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COVER STORY

'Monkey see, monkey sue' lawsuit rattles lawyers



Daily Journal Photo

Venable LLP partner Alex M. Weingarten said a case filed on behalf of PETA against a wildlife photographer over 'monkey selfie' is a clearly frivolous lawsuit. But some say the case could have an impact on copyright suits.

By Ashley Cullins
Daily Journal Staff Writer

"A monkey, an animal-rights organization and a primatologist walk into federal court to sue for infringement of the monkey's claimed copyright." That's not the beginning of a lawyer joke but rather the introduction Berkeley attorney Andrew J. Dhuey wrote in his Nov. 6 motion to dismiss a lawsuit filed against his client, a wildlife photographer, by People for the Ethical Treatment of Animals Inc. on behalf of an Indonesian monkey named Naruto.

In 2011, David Slater left his camera unattended while in the Tangkoko Reserve, according to court documents, and Naruto snatched the camera and took a series of self-portraits, which later went viral and became known as the "monkey selfies."

Last year, Slater published a book called "Wildlife Personalities" that contains the photos, using the self-publishing website blurb.com.

PETA sued Slater and Blurb Inc. in September, claiming defendants infringed on Naruto's copyright as the author of the photos.

"Naruto has the right to own and benefit from the copyright in the Monkey Selfies in the same manner

and to the same extent as any other author," wrote plaintiff's counsel and Irell & Manella LLP partner David A. Schwarz.

"Had the Monkey Selfies been made by a human using Slater's unattended camera, that human would be declared the photographs' author and copyright owner." *Naruto v. Slater et al.*, 15-CV04324 (N.D. Cal., filed Sept. 21, 2015).

PETA is seeking an injunction, damages and "that all net proceeds from the sale, licensing and other commercial use of the Monkey Selfies, including Defendants' disgorged profits, less necessary and appropriate expenses, be used solely for the benefit of Naruto, his community of crested macaques, and preservation of their habitat." Schwarz said the most significant question before the court is what qualifies as an "author" under the Copyright Act.

"If a non-human can be considered an author for the purposes of the Copyright Act, then the non-human would have standing to assert a claim," he said. The complaint further argues that because Naruto took the photos in Indonesia, none is a "United States Work" and therefore no copyright registration is required

to maintain this action.

Dhuey asserts that most details of this case are erroneous in light of the proverbial 800-pound gorilla in the room: "The only pertinent fact in this case is that Plaintiff is a monkey suing for copyright infringement," he wrote. "Monkey see, monkey sue is not good law — at least not in the Ninth Circuit."

Fox Rothschild LLP partner David Aronoff, who is not involved in the case, said he has been around long enough that nothing completely surprises him, but this is a ridiculous lawsuit.

"There's no chance at all that any court is going to find that the monkey owns the copyright," Aronoff said.

"The interesting question is whether a photograph taken by an animal can be copyrightable at all."

"No one can stand it that there's no copyright owner," said Corynne McSherry, legal director of the Electronic Frontier Foundation. "No one needs to collect royalties for this photograph and it's really absurd that someone is trying to."

Raines Feldman LLP partner Miles J. Feldman, an IP litigator not involved in this case, said the defendants were correct in raising issues on standing and proper party.

"Based on the pleadings, it's not even clear that the purported plaintiff monkey was actually the monkey who took the photograph," he said. "It's certainly not clear that anybody who is filing these legal documents has authority to act on that monkey's behalf."

McSherry theorized PETA's motivation isn't really the rights to Naruto's selfies. "They're building up precedent for more serious cases," she said, adding that there are valid reasons for finding standing for animals, most relating to mistreatment. "I don't think depriving this primate of royalties rises to that level."

"It's no secret that PETA has, in the past, advanced arguments in favor of creating legal standing for animals

consistent with its view," Schwarz said. "In this case, we believe it's consistent with the law."

Venable LLP partner Alex M. Weingarten, who is not involved in the case, vehemently disagreed, saying this case is a waste of time and energy and will clearly be dismissed.

"Federal courts are dramatically overwhelmed by the workload that they have already," Weingarten said. "It's unfortunate that now this judge needs to take time and attention away from more legitimate matters to deal with this."

While he appreciates that lawyers must often find creative solutions to problems, Weingarten said this case crosses the line of what is appropriate for the courts.

"I will be very surprised if this doesn't result in the imposition of Rule 11 sections," he said. "This is clearly a frivolous lawsuit."

Aronoff wouldn't opine on the possibility of sanctions, but he did say defendants could be entitled to fees.

"Under Section 505 of the Copyright Act, the court is empowered to award attorney's fees to the prevailing party," Aronoff said. "I have a feeling that these probably wouldn't be awarded against the monkey himself, but maybe there's a chance of a fee award being entered against PETA."

Shwarz acknowledges that the case is novel and there likely won't be copycat suits involving monkeys taking selfies, but said it could answer important statutory and philosophical questions about non-human authors that aren't living species at all.

"As we press the boundaries of the generation of artificial intelligence, these may very well be questions that will have to be answered in that context as well," he said.

Dhuey and Cooley LLP partner Jessica Valenzuela Santamaria, lead attorney for Blurb, did not respond to a request for comment. A hearing on the motions for dismissal is set for Jan. 6 before U.S. District Judge William H. Orrick.