

NARUTO V. SLATER: ONE SMALL SNAP FOR A MONKEY, ONE GIANT LAWSUIT FOR ANIMAL-KIND

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I. INTRODUCTION

When David Slater left his camera unattended in Indonesia, little did he realize the enormous legal battle that would result from that simple act.¹ With a single snap, a “curious male crested black macaque” named Naruto not only captured an iconic photograph, but also managed to jumpstart a legal campaign to assert animals’ rights to sue in federal court and protect their interests in their created works.² If successful, the lawsuit would have been the first legal declaration that an animal owned property.³

Naruto’s case raised intriguing legal questions and stole the public’s attention. The lawsuit, *Naruto v. Slater*,⁴ even took first place for the U.S. Chamber Institute for Legal Reform’s survey of the “Top Ten Most Ridiculous Lawsuits of 2015.”⁵ The case has been called “curious,”⁶ a “stunt,”⁷ and simply “absurd.”⁸ But this case, dealing with who owned the resulting “Monkey Selfies” and who could sue to protect those rights, raised intriguing questions about standing for nonhuman entities.⁹ It also raised novel questions regarding

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1. *This Selfie May Set a Legal Precedent*, PEOPLE FOR ETHICAL TREATMENT ANIMALS (Sept. 22, 2015), <https://www.peta.org/blog/this-selfie-may-set-a-legal-precedent/>.

2. *Id.*

3. *Id.*

4. 888 F.3d 418 (9th Cir. 2018).

5. *Lawsuit on Behalf of Monkey Tops Poll of Year’s Most Ridiculous Lawsuits*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 21, 2015), <https://www.instituteforlegalreform.com/resource/lawsuit-on-behalf-of-monkey-tops-poll-of-years-most-ridiculous-lawsuits>.

6. Rick Kogan, *What We Learn from the Curious Case of the Monkey Selfie*, CHI. TRIB. (Jan. 26, 2018), <https://www.chicagotribune.com/entertainment/ct-ae-monkey-takes-a-selfie-kogan-sidewalks-0128-story.html>.

7. Andrew Orlowski, *Petty PETA Rapped by Judges over Monkey Selfie Copyright Stunt*, REGISTER (Apr. 23, 2018, 6:56 PM), https://www.theregister.co.uk/2018/04/23/peta_monkey_selfie_appeal/.

8. John Bonazzo, *People Are Literally Suing Each Other over the Rights to a Monkey Selfie*, OBSERVER (July 14, 2017, 1:19 PM), <https://observer.com/2017/07/monkey-selfie-lawsuit-peta/>.

9. *See infra* Part IV.

authorship under the Copyright Act and how creativity is protected in the United States.¹⁰

This Article will explore the intriguing and unique case of the “Monkey Selfies” and its implications in a variety of legal spheres. In Part II, this Article will examine the standing doctrine in general, as well as the legal status of animal standing prior to the *Naruto* case. In Part III, this Article will turn to consider the facts and circumstances leading up to the *Naruto* case, the proceedings in the district court, and the subsequent appeal and opinion. Part III will also analyze the Ninth Circuit Court of Appeals’ criticism of the binding precedent from the case *Cetacean Community v. Bush*.¹¹ In Part IV, this Article will consider the legal consequences of the *Naruto* opinion: the split within the Ninth Circuit, the implications for animal standing in the future, and the impact of *Naruto* on other nonhuman entities, including the case’s effect on the Copyright Act specifically.

II. ANIMAL STANDING BEFORE *NARUTO*

A. *Standing in General*

The doctrine of standing is “rooted in the traditional understanding of a case or controversy.”¹² The United States Constitution only grants federal courts jurisdiction over “cases” and “controversies,” establishing the bare minimum necessary to bring suit in federal court.¹³ Standing under Article III of the Constitution requires three elements: “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”¹⁴

A plaintiff must also have statutory standing.¹⁵ “[T]he nonconstitutional standing inquiry is whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit.”¹⁶ To determine statutory standing, one simply examines the statute under which the plaintiff is suing, “a purely statutory inquiry.”¹⁷

However, statutory standing does not automatically create Article III standing; Congress’s grant of statutory standing cannot

10. See *infra* Subpart IV.E.

11. 386 F.3d 1169 (9th Cir. 2004).

12. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

13. See U.S. CONST. art. III, § 2, cl. 1; see also *Spokeo, Inc.*, 136 S. Ct. at 1547.

14. *Spokeo, Inc.*, 136 S. Ct. at 1547; see also *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

15. See *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004).

16. *Id.*

17. *Id.*

compensate for the lack of Article III standing.¹⁸ If Congress attempted to confer statutory standing on an entity that lacked Article III standing (e.g., an animal), the federal court would be still deprived of subject matter jurisdiction, forcing it to dismiss the case.¹⁹

B. *The Cetacean Community Case*

The primary case addressing animal standing before *Naruto* was *Cetacean Community v. Bush*.²⁰ In that 2004 case, the Ninth Circuit held that the world's whales, porpoises, and dolphins possessed Article III standing to sue,²¹ yet lacked statutory standing.²² The court had to decide whether the “Cetacean Community” could sue in their own name under the Endangered Species Act²³ (“ESA”), the Marine Mammal Protection Act²⁴ (“MMPA”), and the National Environmental Policy Act²⁵ (“NEPA”).²⁶

