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Note

A 'Slippery Business'†: The Fact-Law Distinction in Authorship & the Echo of *Loper Bright*

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*This Note explores whether authorship in copyright law constitutes a question of fact, law, or a mixed inquiry. In the wake of rapid developments in generative artificial intelligence and a sharp doctrinal shift in administrative law, this inquiry has become increasingly consequential. The classification determines not only who decides the issue—judge, jury, or agency—but also whether courts must defer to the Copyright Office's determinations. In the post-*Loper Bright v. Raimondo *landscape, where Chevron deference has been eliminated, these questions take on new procedural and doctrinal weight.*

The Note argues that authorship determinations should be treated as mixed questions of law and fact predominated by law. This framework allows courts to consider factual underpinnings concerning the degree of human contribution while reserving the ultimate question of law for judicial resolution. Such an approach promotes accuracy in adjudication, flexibility in application, and consistency in doctrine—ensuring that authorship, a foundational yet slippery concept, remains subject to coherent judicial oversight as generative technologies continue to reshape creative processes. Drawing on fair use, originality, and analogues from patent law, this approach situates the authorship issue within a tradition of hybrid typologies in intellectual property.

Allen v. Perlmutter*, a pending case involving the denial of copyright protection for an AI-assisted image, may serve as the progenitor of a new interpretive lineage. It forces courts to confront not only the factual complexity of human input and the unsettled legal boundaries of authorship in the age of AI, but also the threshold question of how authorship should be classified—as a question of fact, law, or both.*

† Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723, 725 (1996) (discussing proximate cause in workers compensation coverage formula and referring to the distinction between fact and law as a "slippery business").

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INTRODUCTION

What is a question of fact and what is a question of law? The difference is not purely ontological. How an issue is classified has concrete, practical implications: it determines the division of functions between judge and jury, the scope of appellate review, the appropriate degree of generalization, and the balance of power between administrative agency and reviewing court.[1] The distinction is not a sharp one either, but rather it is one of degree, with "finding[s] of fact shading imperceptibly into conclusion[s] of law."[2] Consequently, courts in many areas of law continue to grapple with this blurred, and seemingly artificial, line.

Authorship in copyright law is one such area. While both the U.S. Constitution and the Copyright Act of 1976 explicitly require the existence of an author to secure copyright protection,[3] the concept of the author is left completely undefined. Historically, authorship was presumed in a copyright registration; however, the rapid evolution of artificial intelligence makes it much more of a question and less of a presumption. It may be clear that the generalized aspects of authorship should be defined by courts as a matter of law—for example, that only humans can be authors[4]—but this does not help to determine at what point the human using artificial intelligence ("AI") crosses the threshold into authorship. And, deeper than that, there is an issue as to whether this determination constitutes a question of fact, a question of law, or a mixed inquiry.

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[1] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 349, 359 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[2] Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 240 (1955).

[3] U.S. CONST. art. I, § 8, cl. 8 ("by securing for limited Times to *Authors* . . . .") (emphasis added); 17 U.S.C. § 102(a) ("in original works of *authorship* . . . .") (emphasis added).

[4] *See* cases and discussion *infra* Part IV.A.1 (discussing cases related to human authorship).

Under the now-obsolete *Chevron* doctrine, courts deferred to an agency's reasonable interpretation of law when the statute was ambiguous or silent.[5] Following the Court's decision to overrule *Chevron*, in *Loper Bright v. Raimondo*, the Court declared that questions of law must be resolved independently by courts.[6] The only place where true deference remains is in factfinding, with reviewing courts generally respecting the agency's development of the factual record. Thus, the classification of authorship as fact, law, or mixed inquiry ultimately determines whether the Copyright Office plays a decisive role in shaping outcomes or whether its views serve only as background to the court's independent judgment.

This is precisely what is happening in *Allen v. Perlmutter*.[7] The case, which challenges the Copyright Office's refusal to register a work created with the assistance of artificial intelligence, implicitly presents the problem of classification. On one hand, the inquiry seems factual: how much creative input did the human claimant provide? On the other hand, setting a threshold for authorship seems to present a legal question. And after *Loper Bright*, courts cannot simply defer to the Copyright Office's conclusion on that legal question; instead, they must decide it independently, with the Office's view potentially carrying only persuasive force.[8]

This Note proposes a mixed approach to the classification. It accepts that a factual inquiry will almost always be required[9] to identify the scope and nature of human contribution, while maintaining that the ultimate question—whether those contributions meet the legal threshold of authorship—is one of law. The factfinder (either the Copyright Office or a jury)[10] must resolve concrete questions about the creative process: what exactly the human user

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[5] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that agencies may interpret ambiguous statutes as long as their interpretations are reasonable).

[6] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2247 (2024) (overruling *Chevron* and leaving legal interpretations of ambiguous statutes to courts).

[7] Plaintiff's Complaint and Request for Declaratory Relief and Demand for Jury Trial, Allen v. Perlmutter, No. 1:24-cv-2665 (D. Colo. Sept. 26, 2024).

[8] Presumably, *Chevron* would have applied here because the statute on authorship is ambiguous or silent on the legal question. See *infra* Part I.B. for a discussion on the *Chevron* framework and when it applies. The "persuasive force" is a reference to *Skidmore* deference. *See infra* notes 66–70, and accompanying text (discussing *Skidmore* and its potential impact on future rulings).

[9] This would be true except in cases where the facts are undisputed and clearly on one side of the line, thereby collapsing the inquiry into purely a question of law. *See, e.g.*, Thaler v. Perlmutter, 687 F. Supp. 3d 140, 143 (D.D.C. 2023) (describing how plaintiff stated on the record that the image in question was generated "autonomously" by AI).

[10] The proper factfinder depends on how the dispute arose. *See* discussion *infra* Part I.B. (analyzing the difference between *Chevron* and *Loper Bright*).

contributed, whether the prompt was minimal or richly developed, whether creative judgment was exercised, the extent to which the user modified the AI-generated output, and the overall degree of control over the work. Then, the legal question persists: what threshold of human contribution suffices for authorship? Crucially, this mixed approach brings procedural clarity, substantive elasticity, and a degree of consistency across cases.

The Note proceeds in five parts. Part I provides background, situating the issue within the concept of authorship, the role of the Copyright Office, the Administrative Procedure Act, and the doctrinal shift resulting from *Loper Bright.* Part II addresses the copyrightability of AI-generated works, setting out the traditional requirements for protection and highlighting authorship as the central hurdle. Part III explores the fact-law distinction and how courts have approached it in copyright and patent law, drawing insights from issues such as originality, fair use, non-obviousness, and claim construction. It also draws on Henry M. Hart, Jr. and Alfred M. Sacks to underscore competence and scope as key, functional factors in separating fact from law. Part IV homes in on *Allen v. Perlmutter*, outlining the administrative record, the plaintiff's claims, the key arguments at play, and where the case stands right now. Finally, Part V returns to the fact-law distinction, arguing that a mixed approach predominated by law strikes the right balance. A purely factual approach would lead to inconsistent outcomes, while a strictly legal framework would be overly rigid, potentially categorically excluding the use of AI in the creation of works.[11] In closing, Part V assesses the potential outcomes of *Allen* and shows how *Loper Bright* ensures that, if authorship is treated as law or mixed, courts will control and shape the standard, rather than the Copyright Office.

I. BACKGROUND ON AUTHORSHIP, THE COPYRIGHT OFFICE, & THE ADMINISTRATIVE PROCEDURE ACT

The link between authorship, the Administrative Procedure Act (APA), and the Copyright Office reflects the delicate balance of power among the branches of government. While Congress (and the Constitution) established authorship as a legal requirement, it was the courts that historically gave meaning to the legal fiction of the

[11] The purely legal approach cannot deal with different types and levels of human contributions. Such an exclusion would run counter to the constitutional purpose of intellectual property protection: "To promote the Progress of Science and useful Arts . . . ." U.S. CONST. art. I, § 8, cl. 8.

"author." It is truly "a culturally, politically, economically, and socially constructed category . . . ."[12] The Copyright Office, as an executive agency, administers copyright law while operating within the constraints imposed by the APA—a legislative check on agency authority. Under this framework, Congress legislates, the courts interpret, and the Copyright Office executes, reflecting the structured division of power fundamental to governance. The following Sections will review the existing case law surrounding authorship, situate the Copyright Office as an agency governed by the APA, and discuss the recent doctrinal shift that resulted from *Loper Bright*.

A. *Case Law on Authorship*

Evolving from the first copyright law ever enacted, the 1710 Statute of Anne in England,[13] to being directly embedded into the Constitution,[14] authorship is a core requirement for a copyright to exist.[15] However, it is not generally a controversial topic, "usually appear[ing] as a focus of consensus rather than debate."[16] There have only been a handful of noteworthy debates in the relevant case law that help to establish the legal framework for this slippery concept. Each of these disputes relate to human contribution in some form or another.

Is a photographer an author? In *Burrow-Giles Lithographic Co. v. Sarony*, the plaintiff and photographer, Napoleon Sarony, took a photograph of Oscar Wilde in 1882, which Burrow-Giles Lithographic Co. reproduced and sold.[17] Even though the Copyright Act was amended in 1865 to explicitly grant copyright protection to photographs, Burrow-Giles contended that "a photograph is not a writing nor the production of an author" because it is an exact reproduction.[18] In other words, Sarony was not the author of the

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[12] Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 459 (1991).

[13] 8 Ann. c. 19, §1 (1710) (Eng.); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1095 (2012) (stating the first copyright statute in England was the Statute of Anne in 1710); Jaszi, *supra* note 12, at 468 (discussing the history of authorship, citing the Statute of Anne).

[14] U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to *Authors* . . . .") (emphasis added).

[15] 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of *authorship* . . . .") (emphasis added); *see also* discussion *infra* Part II (describing all requirements for copyrightability).

[16] Jaszi, *supra* note 12, at 456.

[17] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54 (1884).

