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What Do an Orangutan and a Corporation Have in Common?:Whether the Copyright Protection Afforded to CorporationsShould Extend to Works Created by Animals

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What Do an Orangutan and a Corporation Have in Common?: Whether the Copyright Protection Afforded to Corporations Should Extend to Works Created by Animals

HOLLY C. LYNCH*

This article examines the question of whether copyright protection should extend to works created by primates with a human agent. Scholars have considered the protection of the works of non-human persons, such as corporations, and have commonly accepted the concept that through agency principles, corporations can create works to merit copyright protection. Traditionally, courts and scholars alike have acknowledged that materials produced solely by animals are not copyrightable. However, as our understanding of authorship broadens, copyright's constitutional and statutory boundaries must be reconsidered. This article explores the scope of authorship and offers the application of the broadly defined term of authorship for granting limited copyrights to animals.

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I. A MONKEY TAKES A SELFIE

A "selfie," [*noun* self·ie \ˈsel-fē\] is defined as "an image of oneself taken by oneself using a digital camera especially for posting on social networks."[1] Everyone takes selfies: teens take selfies, grandparents take selfies, and even the President of the United States takes selfies.[2] However, an orangutan named Naruto took the selfie that inspired this article.[3] In June of 2011, nature photographer David Slater was in Indonesia when a group of orangutans began playing with camera equipment he had set up.[4] Slater explains that "[t]hey were quite mischievous jumping all over my equipment, and it looked like they were already posing for the camera when one hit the button . . . . The sound got his attention and he kept pressing it."[5] The result, after many pictures were taken, was a perfectly framed and focused selfie of the orangutan's face.[6] The selfie subsequently went viral on the Internet, mainstream television and radio, ultimately landing on the Wikipedia page for the specific monkey species.[7] After becoming aware of the website's use of the photographs, Slater asked Wikipedia to remove the pictures from the site.[8] However, Wikimedia, the nonprofit organization behind Wikipedia, refused to remove the pictures, claiming that the pictures taken by the monkey were in the public domain.[9] Wikimedia argued that copyright law in the United States holds that works originating from a non-human source cannot claim copyright.[10] However, this argument is perplexing, considering the thousands of copyrights claimed by non-human corporate entities.

Slater continued to fight Wikimedia for the removal of the photo, motivated by the feeling that he played a bigger role in the creation of the photo than he was receiving credit for and the desire for recognition.[11] The basis for his argument lies in the improper categorization of the photo;

1. MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/selfie (last visited November 18, 2015).
2. *See* Katy Steinmetz, *Top 10 Everything of 2012: 9. Selfie*, TIME (Dec. 4, 2012), http://newsfeed.time.com/2012/12/04/top-10-news-lists/slide/selfie/.
3. *See* Olivier Laurent, *Monkey Selfie Lands Photographer in Legal Quagmire*, TIME (Aug. 6, 2014), http://time.com/3393645/monkey-selfie-lands-photographer-in-legal-quagmire/.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *See British Photographer in Monkey Selfie Row*, BBC NEWS (Aug. 7, 2014), http://www.bbc.com/news/uk-28684353.
9. *Id*.
10. Laurent, *supra* note 3.
11. *See British Photographer in Monkey Selfie Row*, *supra* note 8.

categorizing the picture as a public domain work denied him of his right to present and subsequent royalties.[12]

However, Slater also offered an alternative view, which potentially solves the monkey selfie quagmire, stating, "You could look at it like this: The monkey was my assistant."[13] Under this view, the work is copyrightable, as the monkey was acting as an agent of the photographer to create the work.[14] Examining the situation under this view lends itself to common law agency principals.[15] This situation—an animal agent creating a copyrightable work under a principal—parallels that of a corporate-held copyright authored by an employee.[16] As such, this Comment will focus on just that; applying agency and corporate copyright principles to animal authorship.

Most recently, almost four years after the original legal battle, a new player has joined the argument. People for the Ethical Treatment of Animals ("PETA"), on behalf of the monkey who took the selfie, has filed a federal lawsuit against Slater claiming that the monkey is the author of the selfies.[17] While Slater claims his right to present and subsequent royalties in the selfies, PETA claims that Naruto the Monkey is in fact the one entitled to those rights.[18] In their complaint, PETA argues, "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. 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."[19]

Though it may not be intuitive, this issue is likely to be a recurring one. Animal-created copyrighted works are merely the tip of the iceberg; the target may not always be a monkey.[20] Yet, when the issue is dissected and closely examined, it is clear that these types of legal arguments will come at a greater frequency as technology advances. The level of sophistication found in technology is quickly on the rise; non-human beings are already creating copyrightable works.[21] With such creations will come ambiguity of

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12. *See* Henry Chu, *Who Owns Monkey Selfie? Photographer Says Monkey Was Like His Assistant*, L.A. TIMES (Aug. 7, 2014), http://www.latimes.com/world/europe/la-fg-british-photographer-monkey-selfie-20140807-story.html.

13. *Id*.

14. *See id*.

15. *See generally* RESTATEMENT (THIRD) AGENCY § 1.01 (2006).

16. *See* 18 AM. JUR. 2D *Copyright and Literary Property* § 76.