The Ninth Circuit held there was no reason why Article III would keep Congress from granting standing to animals.²⁷ The court pointed out that fully competent humans are not the only entities to have standing—corporations, partnerships, trusts, children, and mentally incompetent individuals can all have standing.²⁸ And Article III does not explicitly exclude animals from its ambit. Moreover, as the court stated, “Animals have many legal rights, protected under both federal and state laws.”²⁹

But the Ninth Circuit drew the line at statutory standing under the ESA, MMPA, and NEPA.³⁰ Nothing in those statutes appeared to allow animals themselves to act as plaintiffs.³¹ For example, the ESA's citizen-suit provision granted standing to “any person.”³² But the court held that “[t]here is no hint in the [statutory] definition of ‘person’ that the ‘person’ authorized to bring suit to protect an endangered or threatened species can be an animal that is itself

18. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1992); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (“If a plaintiff lacks Article III standing, Congress may not confer standing on that plaintiff by statute.”).

19. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 109–10 (1998); FED. R. CIV. P. 12(b)(1); cf. *Doe v. Mckesson*, 272 F. Supp. 3d 841, 851–52 (M.D. La. 2017), *rev'd on other grounds*, 945 F.3d 818 (5th Cir. 2019) (“Plaintiff therefore is attempting to sue a *hashtag* [#BlackLivesMatter] for damages in tort. For reasons that should be obvious, a *hashtag* . . . is not a ‘juridical person’ and therefore . . . is patently incapable of being sued.”).

20. *Cetacean Cmty.*, 386 F.3d 1169 (9th Cir. 2004).

21. *Id.* at 1176.

22. *Id.* at 1179.

23. 16 U.S.C. §§ 1531–1544 (2018).

24. 16 U.S.C. §§ 1371–1421h (2018).

25. 42 U.S.C. §§ 4321–4347 (2018).

26. *Cetacean Cmty.*, 386 F.3d at 1171–72.

27. *Id.* at 1176.

28. *Id.*

29. *Id.* at 1175.

30. *Id.* at 1179.

31. *Id.* at 1176–79.

32. 16 U.S.C. § 1540(g)(1)(A) (2018).

endangered or threatened.”³³ The court concluded that “[i]f 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.”³⁴ Without a “plain[]” statement in the statute authorizing animal standing, the Cetacean Community lacked statutory standing.³⁵

C. Other Cases & Commentary

Cetacean Community also had to address a prior Ninth Circuit case from 1988—*Palila v. Hawaii Department of Land & Natural Resources*.³⁶ There, the court stated that a species of endangered bird had “legal status and wings its way into federal court as a plaintiff in its own right.”³⁷ Although this reasoning purported to confer both types of standing on the bird, subsequent cases (even *Cetacean Community*) held this statement was nonbinding dicta.³⁸

Additionally, in 2000, Professor Cass Sunstein wrote that “[u]nder existing law . . . animals lack standing to sue in their own right, for Congress has restricted standing to ‘persons.’ But it also means that Congress can accord standing to animals if it chooses to do so.”³⁹ Sunstein articulated the following standard: “[I]t should be clear that the question of whether animals have standing depends on the content of positive law. If Congress has not given standing to animals, the issue is at an end.”⁴⁰ Sunstein also forecast that Congress might soon begin to confer standing on animals.⁴¹

33. *Cetacean Cmty.*, 386 F.3d at 1178.

34. *Id.* at 1179 (quoting *Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)).

35. *Id.*

36. 852 F.2d 1106 (9th Cir. 1988).

37. *Id.* at 1107.

38. *See Cetacean Cmty.*, 386 F.3d at 1173–74 (“*Palila IV*’s statements are nonbinding dicta In context, our statements in *Palila IV* were little more than rhetorical flourishes.”); *see also* *Hawaiian Crow (‘Alala) v. Lujan*, 906 F. Supp. 549, 552 n.2 (D. Haw. 1991); *Citizens to End Animal Suffering & Exploitation, Inc.*, 836 F. Supp. at 49.

39. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1335 (2000).

40. *Id.* at 1359; *accord* *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) (“[I]f an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing.”). Sunstein also stated the rule as being that “[a]s a rule, the question is therefore quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals.” Sunstein, *supra* note 39, at 1359.

41. *See* Sunstein, *supra* note 39, at 1359.

III. THE *NARUTO* CASEA. *The Selfies*

In 2011, Naruto, a crested macaque, took a series of selfies using photographer David Slater's camera.⁴² Slater published and sold a book containing some of the photos.⁴³ One photo became extremely popular and was circulated on the internet.⁴⁴ Consequently, People for the Ethical Treatment of Animals ("PETA") filed suit on behalf of Naruto, asserting next friend status, and alleged that Slater committed copyright infringement by publishing the Monkey Selfies.⁴⁵

B. *District Court Proceedings*

In its complaint before the U.S. District Court for the Northern District of California, PETA argued that Naruto, not Slater, was the author of the Monkey Selfies.⁴⁶ PETA acknowledged that a "claim of authorship by species other than *homo sapiens*" might be "novel," but argued the term "authorship" under the Copyright Act was "sufficiently broad so as to permit the protections of the law to extend to any original work, including those created by Naruto."⁴⁷ PETA sought a variety of forms of relief, including an order permitting the organization "to administer and protect Naruto's authorship of and copyright in the Monkey Selfies" by giving PETA "all net proceeds from the sale, licensing and other commercial use of the Monkey Selfies."⁴⁸