[18] *Id.* at 56.

photograph because it was the product of the machine. The Supreme Court, however, in describing copyright "as the exclusive right of a man to the production of his own genius or intellect,"[19] expanded the meaning of an author to "the man who really represents, creates, or gives effect to the idea, fancy, or imagination."[20] Therefore, because Sarony made a number of creative choices that evoked the desired expression,[21] the Court upheld a copyright, affirming the judgment below.[22]

Can a book be copyrighted if its claimed author is divine? In *Urantia Foundation v. Maaherra*, the claimant provided that the Urantia book "was authored by celestial beings and transcribed, compiled, and collected by mere mortals."[23] The Ninth Circuit Court reasoned that "it is not [the] creations of divine beings that the copyright laws were intended to protect . . . ."[24] Despite that, they found the copyright was valid because of a distinction between "revelations as facts and the expression[s] of these revelations . . . ."[25]

Can a picture taken by an animal be copyrighted? In *Naruto v. Slater*, a wildlife photographer, David Slater, left his camera unattended and a seven-year-old primate (a crested macaque named Naruto) took several photographs of himself with the camera.[26] While the main issue in this case was whether Naruto had standing to sue, in answering that question, the court articulated that certain provisions of the Copyright Act which involve relationships of one human to another (such as "children," "grandchildren," and "widow") seem to imply humanity as a prerequisite for rights relating to copyright.[27]

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[19] *Id.* at 58.

[20] *Id.* at 61. This case was heavily relied upon by the plaintiff in the case discussed *infra* Part IV. Particularly, in the plaintiff's "First Request for Reconsideration," he analogized photography and works generated by AI. *See* First Request for Reconsideration at 4, Allen v. Perlmutter, No. 1:24-cv-2665 (D. Colo. Sept. 26, 2024) ("[T]he Court [in *Burrow-Giles* distinguishes] between photographs taken with no artistic intent (i.e., the result of someone pointing a camera in a random direction and clicking the button), versus those that have been composed and reflect the artistic ideas of the photographer.").

[21] These creative choices were in "selecting and arranging the costume, draperies, and other various accessories . . . arranging the subject so as to present graceful outlines . . . ." *Burrow-Giles*, 111 U.S. at 55.

[22] *Id.* at 61.

[23] Urantia Found. v. Maaherra, 114 F.3d. 955, 956 (9th Cir. 1997).

[24] *Id.* at 958.

[25] *Id.* at 959.

[26] Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).

[27] *Id.* at 426.

Can providing general, verbal instructions be enough to be an author?[28] In *Community for Creative Non-Violence v. Reid*, the parties were in dispute about the author of a commissioned sculpture.[29] The Community for Creative Non-Violence (CCNV) commissioned Earl Reid to create a sculpture of a modern Nativity scene.[30] While part of the decision in the case revolved around whether the work was prepared by an employee within the scope of their employment,[31] the Court declared, "[a]s a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."[32] Ultimately, in a unanimous decision, the Court held that CCNV did not have sufficient creative control over the sculpture for them to be an author "by virtue of the work for hire provisions of the Act."[33]

These cases[34] comprise much of the case law concerning authorship. They show that (1) an author cannot be a divine being or an animal—they must be human; (2) the human must be the originator or creator; and (3) the concept of a "writing" was designated for the purpose of imprinting human expression.

B. *The Copyright Office and the Administrative Procedure Act*

The Copyright Office was established as a federal agency in 1897.[35] To achieve its constitutional purpose[36] and promote creative and free expression, it serves several functions including registering copyright claims, recording information about copyright ownership,

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[28] The following case aims tangentially at this question but note that that the Supreme Court does not give a clear answer.

[29] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 732 (1989).

[30] *Id.* at 733.

[31] *Id.* at 738. In fact, the main legal question of the case was whether the sculpture constituted a work-made-for-hire, or if Reid was an independent contractor.

[32] *Id.* at 737.

[33] *Id.* at 753. The Court continued, however, that whether the requirements for joint authorship were met would need to be considered separately by the court below. *Id.*; *see also* 17 U.S.C. § 101 (defining a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"). On remand, however, the United States District Court for the District of Columbia decided that Reid was the sole author and that CCNV was not a joint author. *Cmty. for Creative Non-Violence v. Reid*, No. CIV. A. 86-1507 (TPJ), 1991 WL 415523, at *1 (D.D.C. Jan. 7, 1991).

[34] These cases are ones that the Copyright Office seems to consider most salient, as they appear in Part 2 of their recent report on copyright and artificial intelligence. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2: COPYRIGHTABILITY 7–10 (2025).

[35] U.S. COPYRIGHT OFF., *Overview of the Copyright Office*, https://www.copyright.gov/about/ (last visited Mar. 4, 2025).

[36] *See* U.S. CONST. art. 1, § 8, cl. 8 (stating that Congress has the power "[t]o promote the Progress of Science and the useful Arts . . . .").

and assisting Congress on a wide range of copyright issues.[37] Specifically, it "[a]dvise[s] Congress on national and international issues relating to copyright . . . "[38] and "[c]onduct[s] studies and programs regarding copyright . . . ."[39] The Office serves as the gatekeeper between creative works and the public domain, between what is actively protected and what is available for public use.

As a federal agency, the Office is governed by the Administrative Procedure Act (APA).[40] The APA provides federal agencies with the ability to carry out two main functions: (1) rulemaking and (2) adjudication.[41] In broad strokes, rulemaking has prospective applicability, and adjudication is retrospective.[42] Rulemaking refers to a federal agency's ability to utilize a delegation of power transferred to them by a congressional statute.[43] Using this delegation, the agency creates rules through a process known as "notice-and-comment" rulemaking, commonly known as the "informal" way.[44] It requires the agency to publish a proposed rule for public comment as a means of gaining feedback.[45] After this period ends, the agency reviews and considers the comments, and subsequently the rule carries with it the force of law.[46]

Adjudication, on the other hand, is less rigid.[47] It refers to the agency's ability to carry out an action by evaluating the present circumstances.[48] For example, the FDA approves or rejects a drug, or the Copyright Office approves or rejects someone's work for copyright registration. Rulemaking is well-suited for static conditions, whereas adjudication is attractive in dynamic settings "because it does not require a global judgment and because it reduces the agency's task to manageable assessments of the limited interests of the limited number of parties to an adjudication."[49]

These two main powers of federal agencies come with limitations. Under the APA, judicial review is permitted for any "final agency

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[37] U.S. COPYRIGHT OFF., *Overview of the Copyright Office*, *supra* note 35.
[38] 17 U.S.C. § 701(b)(1).
[39] 17 U.S.C. § 701(b)(4).
[40] 17 U.S.C. §§ 701–710.
[41] ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 72 (3d ed. 2014).
[42] Nat'l Small Shipments Traffic Conf., Inc. v. ICC, 725 F.2d 1442, 1447–48 (D.C. Cir. 1984).
[43] AMAN & MAYTON, *supra* note 41, at 75.
[44] 5 U.S.C. § 553(b)–(c); *see also* 5 U.S.C. § 551(4)–(5) (defining "rule" and "rule making").
[45] 5 U.S.C. § 553(c).
[46] *Id*.
[47] AMAN & MAYTON, *supra* note 41, at 74.
[48] *Id*.
[49] *Id*.

action for which there is no other adequate remedy in a court . . . ."[50] If there is a question of law, the reviewing court will review the issue *de novo*.[51] If there is no legal question involved, the reviewing court will set aside the agency action if they find it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[52] Therefore, an adjudicatory action, like rejecting someone's work for copyright protection, is appealable to a federal court under the APA.[53]

C. Loper Bright *and the* Chevron *Doctrine*

In a pair of watershed cases in 2024, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce*, the Supreme Court eradicated the forty-year-old *Chevron* framework.[54] In the four decades this precedential framework was in place, *Chevron* was one of the most cited cases in history—cited by federal courts roughly 18,000 times.[55] In fact, courts of appeals, on average, applied *Chevron* in nearly three-quarters of cases addressing agency interpretations.[56] Unsurprisingly, agencies benefitted the most with a 77.4% likelihood of prevailing when lower courts applied *Chevron*.[57] Under that structure, in the presence of statutory ambiguity or silence, federal courts were required to defer to federal agencies' interpretations, so long as they were reasonable.[58]

For questions of law, which triggered *de novo* review, the *Chevron* doctrine required courts to utilize a two-step framework for reviewing

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[50] 5 U.S.C. § 704.

[51] Even during the *Chevron* era this was the case. Applying *Chevron* deference occurred during *de novo* review (specifically in step two). *See infra* notes 60–63 and accompanying text (demonstrating the court's *de novo* review).

[52] 5 U.S.C. § 706(2)(A). There are five other instances explicitly referenced for when the reviewing court shall set aside an agency's action. 5 U.S.C. § 706(2)(B)–(F).

[53] *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."). This is precisely what occurred in *Allen v. Perlmutter*, discussed *infra* Part IV.

[54] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024) ("*Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to 'ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,' is for us to leave *Chevron* behind." (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986))); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984). *Relentless Inc.* was decided in the same consolidated case as *Loper Bright Enterprises*. *Loper Bright Enters.*, 144 S. Ct. 2244, 2256.

[55] BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R48320, *LOPER BRIGHT ENTERPRISES V. RAIMONDO* AND THE FUTURE OF AGENCY INTERPRETATIONS OF LAW 11 (2024).

[56] *Id.*

[57] *Id.* (stating that 56% of agencies prevailed when lower courts applied *Skidmore* and 38.5% prevailed with no deference regime whatsoever).

[58] *Id.* at 1.

a federal agency's interpretation of a statute. First, a reviewing court must assess "whether Congress has directly spoken to the precise question at issue."[59] If yes, then the court would simply enforce the statute as written. If not, meaning the court determined that the statute is either silent or ambiguous with respect to the issue, then the second step required the court to defer to the agency interpretation so long as it is based on "a permissible construction of the statute . . . ."[60]

Essentially, *Loper Bright* extinguished this second step. The Court held that courts should "use every tool at their disposal to determine the best reading of [a] statute and resolve [any] ambiguity."[61] They reasoned that courts, not agencies, have "special competence" to resolve statutory ambiguity.[62] While two other non-binding deferential doctrines may still apply in limited circumstances,[63] it is clear that the Court wants reviewing courts to arrive at "'the reading the court would have reached' if no agency were involved."[64] Consequently, in APA cases, there may be a sliding scale of deference to federal agencies, depending on the issue, the agency, the jurisdiction, and even the specific judge.[65] Because individual judges will be attempting to arrive at the "best" reading of an ambiguous statute, their conclusions may be unpredictable and even inconsistent

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[59] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

[60] *Id.* (citation omitted) (internal quotation marks omitted).

