

IN THE  
**Supreme Court of the United States**

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CHAPMAN KELLEY,

*Petitioner,*

*v.*

CHICAGO PARK DISTRICT,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF INTELLECTUAL PROPERTY LAW  
ASSOCIATION OF CHICAGO AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE BRIEF OF  
INTELLECTUAL PROPERTY LAW  
ASSOCIATION OF CHICAGO AS *AMICUS  
CURIAE* IN SUPPORT OF PETITIONER**

The Intellectual Property Law Association of Chicago (sometimes "IPLAC") respectfully moves the Court for leave to file an *amicus curiae* brief in support of the petitioner and the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

This motion is filed although not favored, because counsel of record received timely notice of the intent to file the brief and counsel for the Chicago Park District refused to give consent to the filing of the brief.

Leave should be granted so that the *amicus curiae* brief may bring to the attention of the Court relevant matter not already brought to the attention of the Court by the parties, matter that the respondent, the Chicago Park District, also will not bring to the attention of the Court, matter that may be of considerable help to the Court. The matter is relevant because it reflects that the Seventh Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court, has decided an important question of federal law that has not been, but should be, settled by this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

The matter to be brought to the attention of the Court is stated in the brief that is filed as one document with this motion. Briefly, certiorari should be granted because, just as this Court accepted the patent case *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), to resolve that patents could issue on life forms – “anything under the sun that is made by man” – the Court should accept this copyright case to resolve that copyrights may exist on living works made by man. As well, certiorari should be granted because the decision is based on faulty logic and reaches a faulty conclusion of national importance to a variety of industries.

That is, the decision of the Court of Appeals in this case is at odds with a proper scope for copyright law and a proper approach to its decision. It resolves against copyrightability because of the use of natural starting materials as the subject of a work and despite acknowledgement that the creator of the work contributed to the ultimate work. It also resolves against copyrightability because of difficulty of decisionmaking, rather than by analysis on the merits. The first resolution – against copyrightability because of the use of natural starting materials - is at odds with a proper scope for copyright law, and in conflict with *Diamond v. Chakrabarty*, and the second is at odds with a proper approach to court decisionmaking, and a departure such as to call for exercise of this Court’s supervisory power.

The scope of subject matter for copyright should be as wide as the scope of subject matter for patent, “anything under the sun made by man.” The decisions of the courts should be on the merits in spite of difficulty of decisionmaking.

Respectfully submitted,

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August 24, 2011

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**BRIEF OF INTELLECTUAL PROPERTY LAW  
ASSOCIATION OF CHICAGO AS *AMICUS  
CURIAE* IN SUPPORT OF PETITIONER**

*Amicus curiae* the Intellectual Property Law Association of Chicago respectfully supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.<sup>1</sup>

Founded in 1884, the Intellectual Property Law Association of Chicago is a voluntary bar association of over 1,000 members who practice with patents, trademarks, copyrights, trade secrets and the legal issues they present. IPLAC is the country's oldest bar association devoted exclusively to intellectual property matters. In litigation, IPLAC's members are split about equally between plaintiffs and defendants. Its members include attorneys in private and corporate practice before federal bars throughout the United States, as well as the U.S. Patent and Trademark and Copyright Offices. As part of its central objectives, IPLAC is dedicated to aiding in the development of the intellectual property law, especially with the federal courts.

Certiorari should be granted because, just as this Court accepted the patent case *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) to resolve that patents could issue on life forms – “anything under the sun that is made by man” – the Court should

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for a party did not author this brief in whole or in part, and no one made a monetary contribution intended to fund the preparation or submission of the brief.

accept this copyright case to resolve that copyrights may exist on living works made by man. As well, certiorari should be granted because the decision is based on faulty logic and reaches a faulty conclusion of national importance to a variety of industries.