In response, Slater filed a Motion to Dismiss for both lack of standing and failure to state a claim.⁴⁹ Slater relied on *Cetacean Community*, arguing that since the Copyright Act did not explicitly give nonhumans standing to sue for copyright infringement, Naruto could not have standing.⁵⁰ He called the notion that a monkey was an "author" under the Copyright Act a "farcical journey Dr. Seuss might have written."⁵¹ While Slater acknowledged there might be good arguments for conferring legal standing on animals in certain

42. Complaint for Copyright Infringement & Demand for Jury Trial at 1, *Naruto v. Slater*, No. 15-cv-4324 (N.D. Cal. Sept. 21, 2016), ECF No. 1 [hereinafter Complaint]. As implied by the term selfie, Naruto took the photos himself. *Id.*

43. Tanya Basu, *Monkey Should Get Rights to Famous Selfie, PETA Says*, TIME (Sept. 22, 2015), <http://time.com/4044452/peta-monkey-selfie-copyright/>.

44. *Id.* "The Monkey Selfies resulted from a series of purposeful and voluntary actions by Naruto, unaided by Slater, resulting in original works of authorship not by Slater, but by Naruto." Complaint, *supra* note 42, at 1.

45. Complaint, *supra* note 42, at 1–2.

46. *Id.* at 1–2.

47. *Id.* at 2.

48. *Id.* at 9–10.

49. Notice of Motion & Motion to Dismiss at 1, *Naruto v. Slater*, No. 15-cv-4324-WHO (N.D. Cal. Nov. 6, 2015), ECF No. 28.

50. *Id.* at 2–3.

51. *Id.* at 2.

circumstances, “especially with regard to legislation enacted to protect the animals in question,”⁵² he also asserted that Congress, not the federal courts, was the appropriate entity to confer standing.⁵³ But he ultimately rested on the Ninth Circuit’s controlling precedent.⁵⁴

The district court granted Slater’s motion to dismiss, ruling that Naruto lacked standing under the Copyright Act⁵⁵ and declining to even discuss Article III standing.⁵⁶ Relying on *Cetacean Community*,⁵⁷ the court ruled that the Copyright Act “does not ‘plainly’ extend the concept of authorship or statutory standing to animals.”⁵⁸ Additionally, the court deferred to the Copyright Office’s interpretation of the statute—the Copyright Office’s Compendium stated that only works created by humans were copyrightable.⁵⁹

C. Arguments Before the Ninth Circuit

On appeal, PETA raised one issue: whether the fact that “Congress did not *expressly* grant standing to animals to sue under the Copyright Act” meant that Naruto lacked standing.⁶⁰ PETA characterized this as an issue of first impression and also pointed out that the issue extended beyond animal authorship to questions regarding whether works “independently created by artificially intelligent computers are entitled to copyright protection.”⁶¹ PETA disagreed with the district court’s reasoning that Naruto lacked standing because the Copyright Act did not expressly give standing to animals: “[T]hat reasoning misses the mark: Congress did not provide an ‘express’ definition at all. By its silence, Congress accepted the broad constitutional notion of authorship and the judicial construction that had been in place since at least the 19th century.”⁶²

PETA also pointed out that a nonhuman can be the author of a copyrighted work. For instance, 17 U.S.C. § 201(b) makes an

52. *Id.* at 3.

53. *Id.*

54. *Id.* (“Enumerating the reasons why animals should not be able to sue for copyright infringement would serve no useful purpose in this motion since controlling Ninth Circuit authority requires dismissal of this action.”).

55. *Naruto v. Slater*, No. 15-cv-04324-WHO, 2016 WL 362231, at *4 (N.D. Cal. Jan. 28, 2016).

56. *Id.* at *2.

57. *Id.* at *3. “[I]f 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.” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (quoting *Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)).

58. *Naruto*, 2016 WL 362231, at *3.

59. *Id.* at *4 (citing U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 306, 313.2 (3d ed. 2017) [hereinafter COMPENDIUM]).

60. Opening Brief of Plaintiff–Appellant at 1, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469).

61. *Id.* at 5–6.

62. *Id.* at 10.

employer, necessarily including business entities, the author of certain works. “This proposition is so firmly established in the jurisprudence that most copyright cases to reach the United States Supreme Court have been filed by authors who are nonhumans, ranging from motion picture studios to music publishers to others.”⁶³

PETA encouraged the court to consider the Copyright Act broadly.⁶⁴ It concluded by noting that “if animals cannot be authors, there is no copyright protection for their works.”⁶⁵ That, PETA asserted, was inconsistent with the notion, and prior precedent, that “[c]opyright protection extends to *all* ‘original works of authorship fixed in any tangible medium’ of expression.”⁶⁶ “There is no doubt that the general public has an interest in works of art, regardless of their authors’ characteristics or attributes. The tremendous interest in Naruto’s work and Defendants’ attempts to exploit that interest (and to bar others from doing so) only buttresses this conclusion.”⁶⁷

In response, Slater asserted similar arguments to those in his motion to dismiss. He reasserted that *Cetacean Community* was controlling because none of the four statutes considered by the Ninth Circuit in that case “expressly excluded non-human animals from having statutory standing, but all four lacked the requisite plain statement indicating legislative intent to take that ‘extraordinary step’ in federal jurisprudence.”⁶⁸ Two of the statutes used the term “person” when conferring standing and two had no express grant of standing at all.⁶⁹ But, according to Slater, the common thread between these four statutes was that none of them explicitly granted standing to nonhuman animals, which was why the plaintiffs in that case failed to establish standing.⁷⁰ Since the Ninth Circuit in that case held that the absence of “clear direction from Congress”⁷¹ precluded animals having standing, Slater argued that “*Cetacean Community* set forth a straightforward test for nonhuman animal statutory standing, and the Copyright Act fails that test.”⁷² Slater also challenged PETA’s standing to sue as next friend because “PETA did not allege any relationship with Naruto, much less a significant one.”⁷³

63. *Id.* at 12–13.

