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October 2017

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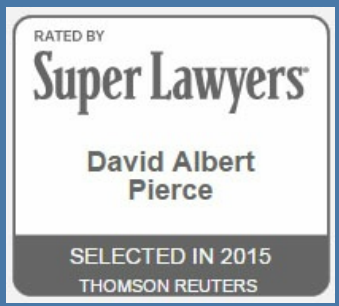

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Naruto v. Slater: A Breakdown In Litigation Incentives

By Daniel Lifschitz, Esq.

By now, many people have heard about **Naruto v. Slater**, otherwise known as the "monkey selfie" case. To most, the case is a punchline -- little more than an exemplar of postmodern absurdity as played out in a courtroom. Scratch below the surface, however, and you get something quite different: a grim tale of misaligned incentives in our judicial system, particular with respect to the cost of litigation.

Facts of the Case:

The facts of the case are relatively straightforward: In **2011**, **David Slater** (a British nature photographer) left

Upcoming Speaking Engagements

On Wednesday, **October 18th at Noon** at Lawry's Prime Rib, The Beverly Hills Bar Association's Entertainment Section sponsors a panel called " **When Entertainment Transactional Attorneys Screw Up, The Sequel** " For information regarding this panel, click here.

On Saturday, October 21st on the **USC** Campus, The annual **USC-BHBA Entertainment Law Symposium** will occur. This all day event is one of the premiere entertainment industry panel programs with a wide array of speakers, including key note speaker **Ben Sherwood**(Co-Chairman **Disney Media Networks**, President, **Disney/ABC Television Groups**). David Albert Pierce is a member of the USC-BHBA Symposium's Curriculum Committee.

On **Nov. 9th**, **David Albert Pierc** will once again be delivering his annual presentation to the Television Academy's **Visiting Professor Program on "Latest Developments In Securing Rights & Clearance Issues."** This will be David's 17th year presenting this program for the **Television Academy** in conjunction with former MGM, Fox, and Starz Business and Legal Affairs

his camera unattended on a tripod while taking photographs of endangered crested macaques in **Sulawesi, Indonesia**. One of the macaques (**Naruto**) took hold of the camera and began playing around with it, resulting in a series of highly amusing self-portraits that quickly went viral online once published.

At first, Slater himself attempted to assert ownership over the copyrights to Naruto's selfies, which caused him to butt heads with **Wikipedia** when they uploaded the photograph to their platform under the justification that the photograph was actually in the public domain, as it had been taken by an animal rather than a human. However, **PETA** then further complicated matters by asserting that, in fact, Naruto was the copyright owner of his selfies, and brought a federal lawsuit in the capacity of Naruto's "next friend" (a status typically reversed for representatives of children and those with developmental disabilities who would otherwise be unable to bring suit without such assistance) to prove it. While the claim of authorship by species other than homo sapiens may be novel," PETA argued, "'authorship' under the **Copyright Act, 17 U.S.C. § 101 et seq**., is sufficiently broad so as to permit the protections of the law to extend to any original work, including those created by Naruto."

What Happened Next?
In a sane and rational world, Naruto's case would have been tossed quickly and cheaply. Indeed, PETA's entire case was squarely foreclosed by controlling **Ninth Circuit** authority, in which the Court stated that "if Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly." **Cetacean Cmty. v. Bush, 386 F.3d 1169, 1179 (9th Cir. 2004)** (quoting **Citizens to End Animal Suffering & Exploitation v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. Oct. 25, 1993))**. Much as the Ninth Circuit found in that case that the **Endangered Species Act** contains no language empowering animals to sue, the **Copyright Act** also contains no mention of animals as capable of asserting intellectual property rights.