17. Complaint for Copyright Infringement, Naruto et al. v. Slater, No. 15-CV-4324, 2015 WL 5576925, ¶ 7 (N.D. Cal. Sept. 21, 2015).

18. *Id*. at ¶¶ 1-5.

19. *Id*. at ¶ 5.

20. *See* Jason G. Goldman, *Creativity: The Weird and Wonderful Art of Animals*, BBC (July 24, 2014), http://www.bbc.com/future/story/20140723-are-we-the-only-creative-*species*.

21. *See* Aaron Smith & Janna Anderson, *AI, Robotics, and the Future of Jobs*, PEW RESEARCH CENTER (Aug. 6, 2014), http://www.pewinternet.org/2014/08/06/future-of-jobs/.

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authorship. This makes it imperative for the United States Copyright Office to revisit the scope of authorship and its purpose.

II. WHAT IS AUTHORSHIP?

The purpose of this section is to discuss the meaning of authorship as it applies to copyright law, not the meaning of authorship under a moral rights approach, which, alone, would require countless pages.

To begin, authorship, as the law defines it and as the law allows it, is not in line with the romantic view of authorship. Authorship under the romantic view is what society conceptualizes an author to be.[22] This conceptualization often resembles an Ernest Hemingway-type author alone with only his creative thoughts, holed up penning his words in a small bedroom, surrounded by books and paper.[23] This view, the one that society conceptualizes, focuses on one vision of the creative process. In many ways, this view has "blinded [law]-makers to the advantages of non-conforming cultural production."[24] Juxtaposing the romantic view of authorship, however, is the view of authorship as it relates to the utility of copyright protection.

The chief justification for copyright protection in the United States is utilitarianism.[25] The active goal of the utilitarian model is the pervasive diffusion of intellectual works.[26] In addition, this view is supported by a functionalist analysis based in economics, which views authored works as fungible goods, the equivalent to consumer goods.[27] In *Diamond v. Am-Law Publishing Corp.*,[28] the Second Circuit Court of Appeals interpreted the purpose of copyright, holding that "the principal purpose of [the Copyright Act of 1976] is to encourage the origination of creative works by attaching enforceable property rights to them."[29]

Hence, "[i]f the purpose of copyright law is to encourage new acts of creative expression, then the purpose of determining the authorship of copyrighted works is to determine how to best allocate the benefits of

22. Laura R. Lenhart, *Normative Notions of Authorship and Participation in the iSociety*, § 3.2 (Feb. 8, 2009) *available at* http://hdl.handle.net/2142/15228.

23. *See id*.

24. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 29, 40 (Martha Woodmansee & Peter Jaszi eds., Duke University Press 1994).

25. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 24 (Stanford 2010).

26. *Id*.

27. *Id*. at 24-25.

28. 745 F.2d 142 (2d Cir. 1984).

29. *Id*. at 147.

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copyright ownership so as to maximize creative activity."[30] The Ninth Circuit Court of Appeals in *Aalmuhammed v. Lee*[31] explained: "The word [author] is traditionally used to mean the originator or the person who causes something to come into being."[32] In other words, the author is the "person with creative control."[33] Or, in an alternate framing, an author is defined as "he to whom anything owes its origin."[34] By this view, whoever creates the thing, holds the copyright. This view of authorship, in regard to the monkey selfie story, would lead to the belief that the monkey should hold the copyright because the photo owes its origin to the monkey.[35]

However, it is not necessarily that simple. Take for instance, a photographer taking a picture of someone posing; or a photograph taken by a photographer's assistant; or a work made by an employee for a large corporation. What is authorship in those situations? When it comes to photographs of "persons who are engaged in real-life events as opposed to intentional creative performances, there is no direct authority on the question whether the person who is the subject of the photograph . . . qualifies as an author of the work."[36] While *Burrow-Giles Lithographic Co. v. Sarony*[37] held that a posed photograph, a planned creative performance, constitutes a copyrightable work, the Supreme Court of the United States did not resolve the issue of whether authorship vested jointly in both the subject and the photographer, or exclusively in the photographer.[38] More recently, in *Natkin v. Winfrey*,[39] the United States District Court for the Northern District of Illinois held that a television performer was not a co-author of photographs of live performances by virtue of providing subject matter.[40] While *Natkin* broadly addressed the issue of whether a subject is a co-author of a photograph, the district court circumvented the issue of whether the subject of the photograph contributed substantial creativity to the fixed work.[41] Further, the district court did not address the issue of authorship in an un-staged environment; for instance, a photograph of someone going about his or her daily routine rather than someone posed.[42]

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30. Mary LaFrance, *Who Is an Author?*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE, VOL. 1, 53, 53 (Peter K. Yu ed., 2007).
31. 202 F.3d 1227 (9th Cir. 2000).
32. *Id*. at 1232.
33. *Id*.
34. *Id*. at 1233 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).
35. *See supra* Part I.
36. LaFrance, *supra* note 30, at 60.
37. 111 U.S. at 53.
38. *See id* at 61.
39. 111 F.Supp.2d 1003 (N.D.Ill.2000)
40. *Id*. at 1010-11.
41. *See id*.
42. *See id*.