64. *Id.* at 15.

65. *Id.* at 16.

66. *Id.* (quoting *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006)).

67. *Id.* at 17.

68. Brief of Defendants-Appellees David John Slater and Wildlife Personalities, Ltd. at 5, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469) [hereinafter Answer Brief] (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004)).

69. *Id.* at 6 (citing *Cetacean Cmty.*, 386 F.3d at 1176–79).

70. *Id.*

71. *Cetacean Cmty.*, 386 F.3d at 1178.

72. Answer Brief, *supra* note 68, at 7.

73. *Id.* at 9. Although the Ninth Circuit’s opinion agreed with Slater on this issue, the next friend issue is beyond the scope of this Article, since the Ninth

D. The Ninth Circuit's Opinion

After oral arguments were held on July 12, 2017,⁷⁴ the parties filed a joint motion to dismiss the appeal and vacate the judgment below.⁷⁵ The parties informed that court that they—Slater and PETA, not Slater and Naruto—had entered into a settlement agreement on September 8, 2017.⁷⁶ But the Ninth Circuit refused to dismiss the appeal.⁷⁷ It reasoned that since a decision in this case would address a “developing area of the law,” such a decision would be helpful to lower courts.⁷⁸

The Ninth Circuit affirmed the district court in a published opinion on April 23, 2018.⁷⁹ The court first held that PETA lacked standing as Naruto’s next friend because PETA had failed to establish the requisite significant relationship with Naruto and because animals cannot be represented by a next friend.⁸⁰ But the court held that it also had to consider Naruto’s standing independent of any next friend.⁸¹ Bound by *Cetacean Community*, the court concluded that animals can have Article III standing.⁸² But the court expressed reluctance to follow *Cetacean Community*, suggesting it was incorrectly decided.⁸³ This disagreement is discussed more extensively below.

In addressing statutory standing, the court referred back to *Cetacean Community*, observing that “[i]f 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

Circuit proceeded to consider Naruto’s standing under Article III and the Copyright Act independent of any next friend. *See Naruto*, 888 F.3d at 422 (holding that “Naruto’s lack of a next friend does not destroy his standing to sue, as having a ‘case or controversy’ under Article III of the Constitution”). Judge Smith would have held that the Court’s conclusion as to the next friend issue deprived the Court of jurisdiction, so considering Naruto’s independent Article III and statutory standing were inappropriate. *See id.* at 427 (Smith, J., concurring in part). Although the question of whether next-friend standing is nonjurisdictional is intriguing, exploration of this question deserves its own article.

74. *See* ECF Nos. 45–46, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469).

75. Joint Motion to Dismiss Appeal and Vacate the Judgment at 1, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469).

76. *Id.* at 3–4.

77. Order at 1, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469), ECF No. 59.

78. *Id.* at 2.

79. *See Naruto*, 888 F.3d at 418, 420.

80. *Id.* at 421.

81. *See id.* at 423.

82. *Id.* at 424–25; *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004) (“[W]e see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.”).

83. *Naruto*, 888 F.3d at 425 n.7.

so plainly” and that the “*absence of any such statement*” indicated a lack of standing.⁸⁴ To the Ninth Circuit, this was “a simple rule of statutory interpretation.”⁸⁵ The *Naruto* court then synthesized a bright-line rule: “If an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing.”⁸⁶

With that clear rule, resolving *Naruto*’s standing question was straightforward. Because “[t]he Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute. . . . *Naruto* lacks statutory standing.”⁸⁷ The Ninth Circuit rejected PETA’s argument about entity standing, noting that corporations have previously been held to be “persons” for both constitutional and statutory standing.⁸⁸

The Ninth Circuit also considered the context of the statute’s language.⁸⁹ The court noted that the Copyright Act refers to “children” of an author.⁹⁰ The Act also discusses the “widow or widower” of an author.⁹¹ Consequently, “[t]he terms ‘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.”⁹² Additionally, the court did not address PETA’s argument that the district court improperly relied on the Copyright Office Compendium. The Compendium has since been cited as authoritative alongside the *Naruto* opinion.⁹³

Although the court of appeals acknowledged that it was bound by prior Ninth Circuit precedent, it expressed displeasure with the *Cetacean Community* decision.⁹⁴ The court did not mince words: “Although we must faithfully apply precedent, we are not restrained from pointing out, when we conclude after reasoned consideration,

84. *Id.* (emphasis added by the *Naruto* court) (internal quotation marks omitted) (quoting *Cetacean Cmty.*, 386 F.3d at 1179).

85. *Id.* at 426.

86. *Id.*

87. *Id.*

88. *Id.* at 426 n.9 (citing *Citizens United v. FEC*, 558 U.S. 310, 341–42 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014)). The court also pointed out that such organizations are organized by humans, not animals. *Naruto*, 888 F.3d at 426 n.9).

