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First, Let Me Take a Selfie: Should a Monkey Have Copyrights to His Own Selfie?

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NOTE

FIRST, LET ME TAKE A SELFIE: SHOULD A MONKEY HAVE COPYRIGHTS TO HIS OWN SELFIE?

Stephen Schahrer[†]

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ABSTRACT

Monkey see, monkey sue. Or better yet, monkey takes a selfie, monkey sues the camera owner for copyright infringement. This Note centers around the controversy of a monkey named Naruto who, via his next friend PETA, asserted a copyright infringement claim against a wildlife

[†] Stephen Schahrer, 2018 Juris Doctor Candidate, Liberty University School of Law. I was inspired to write this piece when I read about the case in the news. Liberty University School of Law Professor Tory Lucas was instrumental in helping me develop the piece from just a fleeting interest into a full concept. I would like to dedicate this Note to my wife, Rhya, because I could not have accomplished all that I have accomplished in law school without her unconditional love and tireless support.

photographer. Naruto claimed copyrights to selfies he took with the photographer's camera. The case seems silly to most—including the court—yet, the case seized the attention of academics and animal rights activists alike. Because animal art has grown in popularity and scientific studies have increased awareness of potential animal consciousness, this case does not come as a huge surprise. The case raises an interesting, but odd question: can a monkey be considered an author, thus warranting protection under the Constitution's Copyright Clause and the laws that enforce it?

Recognizing animal authorship, despite the utilitarian arguments that it could only bring good to society, would fundamentally change not just copyright law, but American property law in general. Animals have long been considered property, and the proposition of granting property a fundamental property right is perplexing, to say the least. As it stands, case precedent and history do not allow a court to expand copyrights to cover animal authors. In addition to the precedential constraints, the threat of a fundamental change in the American property law tradition ensnares the concept of animal authorship in two additional “structural constraints.” Put plainly, the separation of powers doctrine and the theory of federalism upon which the United States is based disallows the courts, and could possibly restrain Congress, from recognizing animals as authors under the American copyright scheme. Naruto's claim to authorship—if vindicated—could completely shift the property paradigm in the United States.

I. INTRODUCTION

Mahatma Gandhi once said, “The greatness of a nation and its moral progress can be judged by the way its animals are treated.”¹ Despite all of the protections afforded to animals via animal rights laws, the case discussed in this Note demonstrates that some believe Western nations have not come far enough in recognizing the rights of animals.²

The case of Naruto the monkey would have likely been missed by even those most attentive to legal news as simply an outrageous claim by an extreme animal rights organization. The claim by People for the Ethical Treatment of Animals (PETA) was that a monkey should have copyrights to his own selfie that he took with a nature photographer's camera.³ The case was dismissed by the Northern District of California as unsupported by

1. *Can the Greatness of a Nation ...*, PETA, <http://www.peta.org/features/gandhi/> (last visited November 28, 2016).

2. *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016).

3. *Id.* at *1.

precedent.⁴ However, the case seized the attention of the legal academic community.⁵ The query it poses is fascinating and odd, all at the same time: should an animal be considered an “author” and be afforded copyrights?

Many authors have pondered this question. Some have concluded that animals should be granted copyrights while others have opined that those who work with the animals (e.g., photographers) should be granted the copyrights under a “work for hire” approach.⁶ Although the latter position requires a less dramatic change in the law, both frameworks fail to address the preliminary question that underlies the query: should the federal government be the one to grant property rights (in the form of copyrights) to animals?

When examined through the lens of history and prior precedent, it might seem that the only barrier restraining the courts from expanding copyright protection to a monkey, like Naruto, is the underlying assumption that *author* in the Copyright Clause really means human author.⁷ A piece of animal art or a photograph taken by an animal can often meet the minimum standards of creativity and originality required by precedent. In fact, some would argue an animal-human distinction is arbitrary.⁸ According to them, the only apparent bar, then, to an animal’s copyright protection is the fact that the concept has not been recognized by legislators or the courts.

However, prohibitions on copyright protection are not only due to specific constraints plainly spelled out in the law, but also due to the deeper assumptions of the American property law tradition.⁹ Granting animals copyrights—and therefore property rights—under federal law would completely upend the federal system of government in the United States of America.¹⁰ As such, this Note posits that the expansion of copyright protection is prohibited by two structural constraints¹¹: (1) the separation of powers doctrine and (2) the federalist form of the United States government, or Federalism. The first constraint prevents the courts from expanding rights where the law does not contemplate them.¹² A proper view

4. *Id.* at *1.

5. *Infra* Section IV.

6. *See infra* Section IV.B.

7. *See infra* Section III.

8. *See infra* Section IV.A.

9. *See infra* Section V.

10. *See infra* Section V.

11. *See infra* Section V.

12. *See infra* Section V.A.1.

of the judiciary's role would disallow any court from extending copyrights to animals.¹³ Plainly put, a court is restrained to only interpret the law and not to create it where it does not already exist.

The second constraint is the theory that the national and state governments operate within their own separate but often overlapping areas of sovereignty.¹⁴ In addition, the nature of the federal government is one of enumerated and not plenary powers.¹⁵ As such, the federal government is restrained from acting unless empowered to do so.¹⁶ Within the realm of copyright, it is the underlying theory of Federalism that prevents the courts (and most likely the Congress) from expanding federal copyrights until state property law has adapted and accepted animal property rights.¹⁷

This second structural constraint is predicated upon the idea that property law is a creature of each individual state. Each state, being the creator of its own common law property scheme, should be allowed to decide whether animals are granted property rights and protections.¹⁸ It would be an unlawful seizure of state power and transformation of property law for the federal government to unilaterally expand animal property rights via copyright protection.¹⁹ As with other developments in the law, the theory of federalism would require that the federal government, even with its express power to grant copyrights, refrain from expanding animal property rights until property law has developed in the states to warrant expansion.²⁰

This Note will begin by discussing the background of *Naruto v. Slater*, as well as the arguments made by both sides on the motion to dismiss. Next, it will discuss the historical development of copyright law relied on by both the parties and the Northern District of California court in its opinion. In addition, the Note will discuss the underlying purposes of copyright law. It will then lay out the various arguments that have been posited for the adoption of animal copyrights by the federal government in order to establish the reasoning behind the argument that case precedent and history of copyright law do not allow for such an expansion. Lastly, the Note will discuss the basic theories of separation of powers and federalism, and show

13. See *infra* Section V.A.1.

14. See *infra* Section V.B.

15. See U.S. CONST. art. I § 8; U.S. CONST. amend. X.

16. See U.S. CONST. art. I § 8; U.S. CONST. amend. X.

17. See *infra* Section V.B.2.

18. See *infra* Section V.B.2.

19. See *infra* Section V.B.2.

20. See *infra* Section V.

that these theories prevent the expansion of copyright protection to animals by the federal government.

II. THE LEGAL BATTLE OVER A MONKEY'S SELFIE

“A monkey, an animal-rights organization and a primatologist walk into federal court to sue for infringement of the monkey’s claimed copyright.”²¹ As stated earlier, this Note centers around the case of *Naruto v. Slater*.²² Before the punchline of the preceding setup is revealed, one should understand the story of the case.