[61] *Id.* at 2266.

[62] *Id*.

[63] The two deferential standards that technically still remain after *Loper Bright* are *Skidmore* and *Auer-Kisor*. JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 3–4 (2024). "The *Skidmore* case itself laid out a list of factors for courts to consider when determining whether an agency's interpretation commands the 'power to persuade.'" BARCZEWSKI, *supra* note 55, at 6 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see also Skidmore*, 323 U.S. at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). *Auer* deference operated similar to *Chevron* but only applies to an agency's own ambiguous regulations. Auer v. Robbins, 519 U.S. 452, 462–63 (1997); *see also* BARCZEWSKI, *supra* note 55, at 33 ("*Auer* deference closely mirrors *Chevron* but applies to an agency's reasonable interpretations of its own ambiguous *regulations*."). In *Kisor*, the Court specifically clarified that this deference should apply only after a court "bring[s] all its interpretive tools to bear" and still finds the regulation to be "of genuine ambiguity . . . ." Kisor v. Wilkie, 139 S. Ct. 2400, 2404 (2019). The Court further elaborated that "not all reasonable agency constructions of those truly ambiguous rules are entitled to deference[,]" explaining that when the reasons for the presumption that Congress intended for courts to defer to agencies do not apply, "courts should not give deference to an agency's reading, except to the extent that it has the 'power to persuade.'" *Id.* at 2415 (quoting *Skidmore*, 323 U.S. at 140).

[64] *Loper Bright Enters.*, 144 S. Ct. at 2266 (quoting *Chevron*, 467 U.S. at 843).

[65] BARCZEWSKI, *supra* note 55, at 13, 24. This was true during *Chevron* too with courts "strategically choosing deference regimes that more easily allow[ed] them to reach an outcome that match[ed] their policy preferences." *Id.* at 12 (citation omitted) (internal quotation marks omitted).

across jurisdictions. This is especially true given the expansive factors that *Skidmore v. Swift & Co.* asks courts to consider.[66] While *Skidmore* may only apply when the "administrative action in question is not necessarily a product of formal adjudication or public notice-and-comment procedures[,]" this category still comprises a significant proportion of agency action with even broader application than *Chevron*.[67]

Having traced the case law surrounding authorship, the role of the Copyright Office and the APA, and the effect of *Loper Bright* on administrative agencies, the discussion shifts to a matter that brings these issues to the forefront.

II. COPYRIGHTABILITY OF AI-GENERATED IMAGES

As a particularly current topic in our day and age, this Section explores when AI-generated images are copyrightable.[68] Under §102(a) of the Copyright Act, "[c]opyright protection subsists . . . 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

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[66] *Skidmore*, 323 U.S. at 140; *see* BARCZEWSKI, *supra* note 55, at 6 (discussing the factors a court will consider in examining an ambiguous statute).

[67] AMAN & MAYTON, *supra* note 41, at 409; *see also* BARCZEWSKI, *supra* note 55, at 20–21 (identifying a 2001 case, *United States v. Mead*, where the Supreme Court held "that even where an agency interpretation, because of its lack of force of law, was ineligible for *Chevron*, it may be eligible to be evaluated pursuant to *Skidmore*").

[68] In the United States, I presume that these images have the capacity to be copyrightable without *sui generis* protection, as the Copyright Act is designed to account for innovations in technology to adjust to the constitutional purpose of copyright. *See* 17 U.S.C. § 102(a) (stating that copyright protection is "fixed in any tangible medium of expression, now known or later developed . . . ."); U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts . . . ."); *see also* Copyright Office Registration VAU 1-543-942, *A Single Piece of American Cheese*, (2024), https://publicrecords.copyright.gov/detailed-record/voyager_37990563 (featuring the first ever copyrighted AI-generated image, therefore it is possible, *see* App. Ex. 3 *infra* p. 904); Söğüt Atilla-Aydin, *A Single Piece of US Copyright: Are AI-Generated Images Original Artistic Works or Banal Compilations?*, THE IPKAT (Feb. 18, 2025), https://ipkitten.blogspot.com/2025/02/a-single-piece-of-us-copyright-are-ai.html. Other countries are also grappling with this issue. With little to no actual legislation, these countries, like the United States, are looking to the language of their already existing copyright acts. One common theme is the "human" requirement, which is either explicitly or implicitly embedded into many of these acts, thereby making it impossible for AI to be the author. This does not, however, answer how much AI use is acceptable, or conversely how much human contribution is necessary. *See generally* Hafiz Gaffar & Saleh Albarashdi, *Copyright Protection for AI-Generated Works: Exploring Originality and Ownership in a Digital Landscape*, 15 ASIAN J. INT'L L. 23, 29 (2025) (looking to copyright law in defining the term "author"); *see, e.g.*, Chosakuken-hō [Copyright Law], Law No. 48 of 1970 (Japan), art. 2.1, translated in (Japanese Law Translation [JLT DS]), https://www.japaneselawtranslation.go.jp/en/laws/view/3379 (defining a "work" as "creatively produced expression of thoughts or sentiments" which implies a human component because only humans are capable of "thoughts" or "sentiments").

with the aid of a machine or device."[69] Further, copyright can never extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form . . . ."[70] Simply, originality requires "independent creation plus a modicum of creativity . . . ."[71] Next, to be fixed, the work must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[72] This requirement rarely causes problems because to submit a copyright application, the Office requires copies or phonorecords that include a perceptible copy of the work.[73]

These two conditions for copyrightability, originality and fixation, are not generally problematic for AI-generated images because they are essentially automatically fixed, and originality is a very low standard.[74] With authorship, however, what may be the easiest requirement for the average copyright applicant to satisfy, is in fact the biggest hurdle for an applicant submitting an AI-generated image to survive.[75]

Therefore, humans can copyright AI-generated works when they can show that they were the author, rather than AI. However, when that is the case, unfortunately, has no neat answer. Authorship, unsurprisingly, requires authority[76]—the author must have control over the creation of their work. Thus, the question quickly transitions into another difficult one: was there sufficient control over the work.

The Copyright Office published a report (the "Report") in January 2025 which discusses the copyrightability of artificial intelligence.[77]

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[69] 17 U.S.C. § 102(a).

[70] 17 U.S.C. § 102(b); *see also* Baker v. Selden, 101 U.S. 99, 103 (1880) (positing that ideas themselves cannot be protected).

[71] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

[72] 17 U.S.C. § 101; *see also* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 305 (3d ed. 2021) (stating that refusal can occur on the basis of fixation if the "work or medium is constantly changing, or if the medium does not allow the specific elements of the work to be perceived, reproduced, or otherwise communicated in a consistent and uniform manner").

[73] U.S. COPYRIGHT OFF., *supra* note 72, at § 305.

[74] Originality is not so straightforward. There might be times when the AI-generated image does not meet the originality standard, but "[t]he vast majority of works make the grade quite easily, as they possess some creative spark . . . ." *Feist*, 499 U.S. at 340. This "spark" should not be linked to a human component because it is important that we do not merge the core requirements of originality and authorship. With fact, however, it is somewhat blurred. *See Feist*, 499 U.S. at 347 ("No one may claim originality as to facts. This is because facts do not owe their origin to an act of authorship.") (citations omitted) (internal quotation marks omitted).

[75] This is because one implied requirement to authorship is simply that the author is human. *See* discussion *supra* Part II (discussing case law on authorship).

[76] Jaszi, *supra* note 12, at 470 ("[I]ndividual control over the created environment . . . .").

[77] COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2, *supra* note 34.

Unsurprisingly, authorship was at the focal point of this Report. The Report acts as research to advise Congress on how to legislate this issue. It is not the governing law, but it does provide the Office with guidelines for reviewing copyright registrations for AI-generated works. It affirmed that copyright will not extend to purely AI-generated material, and whether there was sufficient human control over the expressive elements of a work will be analyzed case-by-case.[78] It walked through a series of cases (some of which have been presented above) to establish the legal framework for authorship as requiring a human author.[79] One key takeaway is that under the technology that is currently in circulation, "prompts alone do not provide sufficient human control to make users of an AI system the authors of the output."[80] They add that, in their view, it is irrelevant how detailed the prompt is because the prompts "do not control how the AI system processes them in generating the output."[81]

One way the Office is dealing with this is by separating the expressive components from the non-expressive. In one instance, for example, the Office concluded that Kristina Kashtanova, the creator of a comic named "Zarya of the Dawn," could be recognized as the author of the comic's text and selection, coordination, and arrangement[82] of the text and images, but not the images themselves because they were generated by AI.[83]

And despite their ostensibly anti-AI disposition, the Office registered the first AI-generated image in January of 2025.[84] The work, titled "A Single Piece of American Cheese," was created by Kent Keirsey, the CEO of Invoke AI.[85] He used Invoke AI[86] by first entering the following prompt: "'fractured glass, faces in the facets,

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[78] *Id.* at iii.

[79] *Id.* at 7–11.

[80] *Id.* at 18.

[81] *Id.* Unless the prompt somehow contains instructions that influence how the AI system executes those directions, the amount of detail is insufficient. *Id.*

[82] This language is taken directly from the definition of a compilation within the Copyright Act. *See* 17 U.S.C. § 101 ("A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are *selected, coordinated,* or *arranged* in such a way that the resulting work as a whole constitutes an original work of authorship.") (emphasis added).

[83] U.S. COPYRIGHT OFF., Letter from Robert J. Kasunic, Assoc. Register of Copyrights, to Van Lindberg (Feb. 21, 2023), https://copyright.gov/docs/zarya-of-the-dawn.pdf.

[84] Atilla-Aydin, *supra* note 68 (reporting on the U.S. Copyright Office registered image "A Single Piece of American Cheese").

[85] *Id.* For a side-by-side image of the work generated by AI and as submitted to the Copyright Office, see App. Ex. 3 *infra* p. 904.

