No. 25-449

In the Supreme Court of the United States

STEPHEN THALER,
Petitioner,

v.

SHIRA PERLMUTTER, REGISTER OF COPYRIGHTS AND DIRECTOR OF THE UNITED STATES COPYRIGHT OFFICE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PROFESSOR LEA BISHOP AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Amicus Lea Bishop is a law professor who teaches copyright law and AI law. She has authored eight articles and a book on copyright law and digital technologies. She has served as a United Nations expert consultant on copyright law and is an Affiliated Fellow of the Information Society Project at Yale Law School.

Amicus files this brief in support of neither party because the Copyright Office has misconstrued both law and the technology, creating great confusion and uncertainty. Whether Thaler receives the relief he seeks or not, American authors and companies look to this Court to provide clarity about what we own and what we may freely copy.

SUMMARY OF THE ARGUMENTS

This petition offers the Court a timely opportunity to clarify the copyright treatment of generative software and scope of agency discretion after *Raimondo*. Machine authorship has an easy answer—only legal persons can hold property—but this case presents two additional questions of real-world importance:

(1) Does the Copyright Act protect authors who create using generative software?
(2) May the Copyright Office subject such authors to special registration burdens?

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amicus contributed monetarily to its preparation or submission. Notification pursuant to and as required by S. Ct. R. 37.2 has been given to Stephen Thaler and the Solicitor General.

The Copyright Act defines protected "works of authorship" expansively, including literary and artistic output of all forms, without regard to tool or technology. Human creativity is indeed essential, but the tiniest amount will suffice. The *Feist* standard has long been applied to software outputs, including by then-Judges Ginsburg and Gorsuch in *Atari II* and *Meshwerks*, respectively. Applying this Court's existing rule to generative software, prompters would earn copyright protection by contributing "a minimal creative spark, no matter how crude, humble, or obvious."

Anticipating *Chevron* deference, the Copyright Office has declared that generative software outputs are categorically ineligible for copyright protection— and that the courts will defer to its expertise. This misunderstands the scope of the agency's power. The Copyright Act authorizes the agency to set minor administrative procedures for handling the mechanics of registration and deposit. Courts have never deferred to agency views on copyrightability as a question of law. After *Raimondo*, the Copyright Office should return to its traditional "rule of doubt," registering submitted works without discrimination and leaving novel questions of law to Article III courts.

Amicus respectfully recommends that this Court grant certiorari to provide the definitive statutory interpretation and clarify the scope of Copyright Office discretion after *Loper Bright*.

THE ARGUMENTS

I. This question has national importance

"Gen AI usage has become mainstream." Wharton Human-AI Research & GBK Collective, *2025 AI Adoption Report: Gen AI Fast-Tracks Into the Enterprise*, 8 (Oct. 2025). Microsoft integrates AI software into Copilot, Word, and Powerpoint. Adobe reports that "86 percent of global creators use creative generative AI tools." Adobe Inc., Inaugural Adobe Creators' Toolkit Report (Oct. 28, 2025).

"Who—or what—is the 'author' of such work is a question that implicates important property rights undergirding economic growth and creative innovation." Pet. App. 2a.; *Thaler* v. *Perlmutter*, 130 F.4th 1039 (CADC 2025). The petitioner's unusual (or merely miscommunicated) views about machine autonomy may cost him a copyright, but the agency's post-hoc justification impacts millions. "While the Copyright Office's decisions indicate that it may not be possible to obtain copyright protection for many AI-generated works, the issue remains unsettled." Christopher T. Zirpoli, Cong. Rsch. Serv., LSB10922, *Generative Artificial Intelligence and Copyright Law* (updated June 16, 2025). This Court can settle this question with straightforward statutory interpretation.

II. Copyright protection is technology neutral

Anticipating further advances in computer software, Congress deliberately defined copyrightable

subject matter in technology-neutral terms. Copyright Act of 1976, 17 U.S.C. § 102(a). The Act defines protected "works of authorship" expansively, including literary and artistic works of all forms, without regard to tool or technology used to produce them:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works.