That is, the decision of the Court of Appeals in this case is at odds with a proper scope for copyright law and a proper approach to its decision. It resolves against copyrightability because of the use of natural starting materials as the subject of a work and despite acknowledgement that the creator of the work contributed to the ultimate work. It also resolves against copyrightability because of difficulty of decision making, rather than by analysis on the merits. The first resolution – against copyrightability because of the use of natural starting materials – is at odds with a proper scope for copyright law, and the second is at odds with a proper approach to court decision making.

IPLAC would suggest the Court answer the questions presented by the petitioner as follows:

Question 1. Whether an original work of art that incorporates living elements is “unauthored” and thus not protected under the Copyright Act.

Answer: No, an original work of art that incorporates life forms and has admitted creative spark, is indeed authored, and subject to copyright, even in the case of a garden.

This should be the decision to preserve the proper scope of copyright consistent with the proper scope of patent. Thus, the petition should be granted

and the decision of the Court of Appeals that is opposite should be reversed.

Question 2. Whether an original work of art that incorporates living elements can be "fixed" for the purposes of protection under the Copyright Act.

Answer: Yes, an original work of art that incorporates life forms and is admittedly tangible and perceptible is fixed, and subject to copyright, even in the case of a garden.

This should be the decision to preserve the proper analysis of fixation across a variety of industries. Thus, the petition should be granted and the decision of the Court of Appeals that is opposite should be reversed.

**I. This Court Accepted the Patent Case *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) to Resolve that Patents Could Issue on Life Forms**

Chakrabarty, a microbiologist, filed a patent application related to his invention of a human-made, genetically engineered bacterium. It was capable of breaking down multiple components of crude oil, a property not possessed by any naturally occurring bacteria.

Chakrabarty had patent claims directed to the new bacteria themselves. The Patent Office refused the claims for the bacteria, on the ground that as living things bacteria are not patentable subject matter under 35 U.S.C. § 101.

Chakrabarty appealed to the Court of Customs and Patent Appeals, which reversed, on the authority of a decision in *In re Bergy*, 563 F.2d 1031, 1038 (C.C.P.A. 1977), which held that "the fact that microorganisms . . . are alive . . . [is] without legal significance" for purposes of the patent law.

Subsequently, this Court granted a petition for writ of certiorari from the Acting Commissioner of Patents and Trademarks in *Bergy*, vacated the judgment, and remanded. 438 U.S. 902 (1978). The Court of Customs and Patent Appeals then vacated its judgment in *Chakrabarty* and consolidated the case with *Bergy* for reconsideration. After re-examining both cases, that Court reaffirmed its earlier judgments. 596 F. 2d 952 (C.C.P.A. 1979).

The Commissioner of Patents and Trademarks again sought certiorari, and this Court granted the writ as to both *Bergy* and *Chakrabarty*. 444 U.S. 924 (1979). *Bergy* was then dismissed as moot, 444 U.S. 1028 (1980), leaving *Chakrabarty* for decision.

This Court resolved that the Constitution grants Congress broad power to legislate to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Turning to the patent laws, the Court stated that these laws promote this progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480-481 (1974); *Universal Oil Co. v. Globe Co.*, 322 U.S. 471, 484 (1944). The authority of Congress is exercised in the hope that "[t]he productive effort thereby fostered

will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens." *Kewanee*, 416 U.S. at 480.

The question before the Court, the Court resolved, was a narrow one of statutory interpretation, of 35 U.S.C. § 101, whether Chakrabarty's micro-organism constituted a "manufacture" or "composition of matter" within the meaning of the statute.

The Court resolved the micro-organism did constitute a manufacture and composition of matter – a product of human ingenuity. It cited the language of the statute, canons of construction, legislative history, the philosophy of Thomas Jefferson, and the Committee Reports accompanying the 1952 Patent Act. The Reports informed the Court that Congress intended statutory subject matter to "include anything under the sun that is made by man." Chakrabarty's bacteria were "not nature's handiwork, but his own," and accordingly, proper subject matter for a patent.

