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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case presents an ideal vehicle for this Court to prevent a single executive agency from incorrectly deciding a legal question of paramount importance in a manner inconsistent with the text of the governing statute and applicable Court precedent.

The Copyright Office has imposed a non-statutory Human Authorship Requirement for copyright registration. It derived this rule not from the Constitution or the Copyright Act but from its own nonbinding agency materials, including its Compendium, guidance publications, and agency reports. This requirement, in effect, denies copyright protection to works created through certain, unclear uses of computer software.

Dr. Thaler transparently disclosed that an AI system that he designed and used generated the image for which he sought copyright protection. The Copyright Office denied registration based on its Human Authorship Requirement. In the time since Dr. Thaler's registration was denied, the Copyright Office has either rejected numerous applications disclosing the use of AI or required applicants to disclaim content made using AI and thus prevented registration of that content.

Other countries, like China and the United Kingdom, already permit copyright protection for AI-generated works. But the Copyright Office's reliance on its own non-statutory requirements have led to an improper cabining of United States copyright law in contradiction of this Court's precedent that copyright law should accommodate technological progress.

As shown in the petition and by the amici in support of the petition, this case presents an ideal vehicle for this Court to correct the Copyright Office's significant misstep. This case has a relatively simple administrative record, and it does not have any other dispositive legal issues, contested factual questions, or procedural hurdles that would prevent the Court from reaching and resolving the question presented, namely whether a work outputted by an AI system without a direct, traditional authorial contribution by a natural person can be copyrighted.

Critically, the Court's resolution of this question, which comes from the language of the Copyright Office's own test, is urgently needed today as opposed to waiting years for a circuit split. This is a vital time for AI development and its use in creative industries and for the international competitiveness of the United States, which is stifled by the Copyright Office's policy.

For the foregoing reasons the Court should grant Dr. Thaler's Petition for Writ of Certiorari.

ARGUMENT

I. The Copyright Office Erroneously Imported a Non-statutory Requirement to Create a Rule Against Granting Copyright for Works Created Using Computer Software

As the government concedes, the Copyright Office denied Dr. Thaler's copyright application based on its Human Authorship Requirement, which requires that a natural person peform the "traditional elements of authorship in the work[.]" BIO at 12.

Neither the Constitution nor the Copyright Act contain any express Human Authorship Requirement. Instead, it is an agency-created policy contained in the Copyright Office's Compendium of U.S. Copyright Office Practices. *See* Pet. App. at 6a. The government claims that the "Copyright Office does not treat the use of AI ... as precluding the possibility of copyright protection" because it "considers the extent to which the human had creative control over the work's expression." BIO at 15. But the Copyright Office's published guidance confirms that "[i]f a work's traditional elements of authorship were produced by a machine ... the Office will not register it" and requires that for any portion of a submitted work that is AI-generated, "that [portion] is not protected by copyright and must be disclaimed in a registration application." *Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, 88 Fed. Reg. 16190, 16912 (March 16, 2023) ("Copyright Guidance"). In effect, this establishes a *per se* rule that any AI-generated works or portions of work cannot receive copyright protection.

The government concedes that the Compendium is "guidance" and not a formal rule promulgated by the Copyright Office, citing the Compendium, a nonbinding policy statement, and various reports issued by the Copyright Office—none of which have the force of law—as the source of the Human Authorship Requirement. *See* BIO at 4–6, 12, 13.

The government further defends the Copyright Office's effectively *per se* rule against copyright protection for AI-generated works by arguing that the word "author" in the Copyright Act refers only to a natural person based

on three arguments: (1) several Copyright Act provisions use "author" in a way that reflects a natural person, *see* BIO at 10–11, (2) this Court's precedent uses "author" in a context that reflects a natural person, *see* BIO at 11–12, and (3) Congress has not expressly rejected the Human Authorship Requirement. *See* BIO at 12–13. None of these arguments validate the Copyright Office's imposition of a non-statutory restriction for copyright registration.

A. The Copyright Act Directly Contravenes the Human Authorship Requirement

The government wrongly focuses on provisions of the Copyright Act that use the word "author" to refer to a natural person. That the Copyright Act sometimes defines the term of a copyright based on the lifespan of a natural person or provides that a copyright can revert to an author's heirs is unremarkable. *See* 17 U.S.C. §§ 203(a)(2)(A), 302(a). Historically, many authors have been natural persons, and the statute reflects that reality. But the fact that the Copyright Act addresses works created in a traditional fashion by a natural person does not address the question here of whether the Copyright Act allows for copyright of works outputted by an AI system without a traditional authorial contribution by a natural person. It does.

The government's argument is counter-statutory—the Copyright Act explicitly provides that non-humans, such as corporate entities and governments, can be authors. *See* Pet. at 19–20; 17 U.S.C. § 201(b). The government erroneously dismisses statutory text directly at odds with a Human Authorship Requirement by claiming that the word "considered" merely allows for a non-human entity to

own the copyright, as opposed to being itself an "author." BIO at 13 ("Congress did not use 'the word "author" by itself to cover non-human entities.'" (citing Pet. App. at 19a-20a).)