A. *A Monkey Takes a Selfie*

This story began in 2011 while David Slater was in Indonesia photographing Macaque monkeys.²³ Slater gained the trust of a group of about twenty-five macaque monkeys over the few days he had been following them.²⁴ Slater described winning the monkeys’ trust in an exciting narrative on his website: “I held out my hand and WOW, one held my hand back. Shock! This went on for maybe 15 minutes. They started to groom me, picking through my hair as I knelt on the ground, hunched over my camera, but desperate to record it all.”²⁵ Afterwards, the monkeys took the camera from Slater several times, only to have Slater’s guide wrest it from them.²⁶ These incidents allowed the monkeys to become semi-familiar with the equipment and to learn how to snap photos.²⁷ Slater tells the rest of the story on his website:

I wanted to keep my new found friends happy and with me. I now wanted to get right in their faces with a wide angle lens, but that was proving too difficult as they were nervous of

21. Motion to Dismiss the Complaint for Lack of Standing and Failure to State a Claim upon which Relief can be Granted (Fed. R. Civ. P. 12(b)(1), 12(b)(6)), *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (3:15-cv-4324-WHO), 2016 WL 9843651.

22. *Id.*

23. Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, CULTURE (Aug. 21, 2014) <http://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961> (last visited Sept. 12, 2017).

24. *Sulawesi Macaques...*, DJS PHOTOGRAPHY, http://www.djsphotography.co.uk/original_story.html. (last visited Aug. 29, 2017).

25. *Id.*

26. *Id.*

27. *Id.*

something[—]I couldn't tell what. So I put my camera on a tripod with a very wide angle lens, settings configured such as predictive autofocus, motorwind, even a flashgun, to give me a chance of a facial close up if they were to approach again for a play. I duly moved away and bingo, they moved in, fingering the toy, pressing the buttons and fingering the lens. I was then to witness one of the funniest things ever as they grinned, grimaced and bared teeth at themselves in the reflection of the large glassy lens. . . . Perhaps also the sight of the shutter planes moving within the lens [] amused or scared them? They played with the camera until of course some images were inevitably taken! I had one hand on the tripod when this was going on, but I was being prodded and poked by would be groomers and a few playful juveniles who nibbled at my arms. Eventually the dominant male at times became over excited and eventually gave me a whack with his hand as he bounced off my back. I new [sic] then that I had to leave before I possibly got him too upset. The whole experiance [sic] lasted about 30 minutes.

It was like the joy of seeing your new baby learn about something new and becoming enlightened with a new toy. They loved the shutter noise, but most of all they loved their own faces, "chimping" [sic] away in what seemd [sic] to me to be total fun for them.²⁸

The words of the photographer convey his excitement and passion, but these photos would soon create both the most outlandish and interesting legal battle of the past several years. Slater faced two legal battles over the monkey selfies.²⁹ The first, and still ongoing, is a battle for the photographer's own copyright of the photo against Wikimedia.³⁰ Wikimedia, an online digital commons website, posted the photo and then refused to remove the photo after Slater requested that the company take it

28. *Id.* One can sense the photographer's joy and passion for his work. To view photos of the monkeys and read the entire story, see <http://www.djsphotography.co.uk/>.

29. A selfie is defined as "[a] photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media." *Selfie*, ENGLISH: OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/selfie> (last visited November 27, 2016).

30. Louise Stewart, *Wikimedia Says When a Monkey Takes a Selfie, No One Owns It*, CULTURE (Aug. 21, 2014) <http://www.newsweek.com/lawyers-dispute-wikimedias-claims-about-monkey-selfie-copyright-265961> (last visited Sept. 12, 2017).

down.³¹ Wikimedia claims that Slater does not own the photo, as it was the monkey who took it and not Slater; Slater, obviously, disagrees.³² The second is the legal battle on which this Note will primarily focus: the Northern District of California case of *Naruto v. Slater*.³³

B. *The Legal Battle for Animal Copyrights*

While Slater was in the heat of the dispute with Wikimedia, PETA sued him, filing a lawsuit as next friend³⁴ of the monkey who took the selfie.³⁵ PETA alleged that the monkey—which they named Naruto—not the photographer,³⁶ owned the copyright to the photograph because the monkey

authored the Monkey Selfies sometime in or around 2011” by “independent, autonomous action” in examining and manipulating Slater’s unattended camera and “purposely pushing” the shutter release multiple times, “understanding the cause-and-effect relationship between pressing the shutter release, the noise of the shutter, and the change to his reflection in the camera lens.”³⁷

PETA also alleged that Slater infringed on Naruto’s copyright by “falsely claiming to be the photographs’ author and by selling copies of the images’ for profit,” and thus, violating Sections 106 and 501 of the Copyright Act of 1976.³⁸

Slater filed a motion to dismiss for lack of standing and failure to state a claim upon which relief can be granted.³⁹ He concluded his introduction

31. *Id.*

32. *Id.*

33. *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016).

34. A next friend is “[s]omeone who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian.” *Next Friend*, BLACK’S LAW DICTIONARY (10th ed. 2014).

35. *Naruto*, 2016 WL 362231, at *1.

36. The author will refer to the monkey as “he” in the article although it should not be construed to imply any assignment by the author of anthropomorphic qualities to the monkey.

37. *Naruto*, 2016 WL 362231, at *1.

38. *Id.* at *1.

39. Motion to Dismiss the Complaint for Lack of Standing and Failure to State a Claim upon which Relief can be Granted (Fed. R. Civ. P. 12(b)(1), 12(b)(6)), *Naruto v. Slater*, No.

with the punchline, “Monkey see, monkey sue is not good law[—]at least not in the Ninth Circuit.”⁴⁰ Slater argued that animals had not been conferred standing to sue under United States copyright law.⁴¹ He stated that “[t]he standing inquiry for animals under *Cetacean Community* is very simple: unless Congress has plainly stated that animals have standing to sue, the federal courts will not read any legislation to confer statutory standing to animals.”⁴²

By citing binding authority that appealed to the separation of powers doctrine,⁴³ Slater made it clear that Congress has never authorized standing for animals, and that until it does, the court should not authorize standing on its own authority.⁴⁴ The defendant curtly concluded, “Still, if the humans purporting to act on Plaintiff’s behalf wish for copyright to be among the areas of law where non-human animals have standing, they should make that dubious case to Congress[—]not the federal courts.”⁴⁵ The court evidently found Slater’s argument persuasive, as it would ultimately rely on this reasoning in its opinion.⁴⁶

PETA, in its response in opposition to the motion to dismiss,⁴⁷ argued for an expansive view of authorship under copyright law which would grant standing to Naruto. PETA argued that because Congress has the power to grant standing to non-human entities such as corporations, Congress also has the power to grant standing to animals.⁴⁸ They then argued that the

15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (3:15-cv-4324-WHO), 2016 WL 9843651.

40. *Id.*

41. *Id.* (citing *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004))

42. *Id.*

43. *See infra* Section V.B.1.

44. This Note does not focus on the standing issue. However, the appeal to separation of powers doctrine will be discussed later in the Note.

45. Motion to Dismiss the Complaint for Lack of Standing and Failure to State a Claim upon which Relief can be Granted (Fed. R. Civ. P. 12(b)(1), 12(b)(6)), *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (3:15-cv-4324-WHO), 2016 WL 9843651.