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After examining the aforementioned cases, however, it is unlikely that a court would recognize this type of unplanned, non-posed photograph as a work of joint authorship for the following reasons: (1) the subject did not authorize the photograph; (2) the subject lacks a creative contribution sufficient to claim authorship; and (3) the subject likely lacks the intent to create.[43] Nonetheless, the idea remains that the author is the person with creative control, whether that traces back to one person or two, and the purpose in making that person the holder of the copyright is to encourage the origination of creative works.[44]

Authorship becomes disputable when an attempt is made to specify what is required to be an author. Does an author need to be human? Does the author need to be an individual? For the purposes of this Comment, the question is why, on one hand, we require human authorship, while on the other hand, the "work for hire" doctrine allows corporations to be deemed authors.[45] As it applies to copyright, giving a corporation the legal "status of persons under the law grants them the ability to stand in for authors, thus transferring the bulk of control over [the authorships] to large bureaucratic institutions."[46] "To a large degree, the bureaucratization of intellectual property . . . is a product of the simple fact that large industrial bureaucracies have taken the place of individuals in the law," which departs far from the romantic view of authorship.[47]

III. WHAT THE COPYRIGHT ACT REQUIRES FOR COPYRIGHT PROTECTION

In order to argue that animals are capable of copyrightable authorship, it must first be established what is required for a work to be copyrightable. In accordance with the 1976 Copyright Act, a work must be original, fixed in a tangible medium, creative, and have a human author.[48] *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*[49] set forth the modern standard for a work to meet the originality requirement for copyright protection, holding that a two-step analysis must be followed that requires both originality and a minimal level of creativity.[50] This analysis rejected the once accepted "sweat of the brow" theory, which based protection upon the amount of

43. LaFrance, *supra* note 30, at 59-60.
44. Kwall, *supra* note 25, at 25.
45. *See* 17 U.S.C.S. 201(b) (LexisNexis 2015).
46. Thomas Streeter, *Broadcast Copyright and the Bureaucratization of Property*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 303, 309 (Martha Woodmansee & Peter Jaszi eds., Duke University Press 1994).
47. *Id*.
48. *See* 17 U.S.C.S. § 102 (LexisNexis 2015).
49. 499 U.S. 340 (1991).
50. *Id*. at 357-59.

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labor required to produce a work, replacing it with a requirement of originality.[51]

a. Originality

> Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to 'secur[e] for limited Times to Authors . . . the exclusive Right to their respective [works].' In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U.S. 82, 25 L.Ed. 550 (1879); and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 4 S.Ct. 279, 28 L.Ed. 349 (1884)—[the Supreme] Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.[52]

Today, the originality requirement still stands as the hallmark of copyright protection.[53] "Leading scholars agree on this point. . . . 'The originality requirement is *constitutionally mandated* for all works.'"[54] However, merely a "modicum of intellectual labor . . . constitutes [this] essential constitutional element."[55] Additionally, beyond being constitutionally mandated, originality is statutorily mandated.[56] Originality is an explicit requirement of the 1976 Copyright Act,which requires an "original work of authorship" in order to grant copyright protection.[57] 17 U.S.C.A. § 102 provides no definition for the phrase "original work of authorship."[58] However, the House report for the revision of the act provides guidance:

> [T]he phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not

51. *Id.* at 353.
52. *Id.* at 346.
53. *See id.*; *see also* Goldstein v. California*,* 412 U.S. 546, 561 (1973).
54. Feist Publications, Inc. v. Rural Telephone Service Co., Inc, 499 U.S. at 347 (quoting Patterson & Joyce*, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 n.155 (1989)).
55. *Id.*
56. 17 U.S.C.A. § 102.
57. *Id.*
58. *See id*.

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> include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.[59]

Courts have interpreted "originality" in a number of ways. *Feist* provides that, in order for a work to meet originality requirement for copyright protection, "the work [must be] independently created by the author (as opposed to copied from other works), and . . . possess[] at least some minimal degree of creativity."[60] While this standard is clearly worded, it is fungible, and acts as a catchall for a majority of works. Furthermore, "[w]hat the Court failed to do in *Feist* was explain just how it determined that Rural's white pages lacked the creativity requisite to elevate it to 'original' status for purposes of copyright."[61]

The standard in *Feist* has been manipulated in various ways by courts.[62] For example, in *Apple Computer, Inc. v. Microsoft Corp*,[63] a district court provided an evaluation standard for deeming a work original, holding that the "work need only be independently created by the author and embody very modest amount of intellectual labor."[64]

Further, in *Alfred Bell & Co. v. Catalda Fine Arts*,[65] the Second Circuit Court of Appeals addressed the ambiguity of the originality requirement by stating, "[original] may mean startling, novel or unusual, a marked departure from the past. [However,] '[o]riginal' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.'"[66] Additionally, the court asserted:

> All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying. No matter how poor artistically the 'author's' addition, it is enough if it be his own.[67]

However, while these standards and interpretations have departed slightly in wording from the *Feist* standard, it remains clear that this

