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Function over Form: Bringing the Fixation Requirement into the Modern Era

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ARTICLES

FUNCTION OVER FORM: BRINGING THE FIXATION REQUIREMENT INTO THE MODERN ERA

Megan Carpenter & Steven Hetcher***

This Article examines the ways that contemporary creativity challenges copyright's fixation requirement. In this Article, we identify concrete problems with the fixation requirement, both practically and in light of the fundamental purpose and policy behind copyright law, and argue for a change that would amend the fixation requirement to better function in the modern era.

Specifically, we conclude that a fair appraisal of the justifications for the fixation requirement provides little, if any, rationale for fixation except to the extent that fixation helps to separate idea from expression in determining the "metes and bounds" of creative expression. Recent case law analyzing the transitory works exclusion in particular demonstrates that this component of the fixation requirement has become an ineffective demarcation of what it means to fix a work in the modern era and provides little guidance for statutory interpretation. We reason that dropping the transitory duration exclusion for copyrightability would enable fixation to serve its essential purpose while not discriminating against important strains of contemporary creativity. Furthermore, removing the transitory works exclusion would better equip copyright law to reflect the purposes of the Intellectual Property Clause in the U.S. Constitution. Despite these considerations, if dropping the exclusion for transitory works is not practically feasible, we argue that it is nevertheless desirable to allow a flexible interpretation of statutory language in light of the purposes of copyright and allow transitory works to come into a safe harbor from the general fixation requirement for copyrightability under the aegis of the Visual Artists Rights Act.

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There is a tension between the law and the evolution of ideas in modern or avant garde art; the former requires legislatures to taxonomize artistic creations, whereas the latter is occupied with expanding the definition of what we accept to be art. . . . In other words, the “plain and ordinary” meanings of words describing modern art are still slippery.¹

Judge David H. Coar

INTRODUCTION

Art is an important aspect of human creativity. As such, and as recognized in the Intellectual Property Clause of the U.S. Constitution, copyright has long sought to promote the creation of artistic works. This proposition seems beyond cavil. It is generally agreed that the purpose of copyright is to encourage creation. The U.S. Supreme Court has noted that the “philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”² Indeed, it takes someone trained in copyright law not to suppose naturally that art should be one of copyright’s main priorities, since it is conventional to think of art as socially beneficial. Great artists are celebrated, and many people expend significant effort to personally experience their works.

Art has been federally funded in the United States since the Great Depression, when Franklin Delano Roosevelt created the Public Works of Art Project and the Federal Art Project, which provided jobs for artists until the beginning of World War II.³ In 1965, Congress created the National Endowment for the Arts, which has given more than \$4 billion in grants to arts organizations.⁴ Support for the arts remains alive and well today. At the 2009 reopening of the American wing of the Metropolitan Museum of Art, First Lady Michelle Obama urged,

The arts are not just a nice thing to have or to do if there is free time or if one can afford it. Rather, paintings and poetry, music and fashion, design and dialogue, they all define who we are as a people and provide an account of our history for the next generation.⁵

Art displays constantly changing norms. There is a general trend to expand the genres and media in which artists create further and further away from paint on a canvas. Each new era of art has pushed the

1. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *4 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part*, 635 F.3d 290 (7th Cir. 2011).

2. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting U.S. CONST. art. I, § 8, cl. 8).

3. MARTIN R. KALFATOVIC, *THE NEW DEAL FINE ARTS PROJECTS: A BIBLIOGRAPHY, 1933–1992*, at xxi–xxv (1994).

4. See National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845, 846–47 (codified at 20 U.S.C. §§ 951–960 (2012)); *About the NEA, NAT’L ENDOWMENT ARTS*, <http://www.nea.gov/about/index.html> (last visited Mar. 25, 2014).

5. Michelle Obama, Remarks by the First Lady at the Ribbon Cutting Ceremony for the Metropolitan Museum of Art American Wing (May 18, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-first-lady-ribbon-cutting-ceremony-metropolitan-museum-art-american-wing>.

boundaries of both viewers' diverse tastes and the law responsible for protecting those tastes. Since the impressionist era, artists have developed new movements in art, including expressionism, cubism, fauvism, surrealism, abstract expressionism, and postmodernism.⁶ Artists affiliated with these twentieth century movements rejected representation and instead produced images whose subjects were less easily identified.⁷ Late twentieth-century and present-day artists have, however, shifted back towards recognizable content displaced into new contexts.⁸ Appropriation and conceptual works often intend to depict commonplace images whose meaning depends on the viewer's response to these sorts of images.⁹ Many recent important pieces challenge traditional notions of museum display.¹⁰