**II. Just as This Court Accepted *Diamond v. Chakrabarty*, This Court Should Accept This Case to Resolve that Copyrights May Exist on Living Works Made by Man**

**A. *Copyrightability Should Extend to All Works that Include Natural Starting Materials and Include some Contribution by an Author***

Just as with *Chakrabarty*, this case presents a narrow issue. Just as with *Chakrabarty*, the issue is statutory interpretation. Just as with *Chakrabarty*, the issue is whether a product of human ingenuity can constitute proper subject matter for a legal system Congress set in place pursuant to its Constitutionally-granted broad power to legislate to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. And just as with the patent law in *Chakrabarty*, the copyright law promotes this progress by offering authors exclusive rights for a limited period as an incentive for their creative efforts. The authority of Congress is surely exercised as much as to copyrights as to patent in the hope that the productive effort thereby fostered will have a positive effect on society through the introduction of new works into the economy, and the emanations by way of increased employment and better lives for our citizens.

Just as with Chakrabarty's living subject matter of invention, the result of this case should be the recognition of the propriety of a property right in Kelley's living subject matter of copyright. There is no logical difference between living subject matter of invention being patentable, and living subject matter of copyright, even gardens, being copyrightable.

Indeed, the scope of the Copyright Act is no less expansive than the scope of the Patent Law. The Copyright Act provides in relevant part: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). There is no limit in this statute against living subject matter of copyright. "Copyright protection subsists . . . in any tangible medium of expression, now known or later developed . . ." Surely these words speak broadly to include living subject matter within copyright.

Even the Court of Appeals had to conclude that Wildflower Works possessed the necessary "creative spark" to constitute an original work, *Kelley v. Chicago Park Dist.*, 635 F.3d at 302-3 (7th Cir. 2011) (Pet. App. 30a-32a), and was "tangible and [could] be perceived for more than a transitory duration," 635 F.3d at 305 (Pet. App. 36a). That should have been enough analysis for Wildflower Works to have been found the proper subject of copyright. "The *sine qua non* of copyright is originality." *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). A copyrighted work must be "original to the author," the person who contributed the original ideas or

creativity. *Id.* While a work must also be sufficiently fixed in a tangible medium such that it can be perceived by a viewer, see 17 U.S.C. § 101, this Court has repeatedly construed originality, authorship and fixation in relation to one another and perhaps even collapsed them into a single concept, as the Court of Appeals itself acknowledged. 635 F.3d 290, 303 (7th Cir. 2011) (citations omitted) (Pet. App. 33a). Therefore, authorship and fixation are subsumed into the test for originality, and the decision of the Court of Appeals was an improper decision against originality, in spite of its finding of a creative spark and adequate originality.

The medium used – living material – in expressing artistic expression was not even a proper basis to deny VARA<sup>2</sup> protection, let alone the more expansive protection afforded under copyright law. As H.R. Rep. 101-514, H.R. Rep. No. 514, 101st Cong., 2nd Sess., 1990 U.S.C.C.A.N. 6915 (Leg. Hist.) stated, “[a]rtists may work in a variety of media, and use any number of materials in creating their works. Therefore, whether a particular work falls within the definition should not depend on the medium or materials used.”

As petitioner explains at length, the Copyright Office itself already recognizes that authorship, fixation, and hence copyright protection, can exist as to works based on living subject matter, such as arrangements of flowers and fruit (petitioner’s cited “Berry bouquet,” Reg. No. VA0001021475; “Blooming daisies,” Reg. No. VA0001021473; “Delicious

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<sup>2</sup> Visual Artist Rights Act of 1990.



celebration," Reg. No. VA0001021474; "Delicious fruit design," Reg. No. VA0001021472; and "Hearts and berries," Reg. No. VA0001021476).