That is precisely the basis upon which the District Court ruled in Naruto's case, additionally noting that Copyright Office policy explicitly states it "will not register works produced by nature, animals, or plants," such as "a photograph taken by a monkey." Regardless of PETA's assertion that there exists "'tremendous [public] interest in animal art," the Court held that the Copyright Act as written cannot be extended beyond its plain and ordinary meaning of only granting copyright protection to "people" and "human beings." (Indeed, given that the primary purpose under the Constitution of granting protection through the Copyright Act is to incentivize authorial creativity, it begs the question of how society would communicate that to animals in order to somehow motivate them to undertake creative endeavors of their

Executive, **Steve Fisch.**

Announcements

On **October 5th David Albert Pierce** was sworn in as the new **Vice Chairman** of the **Beverly Hills Bar Association**'s **Entertainment Law Section.**

From left to right: Departing Entertainment Law Section Chair Alexander Rufus-Issacs, David Albert Pierce, and Pierre Pine, incoming Entertainment Law Section Chair.

New In Theaters

Click Here to Watch the Trailer

Pierce Law Group LLP client, **Black Label Media** is releasing their new drama **Only The Brave** on **October 20** for which we provided legal services.

The film stars **Josh Brolin**, **Miles Teller**, **Jeff Bridges**, **James Badge Dale**, **Taylor Kitsch**, and **Jennifer Connelly**.

China Implements Its Own System For Arbitration

own volition.)

Undeterred, PETA appealed to the Ninth Circuit (the same court bound by its previous determinations in Cetacean Cmty), where PETA was battered with questions as to how a crested macaque could possibly comply with all the strictures of the Copyright Act. Indeed, walking away from oral arguments in the case, there was no indication the Ninth Circuit was prepared to do anything other than hand Slater a decisive victory. Yet after the case was taken under consideration by the Court, the parties announced they had reached a settlement, by which Slater agreed to donate 25% of future revenue earned from Naruto's selfie photos to charity, and both parties requested the Court "to dismiss the case and throw out a lower court decision that said animals cannot own copyrights," according to the Associated Press.

Why Did Slater Settle?

While we may never know all the reasons why Slater chose to settle his case instead of await the Ninth Circuit's decision, given that everyone expected him to emerge victorious, another headline related to the case might provide a hint: "Monkey selfie photographer says he's broke: 'I'm thinking of dog walking'". According to **The Guardian**, "David Slater could not afford the air fare to San Francisco to attend the [Ninth Circuit] hearing on Wednesday. Nor can he afford to replace his broken camera equipment, or pay the attorney who has been defending him since the crested black macaque sued him in 2015[.]" While unfortunate, this is also unsurprising -- federal litigation is an expensive proposition, particularly when involving an appeal, and good litigators routinely warn their clients about the prospect of such costs ahead of time.

Yet this is not a particularly satisfying answer. Slater had already incurred the bulk of his litigation costs, with the District Court proceedings wrapped (absent an appellate reversal) and briefing before the Ninth Circuit already complete. Indeed, most observers expected the only work left once the Ninth Circuit ruled to be of a kind Slater would presumably enjoy: placing a request for PETA to pay his attorneys' fees in full. The Copyright Act is one of the few American legal schemes that allows for fee shifting, and the Supreme Court recently explored when such fee shifting was appropriate in the case of Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979 (2016).

In Kirtsaeng, the Supreme Court reaffirmed that a lack of "objective reasonableness" in a losing party's case is a key motivating factor in granting an award of fees and costs: "[I]t both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant-whether plaintiff or defendant-is clearly correct, the likelihood that he will recover fees from the opposing (i.e., unreasonable) party gives him an incentive to

China has introduced its first ever set of rules for arbitration, as a sign of its further depth of involvement in Western trade. Rules will be administered by **CIEYAAC (China International Economic and Trade Arbitration Commission)**

Pierce Law Group LLP has established connections with entertainment attorneys in Beijing and can handle any and all legal issues concerning Chinese film financing or other matters that involve Asia.