46. *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016). “But that is an argument that should be made to Congress and the President, not to me.” *Id.*

47. Plaintiff Naruto’s Combined Opposition to Defendants’ Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

48. *Id.*

Copyright Act “grants standing to anyone, including Naruto, who create[d] an ‘original work of authorship.’”⁴⁹

PETA relied on the fact that the Act itself does not define the word *author*, but rather “borrowed that term from the Constitution itself, which authorizes Congress to protect the ‘Writings’ of ‘Authors.’”⁵⁰ Further, it relied on *Burrow-Giles Lithographic* in order to state the definition of *author* as “he to whom anything owes its origin.”⁵¹ PETA claimed that Naruto was the one who created the selfies, and had no assistance from Slater in doing so. Thus, “he is their ‘originator,’ the one ‘to whom’ the photographs owe their ‘origin.’”⁵² PETA argued that Naruto’s allegation that he is the author of the selfies⁵³ was enough to give him standing.⁵⁴ PETA further argued that because the word *author* is not defined as specifically human, an animal author should be granted a copyright, so long as the animal author’s work

49. *Id.*

50. *Id.*

51. *Id.* (quoting *Goldstein v. California*, 412 U.S. 546, 561 (1973)). The Court first defined an author as “he to whom anything owes its origin” in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884). *Burrow-Giles* is discussed in Section III.B.

52. Plaintiff Naruto’s Combined Opposition to Defendants’ Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

53. PETA cites to Naruto’s Complaint paras. 1 and 2 which state:

1. Naruto is a free, autonomous six-year-old male member of the *Macaca nigra* species, also known as a crested macaque, residing in the Tangkoko Reserve on the island of Sulawesi, Indonesia. In or around 2011 Naruto took a number of photographs of himself, including one image – the internationally famous photograph known as the “Monkey Selfie.” A copy of the Monkey Selfie is attached hereto and incorporated as Exhibit 1.

2. The Monkey Selfie is one of a series of photographs (the “Monkey Selfies”) that Naruto made using a camera left unattended by defendant David John Slater (“Slater”). 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, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324), 2015 WL 5576925.

54. Plaintiff Naruto’s Combined Opposition to Defendants’ Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544. As the case was at a Motion to Dismiss stage all allegations of the complaint must be assumed true. *Id.* Thus, PETA argues it has alleged Naruto is an author and that is sufficient while also arguing that Naruto legally qualifies as an author. *Id.*

can meet the creativity and originality thresholds set forth by prior copyright precedent.⁵⁵

III. THE DEVELOPMENT OF COPYRIGHT LAW

The history of copyright law sheds light on the question of whether copyright protection should be expanded to include animal authors. Specifically, the adoption of the Copyright Clause, the development of the authorship requirement, and the major theories on the copyright law's purpose provide a framework for answering this inquiry.

A. *The Adoption of the Copyright Clause*

The Copyright Clause of the United States Constitution endowed upon the legislature 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.”⁵⁶ The Copyright Clause was adopted with no argument and by the unanimous consent of the Framers at the Constitutional convention.⁵⁷

Copyrights were first recognized by the English Parliament in 1709 with the passing of the Statute of Anne.⁵⁸ This statute marked a shift in the law, as it provided authors control of the rights to written materials, whereas the predecessor statute provided control to printers. The printers used copyright law to control the book industry.⁵⁹ The Statute of Anne was enacted despite heavy lobbying by booksellers who wished to maintain their monopoly over the book trade in England.⁶⁰

The Statute of Anne extended copyrights to book authors for twenty-one years.⁶¹ “The fact that the author was entitled to hold the copyright did not trouble the booksellers since they insisted that the author give them the copyright before publishing a work. If the author refused, the bookseller

55. *Id.* “The statute itself makes it clear that ‘[c]opyright protection extends to all ‘original works of authorship fixed in any tangible medium’ of expression.’ The only requirement is that the work must be original.” *Id.* (internal citations omitted).

56. U.S. CONST. art. I, § 8, cl. 8.

57. Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 361 (1992).

58. *Id.* at 367.

59. *Id.* at 366-67.

60. *Id.* at 367.

61. *Id.*

might not promote his book as vigorously.”⁶² Booksellers lobbied Parliament to pass a law allowing them to maintain a perpetual copyright on books, but Parliament refused.⁶³ The booksellers then went to the courts, fighting for a common law right to perpetual copyright.⁶⁴ However, the courts also refused to extend such a right. Instead, the courts found that an author did indeed have a common law right to his work, but that this right was limited by the Statute of Anne to twenty-one years.⁶⁵

Accordingly, by the time of the American Revolution, English copyright law had shifted from a mechanism “used to control the book trade to [one used to] encourage authors to write by rewarding them for their efforts.”⁶⁶ This was the first iteration of copyright law that not only required rights to be vested in the author, but also used the term “authorship” in the context of copyright law.⁶⁷ The requirement of authorship would prove to be a central concept in the development of copyright law.⁶⁸ With such a well-established common law right to copyright, the inclusion of such a right in the U.S. Constitution was unsurprising.

The goal of copyright law was to encourage the production of literature. Aply, the Copyright Clause’s stated purpose is “[t]o promote the Progress of Science and useful Arts.”⁶⁹ In addition to the English copyright law already in place, the Framers were most likely heavily influenced by the fact that the majority of the states had already adopted Copyright laws themselves.⁷⁰ Noah Webster, in an effort to obtain copyrights in each state to an English school book he had written, travelled to many of the states and convinced them to adopt some form of copyright protection for authors.⁷¹ For example, after failing to lobby James Madison directly, Webster lobbied George Washington to encourage the adoption of a copyright law in Virginia.⁷² Webster’s efforts resulted in Madison presenting Virginia’s copyright bill in the legislative session of 1785. The bill

62. *Id.*

63. Donner, *supra* note 57, at 368.

64. *Id.* at 367-68.

65. *Id.*

66. *Id.* at 368.

67. Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 468 (1991).

68. *Id.*

69. U.S. CONST. art. I, § 8, cl. 8.

70. Donner, *supra* note 57, at 374.

71. *Id.* 370-74.

72. *Id.* at 371.

was signed into law in 1786.⁷³ By the time of the Constitutional Convention, twelve of the thirteen states had adopted copyright laws—due, at least in part, to Webster’s lobbying.⁷⁴

But *why* did the Framers federalize copyright law? The Framers needed to create a national and uniform system to better protect the rights of authors. “The frustration of Webster in his travels to obtain copyrights from each state was well known throughout the states.”⁷⁵ An author, if he wished to obtain national protection, would need to travel to each state (as Webster did) and obtain the rights to his own work state-by-state.⁷⁶ This was an unworkable system that did not create a nation of united common values, but rather frustrated that purpose by requiring an author to apply to—and comply with—over thirteen different copyright schemes. According to John Madison, there was a “want of concert in matters where common interest requires it.”⁷⁷ He further added that “[i]nstances of inferior moment are the want of uniformity in the laws concerning . . . literary property.”⁷⁸ It was this want of concert among the states that pushed the Framers to institute national protection to the well-established common law right of copyright protection.

The English common law copyright, the states’ consensus on copyright protection, the Framers love for literature,⁷⁹ and the republican ideals of “a social system built on merit”⁸⁰—rather than special governmental dispensations—is what likely motivated the Framers to pass the Copyright Clause with unanimous consent. As James Madison conclusively wrote:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. . . . The public good fully coincides . . . with the claims of individuals. The States cannot separately make effectual provision for [copyright], and most of

73. *Id.*

74. *Id.* at 374.