59. H.R. REP. 94-1476, 51, 1976 U.S.C.C.A.N. 5659, 5664.
60. *Feist*, 499 U.S. at 345.
61. Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 822 (1993).
62. *See, e.g.*, Apple Computer, Inc. v. Microsoft Corp., 759 F.Supp. 1444, 1455 (N.D. Cal. 1991).
63. 759 F.Supp. at 1444.
64. *Id* at 1455.
65. 191 F.2d 99 (2d Cir. 1951).
66. *Id*. at 102 (citing *Burrow-Giles*, 111 U.S. at 57-58).
67. *Id*.

standard provides little guidance as to what makes a work original; still it stands as the basis for determining originality of a work.

b. Creativity

Just as with "originality," the *Feist* Court failed to adequately define "creativity."[68] This left scholars and courts with the task of scrutinizing court opinions and statutory authority to determine what exactly "creativity" means as it relates to copyright.[69] Creativity, the second prong of the *Feist* analysis, reads more as a description than a standard, merely requiring a work to have "the degree of creativity necessary to sustain a copyright in a compilation of factual material."[70] The term "creativity" as required by *Feist* is not a high standard, requiring no innovation or element of surprise.[71] It only requires that the work possess a "modicum of creativity."[72] Prior to *Feist*, the meaning of creativity was articulated in *In re Trade-Mark Cases*,[73] where the Court stated that a work deserving of protection is "founded in the creative powers of the mind . . . [and] . . . *the fruit*[ ] *of intellectual labor*, embodied in the form of books, prints, engravings, and the like."[74]

As such, it is evident that to meet the creativity requirement, the work does not, in fact, have to be very creative at all. However, even given its minimalist boundaries, the creativity element still places works completely obvious and void of any imagination outside of the reach of copyright, thus, keeping them in the public domain. This rule is reflected in 37 C.F.R. § 202.1(a):

> [T]he following are examples of works not subject to copyright and applications for registration of such works cannot be entertained . . . [w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents.[75]

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68. *See* Russ VerSteeg, *Sparks in the Tinderbox:* Feist*, "Creativity," & the Legislative History of the 1976 Copyright Act*, 56 U. PITT. L. REV. 549, 555 (1995).

69. *See id*. at 555-56.

70. Howard B. Abrams, *Originality and Creativity in Copyright Law*, 55 L. & CONTEMP. PROBS. 3, 5 (1992).

71. *Feist*, 499 U.S. at 362.

72. *Feist*, 499 U.S. at 346.

73. 100 U.S. 82 (1879).

74. *Id*.

75. 37 C.F.R. 202.1(a) (LexisNexis 2015).

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Given this, courts have found photographic works that lack the modicum of creativity necessary for registration, including photographic copies of works of art and touched-up photographs with no addition of an appreciable amount of authorship, cannot be protected by copyright laws.[76]

c. Human Author

On December 22, 2014, the Copyright Office Compendium III of Copyright Office Practices section 306 provided that the term "authorship," as required by the Copyright Act, implies that, for a work to be copyrightable, it must owe its origin to a human being.[77] Works failing to meet this requirement are unprotected.[78] The Office will not register works produced by nature, animals, or plants.[79] In fact, copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind."[80] The Supreme Court gave a workable interpretation of this protection in *Burrow-Giles*, where the Court upheld the validity of the copyright of a photo of the author Oscar Wilde.[81] The Court held this to be the fruit of the photographer's intellectual labor and that it was founded in the creative powers of his mind.[82] The Court stated that the photographer made a "useful, new, harmonious, characteristic, and graceful picture . . . entirely from his own mental conception, to which he gave visible form by posing the [subject] and arranging the costume, draperies, and other various accessories . . . so as to present graceful outlines."[83] Given this, one can surmise then that the Copyright Office is making the conclusion that an animal is incapable of intellectual labor or of making a work of "his own mental conception."[84] Further, as ascertained in *Alfred Bell*, "[o]riginality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own."[85] Again, given this standard, it can then be inferred that the Copyright Office is making the conclusion that an animal is incapable of original artistic addition, no matter how feeble.[86] The forthcoming sections of this Comment argue that these conclusions by the Copyright Office are

76. *See* Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp.2d 191, 195 (S.D.N.Y. 1999); Compendium III of Copyright Office Practices § 313.4(B) (2014).
77. Compendium III of Copyright Office Practices § 306.
78. *Id*.
79. *See id*.
80. *Id*. (quoting *Trademark Cases*, 100 U.S. at 94).
81. *Burrow-Giles*, 111 U.S. at 60.
82. *Id*.
83. *Id*.
84. *See id*. at 60; Compendium III of Copyright Office Practices § 306.
85. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d at 103.
86. *See id*.; Compendium III of Copyright Office Practices § 306.

incorrect, and that an animal author can, in fact, make a work of his own mental conception.

IV. Do Animals Meet The Requirements For Protection?

This section will discuss which requirements of copyright protection primates easily satisfy, and the requirements where the Copyright Office has categorized them as falling short. The preceding section broke down the requirements of a copyrightable work, the point of which was to lay the foundation, by showing that the requirements are minimal and ambiguous.[87] As such, primates, absent one element, easily meet the less than stringent requirements.[88]

a. Are Primates Capable Of Producing Creative And Original Work?