PLG Attends Loyala Law School Seminar

On **October 6, 2017**, attorneys for Pierce Law Group attended a special presentation at **Loyola Law School** entitled **"The Slants Case from the Inside: The First Amendment & "Disparaging"** Trademarks." The event covered the recent Supreme Court decision in **Matal v. Tam** striking down a long-standing provision of federal trademark law prohibiting potentially disparaging trademarks as a violation of freedom of speech. Presenters included not only distinguished Loyola Law School professors, but **Simon Tam** himself, bassist for rock group **The Slants** and plaintiff in the case. The presentation afforded attendees not only the opportunity to learn the case's twists and turns from

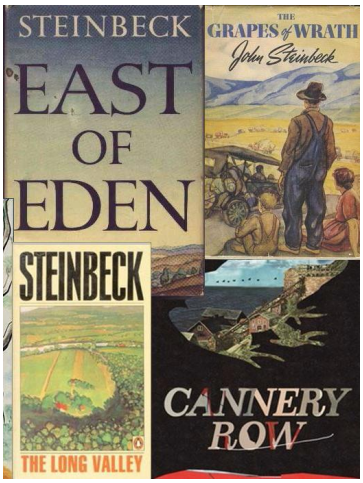
litigate the case all the way to the end." One would think that PETA taking Slater for a six-figure legal ride based on a spurious argument that binding circuit authority had already rejected could not present a clearer case in which principles of compensation and deterrence warranted a fee shift. Yet, for one reason or another, Slater seemingly decided that it was not worth pursuing.

Takeaway Thoughts:
While the subject matter of Naruto v. Slater may no doubt be entertaining, we must remind ourselves that the attorneys on each side did not litigate for fun, and the fact that Slater had to bankrupt himself just to get as far as he did is no laughing matter. While an organization like PETA may have the necessary funds to waste on spurious litigation, many litigants of modest means cannot fight the good fight for the mere prospect of eventually being "considered" for reimbursement of their life savings, no matter how strongly predictive markers line up in their favor. In this case, the result is Slater agreeing to give away more of his money at PETA's insistence -- something that few would agree is warranted in either law or equity.

Don't monkey around when it comes to Copyright! Call Pierce Law Group LLP regarding all your intellectual property rights questions. Contact us at 310-274-9191 or click here to reach us by email

East of Legal: What Can We Learn From The Years of Legal Turmoil Over Steinbeck's Works

By David Albert Pierce, Esq.



John Steinbeck is regarded as one of the great American authors, but we have seen relatively few screen adaptations of his work. Recently, names such as **Jennifer Lawrence** and **Gary Ross** (**Seabiscuit, The Hunger Games**) circled an adaptation of Steinbeck's iconic **East of Eden**, but ultimately, when the project became mired in litigation, it died out. This was far from the first time a potential Steinbeck adaption suffered such a fate.

a firsthand perspective, but also to enjoy an acoustic performance by The Slants themselves at the event's conclusion.

PLG Attends Slamdance WGA Screenwriting Awards

David Albert Pierce attended the annual PLG-Sponsored **Slamdance WGA Screenwriting Competition Awards** at the **WGA West** Headquarters on **10/13**, where he delivered prizes to the winners of the **Feature** and **Horror Film** categories. Pierce Law Group has been a proud sponsor and supporter of Slamdance since 1998, and we were delighted to attend and meet so many new and talented writers.

Congratulations **Tyler Rice** (Best Horror Screenplay Winner) and **Jason Kessler** (Best Feature Screenplay Winner)

A Night of Charity

Steinbeck adaptations have been entangled in a legal struggle for years, due to a dispute between Steinbeck's third wife (**Elaine**) and Steinbeck's sons.

Elaine was given full intellectual property rights when Steinbeck died in 1968. In 1983, Steinbeck's sons sued to obtain a share of the rights, ultimately concluding in a settlement that allowed both sons to participate in the profits from future Steinbeck works, in exchange for giving up all claim to copyright.

However, the two sons have since continued to embark upon their own negotiations regarding Steinbeck's works, while also directly impeding negotiations for future adaptations, including most recently, **Universal**'s attempt at an East of Eden adaptation, amounting to tortious interference.

The dispute finally came to a head in federal court this **September**, with the jury awarding Elaine's heir **$13 million** in damages, and full control of copyright in the future. In the mean time, investors and producers have been repeatedly scared away from Steinbeck works.