89. *Naruto*, 888 F.3d at 426.

90. See 17 U.S.C. §§ 101, 201, 203, 304 (2018).

91. See 17 U.S.C. § 203(a)(2)(A) (2018).

92. *Naruto*, 888 F.3d at 426.

93. See, e.g., 1 HOWARD B. ABRAMS & TYLER T. OCHOA, *THE LAW OF COPYRIGHT* § 4:1 n.10 (2018); 1 KATHERYN A. ANDERSEN, *LAW AND BUSINESS OF COMPUTER SOFTWARE* § 2:3 n.1 (2d ed. 2018); 1 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 1:10.50 (3d ed. 2018); 6 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 21:7 n.13 (2018); Ralph D. Clifford, *Creativity Revisited*, 59 *IDEA: L. REV. FRANKLIN PIERCE CTR. FOR INTELL. PROP.* 25, 27 n.9 (2018).

94. *Naruto*, 888 F.3d at 425 n.7.

that a prior decision of the court needs reexamination. This is such a case.”⁹⁵

The *Naruto* court asserted unequivocally that “[a]nimals have neither constitutional nor statutory standing.”⁹⁶ The court noted that *Cetacean Community* was the only case to ever hold that animals have Article III standing.⁹⁷ With respect to statutory standing, the court also asserted that animals do not possess any sort of “cognizable interests” and that therefore “they cannot bring suit in federal court in their own names to protect such interests unless Congress determines otherwise.”⁹⁸

IV. CONSEQUENCES OF *NARUTO*

The *Naruto* decision provides little resolution to questions of animal standing in general and authorship under the Copyright Act. This Part considers the consequences of the Ninth Circuit’s opinion in a variety of contexts, exploring the new questions that are raised and the decision’s impact on existing statutes.

A. *Internal Circuit Split*

The decision in *Naruto* revealed a split within the Ninth Circuit. The *Naruto* panel did not think animals have any type of standing, in direct contradiction to the *Cetacean Community* panel. By calling into doubt *Cetacean Community*’s rationale and conclusion, the *Naruto* panel demonstrated a divide within the Ninth Circuit, opening the possibility of subsequent review of the issue. Ultimately, this decision suggests that the question of Article III standing for animals is not settled law.

For future cases in the Ninth Circuit, *Cetacean Community* is still binding precedent.⁹⁹ But the criticism by the *Naruto* court provides fodder for future litigants to argue that an en banc panel of the Ninth Circuit should review and overturn *Cetacean Community*. One wrinkle in this, however, is that the Ninth Circuit did decline to reconsider the *Naruto* case en banc.¹⁰⁰

For cases outside of the Ninth Circuit, neither *Cetacean Community* nor *Naruto* are binding authority. The *Naruto* court noted the absence of cases conferring any sort of Article III standing

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 421; *see also* Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (noting that the proposition that “a three-judge panel may not overrule a prior decision of the court” is “unassailable so far as it goes”).

100. *See* Order at 1, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (No. 16-15469), ECF No. 74. The parties did not request an en banc hearing, but one of the judges requested a vote sua sponte. *See id.*

on animals.¹⁰¹ Thus, *Cetacean Community* and *Naruto* present opposing views that could be implemented in other jurisdictions.

B. *Implications for Animal Standing in the Future*

Professor Sunstein's analysis from 2000¹⁰² is strikingly like the standard articulated by the Ninth Circuit in *Naruto*. Sunstein's position was that "it should be clear that the question of whether animals have standing depends on the content of positive law. If Congress has not given standing to animals, the issue is at an end."¹⁰³ The near-identical rule from *Naruto* (originating from *Cetacean Community*) serves as a clear call to legislative bodies. At least in the Ninth Circuit, if citizens want animals to be able to sue in their own right, legislatures must act since the federal courts will not find standing otherwise.

There are many federal statutes that protect animals in some way.¹⁰⁴ But since none of them explicitly confer standing on the protected animals, *Naruto*'s bright-line rule would still deprive those animals of standing. The following Subparts will consider several of those statutes in more depth.

1. *The Humane Methods of Slaughter Act*

The Humane Methods of Slaughter Act¹⁰⁵ requires that "the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods."¹⁰⁶ The Act establishes what methods of slaughter are humane.¹⁰⁷ However, this Act does not explicitly confer standing on any entity to bring suit to enforce the policies and procedures.¹⁰⁸ Rather, the Food Safety and Inspection Service ("FSIS"), an agency of the United States Department of Agriculture ("USDA"), enforces this Act.¹⁰⁹

Although the Humane Methods of Slaughter Act appears to confer some rights on the animals it purports to protect,¹¹⁰ *Naruto* precludes those animals from suing to assert their rights. This lack

101. See *Naruto*, 888 F.3d at 425 n.7.

102. See *supra* notes 39–41 and accompanying text.

103. Sunstein, *supra* note 39, at 1359; accord *Naruto*, 888 F.3d at 426 ("[I]f an Act of Congress plainly states that animals have statutory standing, then animals have statutory standing. If the statute does not so plainly state, then animals do not have statutory standing."). Sunstein also restated the rule thus: "[a]s a rule, the question is therefore quite clear: Animals lack standing as such, simply because no relevant statute confers a cause of action on animals." Sunstein, *supra* note 39, at 1359.

104. See, e.g., 7 U.S.C. §§ 1901–1907 (2018); Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2018); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407 (2018); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

105. 7 U.S.C. § 1901.