Within this framework, a two-dimensional image is a copyright-protected Section 102(a)(5) pictorial work of authorship—whether produced by paintbrush, camera, or generative software. This is not a matter of agency discretion. It is the text. It is unnecessary for Congress to revisit the Act to specially include

generative software outputs. Nor may the Office specially act to exclude them.

III. Generative AI tools are software

Generative software is software. The Copyright Office may not have understood this in 2018, but it does now. Copyright Office Notice of Inquiry: Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948-59949 (Aug. 30, 2023):

> *Glossary of Key Terms*. The Office has included definitions of key terms as they are used in this Notice to clarify the technical processes involved in generative AI systems.
>
> *AI System*: A software product or service that substantially incorporates one or more AI models and is designed for use by an end-user.
>
> *Generative AI*: An application of AI used to generate outputs in the form of expressive material such as text, images, audio, or video. Generative AI systems may take commands or instructions from a human user, which are sometimes called "prompts." Examples of generative AI systems include Midjourney, OpenAI's ChatGPT, and Google's Bard.

Ibid.

These definitions are technically sound, with one correction: generative AI systems *always* take commands from a human user.

IV. Software is controlled by human authors

It is unnecessary to entertain the distraction of machine authorship. No machine has ever requested recognition as an author. ChatGPT and Midjourney are tools, not creators. AI does not author. Computers do not create. People do, using canvas, cameras, and ChatGPT.

To state the obvious, software products execute human instructions. This is recognized within the Copyright Act. See 17 U.S.C. § 101, Definitions ("A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.").

The Copyright Office acts arbitrarily and capriciously in erecting policy upon the demonstrably false claim that generative software operates "without any creative input or intervention from a human author." *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16,190, 16,192 (Mar. 16, 2023).

Whatever Petitioner may believe about artificial intelligence, an agency may not act upon implausible factual claims. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

V. Copyright applies to software outputs

Given that generative AI is a form of computer software, precedent on the copyrightability of software outputs is highly relevant. The Copyright Office omitted these, with the result that the following holdings were not discussed by the courts below:

The Second Circuit held that video game audiovisual displays were protected even though they were "generated by a computer program." *Stern Electronics, Inc.* v. *Kaufman*, 669 F.2d 852, 855–56 (CA2 1982) (finding "no doubt that the display itself, and not merely the written computer program, would be eligible for copyright").

The Third Circuit similarly had no difficulty finding an audiovisual computer output a work of authorship. *Williams Electronics, Inc.* v. *Artic International, Inc.*, 685 F.2d 870 (CA3 1982).

The D.C. Circuit twice overruled the Copyright Office's refusal to register the digital image created by Atari's BREAKOUT computer program. *Atari Games Corp.* v. *Oman*, 888 F.2d 878 (CADC 1989); *Atari Games Corp.* v. *Oman*, 979 F.2d 242 (CADC 1992) (Ginsburg, J.) (unanimous opinion).

The Tenth Circuit found a software-generated image of a car body was ineligible for copyright—but only because its production lacked any creativity whatsoever. "Just as photographs can be, but are not per se, copyrightable, the same holds true for digital models." *Meshwerks, Inc.* v. *Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1269 (2008) (Gorsuch, J.) (unanimous opinion). Copyright was unavailable where "the point of the exercise was to reproduce the underlying works with absolute fidelity." *Id*. at 1270.

As this sampling reflects, it is uncontroversial that works of authorship produced using software are copyrightable subject matter.

VI. A human "spark" is always required

Copyright law requires human creativity, but "[t]he requisite level of creativity is extremely low; even a slight amount will suffice." *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (O'Connor, J.) (unanimous opinion). Even simple prompts, such as "image of a leather tome" provide "some creative spark, no matter how crude, humble or obvious it might be." *Ibid.* (quoting 1 M. Nimmer & D. Nimmer, Copyright § 1.08 C 1 (1990)).

The Copyright Office argues that generative software must be treated differently, because "users do not exercise ultimate creative control over how such systems interpret prompts and generate material." *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16,190, 16,192 (Mar. 16, 2023) ("what matters is the extent to which the human had creative control over the work's expression.")