What can we learn from this?

1. Intellectual Property should be taken into consideration for estate planning purposes with the same care as real estate and physical property.

2. Chain of Title and due dillegence into the actual ownership of intellectual property rights should be conducted when purchasing rights to ensure that you are dealing with the actual parties.

3. Understand the difference between copyright ownership and contractual profit participation/royalties and understand that merely because you may be entitled to participate in the proceeds does not equate to being able to participate in contracts for convergence that provide for such proceeds.

4. To ensure clean chains of title, it is always prudent to record documents that in any way pertain to convergence of copyright or other claims to the property with the US Copyright office, so that all relevant parties can be ID'd in public record.

5. Whether family or best friends, always anticipate the potential for possible conflicts when money is at issue.

6. Reminder of the importance of getting your house in order, lest studios lose interest and move on. In Hollywood, even the threat of a potential legal fight might be enough to encourage producers to move on.

Also Worth Noting:

Those individuals of a celebrity status should further plan

On **Sept. 23rd**, **Tony Hanna** attended the **FaceForward "Arabian Nights"** Charity Gala. FaceForward provides emotional support and reconstructive surgery for victims of domestic violence, human trafficking or any cruel acts of crime.

Congratulations to our friend **Deborah Alessi,** CEO / Founder of **Face Forward** for her tireless efforts in running this deserving charity and this amazing fundraising event.

Former PLG Intern Revolutionizes Timekeeping

Former PLG Intern, **Ryan Alshak**, recently appeared in Legal Rebels, after creating "**Ping**" an automated timekeeping app.

on how their name and likeness are used after their death, when said name and likeness may be tied to commercial endeavors.

The Changing Relationship Between Film Festivals and The Oscars

By William Mavity

With **The New York Film Festival** in full swing, and **Venice, Telluride,** and **Toronto** concluded, we are officially well-into Fall Festival season, and specifically, into Oscar season. Every year, the various fests are full of exciting additions to any year's Oscar race, not to mention, plenty of opportunities to fuel to fall's box-office fire. Traditionally, festival circuit-staples, such as **Fox Searchlight** and **Sony Pictures Classics** are the big stories when it comes to high-profile acquisitions, buying promising Oscar properties and propelling them to awards success while smaller studios look on. 2017, however, indicates a shift in the way festival acquisitions pan out and in which studios assert themselves as Oscar kingmakers.

Craig Gillespie's **I, Tonya** was arguably the biggest acquisition story of this year's festival circuit thus far. The film premiered at **TIFF (Toronto International Film Fest)** to strong reviews and Oscar buzz for performances from **Margot Robbie** (the Wolf of Wall Street) and **Allison Janney** (The West Wing), even placing second for TIFF's Audience Award over major contenders like Sony Pictures Classics' **Call Me By Your Name**, and Fox Searchlight's **The Shape of Water**. Speculation abounded as to whether **Netflix, Miramax**, or **CBS Films** might acquire the film, but ultimately, it was young-up-and-comer, **Neon** (in partnership with **30West)** who paid **$8 million** for distribution rights, slating the film for an awards-friendly **December** release.

Neon is the new production company, co-founded by **Alamo Drafthouse**'s **Tim League** and **Radius-TWC**'s **Tom Quinn.** This year alone Neon has already acquired Anne Hathaway's **Colossal** and Aubrey Plaza's **Ingrid Goes West**.. The fact that I, Tonya's team forewent a larger traditional distributor like CBS Films or Miramax is reflective of a trend as a whole. Almost all of this year's big festival acquisitions were made by indie studios. **Scott Cooper's** $40 Million

Alexa Sasha Lewin Housewarming Party

On October 8th David Albert Pierce attended a Housewarming party for our client producer-director **Alexa-Sasha Lewin** and her husband producer Brad Rister. **The party was doubly joyous as we celebrated a certain deal worth celebrating. More will be shared when we can.**

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Clocks Reset November 5th

dollar western, **Hostiles** (led by Christian Bale) sold to **Byron Allen's Entertainment Studios** as did **John Curran**'s **Jason Clarke**-led **Chappaquiddick**. Comedian, **Louis C.K.**'s **I Love You, Daddy** sold to **The Orchard** for $5 million. **Bleecker Street** acquired **Dominic Cooke**'s **On Chesil Beach** (written by Atonement author, **Ian McEwen**).