75. *Id.*

76. Donner, *supra* note 57, at 374.

77. *Id.* (quoting DEPARTMENT OF STATE, BUREAU OF ROLLS AND LIBRARY, IV DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870 128 (1901)).

78. *Id.* (alterations in original)

79. *Id.* at 375.

80. *Id.* at 376. For additional information, see *infra* Section III.C.

them have anticipated the decision of this point, by laws passed at the instance of Congress.⁸¹

B. Development of Copyright Law After the Founding

Soon after the Constitution was adopted, the Supreme Court set out to define what *author* meant within the context of a copyright or patent. The development of the authorship requirement began with the early cases of *In Re Trademark Cases* and *Burrow-Giles*. *In Re Trademark Cases* laid out the requirement that any invention or writing copyrightable under the Copyright Clause must be “original, and . . . founded in the creative powers of the mind.”⁸² The originality requirement is what differentiated copyrights from trademarks.⁸³ In *Burrow-Giles*, the Supreme Court defined *author* for the first time.⁸⁴ “An author . . . is ‘he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.’”⁸⁵ The Court also stated *writings* in the Copyright Clause included photographs and that the copyright for a photograph belonged to the photographer who staged the shot.⁸⁶

The following years saw many changes in copyright protections. In 1909, Congress passed a new Copyright Act. The Act broadened copyright protections to copies and not just prints. The new Act also broadened the categories of works protected to include all works of authorship, whether published or unpublished.⁸⁷ The Act also introduced, for the first time, “language stating that the employer was the ‘author’ in the case of ‘works made for hire.’”⁸⁸ Later, the Copyright Act of 1976 would further revolutionize copyright law by providing that works are copyrighted the moment they are created, not at the time they are registered.⁸⁹ The Act also did many other things that further advanced copyright law.⁹⁰

81. THE FEDERALIST NO. 43 (James Madison).

82. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (emphasis omitted).

83. *Id.*

84. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884).

85. *Id.*

86. *Id.* at 58.

87. Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547, 564 (2009). The act also extended the protection period to 28 years and included derivative works within copyright protection. *Id.*

88. Jaszi, *supra* note 67, at 487.

89. Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDIS. L.J. 547, 564 (2009).

90. *Id.* at 564-565.

It is under this scheme that the Court in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.* laid out the test to determine whether an author qualifies for a copyright.⁹¹ The first element, as in *Burrow-Giles*,⁹² is a “degree of originality.”⁹³ However, all that is required by the new Copyright Act is “[a] modicum of intellectual labor . . . [to] constitute[] [this] essential constitutional element.”⁹⁴ The second element is creativity, but only a “modicum of creativity” is required.⁹⁵ These two standards—creativity and originality—are extremely low bars that allow the law to protect many different types of works without requiring courts to scrutinize the creativity of the author.

In 2014, the Copyright Office stated that a work must owe its origin to a human author.⁹⁶ It stated:

The copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *Trademark Cases*, 100 U.S. 82, 94 (1879). Because copyright law is limited to “original intellectual conceptions of the author,” the Office will refuse to register a claim if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).⁹⁷

The Copyright Office goes on to specifically deny copyrights to works authored by animals, which includes a selfie taken by a monkey.⁹⁸ The Compendium specifically relies on the language discussed in *Burrow-Giles* and *In Re Trademark Cases* to substantiate its prohibition of animal

[The] Act also extended the amount of “limited time” a work could receive protection. The Act extended the term of protection to the life of an author plus fifty years. The Act provided that works for hire be protected for seventy-five years. The Act applied to unpublished works as well as published works. The Act codified the sales doctrines and the fair use defense. The Act also explicitly allowed photocopying for academic work under certain circumstances and made a fair use for materials that are used for news, criticism, reporting, comments, teaching, etc.

Id.

91. *Feist Publs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1990).

92. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

93. *Feist Publs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1990).

94. *Id.* at 347.

95. *Id.* at 346.

96. U.S. COPYRIGHT OFFICE, COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES § 306 (3d ed. 2014).

97. *Id.*

98. *Id.* § 313.2.

authorship.⁹⁹ It was this section of the Compendium that the *Naruto* court relied on.¹⁰⁰

C. *Theories of the Purpose of the Copyright Clause*

Some would argue that “[t]he chief justification for copyright protection in the United States is utilitarianism[,] [t]he active goal [which] . . . is the pervasive diffusion of intellectual works.”¹⁰¹ Another author argues, even more surprisingly, that the primary concern of copyright protection is to “advance society’s interest in increasing creative output” which “does not depend on the humanity of those authors.”¹⁰² Judge Posner opined that intellectual property law is a “natural field for economic analysis of law.”¹⁰³ He further argued that the law should seek to balance access and incentives.¹⁰⁴

Access is the ability of the public to enjoy the work of an author and the benefit of that work. Incentives are the economic motivation provided to the author by his ability to limit access to his work in order to recover the costs of producing that work.¹⁰⁵ The ability of an author to limit the reproduction of his work—reproduction is generally much less costly than production—incites an author to create more works, since he is able to recover some of the production costs as well as possibly make a profit from his work.¹⁰⁶ Posner sought to balance this private incentive with the public interest in the fruit of individual intellectual labor¹⁰⁷: “For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus

99. *Id.* § 306.

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

101. 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, 270 (2015).

102. Dane E. Johnson, *Statute of Anne-Imals: Should Copyright Protect Sentient Non-Human Creators?*, 15 ANIMAL L. 15, 28 (2008).

103. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 THE J. LEGAL STUD. 325, 325 (1989).

104. *Id.* at 326.

105. *Id.*

106. *Id.*

107. *Id.*

both the losses from limiting access and the costs of administering copyright protection.”¹⁰⁸

The Copyright Clause’s purpose was written directly into it: “To promote the Progress of Science and useful Arts”¹⁰⁹ It would seem that the Framers, too, were balancing private and public interests in drafting this Clause. To equate the private interest, as Posner and the authors above do, to merely the economic benefit that accumulates to an author of a work is to miss the fundamental foundation of the American property law tradition: individual property rights.¹¹⁰

The Framers believed in the republican ideal that each person was equal before the law, and that only a republican society based on merit could achieve true equality.¹¹¹ “This promotion of individual merit was likely an additional motivating factor for a national copyright [protection] which secured for the individual author a property right in his works.”¹¹²

The Copyright Clause was designed to protect what the Framers believed to be a fundamental property right that vested in the creator of a work. They saw the states’ challenges in protecting this right and sought to create a uniform system via the national government in order to secure intellectual property rights. Although they saw intellectual property as a fundamental right, they also saw the need for the collective to benefit from such works. Thus, the Framers placed a limit on the ability of the author to hold the copyright when the Framers wrote that the right would only be secured for a limited time.¹¹³ The Framers knew that with every fundamental right there was a balance that must be struck between protecting and incentivizing the individual’s interests and protecting the collective’s interest in promoting the general welfare.¹¹⁴

In the copyright arena, the private interest is the fundamental right to one’s own work. The public interest is to ensure that no individual would profit on his intellectual work to the detriment of the public. The detriment to the public interest that would occur as a result of a perpetual copyright is not wholly obvious. To use a simple example, take a book on military

108. *Id.*

109. U.S. CONST. art. I, § 8, cl. 8.

110. Donner, *supra* note 57, at 375-76.

111. *Id.*

112. *Id.* at 376.