The "essential fairness of copyright law" reflects a sense that creative works equally deserve protection from unauthorized copying.¹¹ However, as Charles Cronin has noted, "Since the late nineteenth century, when Impressionist painters challenged established tenets of Western art, works associated with many artistic movements that followed have . . . become increasingly problematic in terms of eligibility for copyright protection under U.S. law."¹² This is especially true for contemporary art that includes natural matter, performances, and pieces that are intentionally impermanent.¹³ The Seventh Circuit in *Kelley v. Chicago Park District*¹⁴ recently highlighted the tension between contemporary art and copyright law when it noted that "not all conceptual art may be copyrighted."¹⁵ This analysis must be tested by examining the limits of what works are copyrightable and, specifically, whether the fixation requirement, as it is interpreted by courts, provides a reasonable constraint on copyrightability. In addition, it is worth considering whether works of contemporary art that do not otherwise meet copyrightability requirements should be eligible for moral rights protection under the Visual Artists Rights Act of 1990¹⁶ (VARA).

6. Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 223 (2010).

7. *Id.*; see also Denis Dutton, *Has Conceptual Art Jumped the Shark Tank?*, N.Y. TIMES, Oct. 16, 2009, at A27 (describing contemporary conceptual art as "works we admire not for skillful hands-on execution by the artist, but for the artist's creative concept").

8. Cronin, *supra* note 6, at 224–25.

9. *Id.* at 225.

10. See *id.* ("One might have to step beyond the walls of the museum to experience many works of Conceptual art created over the past fifty years.")

11. Katie Sykes, *Towards a Public Justification of Copyright*, 61 U. TORONTO FAC. L. REV. 1, 3 (2003) (quoting Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134).

12. Cronin, *supra* note 6, at 213.

13. *Id.* at 213–14.

14. 635 F.3d 290 (7th Cir. 2011).

15. *Id.* at 304.

16. Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (codified as amended at 17 U.S.C. §§ 101, 106A (2012)).

As the Seventh Circuit's decision in *Kelley* indicates, copyright fails to promote art in one very important respect¹⁷: it fails to adequately protect contemporary art that is not "fixed" according to current interpretations of fixation under the Copyright Act.¹⁸ Fixation, according to the Copyright Act, requires that works are able to be "perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹⁹ Under this definition, not only are important strains of contemporary art "unfixed" because they are transitory in nature, but also because they often make a point of incorporating elements of change over time. Dynamic elements of artistic works are not merely an unintended consequence but rather a deeper artistic feature often integral to the meaning of this art. Given the seriousness with which society appreciates, values, and pursues fine art, it is puzzling, and deserving of an explanation, that copyright law implies that certain art is somehow not worthy of encouragement—in this case, art that does not satisfy the fixation requirement under interpretations of section 101 of the Copyright Act.

Would not Justice Oliver Wendell Holmes turn in his grave to know that his most famous contribution to copyright doctrine—the *Bleistein* principle—is being controverted, and increasingly so, as nontraditional unfixed art burgeons?²⁰ In *Bleistein v. Donaldson Lithographing Co.*,²¹ Holmes warned that it is bad copyright policy for judges to determine the quality of art.²² He noted that the artists Francisco Goya and Édouard Manet were not appreciated in their time by society and thus likely not to be

17. *Kelley*, 635 F.3d at 305–06 (discussing the requirement that being "fixed" is necessary for copyright).

18. Under the Copyright Act of 1976, 17 U.S.C. § 101 (2012),

[a] work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

19. *Id.*

20. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903); see also Russ VerSteeg, *Jurimetric Copyright: Future Shock for the Visual Arts*, 13 CARDOZO ARTS & ENT. L.J. 125, 134–35 (1994) ("There is something about the thought of a judge trying to evaluate an artist's creativity that is troubling.").

21. 188 U.S. 239.

22. *Id.* at 251. Because each time period creates its own criteria, judges may not be sufficiently sophisticated to appreciate a specific work at a given time, particularly avant-garde works: "Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." *Id.* at 251. On the other hand, judges may be too educated to appreciate the art desired by the general public. As one art critic noted:

Nothing about 20th century art is as disturbing as its warring factions, its schisms and its accusations of heresy and illegitimacy. The battle for modernism is far from over as long as large segments of our population continue to maintain that something is art only if it approximates the appearance of physical reality, or if it follows the strict rules of tradition. And the battle for reason in art is not over as long as representational art is considered regressive or irrelevant by its very nature.