Compare this year to, say, 2016, when **Fox Searchlight** shelled out $17.5 million to enter **Pablo Larrain**'s **Jackie** into the Oscar race, or 2014, when **Paramount** dropped $12.5 million on **Chris Rock**'s **Top Five**, and **Sony Pictures Classics** shelled out big money to win **Julianne Moore** an Oscar for **Still Alice**. And the big question is why? Simply put, Toronto represents increased confidence in the fact that smaller studios have leveled the awards playing field.

The Oscars traditionally have been seen as solely the preserve of the big studios (largely due to heftier campaign coffers), but 2015 marked a turning point. In 2015, **Open Road** and **A24** dominated the night over larger studios, winning Picture, Actress, Original Screenplay, Documentary, and Visual Effects. Just last year, A24 snagged Picture, Adapted Screenplay, and Supporting Actor, while Amazon Studios went home with Best Actor and Original Screenplay. The majority of other awards went to **Lionsgate**, a 'mini-major.' Only six of the night's awards went to a film released by one of the 'major' studios. Suddenly, the teams behind indie films look at an A24 or a Neon, and realize that with a smart campaign, they stand a chance at beating the next Fox or Sony release.

TIFF is in many ways a development pool for Oscar contenders, with nearly all Audience Award winners receiving Best Picture nominations. What better place for this shift in perception to manifest itself than there?

This year, the smaller studios seem poised to contend again for the top awards over major studio fare, proving this perceived shift correct. Oscar aggregator, **GoldDerby** ranks **Willem Dafoe** as the frontrunner for Best Supporting Actor for **The Florida Project** (an **A24** acquisition), while **Greta Gerwig**'s directorial debut, **Lady Bird** (also A24) has popped up in many predictions for Picture, Actress, Supporting Actress, and Screenplay. **STX** has been looking for another hit since **Bad Moms**, and it may have found one with a surefire Adapted Screenplay nominee in **Aaron Sorkin's Molly's Game**.

Of course, there is a long way until the Oscars in March. The coming months will show whether the larger studios, with their traditional in-house produced contenders (**Dunkirk**, **Three Billboards Outside Ebbing Missouri, The Post,** etc) can reassert themselves or whether it is the newer, small distribution companies who will continue to dominate Awards season and cement themselves as the big festival buyers from this point

Reminder: Change those clocks: We exit Daylight Savings Time and fall back to Standard Time this year on **November 5th** at **2 a.m.** Remember to set your clocks and watches to "Fall Back" 1 hour before you go to bed on Saturday November 5th.

And note, **Arizona** is a state that does not participate in the ritual of Daylight Savings. Likewise **Hawaii, Puerto Rico** and the **Virgin Islands** do not change their clocks.Confused?
Just consult your phone for accurate world clock times.

forward.

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Pierce Law Group LLP is a full service, boutique entertainment law firm that provides both transactional and litigation legal services. Our practice areas include entertainment law, intellectual property (copyright, trademarks, right of publicity), film finance, securities law, production counsel, and labor & employment issues affecting the entertainment industry, with an emphasis on film, television, and new media. We represent production companies and other creative businesses as well as artists including producers, actors, writers, directors, comedians, and other entrepreneurs.Our client list includes both Academy Award and Emmy Award winners.
We utilize an academic and analytic legal approach to accomplish creative solutions to our clients' goals.

PIERCE
LAW GROUP LLP

SUITE 225 EAST TOWER
9100 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90212
T 310 274 9191 F 310 274 9151
WWW.PIERCELAWGROUPLLP.COM

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