113. U.S. CONST. art. I, § 8, cl. 8.

114. For example, First Amendment rights are limited in the fact that one cannot yell “fire!” in a movie theater. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 51-52 (1919).

intelligence.¹¹⁵ The author researches and publishes a book about the subject of military intelligence. Said author dies or slips into the “unknown.” The author’s book is never published again so the author obtains no private benefit. However, because of his copyright, no one else besides those who own one of the original copies can learn from his research. The ideas of this author die along with him. The tragedy in this situation is that the public can never benefit from this man’s ideas, and the world, quite likely, is worse off because of it. A limited time for a copyright allows the individual to recover his costs in producing his work and exercise his fundamental right of ownership over his ideas, but it also allows the collective to benefit from his ideas should the author die or discontinue publishing his work. So, while Posner’s and others’ analysis that copyright law is correct in that the law seeks to balance public and private interests, the interests cannot be categorically reduced to economic interests. There are deeper interests than simply economic interests that are espoused by the American property law tradition: fundamental property rights.

Another example of this concept is found in the Fifth Amendment, wherein the Framers empowered the federal government to take property from an individual in the interest of the collective.¹¹⁶ They placed limits on this ability by writing that “private property [may not] be taken . . . without just compensation.”¹¹⁷ The Framers believed that property ownership is a fundamental right, but they also believed that not all fundamental rights are unlimited. The Copyright Clause is no different: it protects the fundamental right of ownership while it also *promotes* the public good by incentivizing authors to produce works that will naturally benefit society.

IV. TO EXPAND OR NOT TO EXPAND

Many have commented on the ability of animals to obtain copyright protection under the current legal regime. The most extreme position is that animals surely meet the requirements set out by precedent, while the most conservative position is that animals simply were not contemplated by Congress as being able to obtain copyrights.¹¹⁸ In between these positions is

115. This example was taken from the following source and was simplified. See Donald A. Barclay, *Shouldn't there be a time limit on Mickey's copyright?*, THE CONVERSATION (Feb. 10, 2016), <http://theconversation.com/shouldnt-there-be-a-time-limit-on-mickeys-copyright-53788>.

116. U.S. CONST. amend. V.

117. *Id.*

118. The conservative approach was taken by the District Court of Northern California and the Copyright Office. See *supra* notes 44-47 and accompanying text.

the idea that photographers, such as Mr. Slater, should be granted copyrights when working with animals, such as Naruto, under the “work for hire” doctrine. The extreme position that animals may obtain copyrights will be discussed in Section A. Section B will discuss the “in between” position. Section C will critically analyze these two views, and then present how history and precedent should decide the query.

A. *Creativity of Animals as Justification for Expansion*

Feist required an author to show both creativity and originality in order to gain copyright protection.¹¹⁹ Accordingly, one of the first arguments that prior precedent should cover animal authors is that animals can meet these requirements of creativity and originality. One proponent of this theory, Dane E. Johnson, has argued that animals do, in fact, have the ability to create works that are worthy of copyright.¹²⁰ In his work, *Statute of Anne-Imals*, Johnson argues that creations of certain animals, such as monkeys, “[represent] the result of choices which would be described as creative if the “author” were human.”¹²¹

Additionally, another author, Holly C. Lynch, argues that chimps have shown both a desire and ability to draw in a humanly artistic manner. She writes about the observations of an ethologist Desmond Morris who concluded that a young chimp ““carried in him, the germ, no matter how primitive, of visual patterns,”” or, in other words, the ability to create artistic works similar to those of humans involving an apparently similar creative process of making artistic choices.¹²²

Lynch uses these scientific findings to point out that, based on only the creativity requirement, there is an inconsistency in the way the law protects a human’s creativity, but not a chimp’s creativity, even if the work is exactly the same.¹²³ Lynch uses the example of a child and a primate to argue, consistently with Goodall’s theory, that the only difference between humans and chimps is humans’ use of sophisticated language.¹²⁴

The author contends that if a child and primate were to draw a picture, it would be impossible to distinguish the difference between the chimp’s creation and the child’s creation, except for the fact that the child will be

119. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

120. Johnson, *supra* note 101, at 17.

121. *Id.* at 28 (quoting Cindy Alberts Carson, *Laser Bones: Copyright Issues Raised by the Use of Information Technology in Archeology*, 10 HARV. J.L. & TECH. 281, 300 (1997)).

122. Lynch, *supra* note 100, at 278.

123. *Id.* at 278-79.

124. *Id.* at 278.

able to communicate exactly what it is that he attempted to create, whereas the chimp will only be able to “‘ooh oh ooo’ in his chimp voice.”¹²⁵ The child, but not the chimp, can be granted copyright protection for his work; however, both of them, the author argues, satisfy the creativity and originality requirements of copyright law.¹²⁶

Johnson and Lynch both address the fact that animal authors cannot speak for themselves. They both argue that the law provides a remedy for children and incapacitated adults who legally cannot speak for themselves by the appointment of a guardian to speak on their behalf to the court.¹²⁷ If a child were to assert his copyright, he would need to do so through a guardian.¹²⁸ An animal should be afforded the same protection.¹²⁹ Ultimately, both authors conclude that animals can meet the creativity and originality requirements of the law, yet are not recognized simply because they are animals.¹³⁰

PETA made similar arguments in its legal brief.¹³¹ It argued that Naruto is the sole creator of the selfies by quoting Slater’s book, wherein he described the monkeys as possibly self-aware—i.e., able to recognize their own reflection, able to work the camera’s shutter button, and able to pose for the camera.¹³² PETA argued that these admissions by Slater show that Naruto was able to employ his creative capacities to create the photograph.¹³³ PETA suggested that Naruto is the *sole* creator of the selfies because he was the one to press the button on the camera.¹³⁴ In addition, PETA made similar arguments to those of Johnson and Lynch for guardianship protection of animals.¹³⁵ PETA argued that it was inconsistent for copyright protection to be given to children and not animals because children are allowed to devise and inherit by law.¹³⁶ They argued that this is

125. *Id.* at 278-79.

126. *Id.*

127. Johnson, *supra* note 101, at 34.

128. *Id.*

129. *See Id.* at 34-35; Lynch, *supra* note 100, at 277-79.

130. *See* Johnson, *supra* note 101, at 32; Lynch, *supra* note 100, at 277-79.