[86] Invoke AI is a generative-AI platform that boasts a demand for the "highest level of control." INVOKE, https://invoke.ai/ (last visited Mar. 1, 2026).

surreal pattern of glazed brushstrokes, spaghetti noodle hair' and 'blurry, out of focus, sketch. [sic] photo.'"[87] After selecting one of the three images generated by the prompt, Keirsey utilized a process known as "inpainting," which allows a user to selectively modify or regenerate specific parts of an image without impacting the surrounding environment.[88] Clearly, the Copyright Office believed Keirsey demonstrated sufficient control to be deemed the author.

Copyright decisions such as this one, however, are deeply problematic. When the Copyright Office decides who qualifies as an author, it is not entirely clear whether it is making a factual finding about creative input or a legal determination about the meaning of authorship. It seems to be actively shaping the meaning of authorship, albeit unintentionally. The following Section will help resolve such ambiguity by exploring the treatment of the fact-law distinction in both copyright and patent law.

III. THE FACT-LAW DISTINCTION[89]

Arriving at a workable definition of an elusive term,[90] like authorship, only partially addresses the real problem. It does not answer who should be the final arbiter in a determination of whether a threshold has been met. To do that, a distinction between fact and law is necessary. Despite the "vexing nature"[91] of creating this distinction, it is of utmost importance because, as Julia Reytblat puts it, "[i]t determines whether the issue . . . will be decided by a judge or a jury, the scope of appellate review, and whether a judge can use summary judgment to dismiss a claim."[92]

In general, the distinction between fact and law comes with great difficulty because "when faced with a dispute as to whether a specific issue should be resolved by the judge or the jury, the typical appellate opinion today does no more than label the question as one of law or

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[87] Atilla-Aydin, *supra* note 68 (citation omitted).

[88] *Id.*

[89] Trademark law also presents issues that demonstrate distinctions between fact and law, but these will not be referenced because the trademark right does not originate from the Constitution. *See* Patricia J. Kaeding, *Clearly Erroneous Review of Mixed Questions of Law and Fact: The Likelihood of Confusion Determination in Trademark Law*, 59 U. CHI. L. REV. 1291, 1291 (1992) (discussing the fact-law distinction in trademark law); Yvette Joy Liebesman, *Rethinking Trademark Functionality as a Question of Fact*, 15 NEV. L.J. 202, 203 (2014).

[90] *See, e.g.*, Feist Publn's, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (defining the elusive "originality" as requiring "independent creation plus a modicum of creativity . . . .").

[91] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[92] Julia Reytblat, *Is Originality in Copyright Law a "Question of Law" or a "Question of Fact?": The Fact Solution*, 17 CARDOZO ARTS & ENT. L.J. 181, 181 (1999).

of fact . . . ."[93] Copyright and patent cases are perhaps of an even more particular strain of difficulty because they "come 'nearer than any other class of cases . . . to what may be called the metaphysics of the law where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent.'"[94]

A. *Illustrations in Copyright*

The fact-law distinction in copyright arises because of its constitutional underpinnings, the nature of the inquiries, and the brevity of the language in certain areas of the Copyright Act. In particular, the foundational requirements provide very little guidance beyond the fact that they are required. As discussed earlier, the notorious sentence in § 102 of the Copyright Act is: "Copyright protection subsists . . . in *original* works of *authorship fixed* in any tangible medium of expression . . . ."[95] Despite each of these emphasized words being a foundational requirement for a work to be copyrightable, there is very little elaboration on them anywhere else in the Act.[96] Consequently, when disputes arise, it has largely been left to the courts to determine what each of these mean. While the interpretations of these meanings are questions of law, once resolved, the question remains who should decide whether the threshold is satisfied in a given case. The reliance on a set of facts does not guarantee that the final question is one of fact. Of course, when there is no dispute as to any material fact, summary judgment may be granted as a matter of law.[97] And in other cases, juries must ascertain the facts for a final judgment to be made as a matter of law.[98] These terms are just a few that present the issue.[99] This Note will focus on

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[93] Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1868 (1966).

[94] Jaszi, *supra* note 12, at 457 (quoting Folsom v. Marsh, 9 F. Cas. 342, 344 (1841)).

[95] 17 U.S.C. § 102(a) (emphasis added).

[96] *But see* 17 U.S.C. § 101 (providing a definition of a work that is "fixed," which helps but does not solve its ambiguity entirely).

[97] FED. R. CIV. P. 56(a).

[98] *See* discussion *infra* Part III.A.2 (discussing fair use as often requiring a jury to settle matters such as the amount taken or the harm to the potential market but leaving the question of whether the use was ultimately *fair* to the judge).

[99] Substantial similarity with respect to copyright infringement is another fruitful area. *See, e.g.*, Rentmeester v. Nike, Inc., 883 F.3d 1111, 1118 (9th Cir. 2018) ("Determining whether works are substantially similar involves a two-part analysis consisting of the 'extrinsic test' and the 'intrinsic test.' . . . Only the extrinsic test's application may be decided by the court as a matter of law . . . ."); *see also* Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002) (explaining that the extrinsic test

originality and fair use (another doctrine which appears in § 107 of the Copyright Act) because they provide meaningful lessons in delineating questions of fact from law.

With each of these, there is a varying degree of clarity on where it ultimately stands. With originality, not only is there little consensus among the circuit courts about whether the issue falls under fact or law, but their theoretical and practical positions are sometimes juxtaposed.[100] With respect to fair use, while the Supreme Court has said that it is a mixed question, it has also said that the question of law predominates.[101]

1. *Originality*

Originality is one of the foundational requirements for gaining copyright protection.[102] Despite that, for a while it was unknown what "original" really meant. It was not until *Feist Publications, Inc. v. Rural Telephone Service Co.* that there was any established definition or standard to originality.[103] The Supreme Court prescribed a "minimal degree of creativity"[104] and that "[t]he vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[105] It is imperative to decide whether a work is original because "[a] work that is not original does not have a limited scope of protection – it has no protection, regardless of how much labor went into its production."[106] Declaring, as a matter of law, some workable definition for originality,[107] however, does not assist in answering who is responsible for deciding whether a particular work has met that

involves comparing the specific expressive elements of the two works). This test is not unique to the 9th Circuit. *See, e.g.*, Towler v. Sayles, 76 F.3d 579, 583–84 (4th Cir. 1996) (describing a two-part process to determining substantial similarity, with the first step requiring a plaintiff to show that the works are extrinsically similar). Some circuits, however, disagree. *See, e.g.*, Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d. 357, 373–74 (5th Cir. 2004) ("[W]hether two works are substantially similar is a question for the jury itself to determine by examining the actual works in question.").

[100] *See* Reytblat, *supra* note 92, at 199 (explaining the lack of consensus on how to label originality).

[101] *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1214 (2021) (Thomas, J., dissenting) ("[F]air use is a mixed question of fact and law and . . . questions of law predominate.").

[102] *See* 17 U.S.C. § 102(a) (stating that copyright protection subsists in "original works").

[103] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

[104] *Id.* at 345.

[105] *Id*. (internal citation omitted).

[106] William Patry, *Copyright in Collections of Facts: A Reply*, 6 COMMC'NS & L. 11, 27 (1984); *see also Feist*, 499 U.S. at 359–60 (affirming that "sweat of the brow" is irrelevant).

[107] *Feist*, 499 U.S. at 346 ("[O]riginality requires independent creation plus a modicum of creativity.").

general standard. Despite the significance of this question and the *Feist* decision, there is no uniform agreement among the circuits.[108]

In *Feist*, after Rural Telephone Co. (a small company that published a local telephone directory) refused to grant permission to Feist Publications, Inc. (a larger company which compiled regional directories) to use its listings, Feist decided to copy thousands of listings from Rural's directory anyway.[109] To determine whether this constituted copyright infringement, the Court had to assess whether Rural's telephone directory was sufficiently original to qualify for copyright protection in the first place.[110]

First, as a matter of law, the Court needed to decide whether factual information could ever be protected under copyright.[111] Interpreting § 102 of the Copyright Act, the Court emphasized that facts themselves cannot be copyrighted, though their arrangement or selection may be if the compiler can show a minimum amount of creativity in the selection, coordination, or arrangement of those facts.[112] It also determined the threshold for originality as the "possess[ion of] some creative spark . . . ."[113]

Next, as a matter of fact, the Court examined the record for Rural's choices in compiling and organizing the directory. Not only did it find that "Rural did not truly 'select' to publish the names and telephone numbers of its subscribers" because they were required to do so, but with respect to arrangement, it also did "nothing more than list Rural's subscribers in alphabetical order."[114]

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[108] *See* Reytblat, *supra* note 92, at 199 (describing the lack of "consensus on how to label originality" and the prevalence of the issue being examined as a question of law for judges); *see also* Fin. Info., Inc. v. Moody's Investors Serv., Inc., 808 F.2d 204, 207 (2d Cir. 1986) (rejecting classifications of originality based on "sweat of the author's brow" in factual compilations); Bellsouth Advert. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436, 1441 (11th Cir. 1993) (finding that, while originality may extend to selection of facts in factual compilations, it does not extend to the means to discover those facts); NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 17.14 cmt. (2025) (acknowl edging post-*Feist* disagreement among circuits over operational definitions of originality and treating originality as a fact-dependent issue for the jury).

[109] *Feist*, 499 U.S. at 342–44.

[110] *Id.* at 344–45.

[111] *Id.*

[112] *Id.* ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates[,]' . . . however, it is beyond dispute that compilations of facts are within the subject matter of copyright.") (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)). A portion of this case was dedicated to resolving the ostensible inconsistency.

[113] *Feist*, 499 U.S. at 345.

[114] *Id.* at 363.

Last, the Court had to determine whether the selection, coordination, and arrangement of Rural's white pages rose to the minimum threshold of originality. It determined it did not and was, therefore, not entitled to copyright protection.[115]

Because the *Feist* Court divided the issue in this way, it seems originality is a mixed question of fact and law. However, because it remains ambiguous if the third step—whether the threshold has been met—is ultimately a question of fact or law, the lack of a clear pronouncement on that issue is likely what is causing the different approaches in different jurisdictions.[116] This discussion illustrates that parsing facts from law may be helpful, but it does not always yield a practical distinction. In fair use, however, it does.