Indeed, there really can be no doubt that Wildflower Works is a copyrightable work of authorship as such terms are reasonably, widely understood. The Chicago Park District itself conceded that Wildflower Works was both a sculpture and a painting. 635 F.3d at 300 (Pet. App. 26a-27a). Confirming this concession, in a November 1985 letter, the Mayor of Chicago expressed that Mr. Kelley had provided the city with "a magnificent piece of *art*." Pet. App. 9a, C.A. App. 28 (emphasis added). The Illinois Senate passed a resolution praising Wildflower Works and stating that Mr. Kelley had "transformed Chicago's Grant Park into a showcase for a new form of living *art*." Pet. App. 9a, C.A. App. 17-18 (emphasis added). The *New York Times* praised Wildflower Works and Mr. Kelley in its article "Wildflowers as *Art* for a Chicago Park." Pet. App. 47a (emphasis added).

***B. A Decision Against Copyrightability  
Should Not Have Been Made Simply  
Because the Decision Is Difficult on the  
Courts***

As will be explained next, the anticipation of the Court of Appeals that a decision other than the decision it reached would unleash great difficulties upon the courts was overblown. Regardless, the decision should not have been made on the basis of alleged difficulties of decision instead of by decision on the merits. The decision of *Chakrabarty* was no

less difficult, and indeed, arguably quite more difficult, than the decision here. *Chakrabarty* involved the high science and religious and political disputations of biotechnology – the high science and disputations associated with the splicing of genes into a natural living thing, and the human assumption of the power to create new living things – while this case concerns a garden. Anticipated difficulty of decisionmaking by future courts was hardly a reasonable basis of decision. Astonishment with a party's omission, 635 F.3d at 300 (Pet. App. 26a-27a), was also hardly a reason to construct an unasserted basis of decision. The case should have been decided on its merits.

### **III. As Well, Certiorari Should Be Granted Because the Decision Is Based on Faulty Logic and Reaches a Faulty Conclusion of National Importance to a Variety of Industries**

The specific logic of the decision to be reviewed is that all gardens lack for authorship and appropriate fixation because they are assertedly all subject to difficult questions, stated as follows, at the crux of decision, 635 F.3d at 305 (Pet. App. 36a):

If a garden can qualify as a “work of authorship” sufficiently “embodied in a copy,” at what point has fixation occurred? When the garden is newly planted? When its first blossoms appear? When it is in full bloom? How – and at what point in time – is a court to determine whether infringing copying has occurred?

These questions are assertedly difficult because of this alleged essence of all gardens, *id.*:

... Seeds and plants in a garden are naturally in a state of perpetual change; they germinate, grow, bloom, become dormant, and eventually die. The essence of a garden is its vitality, not its fixedness. It may endure from season to season, but its nature is one of dynamic change.

***A. The Decision Is Illogical In Relation to the Reality of Wildflower Works and Gardens***

The logic of these questions and the alleged essence of all gardens is faulty, however, because the questions and alleged essence of gardens ignore the reality of gardens, and ignore their reality in relation to the context of the variety of human endeavors within which they fit, that are certainly capable of authorship and copyright fixation.

First, even if grown with blooms, indeed intended for blooms, gardens are not without their fixation as gardens are reasonably understood. The Chicago Park District itself expressed its understanding of when and in what condition Wildflower Works would be fixed, when it said, in its press release: “[o]nce the ovals mature, the results will be two breathtaking natural canvases of Kelley-designed color patterns.” 635 F.3d at 293 (Pet. App. 8a).

Second, all gardens are not as changeable as asserted. Gardens are not necessarily grown from

seeds or immature plants. Wildflower Works was not grown from seeds, but from plugs. *Id.*

Indeed, other gardens are frequently planted with full grown plants, not even the immature. Even mature trees as tall as thirty feet are now suitable for planting, as the technology of tree spades has made such transplanting possible. See, e.g., <http://www.popularmechanics.com/home/improvement/lawn-garden/1273551>.