131. Plaintiff Naruto’s Combined Opposition to Defendant’s Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

132. *Id.* (internal citations omitted).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

inconsistent because children require a guardian to enforce their legal rights.¹³⁷ PETA presented the idea that even though animals cannot enforce their own legal rights of inheritance, they could, like children, be appointed a guardian.¹³⁸

B. The Work for Hire Doctrine, Corporations as Authors, and Animal Copyrights

Another, albeit less extreme, position on animal copyrights would apply the “work for hire” doctrine to animal authors.¹³⁹ The work for hire doctrine was set forth in the Copyright Act of 1976. It states that “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author.”¹⁴⁰ Essentially, applying this theory would punt the idea of granting animals actual copyrights. Instead, it would just vest copyrights in a photographer who, like Slater, sets up the camera for the monkey to take the photo.¹⁴¹ The monkey would be treated as an assistant, or even as an employee of the photographer.¹⁴² Because the photographer sets up the photograph, the monkey actually snapping the picture would not take the photographer’s copyrights away. Similarly, the copyrights would not vest with a human assistant photographer who snapped the photograph set up by the senior photographer.¹⁴³

In her challenge to withholding copyrights from animals, Lynch also makes a comparison of animals to corporations. She makes the comparison that corporations, like animals, are *not humans*.¹⁴⁴ However, corporations, unlike animals, are afforded copyright protection via the work for hire doctrine.¹⁴⁵ She essentially argues that if copyright is, in fact, limited to strictly human authors then it should not cover nonhuman corporations.¹⁴⁶ Therefore, because corporations are deemed authors under the work for

137. Plaintiff Naruto’s Combined Opposition to Defendant’s Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

138. *Id.*

139. Lynch, *supra* note 100, at 285-86.

140. 17 U.S.C. § 201(b) (West).

141. Lynch, *supra* note 100, at 285-86.

142. *Id.* at 286.

143. *Id.*

144. *Id.* at 283.

145. *Id.*

146. *Id.* at 282.

hire doctrine, “author” is not inherently limited to only human actors. Thus, animals should also be considered authors.¹⁴⁷

C. *Critical Analysis of Positions and the Current Precedent’s Verdict*

One of the key justifications for the expansion of copyrights to include animals is the idea that “author” has never truly been restricted to merely human authors.¹⁴⁸ Supporters essentially argue that because originality and creativity are considered the touchstones for copyright protection, then an animal that can meet these requirements should be protected by a copyright.

In claiming that the Copyright Office’s conclusion that animals cannot be authors¹⁴⁹ is incorrect, one author states, “it can then be inferred that the Copyright Office is making the conclusion that an animal is incapable of [an artistic rendition].”¹⁵⁰ This view of authorship presents several issues. Namely, advocates of animal copyrights have incorrectly concluded that the expansion of copyright law to cover additional *works* has created a precedent that militates for coverage of additional *types of authors*. Boiling authorship down to a mere evaluation of the creativity and originality requirements misapplies the law; those requirements apply to the work, *not* the author. Supporters of animal copyrights have wrongly equated the ability to protect additional works under copyright law with the ability to cover additional authors under copyright law. This falsely leads proponents of this view to believe that precedent and history would allow the expansion of the definition of author. Such a narrow focus on case precedent completely ignores the issue of whether an animal author can truly hold a *property* right, and the paradigm shift that such a recognition would cause.

The Copyright Office and animal rights activists rely on *Burrow-Giles*, *In Re Trademark*, and *Feist* to help define authorship,¹⁵¹ but they often misapprehend the requirements of creativity and originality as being the minimum requirements for an author. To their credit, the authors initially present the material as the requirements for certain art or other publication

147. Lynch, *supra* note 100, at 285-86.

148. Johnson, *supra* note 101, at 17-19; Lynch, *supra* note 100, at 276.

149. Trade-Mark Cases, 100 U.S. 82, 94 (1879).

150. Lynch, *supra* note 100, at 276.

151. U.S. COPYRIGHT OFFICE, COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES § 306 (3d ed. 2014); Plaintiff Naruto’s Combined Opposition to Defendant’s Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

to be copyrightable; however, they then conclude that because animals can meet these bare minimum requirements, they should be deemed authors.¹⁵²

Although the authors seem to separate the two questions at first—can an animal produce copyrightable material? Should an animal be considered an author?—they often end up blending the two concepts, and in blending do not recognize that ability to create and authorship are two distinct concepts. For example, Lynch argues that animals meet the *Feist* test and can produce the copyrightable work, as they are mentally able to create art.¹⁵³ She then follows this argument with a discussion on the law's recognition of corporations as authors under the work for hire doctrine.¹⁵⁴ Lynch argues that it is inconsistent for the law to allow a corporation to hold a copyright while it fails to fulfill the requirements of copyright law.¹⁵⁵ Lynch argues that a corporation is not human and does not possess any human qualities because corporations “are not freethinking, they do not have emotions, and they are not *creative*.”¹⁵⁶ Lynch challenges the humanness of a corporation based on its ability to be creative—i.e., its ability to meet copyright requirements. Since a corporation is not human, she wonders, “How are corporations able to hold copyrights . . . ?”¹⁵⁷

PETA rightfully points out this discrepancy in both the arguments of the defendant's brief and the defendant's discussion of the Compendium.¹⁵⁸ In referring to *Burrow-Giles* and *In Re Trademark Cases*, PETA explains, “[n]either case held, or even considered, whether a human mind is necessary for copyright protection. Rather, these cases were addressing the requirement that copyrightable works must be ‘original.’”¹⁵⁹ PETA was correct. All precedent that both the Compendium and the animal copyrights supporters have used to support their position addresses whether the *work* is copyrightable and not whether the author may obtain a copyright.

The question in *Burrow-Giles* was whether a photograph would warrant copyright protection, not whether a photographer was an author.

152. See *infra* Section IV.A.

153. *Id.*

154. See *infra* Section IV.B.

155. Lynch, *supra* note 100, at 283.

156. *Id.* at 282 (emphasis added).

157. *Id.* at 283.

158. Plaintiff Naruto's Combined Opposition to Defendant's Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

159. *Id.*

Additionally, the test in *Feist* lays out the requirements for a work to be copyrightable, not what qualifications an author must have. This distinction is an important one. In fact, there are two questions that must be dealt with in solving this issue: (1) whether the work is copyrightable; and (2) whether the “author” is an author under the purview of the Copyright Clause. The prior cases simply do not address the latter question.

In order to answer this question, it is appropriate to examine the roots of copyright law because there is not specific precedent on point.¹⁶⁰ Copyright law was founded upon the need of the national government to protect state-created copyrights.¹⁶¹ It was also founded after the common law right to a copyright on original works by the author was clearly established. One author admits, “It would likely not have occurred to the Framers that anything or anyone except a human could be an author.”¹⁶² As discussed previously, the purpose of the Copyright Clause was to balance private interest of authors in their works with the public’s interest in the works’ consumption and continued production.¹⁶³ Copyright law is inherently a balancing of fundamental property rights and the public welfare.

Human authorship is the cornerstone of copyright law. The original Statute of Anne was created to grant copyrights to authors of books, and the English court eventually found this to be a common law right.¹⁶⁴ Animals have never had a common law right to anything they “create.” In fact, throughout history and even in modern times, the common law has viewed animals as property themselves.¹⁶⁵ At the time of copyright law’s inception, neither the Framers of the Constitution, the English courts, nor Parliament ever contemplated whether animals or any other nonhumans could be authors. Additional support for the *modern* intent of legislators is the fact that the Copyright Act provides for protection for “the life of the author and

160. One case may be on point where the Ninth Circuit ruled that works supposedly spoken by a celestial being were copyrightable by the first humans to record them. *Urantia Found. v. Maaherra*, 114 F.3d 955, 959 (9th Cir. 1997). The Court also stated that “for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity.” *Id.* at 958. However, the Court did not truly deal with the nonhuman authorship issue here because the work was compiled with “human selection and arrangement.” *Id.* at 959.

161. *See supra* Section III.A.

162. Johnson, *supra* note 101, at 19-20.

163. *See supra* Section III.C.