106. *Id.*

107. 7 U.S.C. § 1902.

108. See 7 U.S.C. §§ 1901–1907.

109. See 9 C.F.R. §§ 300.1, 313.1 (2019).

110. See 7 U.S.C. § 1901.

of standing is amplified since this Act does not even contain a citizen-suit provision.¹¹¹ The addition of a citizen-suit provision authorizing persons to sue for enforcement (compared to FSIS enforcing the Act) would have the potential to create a standing question for animals, depending on how a court would construe that citizen-suit provision. But the explicit language standard articulated by *Naruto* would still serve as a substantial barrier.

2. *The Animal Welfare Act*

The Animal Welfare Act¹¹² governs the transportation and treatment of animals in research and exhibition.¹¹³ This Act explicitly delegates enforcement to the Secretary of Agriculture,¹¹⁴ which is executed by the USDA and the Animal and Plant Health Inspection Service (“APHIS”).¹¹⁵

This Act protects certain animals used “for research, testing, experimentation, or exhibition purposes.”¹¹⁶ But none of those animals may sue under this Act, thanks to *Naruto*. The only entity authorized to enforce this Act is the Secretary of Agriculture; the Act does not contain a citizen-suit provision.¹¹⁷ Moreover, if this Act did grant standing to persons, its definition of “person” would likely not be explicit enough to confer standing on animals. This Act defines a “person” as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.”¹¹⁸ Even this broad, all-inclusive language would most likely fall short of *Naruto*’s explicit language requirement.¹¹⁹

3. *The Marine Mammal Protection Act and the Endangered Species Act*

The Marine Mammal Protection Act of 1972¹²⁰ and the Endangered Species Act of 1973¹²¹ were two of the acts considered in *Cetacean Community*.¹²² Of course, the court of appeals held that neither contained the requisite explicit statutory language required

111. See 7 U.S.C. §§ 1901–1907.

112. 7 U.S.C. §§ 2131–2159 (2018).

113. 7 U.S.C. § 2131.

114. 7 U.S.C. § 2146.

115. See *About APHIS*, U.S. DEP’T AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., <https://www.aphis.usda.gov/aphis/banner/aboutaphis> (last modified Dec. 4, 2019).

116. 7 U.S.C. § 2132(g).

117. See generally 7 U.S.C. §§ 2146, 2159.

118. 7 U.S.C. § 2132(a).

119. See *Naruto v. Slater*, 888 F.3d 418, 420–22 (9th Cir. 2018); cf. *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 216 A.3d 839, 844–46 (Conn. App. Ct. 2019) (dismissing habeas corpus case on behalf of an elephant because an elephant is not a person).

120. 16 U.S.C. §§ 1361–1407 (2018).

121. 16 U.S.C. §§ 1531–1544 (2018).

122. See *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1171 (9th Cir. 2004).

to confer animal standing.¹²³ Thus, again, the construction of these acts, which were designed to protect certain animals, demonstrates the lack of ability for any affected animal to assert its rights under the acts.

4. *Consequences of Lack of Standing in These Statutes*

The implications of animals lacking standing under the above acts may not appear too extreme at first blush. Yet the main challenge is the very principle of the matter—the very *things* the acts were intended to protect cannot sue under the statutes to protect and assert their rights. Of course, the practicalities of animals suing under these statutes is extremely questionable. How would an animal know it had a right to sue in the first place? How could it communicate to assert its rights? How would a court know whether it was properly understanding the concerns raised by the animal?

Moreover, existing enforcement procedures may be sufficient. For example, the USDA regularly brings enforcement actions against establishments that are alleged to have violated the Humane Methods of Slaughter Act.¹²⁴ Additionally, USDA inspectors with APHIS “conduct routine, unannounced inspections of all facilities licensed or registered” under the Animal Welfare Act.¹²⁵ The USDA may even bring enforcement actions against facilities that fail to comply.¹²⁶ More importantly, APHIS is not wholly insulated from the public; individuals may report potential violations of the Animal Welfare Act.¹²⁷

C. *The Implications of Explicit Legislation*

New questions would arise if Congress did pass legislation explicitly conferring standing on animals. Although such a statute would be compatible with *Cetacean Community*, the statute would still fail due to lack of Article III standing according to *Naruto*. Both *Cetacean Community* and *Naruto* used the lack of statutory standing to defeat the plaintiffs’ claims. In essence, the panels could fall back on their bright-line rule on statutory standing. But would a court’s rationale change if it no longer had that line of defense? In the face of a statute explicitly granting standing to animals, would even the *Naruto* panel still hold that the Article III standing requirement was

123. *Id.* at 1177–78.

124. *See Humane Handling Enforcement Actions*, U.S. DEP’T AGRIC., FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/wps/portal/phis/topics/regulatory-compliance/regulatory-enforcement/humane-handling-enforcement-actions/humane-handling-enforcement-actions> (last modified Jan. 13, 2020).

125. *Animal Welfare Act*, U.S. DEP’T AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_program_information (last modified Sept. 13, 2019).