All gardens are also not necessarily blooming gardens. Gardens are frequently planted with non-blooming plants. For example, ferns and pine trees are commonly known non-blooming plants. Fern gardens are commonly known gardens. See, e.g., [http://www.ehow.com/how\\_7628730\\_design-plant-fern-garden.html](http://www.ehow.com/how_7628730_design-plant-fern-garden.html). Tree collections are well known, see, e.g., <http://www.mortonarb.org/tree-collections.html>, and can include evergreen trees such as arborvitae. *Id.* Trees, of course, can exist in their maturity for decades and centuries. Evergreen bonsai in Japanese gardens are hardly subject to much change ever. Much of the gardens of Versailles as seen today are as they were in the 1600s, with their permanently cropped trees, consistently trimmed hedges, and carefully tended lawns.

As well, not all gardens germinate, grow, bloom, become dormant and die. Gardens are frequently planted without germination, pruned against growth, exist without blooms, and remain in relative constant states for long terms without dormancy or death. Conservatories with indoor gardens typically prune and protect portions of their gardens for near permanent displays. Even common plants in containers and terrariums can be pruned, even in

their roots, to maintain their size. See, e.g., <http://containergardening.about.com/od/containergardening101/f/Rootpruning.htm>.

***B. The Decision Reaches a Faulty Conclusion of National Importance to a Variety of Industries***

As petitioner points out well as to photography, the fact that a work of authorship can incorporate and be predominated by natural elements, and be fixed even if caused to change by outside influences, is evident in a variety of national realms. As petitioner notes, in the realm of photography, humans, animals and plants are indisputably the subjects of works that are subject to copyright protection. There is no real difference between the originality expressed by the authors of photographs of life forms and Kelley's use of flowering life forms in his art.

Consider the national videogame industry. There, a video game's "play mode" is continually changing in nature due to the actions of its players. *Williams Elecs., Inc. v. Artie Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982). They interact with the games, changing the audiovisual presentations from one play of the games to the next play. *Id.* However, that does not make a video game any less a fixed and authored work subject to copyright. *Williams*, 685 F.2d at 874.

Consider also the national software industry, There, software is stored only temporarily in RAM before giving way to free space. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993), *rev'd on other grounds, eBay, Inc. v.*

*MercExchange, L.L.C.*, 547 U.S. 388 (2006). When the computer of the RAM is shut down, the software in the RAM is lost. *Id.* Nevertheless, the software is sufficiently fixed to be copyrightable. *Id.* at 518. To the same effect is *Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 101 (D.C. Cir. 1998).

Indeed, software sometimes exists only temporarily in electronic form while the author revises it. See *SimplexGrinnel LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206, 208-09 (S.D.N.Y. 2009). Still, it is subject to copyright.

Consider further the burgeoning biochip industry. See, e.g., <http://en.wikipedia.org/wiki/Biochip>. Living material is used as the input to integrated electronic analytical elements. *Id.* Computer software is included. Cancer diagnosis through DNA typing is just one market. *Id.* A variety of industries want the ability to simultaneously screen for a wide range of chemical and biological agents. *Id.* Their purposes include but are not limited to testing public water systems for disease agents to screening airline cargo for explosives. *Id.* The software involved is no less copyrightable because living materials are involved.

These illustrative national industries and similar others depend heavily on copyright for protection, where either or both of life forms as starting materials or transitory fixations are involved. Unfortunately as to these important industries, the decision of the Court of Appeals introduces faulty conclusions as to copyrightability and fixation with grave potential to propagate and undermine the ability of the law to protect the works that it should protect. To aid these industries, and

not undermine them, the decision of the Court of Appeals should not stand.

**CONCLUSION**

*Amicus curiae* the Intellectual Property Law Association of Chicago agrees with the petitioner; the petition for a writ of certiorari should be granted. The scope of subject matter for copyright should be as wide as the scope of subject matter for patent, "anything under the sun made by man."

Respectfully submitted,

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