164. *See supra* Section III.A.

165. Vania Gauthreaux, *Far from Fauvists: The Availability of Copyright Protection for Animal Art and Concomitant Issues of Ownership*, 7 J. ANIMAL L. 43, 70 (2011).

70 years after the author's death."¹⁶⁶ Also, the Act provides for the rights of an author's widow or widower after the author's death.¹⁶⁷ Although the law is not explicitly clear as to the humanity requirement, these provisions of the law clearly demonstrate that even modern legislators only meant to cover human authors. To conclude that "authors" is an ambiguous term within the Constitution or the Copyright Act is to completely ignore the common law property tradition that exclusively granted property rights to humans and the vast amount of context clues within the Act.

One of the concepts that animal copyright supporters use to substantiate their argument that the word "author" has been expanded over the years is the work for hire doctrine, which makes corporations authors under the Copyright Act.¹⁶⁸ However, this argument misses a fundamental point; despite stating that the corporation is the "author," the true author is the human who is working for the corporation. Essentially, the law was created so that the two-step transaction of vesting copyrights in an employee, who would then contractually assign his/her copyrights to his/her employer, could be avoided.

Furthermore, this area of law is governed by agency principles, which mandates that works produced by an employee for an employer belong to the employer.¹⁶⁹ "The employer [is] . . . the visionary, and the employee [is the] . . . mechanic following orders."¹⁷⁰ The American law tradition has had a hard time separating corporations from their owners.¹⁷¹ Regardless of the judicial application of human characteristics and protections to nonhuman entities, it cannot be denied that these entities are *made up of* humans. Thus, when a work is created for hire by an employee of a corporation, it is not created by the corporation, it is created by a human employee. Accordingly, the copyright is assigned to the "visionary" or employer rather than the employee. The law did not create a new category of creative beings, but rather structured copyright law to conform to the common law of agency.

166. Johnson, *supra* note 101, at 20 (quoting 17 U.S.C.A. § 302(a) (West)).

167. *Id.*

168. Lynch, *supra* note 100, at 283.

169. Jaszi, *supra* note 67, at 489-90.

170. *Id.* at 489.

171. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2741 (2014); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Although “[t]he Supreme Court emphasizes that the Copyright Act must be interpreted broadly to achieve the purpose on which it is based,”¹⁷² it simply cannot abandon its roots in the common law. Contrary to the accusations of animal copyrights supporters, the law has not done so. Therefore, despite the arguments that the current precedent would allow expansion of copyright law to cover animal authors, this is not the case. Not only would that abandon the law’s roots in the common law, it would cause a fundamental shift in the paradigm of American property law. Such a drastic shift is more appropriate in the states rather than in the federal government.

V. STRUCTURAL CONSTRAINTS ON EXPANSION

The separation of powers doctrine and federalism place structural constraints on the expansion of copyright law to include animal authorship. The separation of powers doctrine precludes the courts from interpreting the law in such a way that it legislates a new meaning. Federalism requires that the federal government recognize and respect the member states of the Union and their right to develop property law schemes.

A. *Separation of Powers Doctrine and Copyright Law*

The separation of powers doctrine is deeply embedded in the American constitutional tradition and has been written about since the founding of America.¹⁷³ The principle that there are three distinct powers of government—legislative, judicial, and executive—that should be exercised by separate branches of the government was of paramount importance to the Framers of the constitution.¹⁷⁴ The reason for the separation was to avoid the concentration of all powers into one branch of government.¹⁷⁵ The Framers sought, more or less, a balanced government in which the branches that were selected or elected differently would need to cooperate in order to govern.¹⁷⁶ They feared a repeat of a monarchy that was able to control every

172. Plaintiff Naruto’s Combined Opposition to Defendant’s Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544.

173. See e.g., THE FEDERALIST NO. 47 (James Madison).

174. *Id.*

175. THE FEDERALIST NO. 51 (James Madison).

176. The executive is elected by the entire nation, the legislature is made up of locally elected officials, and the judicial branch is appointed by the executive and confirmed by the Senate. The system by design consists of both separate and interdependent branches. See U.S. CONST. arts. I, II, III.

aspect of the law and its enforcement; they believed and espoused a minimalist government.¹⁷⁷ Although a general theory, this idea provides the basis for limitations on each branch, including the judicial branch.

The principle of separate and distinct branches touches every decision of a court when it interprets the law. The courts must be careful not to expand the law or even rewrite the law under the pretense of interpreting it.¹⁷⁸ The copyright law derives its power from the Copyright Clause of the Constitution, and therefore, when interpreting or defining the word “author,” the courts must trace the word’s meaning back to its original meaning within the general grant of power in the Constitution. The Framers would have never contemplated that an animal could obtain property rights, and the precedent and development of copyright law has never allowed for expansion within the realm of authorship.¹⁷⁹ The only expansion one can see is the expansion of the law to cover newly created works of human authorship.¹⁸⁰ Therefore, were the court, as PETA requests, to interpret the word author to mean literally anyone (or thing) “to whom anything owes its origin”¹⁸¹ it would be stepping outside of its role as a court and would become a legislature. Because the original intent, and all the subsequent precedent, points to human authorship, if the court were to include animals as authors, it would utterly change the meaning of author in copyright law.

It is not the province of the courts to create law, only to interpret it. The District Court Judge in *Naruto* clearly understands this concept since he concluded: “Naruto is not an ‘author’ within the meaning of the Copyright Act. Next Friends argue that this result is ‘antithetical’ to the ‘tremendous [public] interest in animal art.’ Perhaps. But that is an argument that should be made to Congress and the President, not to me.”¹⁸² Despite scientific advances in understanding animal consciousness and creativity, it is simply outside of the court’s role to read animal authorship into the Copyright Act, much less the Constitution.

177. Philip B. Kurland, *The Rise and Fall of the ‘Doctrine’ of Separation of Powers*, 85 MICH. L. REV. 592, 601 (1986).

178. *King v. Burwell*, 135 S. Ct. 2480, 2506 (2015) (Scalia, J., dissenting).

179. *See supra* Section IV.C.

180. *Id.*

181. Plaintiff *Naruto*’s Combined Opposition to Defendant’s Motion to Dismiss, *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan. 28, 2016) (15-cv-4324-WHO), 2015 WL 9392544 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

182. *Naruto v. Slater*, No. 15-CV-04324-WHO, 2016 WL 362231, at *4 (N.D. Cal. Jan. 28, 2016) (citation omitted).

B. Federalism's Role in Constraining Copyright Jurisprudence

Federalism, in the most general sense, is a covenantal form of government in which there are multiple sovereigns with different, though often overlapping, spheres of control.¹⁸³ In the United States, there is one national sovereign and fifty local sovereigns (the states).¹⁸⁴ Each sovereign has its own sphere in which it governs. It is this concept that restrains an enumerated national government from expanding property rights which are truly creatures of the states.

1. Federalism Generally

The Framers created two levels of sovereigns, dividing authority in the new Union “along subject-specific lines.”¹⁸⁵ The federal legislature is one of enumerated powers where “[t]he powers of the legislature are defined, and limited; and [so] that those limits may not be mistaken, or forgotten, the Constitution is written.”¹⁸⁶ There are several modern theories of how this division of power works and should work in the United States; however, the Supreme Court has most closely adhered to the concept of “dual federalism.”¹⁸⁷ Dual federalism recognizes that the federal and state governments have distinct and mutually exclusive realms in which they regulate.¹⁸⁸

183. This is the author's own definition derived from various sources he has reviewed over his academic career. Although it most likely can be attributed to various sources, he cannot point to a certain source for this simple definition. This Note is not intended to be a robust discussion of the various theories and definitions of federalism (and there are many) but rather just a general overview of the federalist system and how it may prevent the federal government from expanding federal property law.