The Office's arguments about predictability, control, and traditional elements of authorship have intuitive appeal, but are without basis in statute or caselaw. The Copyright Act does not require any particular degree of control or predictability; only fixation and originality. 17 U.S.C. § 102(a).

An artist may choose to work in an unpredictable medium. The Copyright Office does not have authority to punish that choice by withholding the normal protection of the law. See *Bleistein* v. *Donaldson*

Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the work of pictorial illustrations," and artistic trends.)

VII. The Office should defer to Article III courts

The Office long deferred to Article III judges on questions of law by applying its traditional "rule of doubt." See *Copyright Office Manual* 37–38 (1950) ("We will register material which we feel a court might reasonably hold copyrightable, even though, personally, we feel that it is not subject to copyright.")

The Office maintained this practice after adoption of the Copyright Act of 1976. U.S. Copyright Office, Compendium of U.S. Copyright Office Practices II § 605.05 (1984, rev. 1988):

> **Examination process: "rule of doubt."** The Copyright Office will register a claim even though there is a reasonable doubt about the ultimate action which might be taken under the same circumstances by an appropriate court with respect to whether (1) the material deposited for registration constitutes copyrightable subject matter or (2) the other legal and formal requirements of the statute have been met.

Ibid.

The agency altered its practice at the height of *Chevron* deference. *Chevron, U.S.A., Inc.* v. *Nat. Res.*

Def. Council, Inc., 467 U.S. 837 (1984) (overruled by *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 378 (2024)). Turning the traditional rule upside down, the Office now claims "exclusive authority." U.S. Copyright Office, Compendium of U.S. Copyright Office Practices III § 607-608 (2014). "The Office will not register a claim under the Rule of Doubt simply because there is some uncertainty as to how that issue may be decided by a particular court." *Ibid*.

In declaring generative software outputs ineligible for copyright protection, the Copyright Office expected courts would defer to the agency's expertise. See *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16190 (Mar. 16, 2023) (asserting that "courts credit the Office's expertise in interpreting the Copyright Act" and citing *Chevron*-era cases giving "considerable weight" to Register determinations).

This misunderstands the constitutional division of powers. Courts do not defer to the Office on questions of law. "It is not the Register's task to shape the protection threshold or ratchet it up beyond the 'minimal creative spark required by the Copyright Act and the Constitution.'" *Atari II*, 979 F.2d at 247 (Ginsburg, J.) (unanimous opinion).

When new creative technologies emerge, people often have trouble perceiving the art behind the science. Almost 150 years ago, the agency refused to register photographs, asserting these were mere mechanical outputs lacking in human authorship. This Court responded by reminding the agency of its limited role. "A deposit of two copies of the article or work with the librarian of congress, with the name of the author and its title page, is all that is necessary to secure a

copyright;" only "when the supposed author sues for a violation of his copyright the existence of those facts of originality, of intellectual production, of thought, and conception on the part of the author should be proved" to an Article III court. *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 59–60 (1884).

After *Raimondo*, the Copyright Office should reinstate its traditional rule of doubt: register submitted works and leave questions of law to courts.

VIII. This case is an appropriate vehicle

This petition offers the Court a fortuitous opportunity to clarify property rights in an infant industry. Thaler was an early experimenter with AI systems, creating the disputed work with generative software he programmed himself. He initiated this test case by seeking registration in 2018, five years before ChatGPT would become a household name.

Despite the petitioner's idiosyncratic views on machine sentience, he has consistently asserted ownership as the man behind the machine. The case thus squarely presents the question of when copyright law protects natural persons who create new works by operating generative software.

This Court is unlikely to be presented with a cleaner vehicle. A second APA challenge is pending, filed by the same counsel. *Allen* v. *Perlmutter*, No. 1:24-cv-02665 (D. Colo. filed Sept. 26, 2024). Allen's facts, however, (600+ prompts) would make it more difficult to distinguish originality from "sweat of the brow." If *Feist*'s "minimal spark" is the correct standard, *Thaler* presents the question more cleanly.

Other applications are held up within the Copyright Office. Petitioner's application took 39 months to reach final agency action. The Office has no time limit for examiners or the Review Board.

CONCLUSION

This Court should grant certiorari to clarify property rights in prompted works and the scope of agency discretion.

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