126. *Id.*

127. *Animal Welfare Complaint*, U.S. DEP’T AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/complaint-form> (last visited Feb. 2, 2020).

met? As discussed above, Congress may only confer statutory standing, not Article III standing, and both are required for a meritorious suit.¹²⁸

It is easy for the *Naruto* court to speak in footnotes of animals lacking Article III standing when the stakes are not high (having the lack of statutory standing to fall back on). But it is a wholly new matter for a court to be faced with that question as the ultimately dispositive issue. Although the *Naruto* panel considered the issue foreclosed and easily addressed, others have presented arguments suggesting that the constitutional standing issue is not so easily resolved.¹²⁹ The *Naruto* opinion was arguably written so as to invite en banc review.¹³⁰ Thus, even the *Naruto* panel may have comprehended that an en banc panel or the Supreme Court might be better suited to consider this question and provide a clear resolution.

D. *Standing for Other Nonhuman Entities*

Another area that the *Naruto* decision implicates is the realm of other nonhuman entities that may “author” certain works that would otherwise qualify for a copyright. This is specifically relevant in the world of artificial intelligence (“AI”). Ultimately, the rise of AI poses many of the same questions that *Naruto* the monkey did.¹³¹

Although the Ninth Circuit’s opinion in *Naruto* only addressed the issue of animal standing, the bright-line rule it articulated seems much more broadly applicable and could translate into other spheres. Under a sort of “transitive property” principle, it could be inferred that unless Congress explicitly grants standing to AI entities, then the works created by those entities cannot be “authored” by the AI.¹³² The Copyright Office’s Compendium’s standard would also preclude AI entities from being authors.¹³³

128. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1992); *Cetacean Cmty.*, 386 F.3d at 1174 (“If a plaintiff lacks Article III standing, Congress may not confer standing on that plaintiff by statute.”).

129. See, e.g., Relators’ Reply Brief at 8–9, *State ex rel. Twitchell v. Saferin*, 119 N.E.3d 365 (Ohio 2018) (No. 2018-1238); Symposium, *Legal Standing for Animals and Advocates*, 13 ANIMAL L. 61, 63–65 (2006).

130. See *Naruto v. Slater*, 888 F.3d 418, 421, 423 n.5 (9th Cir. 2018).

131. See Paul T. Babie, *The “Monkey Selfies”: Reflections on Copyright in Photographs of Animals*, 52 U.C. DAVIS L. REV. ONLINE 103, 116 (2018) (“Today, we live in a world in which the future development of Artificial Intelligence (‘AI’) presents the same challenges of classification canvassed in *Naruto*: can an artificial consciousness or intelligence constitute a legal personality?”).

132. See ANDERSEN, *supra* note 93, § 2:3 (“Although advancements in artificial intelligence continue to expand the capacity of robots and computers to design and ‘create’ works using new algorithmic models and processes, only works traceable to a human author are eligible for copyright protection.”).

133. See COMPENDIUM, *supra* note 59, § 313.2 (“Similarly, the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”).

E. Implications for the Copyright Act Specifically

Although *Naruto* held that animals do not have standing under the Copyright Act, the opinion left open one major question: if an animal takes a photo, does anyone have rights to that photo? Is anyone the author? Regardless of whether the issue is animal authorship or authorship by artificial intelligence, *Naruto* fails to provide any clarity as to who, if anyone, owns the copyright to a work created by a nonhuman entity. PETA and *Naruto* lost their lawsuit on standing grounds; the question of whether Slater or his company held the copyright was never even reached.

Even though PETA lost on essentially every front, one assertion it made may still stand. Slater may not be the author of the Monkey Selfies; therefore, he cannot assert any copyright interest in the selfies.¹³⁴ This principle is demonstrated in the difficulties the Wikimedia Foundation encountered with the Monkey Selfies, as many of them were uploaded to Wikipedia.¹³⁵ Wikimedia took the position that copyright only existed in human authorship; therefore, the selfies were in the public domain.¹³⁶ Although Slater asserted that he held the copyright and demanded that Wikimedia take the photos down, Wikimedia refused.¹³⁷

Thus, under *Naruto* and the U.S. Copyright Office's official position,¹³⁸ works created by animals are not copyrightable. Therefore, nothing prevents others from exploiting or using those works for profit. For example, Slater sold, and appears to continue to sell, prints of the Monkey Selfie.¹³⁹ Additionally, zoos sometimes generate revenue by selling paintings made by their animals.¹⁴⁰

134. See Complaint, *supra* note 42, at 1 (“The Monkey Selfies resulted from a series of purposeful and voluntary actions by *Naruto*, unaided by Slater, resulting in original works of authorship not by Slater, but by *Naruto*.”); see also 17 U.S.C. § 102(a) (2018) (emphasis added) (granting copyright protection only to “original works of authorship”).

135. See *Mailbag: What is Going on with Wikipedia and the Monkey Selfie? We Love Monkeys and Photographers, Let Us Tell You More*, WIKIMEDIA FOUND. (Dec. 22, 2017), <https://blog.wikimedia.org/2017/12/22/monkey-selfie/>.

136. See *id.* (“Because a monkey took the photos, and a monkey cannot claim copyright, those photos are considered to be in the public domain and freely shareable on Wikimedia projects.”).

137. See *id.*

138. See COMPENDIUM, *supra* note 59, § 313.2 (“The Office will not register works produced by nature, animals, or plants.”).