184. As Justice Kennedy famously wrote:

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

185. Ernest A. Young, *What Does It Take to Make A Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 TULSA L. REV. 831 (2010) (quoting ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010)).

186. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

187. Christopher K. Bader, *A Dynamic Defense of Cooperative Federalism*, 35 WHITTIER L. REV. 161, 165 (2014).

188. *Id.*

Another theory of federalism, Collective Action Federalism, sees Article I Section 8 as a grant of general authority to promote the general welfare (meaning national welfare) with each clause illuminating a specific instance in which the federal government should regulate.¹⁸⁹ Essentially, proponents of this theory of federalism state that the purpose of the national government is to regulate in areas of national concern which would require a national government to regulate in order to have any law passed have the proper effect¹⁹⁰ For example, as discussed in prior sections, copyright law is best regulated by the federal government because each individual state cannot protect its citizens adequately from citizens of another state violating local copyrights.¹⁹¹

2. Application to Copyright Jurisprudence

How does the federal government regulate copyright protection within this system of government? To some, “[w]here the Constitution permits one to regulate, it has plenary authority.”¹⁹² To others, the power of the federal government is limited to those powers enumerated in the Constitution only.¹⁹³ Regardless of the theory of federalism that one chooses, the issue of animal authorship presents an interesting problem that challenges the nature of our Union. Undoubtedly, the federal government has the power to regulate copyrights and this power was given because it was necessary for a national government to protect individuals across the Union from copyright infringement.¹⁹⁴ The Copyright Clause, at its inception, merely created a mechanism that would secure preexisting state property rights across the Union.¹⁹⁵

Despite the ever-expanding role the federal government plays, there has been a recent resurgence in the Supreme Court, beginning with Justice Rehnquist, of a federalism that respects the states plenary power over certain core areas of regulation.¹⁹⁶ That begs the question, does copyright law implicate one of these core areas where states generally have plenary

189. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 115–16 (2010).

190. *Id.* at 115.

191. *Id.* at 148–49.

192. Bader, *supra* note 186, at 165–66.

193. *See e.g., Marbury*, 5 U.S. at 176.

194. *See supra* Section III.A.

195. *Id.*

196. Bader, *supra* note 186, at 167.

authority? The answer is emphatically, yes. Copyrights have their basis in property law—i.e., the right to own or exclude.

The right to copyright was a common law right before the passage of the Copyright Clause and nearly every state in the Union had already created their own copyright schemes.¹⁹⁷ The Copyright Clause was adopted because the states could not alone enforce their own citizens' copyrights, or as Madison put it, "The States [could not] separately make effectual provisions for [copyright]"¹⁹⁸ and thus, federal action was not only prudent, but also required to protect the common law right to intellectual property. The federal scheme merely *secured* a preexisting state property right for citizens of certain states against the citizens of other states. It did not create any new "federal right." The Copyright Clause implicates an area of the law that is generally regulated by the states: property law.

The Supreme Court has dealt with the interaction of federal guarantees and state property laws before. For example, in *Lucas v. S.C. Coastal Council*, the Court addressed regulatory takings of land by states.¹⁹⁹ South Carolina passed a regulation disallowing construction on a certain island due to beach erosion.²⁰⁰ The plaintiff argued this regulation made his land economically valueless.²⁰¹ A regulation by a state that renders land completely valueless constitutes a regulatory taking, and the state must compensate the individual for his land.²⁰² Justice Scalia first reviewed precedent, which held that the Takings Clause limits states from passing bills that render land economically valueless in the name of merely the public interest.²⁰³

Accordingly, Justice Scalia deferred to state law to formulate how regulatory takings cases should be adjudicated.²⁰⁴ Summarily, he held that the Takings Clause disallows a state from rendering land economically valueless by a new regulation *unless* that restriction "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²⁰⁵ In other words, state property law, prior to the adoption of the new regulation,

197. *See supra* Section III.A.

198. THE FEDERALIST No. 43 (James Madison).

199. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 (1992).

200. *Id.* at 1007.

201. *Id.*

202. *Id.*

203. *Id.* at 1020.

204. *Lucas*, 505 U.S. at 1029.

205. *Id.*

would determine whether that regulation rendered the land valueless. If the desired use were a nuisance, for example, then the regulation prohibiting that use could not be a regulatory taking. “[T]he owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land.”²⁰⁶

Without laboring over the Court’s takings jurisprudence, the principle *Lucas* demonstrates is that the federal judiciary is required to respect state-created and regulated rights—i.e., property rights. Justice Scalia deferred to “background principles of the State’s law of property and nuisance”²⁰⁷ in order to determine whether a property was truly valueless *before* the state passed the new regulation or prohibition. In other words, the right to property and the right to enjoy it could be limited by state common law principles without it constituting a regulatory taking. It was *state* common law that determined whether the regulation was a taking and not federal principles or jurisprudence. State guarantees of property were simply *secured* by the Takings Clause and new property rights were not necessarily created.

This interaction of state and federal regulation can help inform the way the federal government regulates copyrights. Just as the Takings Clause is limited to respecting how states treat property rights so, too, should the federal government be limited in its ability to recognize new authors under the Copyright Clause.

The original intent of the Copyright Clause was to secure the preexisting rights of human authors. Subsequent expansions of copyright protections merely expanded the type of mediums that are protected, not the type of *authors* that are protected. Without a clear authorization by the Constitution, whether developed from precedent or history, how can the courts or the legislative branch recognize a new property right never before contemplated? The federal government cannot. The area of property rights is clearly regulated, and often created, by the states.

It would be an inappropriate overstep into the states’ spheres of governance for the federal government to recognize animal property rights. To do so would upend state property schemes that, as of now, only recognize animals as property themselves. The changing standard of consciousness and awareness as the basis for property rights is something that should be experimented with in the states, and then possibly

206. *Id.*

207. *Id.*

recognized and secured by the federal government, not vice versa.²⁰⁸ A federal government that violates states' sovereignty over property law is one that violates the very basis for our Union: federalism and separate spheres of governance.

VI. CONCLUSION

American copyright law had its beginning in the newly formed states just prior to the creation of the United States of America. It was not created by the Constitution, but was rather secured and protected by a national government out of necessity. Precedent and statutory history lay no foundation upon which copyright can be expanded to include animal authorship. In addition, the separation of powers doctrine would disallow the Supreme Court from reinterpreting the Clause to include animal authors.

Lastly, the Supreme Court has recognized its role in the realm of property jurisprudence and that is one most often of deferral and respect for the states' ability to regulate their own property law schemes. To allow the courts or any other federal branch to rewrite state law by allowing animal ownership of property would shatter the divides of the federal system. State property law should be regulated by the states and secured by the federal government. Therefore, until the states recognize animals as having the ability to own property, the federal government must not grant copyrights to monkeys. Monkey see, monkey sue is, in fact, bad law.

208. As Justice Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