2. *Fair Use*

Fair use is a limitation on copyright protection, allowing others to use a copyrighted work without infringing in limited circumstances.[117] It is one of the most notable doctrines in the ambit of copyright, and it is a rare coalescing of constitutional support, common law, and equity. Courts must consider the constitutional purpose of copyright, what courts have done and been doing, and what would—quite literally—be fair. There are four factors that courts consider: (1) the "purpose and character of the use," (2) the "nature of the copyrighted work," (3) the amount taken (quantitatively or qualitatively), and (4) the effect of the use on potential markets.[118] While fair use may be widely recognized, it is often misunderstood and misapplied.[119] To the layperson, it is commonly thought of as a concept that potentially allows for infringing activities. But fair use is meant to be an affirmative defense available once infringement is alleged. Conversely, even a legally trained individual may struggle to predict whether an unauthorized use will be considered "fair." Part of the

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[115] *Id.* at 362–64.

[116] *See* Reytblat, *supra* note 92, at 199–200 (discussing some different circuit approaches to the labeling problem).

[117] 17 U.S.C. § 107.

[118] *Id.*

[119] *See, e.g.*, Anna Stiles, *Five Common Fair Use Myths*, THE OHIO STATE UNIV. (Feb. 22, 2023), https://library.osu.edu/news/five-common-fair-use-myths (providing resources for individuals who have misconceptions about fair use); *Ten Misconceptions About Copyright and Fair Use*, VORYS (Oct. 28, 2013), https://www.vorys.com/publication-Ten-Common-Misconceptions-About-Copyright-and-Fair-Use (providing the same); *Common Misconceptions About Fair Use in Copyright Law*, ZVMLAW (Feb. 2023), https://zvmlaw.com/blog/mbo58ing3i8uy20p7wsi82tr2fjqo5-cl6sw (providing the same).

reason for this is because fair use requires a mixed approach to the fact-law distinction.

As the Supreme Court recently affirmed, "[f]air use is a mixed question of law and fact."[120] In *Google LLC v. Oracle Am.*, Google had copied roughly 11,500 lines of code from Oracle's Java SE program (which Oracle owned a copyright for).[121] The Court provided useful insight into mixed questions:

> [A] reviewing court should try to break such a question into its separate factual and legal parts, reviewing each according to the appropriate legal standard. But when a question can be reduced no further, we have added that "the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work."[122]

Continuing that thought, Justice Breyer explained that the origin and evolution of fair use point to it being a "question that primarily involves legal work."[123] In other words, an important consideration was that the concept of fair use has been guided over many years by legal interpretation through case law, and these cases continue to provide such guidance.[124] Therefore, the Court was able to separate the factual questions, such as the amount taken from the copyrighted work and the "harm to the actual or potential markets . . ." [125] from the final and dominant legal question of whether the use was *fair*.

B. *Illustrations in Patent*

As the close cousin of copyright, with a shared basis in the Constitution, patent issues are similarly thorny. Two such issues are *non-obviousness* and *patent infringement with respect to the construction of claims*. These issues act as a reminder of the instability of the inquiry into the nature of the salient question. The landscape is dynamic and the conclusions are infirm, subject to change, and have

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[120] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1999 (2021) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)).

[121] *Google*, 141 S. Ct. at 1191.

[122] *Id.* at 24 (quoting U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC., 583 U.S. 387, 396 (2018)).

[123] *Google*, 141 S. Ct. at 1999. To be sure, this idea is similar to asking who is best positioned to decide the question, as we saw in the approach by HART & SACKS, *supra* note 1.

[124] *Google*, 141 S. Ct. at 1200.

[125] *Id.*

actual, determinative consequences in practice. They also show that how the issue is delineated will often come down to who has a better chance of consistently being right. Two landmark Supreme Court patent cases will be discussed to address these two issues respectively: *Graham v. John Deere Co.* and *Markman v. Westview Instruments*.[126]

1. *Non-Obviousness*

Perhaps one of the most abstract concepts in patent law, non-obviousness is one of the requirements for patentability.[127] The question of patent validity very frequently comes down to this idea of obviousness. It is necessary, therefore, to consider whether patent validity, and by proxy, non-obviousness, is a question of fact or a question of law.

In a landmark Supreme Court case, *Graham v. John Deere Co.*, the Court considered this question.[128] "While the ultimate question of patent validity is one of law[] . . . the § 103 condition, which is but one of three conditions [of patentability] . . . lends itself to several basic factual inquiries . . . ."[129] such as "scope and content of the prior art . . . differences between the prior art and the claims at issue . . . and the level of ordinary skill in the pertinent art . . . ."[130] This concept of separating the relevant inquiries while illuminating the "ultimate question" should not be unfamiliar. In fair use, we saw the same analysis but also the same brevity: only a few sentences on the fact-law distinction.

2. *Patent Infringement and Claim Construction*

Patent infringement has been seen as a question of fact since 1854.[131] Claim construction, which refers to interpreting the meaning and scope of the terms within a patent, however, had no such clarity.[132] Then, in 1996 in *Markman v. Westview Instruments, Inc.*, the Court decided that, from then on, the interpretation of a claim's construction

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[126] Graham v. John Deere Co., 383 U.S. 1, 37 (1966); Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996).

[127] 35 U.S.C. § 103. The other two abstract concepts are "utility" and "novelty," both of which are much more easily defined. *See* 35 U.S.C. §§ 101–102 (describing those abstract concepts).

[128] *Graham*, 383 U.S. at 17.

[129] *Id.* (citations omitted).

[130] *Id.*

[131] Winans v. Denmead, 56 U.S. 330, 338 (1854) ("[H]as that thing been constructed, used, or sold by the defendants . . . is a question of fact . . . .").

[132] *See* Markman v. Westview Instruments, Inc. 517 U.S. 370, 388 (1996) ("So it turns out here, for judges, not juries, are the better suited to find the acquired meaning of patent terms.").

would be a question of law.[133] In patent infringement cases, while whether infringement occurred is a question of fact, it always hinged on how the claim construction should be interpreted.[134] They reasoned, potentially with some hubris, that "'[t]he judge, from his training and discipline, is more likely to give a proper interpretation . . . and . . . more likely to be right, in performing such a duty, than a jury can be expected to be.'"[135] In essence, the decision in *Markman* marked a change in landscape—one that gave the courts more control over the outcome in patent infringement cases.[136] In fact, as a direct result of this case, many district courts utilize a new pre-trial, procedural step known as a "Markman Trial" or "Markman Hearing."[137] These hearings are designed to give the judge an opportunity to determine the meaning of patent claims early on in the case, providing the parties with valuable insight into how they should proceed in the litigation, if at all.[138]

C. *The Source of Difficulty*

Henry M. Hart, Jr. and Albert M. Sacks, two prominent legal scholars and professors from Harvard Law School, help illuminate the source of the difficulty in drawing the line between fact and law, offering insight in the form of clarity. They propose that there is a three-fold nature to the decisional process, which provides very useful terminology moving forward: (1) the function of law declaration, where a formulation of the relevant law to be applied is made in general terms; (2) the function of fact identification, where relevant characteristics about the particular matter are determined and identified; and (3) the function of law application, where the particular

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[133] *Id.* at 388–89.

[134] Frank M. Gasparo, Markman v. Westview Instruments, Inc. *and its Procedural Shock Wave: The Markman Hearing*, 5 J.L. & POL'Y 723, 724–25 (1997).

[135] *Markman*, 517 U.S. at 388–89 (quoting Parker v. Hulme, 18 F. Cas. 1138, 1440 (1849)). This adds an additional layer to the idea that it should be considered who is best positioned to answer the question.

[136] After this case, it would no longer be an argument that claim construction should be decided by the jury, and therefore more cases will be decided at summary judgment.

[137] Gasparo, *supra* note 134, at 724–25.

[138] *Id.*

and the general are linked.[139] Whether a threshold has been met is a quintessential example of law application.[140]

Hart and Sacks explain that one source of the confusion and difficulty in classifying a question as either of fact or law is in "trying to squeeze into two categories questions which call for a three-fold analysis."[141] While it is clear that law declaration and fact identification can easily be labeled as questions of law and fact respectively, the problem arises with law application.[142] They continue, adding that phrasing the question as "[*i*]*s* this a question of law or of fact?" is inherently misleading because it implies that the answer can be discovered by careful examination.[143] Rather, the "is" is not really an "is" but a special kind of "ought" where whether the issue *ought* to be treated as law or fact defines whether it *is*. One idea, which will reappear later, is that whether a question "is" of law or of fact can be translated into two functional and connected questions. First, who is better positioned, institutionally speaking, to decide the issue—the judge or the jury?[144] Second, is this issue one that should apply generally for all other like cases or particularly for only the case at hand?[145] The Supreme Court has explicitly considered that first question in *Miller v. Fenton*:

> [I]n those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one

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[139] HART & SACKS, *supra* note 1, at 350–51. Note that "steps" (1) and (2) are not necessarily in that order. There is a bit of a chicken and egg problem, where fact identification requires understanding the applicable laws and, vice versa, the applicable proposition of law requires knowing what the facts are. *Id.* at 359.

[140] Not every threshold determination is a question of law. *See id.* at 347 ("We cannot say, as a matter of law, that the facts that the prize was money and not specific, and that more than one could select the same number with the same result, prevented the game from being a lottery. It is a lottery according to the popular use of the word . . . .") (quoting Commonwealth v. Wright, 137 Mass. 250, 251–52 (1884)).

[141] HART & SACKS, *supra* note 1, at 351.

[142] *Id.*

[143] *Id.* (emphasis in original). In both situations, the characterization "*does* lie in the inherent characteristics of the question—in whether it is concerned with general propositions or particular events." *Id.* at 352 (emphasis in original).

[144] *Id.* at 354.

[145] *Id.* Note that if the issue is one that should apply generally, then a judge is best positioned to answer. Vice versa, if the judge is best positioned to answer, then it likely has a generalized component to it.