139. See *The Monkey Selfie by David J. Slater*, DJS PHOTOGRAPHY, <http://www.djsphotography.co.uk/monkeyselfie.htm> (last visited Jan. 31, 2020). The cover of Slater's book, *Wildlife Personalities*, also contains the iconic selfie. See *id.*

140. See Jane Desmond, *Zoos Make Money Selling Paintings Made by Animals. Are They Art?*, WASH. POST (Sept. 7, 2016, 8:00 AM), <https://www.washingtonpost.com/news/animalia/wp/2016/09/07/zoos-make-money-selling-paintings-made-by-animals-are-they-art/>; cf. Kate Good, *Elephant Artists? Here's Why Making an Elephant Paint is Cruel, Not Cute*, ONEGREENPLANET, <http://www.onegreenplanet.org/animalsandnature/why->

Profiting off animal creations, especially when the animal has no possible means of asserting any interest in the work, raises intriguing ethical questions.¹⁴¹

Copyright protection exists primarily to promote creativity and secondarily to benefit the author.¹⁴² Thus, the question is whether withholding statutory standing and authorship from animals furthers those purposes. If animals are not even recognized as the authors of their creations, then there is no recourse to protect those creations from exploitation. Just as David Slater continues to sell and profit from photos he himself did not take, so too can zoos and others sell and profit from created works that do not in fact belong to them. Does this result promote creativity? Or does it instead merely give profiteers the opportunity to benefit from another's work without exerting any creative effort themselves?

Granting an animal authorial rights under the Copyright Act, however, would present substantial practical problems. Animals cannot contract, bargain, or license. Thus, if the Copyright Act recognized animals as authors, their created works would become stagnant, unable to be used by anyone, even if the purpose was to benefit the animals themselves. Access to and the opportunity to use others' created works furthers invention and expression, so long as the author's rights are still respected.¹⁴³ By granting animals statutory standing and authorship rights, the law would essentially establish an impenetrable monopoly in direct contradiction to the goal of creativity.¹⁴⁴ An animal would have the rights to its work, but there would be no practical mechanism for facilitating a marketplace for licensing or for others to properly access and use that work, due to the inevitable communication barrier between humans and animals.

The issue becomes even further complicated in situations involving other nonhuman entities such as artificial intelligence. With artificial intelligence, there is a human creator behind the AI.

[making-an-elephant-paint-is-cruel-not-cute/](#) (last visited Jan. 31, 2020) (discussing "elephant tourism" and how elephants are taught to paint).

141. See Rain Embuscado, *Paintings by 'Animal Artists in Residence' at San Francisco Zoo Head to Auction*, ARTNET (Apr. 25, 2016), <https://news.artnet.com/market/sf-zoo-animals-art-auction-480998>.

142. See U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . to 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 . . ."); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (internal citations omitted) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' . . . [C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 506 (1945).

143. See Chafee, *supra* note 142, at 511 ("Nobody else should *market* the author's book, but we refuse to say nobody else should *use* it. The world goes ahead because each of us builds on the work of our predecessors.")

144. See *id.*

But the Copyright Office will register a copyright, “provided that the work was created by a human being.”¹⁴⁵ If a human created the AI software, then it is possible that the human creator might hold the copyright, even if the AI cannot.¹⁴⁶

V. CONCLUSION

The Monkey Selfie case raises far more questions than answers. But the questions are important. Standing is often assumed but it is the foundation of who has access to the courthouse. The doctrine of standing is the gatekeeper; standing decides who has rights, for a right without recourse is no right at all.

As animals and humans become more intertwined, and as AI becomes more prevalent, the legal questions raised in *Naruto* will only become more important and pressing. The Ninth Circuit, thanks to the dispute between the panels in *Cetacean Community* and *Naruto*, has the opportunity with en banc review to return to this issue and provide clarity and resolution. The consequences of such review could be immense. The court could articulate an entirely new rule granting animals statutory standing. Or the court could foreclose the issue altogether by agreeing with the *Naruto* panel that the Constitution itself does not comprehend standing for animals. The absence of similar cases in other circuits¹⁴⁷ suggests that Supreme Court review is currently unlikely. But with the internal split in the Ninth Circuit and the existing circuit precedent as to Article III standing, the questions have only just begun.

Naruto’s case ultimately ended with Slater agreeing to donate 25 percent of his future proceeds from use of the selfies to charities protecting crested macaques’ habitats.¹⁴⁸ But other cases may not end in settlement. If individuals know that animals have little chance to assert rights through a lawsuit, that knowledge may simply serve as an invitation to test the extents of this “immunity.” Thanks to animal protection and anti-cruelty statutes, animals are not left entirely vulnerable. While animals cannot speak for themselves, and the legal system may provide inadequate help, *Naruto v. Slater* tells us that these issues are far from resolved.

145. COMPENDIUM, *supra* note 59, § 306.

146. See Stuart N. Brotman, *The Human Importance of the Monkey Selfie*, BROOKINGS INST.: TECHTANK (Aug. 12, 2014), <https://www.brookings.edu/blog/techtank/2014/08/12/the-human-importance-of-the-monkey-selfie/>. How much human involvement is sufficient is another open question. For example, PETA did not consider Slater’s involvement in providing the camera to be enough to give him rights to *Naruto*’s selfies. See Complaint, *supra* note 42, at 1 (“The Monkey Selfies resulted from a series of purposeful and voluntary actions by *Naruto*, *unaided by Slater* . . .” (emphasis added)).

147. See *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018).

148. PETA Statement: ‘Monkey Selfie’ Case Settled, PEOPLE FOR ETHICAL TREATMENT ANIMALS (Sept. 11, 2017), <https://www.peta.org/media/news-releases/peta-statement-monkey-selfie-case-settled/>.