Are primates capable of producing creative and original work? At first blush, given the average conception we as humans have of primates, the answer to this question would be no. However, primatologic, ethologic, and anthropologic research has shed light on a different answer.[89] This topic in and of itself is extremely complex, and could be a thesis on its own. Nevertheless, for the purposes of this Comment, the focus will be to prove that primates are capable of a modicum of creativity. As established above, the Copyright Act only requires a modicum of creativity.[90] *Feist* notes that a work is incapable of valid copyright protection if its "creative spark is utterly lacking or so trivial as to be virtually nonexistent."[91]

Since 1960, Jane Goodall has been held as the foremost expert in primates.[92] She recently gave a lecture where she sets forth that the only real difference between humans and chimps is our sophisticated language.[93] She describes stories of two chimps that clearly indicate the fact that the mind of a primate is capable of creativity. The first story is of a female chimp that loves playing video games on the computer.[94] Goodall recounts, "[the chimp] does things with her computer screen and a touchpad that she can do faster than most humans[;] [s]he does very complex tasks."[95] Next, she tells the story of a chimp named David Greybeard, who modified

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87. *See supra* Part III.
88. *See infra* Part IV.a.
89. *See* Jane Goodall, *What Separates Us from Chimpanzees?*, TED (Mar. 2002), *available at* https://www.ted.com/talks/jane_goodall_on_what_separates_us_from_the_apes.
90. *See supra* Part III.
91. *Feist*, 499 U.S. at 359.
92. *About Jane*, JANE GOODALL INSTITUTE, http://www.janegoodall.org/who-we-are/about-jane/ (last visited Nov. 18, 2015).
93. Goodall, *What Separates Us from Chimpanzees?*, *supra* note 89.
94. *Id.*
95. *Id.*

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objects such as twigs and leaves to make them suitable for a specific purpose.[96] In other words, David Greybeard was making tools.[97] Goodall details, "The reason this was . . . such a breakthrough is at that time, it was thought that humans, and only humans, used and made tools. When I was at school, we were defined as man, the toolmaker."[98] Stories such as this, of primates playing video games and creating tools, are physical representations demonstrating the existence of advanced cognitive process and abilities.[99]

Goodall is not the only scientist to acknowledge the existence of these abilities in primates. Dr. Eman Fridman in his book *Medical Primatology* states, "chimpanzees have the desire to draw even without any stimulation by people."[100] Ethologist Desmond Morris observed this kind of artistic desire to draw when his young chimp Congo began drawing.[101] Morris discovered that the drawings made by Congo were not random, noting, "Congo carried in him, the germ, no matter how primitive, of visual patterns."[102] The process of Congo's drawing was, in fact, quite similar to that of a young child.[103] Congo's artistic process began when he "'balanced' a page by placing a pictorial weight in the blank portion, filled in figures and resisted drawing outside them, completed those that seemed unfinished, favored the color red . . . and, like other chimpanzees whose drawings have been studied, seemed to evolve his own style."[104] Nothing about this behavior or the work created by Congo the chimp suggests that "creative spark was utterly lacking."[105]

Imagine a scenario where a young child and a primate draw something alike, such as lines and graphic patterns. The child and monkey then present their paintings to a viewer, a viewer who would unlikely be able identify the lines and objects by name. Now, apply Goodall's theory that the only real difference between humans and chimps is our sophisticated language.[106] Using this theory, it is likely that the child would describe to the viewer what is in the painting; whereas the chimp would be incapable of

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96. *Id*.
97. *Id*.
98. Goodall, *What Separates Us from Chimpanzees?*, *supra* note 89.
99. Lesley J. Rogers & Gisela Kaplan, *All Animals Are Not Equal: The Interface Between Scientific Knowledge and Legislation for Animal Right*s, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 175, 185-88 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).
100. EMAN P. FRIDMAN, MEDICAL PRIMATOLOGY: HISTORY, BIOLOGICAL FOUNDATIONS AND APPLICATIONS 197 (Ronald D. Nadler ed., Taylor and Francis 2002).
101. HOWARD GARDNER, THE ARTS AND HUMAN DEVELOPMENT: A PSYCHOLOGICAL STUDY OF THE ARTISTIC PROCESS 53 (John Wiley & Sons 1973).
102. *Id*. at 53-54.
103. *Id*. at 54.
104. *Id*.
105. *Id*. at 53-54.
106. Goodall, *What Separates Us from Chimpanzees?*, *supra* note 89.

describing what he drew on the paper. He may "ooo oh ooo" in his chimp voice, but the viewer would not understand. Still, does this make what he placed on his piece of paper any less creative than what the little boy placed on the piece of paper? Imagine a little boy describing what was on his piece of paper to a viewer who does not speak the same language as him, the viewer would not understand the little boy's description of what his lines and shapes on the paper were. Nevertheless, that would not mean they were any less of a creative work than the little boy who was able to articulate and identify his art.