But this ignores Copyright Act provisions that directly use "author" to encompass non-human entities. In its requirements for a work to be a "United States work," the Copyright Act requires that for "a published work ... all of the authors of the work are ... legal entities with headquarters in, the United States" and for "an unpublished work ... all the authors are legal entities with headquarters in the United States[.]" 17 U.S.C. § 101. This language directly recognizes non-human entities as authors.

Similarly, the Copyright Act defines an "anonymous work" as "a work ... of which no natural person is identified as author." 17 U.S.C. § 101. If Congress had intended for this to only include works by natural person authors who have completely hidden their identity it could have said so by defining it as "a work for which a natural person author provides no name or identification." Instead, it used broader language that plainly encompasses non-human authorship.

Section 302(c) builds on this by providing that "[i]n the case of an anonymous work ... or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation[.]" 17 U.S.C. § 302(c). This method of calculating copyright duration is untethered from the life of a natural person and applies to works without a natural person author.

Thus, the government and the Court of Appeal err in arguing that the Copyright Act permits the Copyright Office to nonetheless impose a non-statutory Human Authorship Requirement.

B. This Court's Precedent Allows for Protection of AI-Generated Works

The government similarly argues this Court's precedent only allows natural person authors. *See* BIO at 11–12. But it is unsurprising that cases involving human authors would discuss authorship in human-centric language. The true question is whether this Court's precedent forecloses copyright protection for works made using AI systems. That answer is clearly no.

"The sine qua non of copyright is originality[,]" and "the requisite level of creativity is extremely low[.]" *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345, 347 (1991). The use of computer software to generate a work should not preclude finding that a work can be copyrighted. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Court held that a photograph could receive copyright protection; even though it "is the mere mechanical reproduction of the physical features or outlines of some object... " *Id.* at 59. The use of a mechanical device did not preclude copyright protection for the resulting work.

The Court has also rejected looking at "the creator's design methods, purposes, and reasons" as factors of whether a work could be copyrighted. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 422 (2017). Instead, the Court recognized that its "inquiry is limited to how the article and feature are perceived[.]" *Id.* at 423.

The government tries to confine *Star Athletica* to being about what kinds of works could be copyrighted rather than authorship. *See* BIO at 15–16. But both *Sarony* and *Star Athletica* require copyrightability be determined without looking to the means used to produce a work. The Copyright Office's policy denying copyright protection to any portion of a work that is generated by AI, *see Copyright Guidance*, 88 Fed. Reg. at 16912, contravenes this precedent because it precludes copyright protection based solely on the means of producing the work.

C. Congress Has Not Acquiesced to the Human Authorship Requirement

The government also argues that Congress intended for authorship to be construed in accordance with the Human Authorship Requirement contained in the Compendium issued at the time Congress passed Copyright Act of 1976. *See* BIO at 12–13. But this Court previously rejected an argument that Congress' silence regarding the meaning of "employee" in the Copyright Act of 1976 "meant to incorporate a line of cases decided under the 1909 Act" because "[o]rdinarily, 'Congress' silence is just that—silence.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748, 749 (1989). It further held that "reliance on legislative silence is particularly misplaced here because the text and structure of § 101 counsel otherwise." *Id.* Similarly, as discussed above, the language of the Copyright Act and this Court's precedent contravene a Human Authorship Requirement. Thus, it is "particularly" inappropriate to read Congress' seeming silence as acceptance of the Human Authorship Requirement. Even more so when this is the first case of the Copyright Office publishing that it has rejected an AI-generated work based on its policy.

Separately, reading Congressional silence as deference to an agency interpretation at odds with the statutory text is inconsistent with *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which held that courts need not defer to agency interpretations of statutes and should exercise their independent judgment as to statutory meaning. *See id.* at 413. Similarly, there should be no presumption that Congress silently deferred to prior agency interpretations of a predecessor statute, particularly where, as here, the statute contravenes the agency's interpretation.

II. This Case Presents an Ideal Vehicle to Resolve an Issue of Paramount Importance

This case presents an ideal vehicle for addressing the issue of whether an AI-generated work, a work outputted by a system without a direct, traditional authorial contribution by a natural person, can receive copyright protection. The Copyright Office rejected Dr. Thaler's application because it has what amounts to a *per se* rule denying copyright protection to any work or portions of work generated by certain uses of computer software. *See Copyright Guidance*, 88 Fed. Reg. at 16912. And the facts are clear because Dr. Thaler transparently disclosed his use of AI to generate the work at issue. Thus, this case presents a discrete legal question that does not turn on contested evaluation of facts. No other legal or procedural issues interfere with the Court addressing the central issue of whether AI-generated works can receive copyright protection.