> judicial actor is better positioned than another to decide the issue in question.[146]

Ultimately, the classification of the third function as predominately a question of law or fact turns on two considerations. The first is institutional competence: who is better positioned to decide. This, in turn, asks who is more likely to be correct and whether the task entails primarily legal work or factual work. The second is scope: whether the determination should carry any precedential weight and apply generally, or whether it should be confined to the particular dispute. Although courts tend to categorically label an issue as "fact" or "law," the distinction can be more sharply defined by functional judgments about competence and scope.

The difficulty in distinguishing fact from law is not simply academic. It defines, among other things, the division of power between judge and jury and between reviewing court and administrative agency. The inquiry now turns to a current case exemplifying the latter division, one where the Copyright Office's approach to authorship faces judicial review.

IV. ALLEN V. PERLMUTTER

The case of *Allen v. Perlmutter*[147] is ongoing in the U.S. District of Colorado. At the time of writing this Note, a Motion for Summary Judgment has been submitted by the plaintiff and a Motion for Stay was granted until the federal government reopens.[148] It is one of the first cases involving authorship, AI, and the Copyright Office, and it is ripe for seeing the implementation of the fact-law distinction in the context of authorship. In brief, the plaintiff was denied a copyright registration by the Copyright Office because the AI he used in generating the image was deemed the author, and not him. The administrative record (including the position of the Copyright Office),

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[146] Miller v. Fenton, 474 U.S. 104, 114 (1985).

[147] *See infra* note 148 (showing documents that are part of Allen v. Perlmutter, No. 1:24-cv-02665-WJM (D. Colo. Aug. 25, 2025) since a case opinion has not been written at the time of this Note). Perlmutter refers to Shira Perlmutter, the current Register of Copyrights and Director of the U.S. Copyright Office. *See Shira Perlmutter*, U.S. COPYRIGHT OFF.: LEADERSHIP, copyright.gov/about/leadership/shira-perlmutter.html (last visited Mar. 9, 2025) (giving a summary of Perlmutter's role at the U.S. Copyright Office).

[148] Pet'r's Mem. Supp. Summ. J., Allen v. Perlmutter, No. 1:24-cv-02665-WJM (D. Colo. Aug. 25, 2025); Unopposed Motion for a Stay to the Proceedings in Light of Lapse of Appropriations, Allen v. Perlmutter, No. 1:24-cv-02665-WJM (D. Colo. Oct. 1, 2025).

the origins of the dispute, and the key points in the complaint are outlined below.

A. *The Administrative Record*

In 2022, plaintiff Jason Allen created an image called "Theatre D'Opera Spatial."[149] The image proceeded to win the 2022 Colorado State Fair's annual fine art competition in the digital art category, becoming the first AI-generated image to win.[150] On September 21 of that year, he filed an application with the Copyright Office to register the work.[151] Despite his fame from winning the competition, he did not disclose the use of AI in the application, which raised eyebrows at the Copyright Office.[152] Consequently, the examiner assigned to his application requested he provide information on his usage of Midjourney, a generative-image AI program.[153] Mr. Allen explained that he "input numerous revisions and text prompts at least 624 times to arrive at the initial version of the image."[154] He then utilized Adobe Photoshop to remove flaws and create new visual content, and subsequently increased the image's resolution using Gigapixel AI.[155] After this information was provided, the examiner refused to register his claim unless he excluded the features of the work that were generated by Midjourney. Mr. Allen refused to do so, resulting in the claim being rejected.[156]

In January of 2023, Mr. Allen submitted his first request for reconsideration.[157] He contended that the examiner (and, by proxy, the Office) had misapplied the human authorship requirement.[158] Despite that, the Office maintained its stance, explaining that "the initial basis

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[149] *See* App. Ex. 1 *infra* p. 903 (showing the image by Allen).

[150] Kevin Roose, *An A.I.-Generated Picture Won an Art Prize. Artists Aren't Happy.*, N.Y. TIMES (Sept. 2, 2022), https://www.nytimes.com/2022/09/02/technology/ai-artificial-intelligence-artists.html.

[151] *See* Second Request for Reconsideration for Refusal to Register Théâtre D'opéra Spatial at *2, SR # 1-11743923581, Correspondence ID: 1-5T5320R (D. Colo. Sept. 5, 2023) [hereinafter Request for Reconsideration] (stating that Allen filed an application to register the work on September 22, 2022).

[152] *Id.*

[153] *Id.* Midjourney is a generative AI program. *See Learn About Midjourney*, MIDJOURNEY, https://docs.midjourney.com/hc/en-us (last visited Mar. 9, 2025) (providing information on how the program works and how to use it).

[154] Request for Reconsideration, *supra* note 151, at *2 (citation omitted) (internal quotation marks omitted).

[155] *Id.* Gigapixel AI upscales and enhances images. *See Gigapixel AI: Your One-Stop AI Platform for Image Creation Tools*, GIGAPIXEL AI, https://gigapixelai.com/ (last visited Mar. 9, 2025) (providing information on how the program works).

[156] Request for Reconsideration, *supra* note 151, at *2.

[157] *Id.*

[158] *Id.*

for th[e] Work is not an original work of authorship protected by copyright."[159]

On July 12, 2023, Mr. Allen then utilized 37 C.F.R. § 202.5(c) to submit a second request for reconsideration to the Copyright Review Board.[160] This time he crafted more elaborate arguments. First, he argued that the creative input necessary for inputting a series of prompts is "on par with that expressed by other types of artists and capable of Copyright protection."[161] Second, he added that the use of Midjourney was transformative because the AI-generated work was simply "*raw material*," which Mr. Allen transformed.[162] Next, he emphasized that the Office's general refusal to register content generated by AI places "a value judgment on the utility of various tools . . . ."[163] And last, he opposed the Office's requirement for creators to list each tool used and their proportionate contribution in the creation of an image, claiming it "would have a burdensome effect if enforced uniformly."[164]

1. *Human Authorship Requirement*

In their final agency action, the Office rejected each of Mr. Allen's arguments.[165] First, the Office addressed the "human authorship" requirement.[166] They quoted one of their practices from the Copyright Compendium, an administrative manual for registration,[167] which directs the Office to "refuse to register a claim if it determines that a human being did not create the work."[168] They also cited cases such as *Thaler v. Perlmutter*, *Urantia Found. v. Maaherra*, and *Naruto v. Slater*.[169] These cases evince a general acceptance of an interpretation of "works of authorship" within § 102(a) of the Copyright Act to require human creation.

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[159] *Id.* (citation omitted) (internal quotation marks omitted).

[160] *Id.*

[161] *Id.* at *3 (citation omitted) (internal quotation marks omitted).

[162] *Id.* (citation omitted) (emphasis in original).

[163] *Id.* (citation omitted) (internal quotation marks omitted).

[164] *Id.* (citation omitted) (internal quotation marks omitted).

[165] *Id.* at *3.

[166] *Id.* (citation omitted) (internal quotation marks omitted).

[167] *See* U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, https://copyright.gov/comp3/ (last visited Nov. 24, 2025) ("[The Compendium] is the governing administrative manual for registration and recordations issued by the U.S. Copyright Office . . . .").

[168] U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 306 (3d ed. 2021), https://copyright.gov/comp3/docs/compendium.pdf.

[169] The latter two of these were discussed *supra* Part I.A.

Thaler was the only other case where an AI-generated image was denied copyright registration, but the facts were quite different. The author, Stephen Thaler, declared in his application to the Office that the image was "autonomously created by a computer algorithm running on a machine . . . ."[170] As a result, the court did not inquire as to who the author was, but rather into whether copyright law requires a human author.[171] The *Thaler* court explained that "[h]uman authorship is a bedrock requirement of copyright[,]" and "human creativity is the *sine qua non* at the core of copyrightability . . . ."[172] They reasoned that despite the Copyright Act's lack of a definition of "author," there are a few reasons why the human requirement should be implied.

First, they reason that the definition of an "author" implies an "originator with the capacity for intellectual, creative, or artistic labor."[173] They assume that AI does not possess any of these capabilities. Second, they argue that part of the purpose of the Intellectual Property Clause in the Constitution[174] is to incentivize artists with exclusive rights, but non-human actors need not be, nor can they be, incentivized.[175] Last, the court cited the Copyright Act of 1909 to interpret congressional intent, which explicitly indicated that only a "person" could secure copyright for his work.[176] For these reasons and more, the court upheld the human authorship requirement.[177] Nevertheless, the issue has not been appealed or heard before the Supreme Court, so the rule is not completely shielded.

This case, and the ones discussed in Part I.A of this Note, show that when this issue has come up, courts have interpreted the relevant provisions of the Copyright Act to mean that human authorship is required. However, whether or not the human authorship requirement is settled or established law is not the main inquiry in this Note. The deeper question is "whether the 'work' is basically one of human

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[170] Thaler v. Perlmutter, 687 F. Supp. 3d 140, 143 (D.C. Cir. 2023) (citation omitted) (internal quotation marks omitted).

[171] *Id.* at 149 ("Undoubtedly, we are approaching new frontiers in copyright as artists put AI in their toolbox to be used in the generation of new visual and other artistic works. . . . This case, however, is not nearly so complex.").

[172] *Id.* at 146.

[173] *Id.* at 147.

[174] U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts . . . .").

[175] *See Thaler*, 687 F. Supp. 3d at 147 ("Non-human actors need no incentivization . . . .").

[176] *Id.* ("[T]he Copyright Act of 1909 . . . explicitly provided that only a 'person' could 'secure copyright for his work' under the Act.") (citation omitted).

[177] *Id.* at 148–49 (stating how the human author requirement has been recognized by the Supreme Court and other lower courts).

authorship, with the computer merely being an assisting instrument, or whether the traditional elements of authorship in the work . . . were actually conceived . . . by a machine."[178] How do we make this crucial determination?