Furthermore, primates are capable of original work.[107] The work of primates, whether it be paintings, drawings, or photographs are the original work of that primate.[108] The Copyright Act, as mentioned in the previous sections, provides that a work must be an "original work of authorship" in order for the granting of copyright.[109] To validate a work as copyrightable, the work must be "entirely from [the author's] own original mental conception."[110] A drawing made by a primate comes entirely from his own original mental conception, there is no human guiding his hand, nor is there an instructor telling him what to draw.[111]

b. Monkeys are not Human Authors

Given the aforementioned sections, in accordance with the requirements of the Copyright Act, the only requirement a primate fails to meet is his inability to be a human author.[112] The Compendium of U.S. Copyright Office Practices provides that the term "authorship," as required by the Copyright Act, implies that for a work to be copyrightable, it must owe its origin to a human being.[113] However, the Compendium is not binding authority; it is an administrative manual, intended to provide instruction to the legal community.[114] It does not have the force and effect of the law, no matter how persuasive it may be.[115]

In February 2015, the Supreme Court of New York County spoke to the status of chimps as non-human persons in *The Non-Human Rights Project v. Stanley*.[116] Allowing Petitioners, The Non-Human Rights Project to have

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107. *See* Goldman, *supra* note 20.
108. *See id*.
109. 17 U.S.C.A. § 102.
110. Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 878 (2007).
111. *See* Goldman, *supra* note 20.
112. *See* 17 U.S.C.A. § 102.
113. Compendium III of Copyright Office Practices § 306.
114. *Id*. at § 301, 303.
115. *Id*.
116. 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015).

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standing on behalf of the chimps, the court heard the case.[117] Petitioners argued that the chimps "Hercules and Leo are 'persons' within the meaning of the New York common law of habeas corpus, . . . and are entitled to the New York common law right to bodily liberty protected by the New York common law of habeas corpus."[118] To uphold its argument, Petitioners asserted, "[C]himpanzees are autonomous and self-determining beings who possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty, as a matter of common law liberty, equality, or both."[119] Petitioners urged the court to identify chimps as "persons" since such a determination is "strongly supported by law, science, history, and modern standards of justice . . . ."[120] As such, primates do not fail to achieve personhood in every area of the law.

However, in July 2015, the court ultimately denied the petition for habeas corpus.[121] While the decision did not favor the chimps, it did not dismiss the idea that chimpanzees can attain legal rights.[122] Judge Barbara Jaffe noted:

> The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration.[123]

The subsequent sections of this Comment will examine the other non-human persons that Congress allows to hold copyrights. If the Compendium sets forth that a non-human cannot author a copyright, then should non-humans, such as corporations, hold copyrights, which are meant to encourage the origination of creative works? This examination will unveil that the issue goes beyond whether the author of a work must be human. Rather, the question one must consider is what the Copyright Office is attempting to promote through their use of copyright protection.

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117. *Id*. at 905.
118. Verified Petition, The Nonhuman Rights Project v. Stanley, No. 1527362015, 2015 WL 1872094, ¶ 5 (N.Y. Sup. Feb. 12, 2015).
119. *Id*. at ¶ 3.
120. *Id*.
121. Matter of Nonhuman Rights Project, Inc. v. Stanley, 16 N.Y.S.3d at 918.
122. *See id*. at 917-18.
123. *Id*. at 917.

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Thus, the issue is whether the purpose of the Copyright Act is to use copyright protection to incentivize creativity in authors or whether its goal is to encourage profit in the economic market by allowing temporary monopolies for copyrighted works.

V. CORPORATIONS ARE NON-HUMAN AUTHORS

The term "legal person" is not synonymous with being human; in fact, the concept of being a "legal person" is not even a biological concept.[124] However, the Supreme Court has granted corporations legal personhood in the United States.[125] This section will discuss whether corporations are human, and whether, as an entity, they are entitled to author and hold copyrights.

a. Are Corporations Human?

On the surface, it is clear that a corporation is not a human. Just like it is clear on the surface that a chimp is not a human. Again, this sub-topic alone is a complex issue, one that would requires years of study. As such, this Comment will focus on what makes a corporation more human than a primate, as it relates to copyright requirements.

After *Citizens United v. Federal Election Committee*,[126] the status of corporations is not obvious. Although *Citizens United* did not unambiguously decide the issue of corporate personhood and did not label corporations as legal persons, the decision clearly suggests that corporations are people.[127] Most recently, the Supreme Court ruled on *Burwell v. Hobby Lobby Stores Inc.*,[128] which further blurred the line as to the identity of a corporation.[129] The Court went so far as to state that the definition of "person" includes corporations as well as natural persons.[130]

Nevertheless, regardless of their label as a person, "corporations . . . are not [humans] like you and me."[131] The differences between a corporation and human being are clear:

> Human beings—biological organisms with limited life span who are vulnerable to illness and death—often regard

124. *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 458-60 (2013).
125. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2759-60 (2014).
126. 558 U.S. 310 (2010).
127. *See id*. at 339.
128. 134 S. Ct. 2751 (2014).
129. *Id*. at 2759-60.
130. *Id*. at 2768.
131. Binyamin Appelbaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES (July 22, 2014), http://www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html?_r=0.