The government argues that this case is not an appropriate vehicle because it claims that the Copyright

Office "does not refuse to register works based solely on a human author's use of AI" and in this case, that Dr. Thaler represented to the Copyright Office that "the image he sought to register involved no creative contribution from a human actor at all." BIO at 17, 18. The government misstates the record on both points.

First, the government argues that the use of AI does not disqualify a work as a whole from receiving copyright protection, but it leaves out that the Copyright Office's policy requires an applicant to disclaim any portion of a work generated by AI, and that in the case of a work that is entirely AI-generated, as with the present work, the entire work is barred from receiving protection. *See Copyright Guidance*, 88 Fed. Reg. at 16912. This policy has resulted in rejection of copyright of AI-generated works with very high degree of human involvement—far beyond the involvement in the present case:

- *Zarya of the Dawn* (Registration # VAu001480196) (Feb. 21, 2023), https://perma.cc/AD86-WGPM—the Copyright Office refused to allow copyright of comic book images created with an AI system even though a human user "provided hundreds or thousands of descriptive prompts to Midjourney until the hundreds of iterations [created] as perfect a rendition of her vision as possible." *Id.* at 8.

- *Théâtre D'opéra Spatial* (SR # 1-11743923581) (September 5, 2023), https://perma.cc/F97M-QFTJ—the Copyright Office refused to allow copyright for a work that won the 2022 Colorado State Fair's annual fine art competition because of the use of AI to generate the base of the work,

> even though a human user "input[] numerous revisions and text prompts at least 624 times" that combined two "big picture description[s]" and instructed the AI system on "the overall image's genre and category," "the tone of the piece," "how lifelike ... the piece [should] appear," "how colors [should be] used," the "style/era the artwork should depict," and other "various parameters[.]" *Id.* at 6.

Under the Copyright Office's broad policy, the determinative factor in this case and in the cases described above was the use of "generative AI" in the creation of a work. But the policy is also entirely vague and ambiguous, as it fails to differentiate between works made using generative AI versus traditional computer software, or what specifically a human computer user like Dr. Thaler must do to qualify for protection. Thus, the issue squarely presented in this case would provide clear guidance for countless other works created with the use of AI.

Second, the government's claim that Dr. Thaler represented that his work had "no creative contribution from a human actor," BIO at 18, is actually a quote from the Court of Appeals that quotes the Copyright Office's submissions. *See* Pet. App. at 8a. To the contrary, Dr. Thaler only claimed that the work lacked "traditional human authorship" not that it had no human contribution whatsoever. *See id.*; Pet. At 9 ("Stephen Thaler, is the owner of the AI that generated the [computer-generated work] and should thus be the owner of any copyright.... Stephen Thaler is also the Al's user and programmer.") Including in his requests for reconsideration, which the Copyright Office was required to consider holistically in rejecting

his application,[1] as well as in the other proceedings below, Dr. Thaler consistently argued that he should also be recognized as the author under established doctrines of work made for hire, chattel theory, and based on his non-traditional and indirect creative contributions to building and using his AI system. *See* Pet. App. at 8a–9a. Thus, this case presents all these arguments for the Court to consider when deciding the ultimate issue of copyright protection for works made using AI systems.

Third, although the government contends that this Court should not take this up because there is no circuit conflict, *see* BIO at 16, the question requires resolution now and not years later. As amici point out this question already has enormous public significance. Of course, there cannot be a circuit split now given that this case represents the first published denial of a copyright registration due to the use of an AI system, as well as the first challenge to such a denial based on the APA. But there is already a conflict between the Copyright Office's policy and

1. The Office must take all the information provided in the requests for reconsideration into account. Per the Office's Circular 20 (available at: https://www.copyright.gov/circs/circ20.pdf), "[a] first request for reconsideration will be reviewed by a Registration Program staff attorney who did not participate in the initial examination of your claim. The Office will base its decision on your submission and the administrative record." In addition, "[a] second request for reconsideration will be reviewed de novo by the Review Board, which consists of the Register of Copyrights, the general counsel of the U.S. Copyright Office (or their respective designees), and a third individual designated by the Register. The Office will base its decision on your written submission and the administrative record."

other countries which allow copyright protection for AI-generated works.

- In the United Kingdom "[i]n the case of a ... work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken." Copyright, Designs and Patent Act 1988, c. 48, § 9(3) (UK).

- China has recognized that "images generated with Artificial Intelligence (AI) are eligible for copyright protection." Aaron Wininger, *Chinese Court Again Rules AI-Generated Images Are Eligible for Copyright Protection*, China IP Law Update (Mar. 14, 2025), https://www.chinaiplawupdate.com/2025/03/chinese-court-again-rules-there-is-copyright-in-ai-generated-images/.

This split means that works are eligible for copyright protection in other jurisdictions but not here, which places United States residents and businesses at a competitive disadvantage.

III. CONCLUSION

For the foregoing reasons, Dr. Thaler respectfully asks that the Court grant his Petition for Certiorari and ultimately determine that the Work can be registered for copyright.

Respectfully submitted,

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