2. *Copyright Office on When the Human Should be Considered the "Creator" of AI-Generated Output*

As this refusal occurred before the publication of the Report, the Office utilized the guidance it issued in March 2023, which provided some, albeit very little, guidance as to how the Copyright Office will determine when the human is the creator and when they are not.[179] Unhelpfully, according to the guidance, "[t]he answer will depend on the circumstances . . . ."[180] In other words, this process will always be assessed on a case-by-case basis, as it is fact specific.[181] They will have to consider whether or not the AI contributions came about from "'mechanical reproduction' or instead . . . an author's 'own original mental conception, to which [the author] gave visible form.'"[182] Specifically, if the traditional elements of authorship were a product of the machine, then the Office would not register it.[183] "[W]hen an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response," then these traditional elements of authorship were necessarily a product of the technology because "users do not exercise ultimate creative control over how such systems interpret prompts and generate material."[184]

The decision to deem Midjourney as the author, and not Mr. Allen, therefore, was based on the circumstances. Ultimately, the Copyright Board said his sole contribution to the initial image was simply inputting text that generated an image.[185] One key piece was how Midjourney actually operates: it does not take a text prompt and treat

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[178] Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 1044 (1993) (citation omitted) (internal quotation marks omitted).

[179] Request for Reconsideration, *supra* note 151, at *4.

[180] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

[181] *Id.*

[182] *Id.* (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884)).

[183] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

[184] *Id.* (footnote omitted); *see also* 5 U.S.C. § 704 (laying out actions subject to judicial review); 17 U.S.C. § 704(e) (affirming that the Office is subject to the provisions of the APA).

[185] Request for Reconsideration, *supra* note 151, at *6.

it as directions, but rather the text is interpreted and compared to its training data.[186]

B. *The Complaint*

As the rejection of the second request for reconsideration by Mr. Allen constituted a "final agency action," he could now file a complaint.[187] He filed under § 701 of the APA and § 701(e) of the Copyright Act.[188] While the Office would compare prompting AI to instructions for a commissioned artist,[189] Mr. Allen likens his usage to a director working with a cameraman.[190] In other words, Mr. Allen believes he used AI as a tool, while the Copyright Office holds the opposite. He claims the denial of the copyright by the Office has "crushed [his] ability to monetize his artistic creation" due to mass infringement.[191]

The Complaint continues, describing the "elaborate process"[192] by which he arrived at the image. He inputted a text prompt with "exact specifications," which caused Midjourney to generate four images or variations.[193] After reviewing the set and determining which of his instructions were effective, he "rephrased, added, or deleted portions of his instructions to clarify his vision."[194] Repeating this process a total of 624 times,[195] Mr. Allen alleges that through this massive number of iterations he was able to study Midjourney's behavior and learn how it received the instructions.[196] According to the Complaint, he even "developed a 'writing technique' for crafting effective prompts, ensuring the AI accurately captured his vision."[197] From all of this, Mr. Allen claims that this image was not simply the product

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[186] *Id.* at *6–7.

[187] U.S. COPYRIGHT OFF., REQUESTS FOR RECONSIDERATION 1, 3, https://www.copyright.gov/circs/circ20.pdf (last visited Mar. 9, 2025).

[188] Complaint ¶ 1, Allen v. Perlmutter, No. 1:24-cv-2665 (D. Colo. Sept. 26, 2024).

[189] Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202).

[190] Complaint, *supra* note 188, ¶¶ 19, 8. This metaphor is drawn a few times throughout the Complaint.

[191] *Id.* ¶ 11.

[192] *Id.* ¶ 18.

[193] *Id.* ¶ 17.

[194] *Id.*

[195] *Id.* ¶¶ 18–19. *But see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353 (1991) (explaining how "sweat of the brow" does not warrant protection). But perhaps the purpose of mentioning the number of times he repeated the process is not to indicate the amount of work he put into it, but rather to show that the first 624 times did not execute his vision.

[196] Complaint, *supra* note 188, at 8.

[197] *Id.*

of a few prompts,[198] and that he demonstrated a "creative selection and arrangement of elements in the image . . . ."[199]

Mr. Allen alleges that the Office's refusal is "arbitrary and capricious"[200] because the Work is both original and contains human authorship.[201] The salient question, which was briefly discussed above, is whether Mr. Allen demonstrated sufficient "exercise of creative control and decision-making in the production of the Work."[202] One important point to keep in mind is that this Complaint was filed before the aforementioned January 2025 Report on copyright and AI by the Copyright Office,[203] but that report is not the law itself. Mr. Allen asserts that "descriptions of thematic elements, adjustments of color palette, fine-tuning of the balance between abstraction and realism, iterating on textures . . . reflect[] the artists' unique vision . . . resulting in a work that directly manifests their artistic vision."[204] This argument is reminiscent of what was discussed in *Burrow-Giles*.[205] If Mr. Allen was successful in "evoking the desired expression,"[206] then he should receive copyright protection for that expression. However, at this stage it is unknown whether he was truly successful in that aspiration and how clear the desired expression must be. Given the Copyright Office's refusal to copyright the piece and the Report, their stance seems steadfast—that Mr. Allen did not author the Work.

V. THE FACT-LAW DISTINCTION IN AUTHORSHIP

The question of authorship in AI-assisted works forces courts to confront directly whether the issue is one of fact, law, or both. The Copyright Office has treated it as a case-specific inquiry,[207] but that

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[198] *Id.* ¶ ¶ 55, 58.

[199] *Id.* ¶ 25.

[200] *Id.* ¶ 45; *see also* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [or] capricious . . . .").

[201] There is a brief argument for originality in Complaint, *supra* note 188, at 16–17, but this will likely not be in dispute in this case.

[202] *Id.* ¶ 51.

[203] *See generally* COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2, *supra* note 34 (explaining the Office's stance on AI's impact on Copyright Law).

[204] Complaint, *supra* note 188, ¶ 56.

[205] *See supra* Part I.A (discussing the human-authorship requirement in copyright law and the Copyright Office's APA-governed role in administering and reviewing copyright claims).

[206] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884).

[207] *See* COPYRIGHT AND ARTIFICIAL INTELLIGENCE PART 2, *supra* note 34, at iii ("Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.").

view risks inconsistent adjudications.[208] Like fair use and non-obviousness, authorship involves factual underpinnings, yet the ultimate determination is legal. Treating the issue as mixed but predominated by law allows significant and salient inquiries by the factfinder that the whole case might hinge on. It also permits cases to be decided at the summary judgment phase because in obvious cases, the court could decide them as a matter of law. In these instances, it would be clear given the undisputed facts on the record that the human contribution did not rise to the requisite threshold. For example, if the author claimed AI created the work "autonomously."[209] Most cases, however, will lie in a penumbral area, where hard factual inquiries may make-or-break the case.

In what follows, this Note argues that, under the aforementioned principles of competence and scope, the courts should both define the threshold of authorship and determine when that threshold has been satisfied. The Note then applies the classification to the *Allen* case and explains the impact of *Loper Bright.*

A. *A Mixed Question*

Authorship in the age of AI is best understood as a mixed inquiry, but one predominated by law. Of course, an authorship determination requires factfinding: what the claimant contributed, how many prompts were used, whether the editing process reflected creative judgment, and whether the final product embodies a human vision. These questions are fact intensive and must be answered in every case. Yet the factual record is only the beginning. The decisive question is whether those contributions cross the threshold for "authorship" under the Copyright Act and the Constitution. And that inquiry is a legal one because judges are better positioned to answer the final question and the answer should impact more than just the particular case.

First, from the competence standpoint, considering who is best poised to answer the final question, "subjective judgments based on peoples' experiences and perceptions of the world" should be left to the fact finder.[210] With respect to this issue, however, perception is not the end-all-be-all. The judge is better positioned because the

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[208] For example, the fact that "A Single Piece of American Cheese" was accepted, but "Theatre D'Opera Spatial" was not.

[209] *See, e.g.*, Thaler v. Perlmutter, 687 F. Supp. 3d 140, 143 (D.C. Cir. 2023) (where the plaintiff in the case stated on the record that the image was generated "autonomously" by AI).

[210] Reytblat, *supra* note 92, at 197.

inquiry is not limited to assessing facts but requires interpreting the legal concept of authorship.

Authorship is a constitutional and statutory term of art, not a layman's label. Determining whether a claimant's contributions amount to authorship demands consideration of policy, congressional intent, and consistency across cases. In other words, the primary work is legal. Considering this point in the context of copyright infringement helps to further understand this issue. Assuming Mr. Allen received a copyright and believed someone was infringing his right (as many people are actively using his image without a license), he could sue them. In the course of that litigation, the defendant would argue that the copyright is not valid or should not have been granted because it was not *authored* by Mr. Allen. The court would then have to decide on this issue, which would require them to define what the threshold for the author is and whether it has been met given the facts.

Moreover, when we contemplate who is most likely to be consistently "right," it is worthwhile to think about what it means to be right in this context. Copyright law is designed to protect expression for the purpose of cultural progress. To be right, in the context of an authorship determination, is to uphold copyright in works of expression and to deny copyright to unexpressive works. It is also to understand underlying policy rationales and interpret constitutional and congressional intent. Being "right" may involve balancing countervailing interests, a historically judicial job.

And second, from the scope perspective, just as in fair use determinations, similar questions will inevitably repeatedly arise. If authorship is treated as a purely factual matter, each case would stand alone, insulated from meaningful appellate review under a "clearly erroneous" standard. The result would be a patchwork of inconsistent outcomes, where two claimants with virtually identical processes could receive opposite answers depending on the jury,[211] the examiner, or the jurisdiction. That instability undermines the predictability on which copyright depends. At the same time, authorship should not be defined with mechanical rigidity, as though one set of steps will always suffice or never suffice. Instead, there must be a degree of generality to ensure that like cases are treated alike, but flexible enough to allow courts to account for factual variation at the margins. By treating authorship as a mixed inquiry predominated by law, courts can strike

[211] In copyright infringement cases.

that balance: factfinders develop the evidentiary record, but judges provide the consistent and principled framework that ensures the law evolves coherently across cases.

It seems most prudent to treat the question as mixed in a similar way to both fair use and non-obviousness, where significant evidentiary underpinnings can be quite persuasive, but the court decides whether those facts clear the legal threshold.[212] This approach provides a harmonious integration of distinct benefits. It places the burden of showing human contribution squarely on the claimant; it allows the Copyright Office to process registrations more consistently through standardized declarations; it ensures that courts can resolve weak claims at summary judgment when the legal threshold is not met; and it limits the Office's role to fact evaluation while leaving the legal standard to the courts. Although it may not yield immediate consistency, over time, precedent will gradually establish a more stable framework. When the case is obvious, it can end at the summary judgment phase or even be dismissed before discovery. For example, if the user did nothing but supply AI with a singular and simple prompt and attempted to claim a copyright for the corresponding image. Likewise, on the other side of the spectrum, if AI was used to proofread a manuscript for spelling and grammar, there would be no question that the manuscript was "authored," and a copyright exists. Most claims, however, will fall in the penumbra, requiring careful factfinding that is then assessed against a legal standard set by courts.