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> themselves as thinking, feeling, and doing creatures. Corporations—legally constructed entities comprised of capital, held together by contracts, and owned and operated by various other entities and individuals—lack self-consciousness and are not subject to the vulnerabilities arising from either death and illness or thinking and feeling.[132]

Moreover, corporations hold special legal powers making them different from human beings.[133] These powers give them the ability to make a major impact on the economy.[134] In *First National Bank of Boston v. Bellotti*,[135] the predecessor of *Citizens United*, Justice William Rehnquist wrote in dissent: "Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed."[136] This statement by Justice Rehnquist has now come to fruition, with corporations yielding their economic power.

Regardless of whether a corporation is a legal person, a corporation does not possess the same qualities as a human being, or even the same qualities as a primate. This is troubling for copyright purposes because corporations are not freethinking, they do not have emotions, and they are not creative. In addition, while they may have special economic power and control, this is of little importance to what the 1976 Copyright Act intended to protect, where the "principal purpose is to encourage the origination of creative works by attaching enforceable property rights to them."[137]

As it applies to copyright, giving a corporation the legal "status of persons under the law grants them the ability to stand in for authors, thus transferring the bulk of control over [the authorships] to large bureaucratic institutions."[138] "To a large degree, the bureaucratization of intellectual property . . . is a product of the simple fact that large industrial bureaucracies have taken the place of individuals in the law," departing far from the romantic view of authorship.[139]

However, as indicated by the Congressional Record of the 1909 Copyright Act, "Congress sought to protect the individual and his rights and did not desire the Act to become a moneymaking device for large corporations. Congress wanted to find a way to protect the individual while

132. Matambanadzo, *supra* note 124, at 478.
133. Appelbaum, *supra* note 131.
134. *Id*.
135. 435 U.S. 765 (2010).
136. *Id*. at 826.
137. Diamond v. Am-Law Publg. Corp., 745 F.2d 142, 147 (2d Cir. 1984).
138. Streeter, *supra* note 46, at 309.
139. *Id*.

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preventing the formation of 'oppressive monopolies.'"[140] The purpose intended by Congress in the 1909 Act holds consistent with the Constitution in that it desires to protect "the individual by rewarding his creative effort, thereby, enhancing the arts and the sciences. This, in turn, enriches the material in the public domain available to the general public."[141]

As such, how can a corporation produce a creative original work by a human author? This is problematic, as we have seen all the ways primates fulfill the requirements of copyright law, yet a corporation, who fails in as many if not more ways, is afforded the right to author and hold copyrights. How are corporations able to hold copyrights if they are not, in fact, human authors?

b. How Do Corporations Get Around This?

The Copyright Act of 1976 explains that "copyright in a work . . . vests initially in the author or authors of the work."[142] On the surface, this provision seems to state that copyright goes to the person who creates the work. However, the 1976 Act further sets forth: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author."[143] As a result, if a work is "made for hire," copyright goes to the employer; if not, it goes to the creator.[144]

Most often, a corporation explicitly owns a copyright in an employee's creation, which the statute refers to as "works made for hire."[145] T work for hire doctrine functions by allocating copyright ownership of works created in employer-employee relationships.[146] "This doctrine reverses the usual assumption that 'authorship' and initial ownership of the copyright vest in the individual who conceives the work and first embodies it in some fixed medium."[147]

However, in order for this doctrine to come into effect, there must be an employer-employee relationship. Until the mid-1960s, courts used a test based in agency law to determine the existence of employer-employee

140. Blake Covington Norvell, *The Modern First Amendment and Copyright Law*, 18 S. CAL. INTERDISC. L.J. 547, 564 (2009).
141. *Id*.
142. 17 U.S.C.S. § 201(a).
143. *Id*. at (b).
144. *See id*. at (a)-(b).
145. 17 U.S.C.S. § 101.
146. *Id*.
147. Deborah Tuessey, *Employers as Authors: Copyrights in Works Made for Hire*, *in* INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE, VOL. 1, 70, 72 (Peter K. Yu, ed., 2007).

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relationships in copyright cases.[148] The key element of this test was "the right of the employer 'to direct and supervise the manner in which the creator performs his work."[149] More recently, the Supreme Court spoke to this matter in *Community for Creative Non-Violence v. Reid*;[150] the driving force of their decision was to establish a definitive test for the existence of an employer/employee relationship.[151] Here, the Court concluded, "to determine whether work is for hire under the Act, a court should first ascertain, using principles of general common law agency, whether work was prepared by employee or an independent contractor. After making this determination, the court can apply the appropriate subsection."[152]

> Among the other factors relevant to this inquiry [to determine whether party hired to produce copyrighted work is employee under general common law of agency] are the skill required; the source of instrumentalities and tools; the location of the work; the duration of relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[153]

Therefore, in order for the copyright of the employee's work to vest in the corporation (*i.e.*, the employer), there must be a sufficient employer-employee relationship meeting the aforementioned test.[154]

Yet, as previously mentioned, while the Copyright Act permits corporate authorship, there has been little focus on whether corporations come within the constitutional boundaries of copyrights. "American legal culture has consequences for the law's . . . failure to engage[] the realities of contemporary [authorship], which is increasingly . . . corporate."[155] In

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148. *See* Alan Hyde & Christopher W. Hager, *Promoting the Copyright Act's Creator-Favoring Presumption: "Works Made for Hire" Under Aymes v. Bonelli & Avtec Systems, Inc. v. Peiffer*, 71 Denv. U.L. Rev. 693, 704 (1994).

149. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 62.31 (Matthew Bender, Rev. Ed. 2013).

150. 490 U.S. 730 (1989).

151. *Id*. at 737-38.

152. *Id*. at 750-51.

153. *Id*. at 751-752.

154. *Id*.

155. Jaszi, *supra* note 24, at 38.

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reality, large corporations now replace individual authors when it comes to copyright protection.[156]

VI. ALTERNATIVE: WHAT IF THE WORK-FOR-HIRE APPLIED TO ANIMAL AUTHORSHIP?

One may believe that it is preposterous to allow primates to hold copyrights. If that is in fact the case, I present an alternative argument. If corporations, non-human authors are vested with the copyrights of their employees, then perhaps works created by a primate, creative and original works, could vest in other non-humans.

If, as previously established, the purpose of copyright law is to promote the output of creative works, then applying a pseudo-version of the work for hire doctrine to animal artists would greatly serve that purpose. Applying this type of doctrine would encourage those who hold title to animal-created art to invest more in the distribution of the work; the holder would be more inclined to foster the work of the animal, which would ultimately benefit society at large. As we have seen through our analysis of corporate copyrights, the holder of the copyright seems to be of little importance to the copyright as it relates to the creative essence of copyright law. This view fails under the concept that employees, for purposes of work-for-hire, are defined under "the conventional master-servant relationship as understood by common law agency doctrine."[157] Under a common law agency doctrine, agency requires agreement and consent between parties that one will act on behalf of another and subject to the other's control.[158] In the situation between the monkey and the photographer, it is arguable the monkey has no way of consenting that he will act on behalf of the photographer and be subject to his control. However, the law often allows implied consent in contracts. "An implication of consent may be drawn where the remote party is aware of the contract and has encouraged its making because it serves the remote party's interest."[159] In the case of the monkey, it is difficult to imply consent because, in accordance with Goodall's aforementioned theory that the only distinction between primates and humans is our advanced language, the monkey could be aware that he wants the photographer to exploit the photo, but he is simply unable to communicate in a language understood by the photographer.

Furthermore, even without express or implied consent, the factors are present to show that the monkey was hired to produce the work under

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156. Streeter, *supra* note 46, at 309.
157. Community for Creative Non-Violence v. Reid, 490 U.S at 739-40.
158. RESTATEMENT (THIRD) AGENCY § 1, cmt. b.
159. HUGH COLLINS, THE LAW OF CONTRACTS 130 (4th ed. 2003).

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common law agency principles.[160] The source of the instruments was from the photographer; the monkey used the photographer's camera and equipment. The location of the work was in the jungle where the photographer had set up his temporary studio. Furthermore, the photographer had extensive discretion as to how the picture turned out and he was able to set the focus and lighting of the camera.

Next, if the view of a pseudo work for hire between the monkey and the photographer is too attenuated, then view the monkey as an assistant to the photographer. It is common in the field of photography for a photographer to take credit for (including the copyright) the work of his assistant.[161] It is common course that "if the services rendered by the Assistant Photographer result in the creation of copyrights or other intellectual property, the Assistant Photographer agrees that any such copyrights . . . shall belong to the Photographer."[162] The assistants in these situations are carrying out the vision of the photographer; as such, the images belong to him. Take this situation and apply it to the orangutan that took the selfie; now the monkey is the photographer's assistant, carrying out his creative vision, using his camera, his lights, and his set. The photographer would now own the copyright to the photograph because the orangutan was a work-for-hire.[163] As previously established, the doctrine of work-for-hire automatically vests ownership in the employer when the employee creates a work within his employment.[164] Therefore, the orangutan would be an employee of the photographer since he was using the instrumentalities of the photographer and possibly receiving remuneration for his work, maybe in the form of treats. This establishes the employer-employee relationship of the orangutan as an assistant to the photographer, and would allow the photographer to own the rights in the selfie through the authorship of the monkey.

VII. CONCLUSION

If the thought of a monkey authoring a work still seems far-fetched, then answer why, on one hand, do we require human authorship, while on the other hand the work for hire doctrine allows corporations to be authors? This issue goes beyond whether a monkey should author a work. The issue goes straight to the actual purpose of copyright law because, from this, the question of what copyright is trying to protect logically arises. By placing copyright in the hands of large corporations, where copyrights become a

160. *Community for Creative Non-Violence*, 490 U.S at 751-52.
161. ELIZABETH ETIENNE, PROFITABLE WEDDING PHOTOGRAPHY 40 (2013).
162. *Id*.
163. 17 U.S.C.S. §§ 101, 201.
164. 17 U.S.C.S. § 201.

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moneymaking device, copyright has departed so far from the Constitution's desire to protect "the individual by rewarding his creative effort, thereby, enhancing the arts and the sciences."[165] Given this divergence, protecting the creative efforts of a primate does not seem to depart any further from the intention of the Constitution than allowing a Corporation to act as an author.

165. Norvell, *supra* note 140, at 564.

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