shed light on many issues involving the case, the bench mostly relied on the statutory standing of the monkey in the court of law i.e. the monkey cannot be considered an author under the copyright regime of the US. However, the judgment failed to consider that the whether the picture can be put in the public domain, or can be filed for a joint authorship with Naruto and Slater. Additionally, reliance has been put on the clarification issued by the US Copyright office, however, since a guiding manual created by the U.S. Copyright office is not a legal notification, it holds no legal value.¹⁵

CONCLUSION

This study traced the case of *Naruto v. Slater* with the objective of finding out the various ways the principles of copyright has been interpreted in case of a non-human creator. The concepts of “originality”, “authorship” and “nature of work” were main areas of discussion along with the legal standing of an animal in intellectual property disputes. It was found that the US copyright law lacks clarity in many of its definitions and the code. Coming to the judgment, it provides substantive clarity on the existing stand of copyright eligibility with respect to animals. It does not however, address topics such as the lack of specific provisions relating to the matter, jurisdictional issues and joint authorship.

¹⁵ Guadamuz, Andrés, “The monkey selfie: copyright lessons for originality in photographs and internet jurisdiction”, Volume 5, *Internet Policy Review*, pg 3-6, (2016)