B. *Application to* Allen v. Perlmutter

Allen provides a perfect application to the distinction. There may be many undisputed facts in the case: for example, what the original image generated looked like,[213] the number of prompts Mr. Allen used to generate the initial image, the amount of editing he did afterward, and many others. However, there remain material questions of fact. Is Mr. Allen's final work what he set out to express? Did he demonstrate sufficient control? To answer these questions, a factfinder would need to hear from Mr. Allen and what he has to say. Perhaps he can explain precisely what he had in mind and, depending on whether the factfinder believes him and finds him credible, the answers could flip either way. The main question of law is whether the level of human

[212] *See supra* discussion in Parts III.A.2, III.B.1 (explaining fair use as an ultimately legal inquiry informed by underlying factual considerations).

[213] *See* App. Ex. 2 *infra* p. 903 (showing the original image generated by Midjourney).

contribution rose to the threshold for the work to constitute a "writing" and for the user to constitute an "author."

The problem with treating the entire issue as one of fact is massive inconsistency in results. Whether the factfinder trusts what Mr. Allen is saying and whether the evidence in the record indicates that the final work represented his original expression will be different in every case. The same facts can lead to different verdicts, with jury findings in opposite directions. On the other hand, if the matter were considered entirely one of law, a main function of the Copyright Office would be questioned and effectively extinguished[214] and courts could easily be misguided in situations where there is a fact-intensive scenario that requires resolution through clear fact-finding.

C. *The Echo of* Loper Bright

This classification directly implicates *Loper Bright*. If authorship were purely factual, reviewing courts would accept Copyright Office denials so long as they were not arbitrary or capricious. Where there is no question of fact, *Chevron* would never have applied, and its demise would be irrelevant. But because authorship is law-predominated, courts may not defer to the Office's interpretation. Before *Loper Bright*, the *Allen* case would likely have been closed the moment the Office declared that prompts are insufficient,[215] with *Chevron* forcing courts to accept that view so long as it was reasonable.[216] After *Loper Bright*, however, the opposite is true, and courts must engage with the question of authorship for themselves, at most treating the Office's reasoning as persuasive.[217]

The change is not only procedural, but it also reallocates institutional power. The Office continues to provide a factual record, but its views on what qualifies or defines an author no longer control.

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[214] This is something that the Court in *Graham* was cautious of with respect to the Patent Office. "While we have focused attention on the appropriate standard to be applied by the courts, it must be remembered that the primary responsibility for sifting out unpatentable material lies in the Patent Office." Graham v. John Deere Co., 383 U.S. 1, 18 (1966). If *Allen* were to be heard by the Supreme Court, this is something they too might be mindful of with respect to the Copyright Office. Even treating the issue as mixed risks this to some extent as well.

[215] In fact, Mr. Allen may have never filed the original complaint if *Chevron* were not reversed.

[216] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[217] *See generally* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . .").

Instead, courts must articulate the legal standard by drawing on constitutional text, statutory structure, and precedent. That shift is crucial in the AI context, where thousands of claims will turn on similar questions. If courts treat authorship as law-predominated, they can build a coherent body of doctrine through judicial opinions, rather than allowing the Office to shape the law indirectly through registration denials. In other words, *Loper Bright* ensures that authorship is defined through visible, precedential reasoning, not opaque administrative practice.

D. *Verdict*

The outcome in *Allen* will likely turn on how the court frames the balance between fact and law. Mr. Allen has argued, citing *Loper Bright*, that the Copyright Office is entitled to no deference in defining "author."[218] He also contends that *Skidmore* is not applicable, but it remains available to the Court. Under *Skidmore*, the persuasiveness of the Office's position depends on the thoroughness of its consideration, the validity of its reasoning, and the consistency of its treatment over time.[219] Applied here, those factors are mixed. The Office has institutional expertise in copyright registration, but its guidance has been framed in "case-by-case" terms that resist principled generalization, with its reasoning often emphasizing policy over statutory interpretation, and its positions shifting as new controversies arise. These weaknesses make its guidance less persuasive than in many other areas of copyright law, but they do not foreclose the possibility that a court will cite it as informative background, even while developing the legal standard independently.

While Mr. Allen's arguments are persuasive that the final image is the one he had in his mind from the beginning, it seems unlikely that a factfinder would agree. The argument that the 624 prompts indicate that Mr. Allen had a vision he was attempting to make Midjourney realize is strong, but it fails to consider the tainted lens of seeing the initial image. Consider how a reader naturally develops a mental image of a character or environment from a novel. A subsequent film adaptation often overwrites and distorts that original mental image. Similarly, Midjourney's rendering of a concept can overwrite an original vision. Thus, the factfinder may or may not agree that Mr. Allen's original conception is the one Midjourney

[218] Pet'r's Mem. Supp. Summ. J., *supra* note 148, at 16.
[219] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

generated. Consequently, the collection and organization of the creative process as evidence of authorship is becoming increasingly important.[220]

Naturally, this is a close case. But given the twist that occurred when the Copyright Office registered the very first AI-generated image, it seems likely that the Court may overturn the Office's action.[221] However, in either scenario, this may not mark the end of litigation. The Office (or Mr. Allen), if desired, could appeal to the 10th Circuit, which may yield a similar result. Finally, they could file a writ of certiorari to the Supreme Court, who may be interested in making sweeping statements about authorship, the copyrightability of AI-generated content, and even the role of the Copyright Office moving forward.

CONCLUSION

The Constitution explicitly protects the "author," making this principle fundamental to copyright protection. Nevertheless, defining what qualifies as an author remains fuzzy. In today's world, where AI is widely used—including by artists—it is crucial to draw a line between employing AI as a tool to assist in creating an image and merely prompting AI to generate one. Under the current interpretation of authorship, which requires a *human* author, the former would be eligible for copyright protection, while the latter would not. In an effort to clarify where this line may lie, the Copyright Office

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[220] *See, e.g.*, Vincent Fachoux, *Artificial Intelligence and Copyright: The Invoke Decision and "A Single Piece of American Cheese", A Landmark Decision by the U.S. Copyright Office?*, DDG (Mar. 14, 2025), http://ddg.fr/actualite/artificial-intelligence-and-copyright-the-invoke-decision-and-a-single-piece-of-american-cheese-a-landmark-decision-by-the-u-s-copyright-office ("It is therefore now recommended that companies methodically organise the collection of evidence throughout the creative process . . . .").

[221] *See supra* notes 86–90 and accompanying text (discussing this notion). Copyright Office Registration VAU001543942, "A Single Piece of American Cheese" (Jan. 30, 2025), *see* App. Ex. 2 *infra* p. 903 (showing the original image generated by Midjourney). There are not details about why this particular image was eligible, but Mr. Allen's was not. The fact that it was, however, lends credence to the idea that the standard is ambiguous and likely varies depending on the examiner at the Copyright Office. One interesting possible explanation for the discrepancy, which the Office will likely argue to distinguish Mr. Allen's image from the one they registered, is the difference in how the tools are advertised. Invoke AI specifically boasts in multiple areas on their home page that it gives artists "control" over the works. *See* INVOKE, invoke.ai (last visited Mar. 1, 2026). Midjourney, on the other hand, does not mention control anywhere on their home page. Given the relationship between control over the work and authorship, the Office may believe Keirsey proved his control over the work better than Mr. Allen. It is also worth mentioning that while the claimant seemed to disclaim the AI-generated parts of the work, it is not clear how, in an image, that is functionally distinct from registration of the entire work.

published a report on the issue. This report serves only as guidance to Congress and does not carry the force of law, but it does explain how they will evaluate copyright registrations that use AI. It also only contained one bright line—prompts alone will not be sufficient.

Yet, at the heart of this question is another: who should decide where that line is? In other words, what is the nature of the question—one of fact, one of law, or a mix? Bearing in mind that there is "[no] rule or principle that will unerringly distinguish a factual finding from a legal conclusion,"[222] this Note proposes the nature to be mixed but predominated by law. It paints the judge as ultimately deciding whether the authorship line has been crossed but factually underpinned by inquiries into the amount of human contribution and the insights into the user's mind. This approach provides a larger degree of flexibility, accuracy, and consistency. It further leads to some judicial efficiency because some cases will be able to be dealt with easily at the summary judgment phase (or even before).

In view of *Loper Bright*, the ramifications of this typology are glaring. Considering cases like *Allen v. Perlmutter*, reviewing courts need not show deference to the Copyright Office on this ultimate question. Perhaps the factual inquiries may not be questioned,[223] but because the issue is one predominated by law, the reviewing court can still reverse an agency's decision as a matter of law. Manifesting this result in *Allen*, the reviewing court will likely reverse the Office's decision, finding a valid copyright in Mr. Allen's work. The cart may not stop there, however, as this case is ripe for the Supreme Court to weight in. And given this Court's disposition towards federal agencies, it seems more than possible that they are interested in voicing an opinion and clarifying this rapidly developing issue.

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[222] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[223] According to the Administrative Procedure Act, "the facts are subject to trial de novo . . . " when the agency action is "unwarranted by the facts . . . ." 5 U.S.C. § 706(f); *see also* CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA), https://crsreports.congress.gov/product/pdf/LSB/LSB10558# (last updated Sep. 16, 2024) (explaining the two limited cases when reviewing courts may review factual determination de novo: "(1) when the action is adjudicatory in nature and the agency factfinding procedures are inadequate; and (2) when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action") (citation omitted) (internal quotation marks omitted).

APPENDIX

Exhibit 1: "Theatre D'Opera Spatial"

Exhibit 2: Original Image Generated by Midjourney

Exhibit 3: "A Single Piece of American Cheese" (Left: originally generated image; Right: final copyrighted image).