THEODORE F. WOLFF, *THE MANY MASKS OF MODERN ART* 2 (1989).

appreciated by a judge either.²³ Holmes's remarks have been cited for a variety of propositions, but for present purposes, his use of Goya and Manet as examples illustrates that copyright should not seek to discern socially worthy art from art that is not, lest a potentially great artist go underappreciated. Vincent Van Gogh is a classic example of an artist who enjoyed very little success during his lifetime (selling only one painting, some believe),²⁴ but whose works became some of the most popular and influential in the twentieth century, including two paintings that are listed in the top ten most expensive paintings of all time.²⁵ Fear of excluding art that may be socially valuable informs the argument that copyright should protect *all* art, which is a social good.

The traditional view is that copyright incentivizes creation. But because copyright law protects only "fixed" art, it fails to adequately incentivize an important form of contemporary art: art that is "unfixed" according to the strictures of the Copyright Act.

As the following discussion will demonstrate, this conclusion could lead to a significant policy shift: elimination of the fixation requirement. This Article, however, concludes that fixation is an important element of copyright law because it serves a functional purpose of delimiting idea from expression. Unfortunately, many works of art are embodied in a particular expression, yet have transitory duration; those works of art are not copyrightable because they are not "fixed" under the Copyright Act. Our normative argument, in sum, is that the "transitory duration" exclusion should be abolished from the statutory definition of fixation. This would allow copyright law to protect important classes of contemporary art while retaining the functional benefits of the fixation requirement.²⁶ As an alternative, this Article proposes a policy change that is narrowly tailored to address the immediate problem of a lack of copyright protection for certain forms of contemporary art. Such a policy change is not without important precedent in U.S. copyright law. The most significant example is, of course, section 106A: the moral rights provision of the Copyright Act, which protects works of visual art.²⁷ If eliminating the transitory duration

23. *Bleistein*, 188 U.S. at 251.

24. Vasko Kohlmayer, *The Red Vineyard: The Only Picture Vincent van Gogh Ever Sold*, WASH. TIMES (Aug. 2, 2011), <http://communities.washingtontimes.com/neighborhood/vasko-kohlmayers-globe/2011/aug/2/red-vineyard-picture-vincent-van-gogh-sold>.

25. See Jethro Mullen, *New Van Gogh Painting Discovered: 'Sunset at Montmajour,'* CNN (Sept. 9, 2013, 5:37 PM), <http://www.cnn.com/2013/09/09/world/europe/netherlands-van-gogh-new-painting/> ("During the art market boom of the late 1980s and early 1990s, three of van Gogh's works succeeded each other as the most expensive paintings ever sold: 'Sunflowers' for \$39.9 million, 'Irises' for \$53.9 million and 'Portrait of Dr. Gachet' for \$82.5 million.").

26. According to the Copyright Act of 1976, copyright 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 with the aid of a machine or device." 17 U.S.C. § 102(a) (2012). This statute establishes the requirements for copyrightable subject matter. The ones at issue for contemporary art are (1) fixation and (2) authorship.

27. *Id.* § 106A.

requirement has negative policy implications, then removing the requirement in the more limited domain of contemporary art, perhaps by means of amending section 106A, may nonetheless improve on the status quo.

One response to these proposals might be to observe that both would seem to suffer from the impossible task of defining art. As will be discussed below, this issue is not to be minimized. Nevertheless, section 106A functions despite limited scope of coverage; “visual art” and vague tests, such as “recognized stature” of the work, determine the basic scope of the coverage. While section 106A broadens the scope of owners’ rights, it does not affect the test for ownership rights in the first place. By contrast, eliminating the transitory duration limitation for contemporary art opens up a new frontier for claiming private ownership of highly original and important contemporary art. Restricting the policy shift to the subject matter of section 106A would apply to works that are “visual works” of “recognized stature.”²⁸

The discussion proceeds as follows. First, this Article examines types of contemporary art that are not protected by copyright under the terms of the statute. This Article then explores why copyright law includes a fixation requirement. The main arguments in favor of the fixation requirement that this Article considers are: First, that fixation is an implied requirement under the U.S. Constitution. Second, that fixation serves an important evidentiary role in copyright law. And third, that fixation plays a role as a gatekeeper for a low originality standard.

This Article concludes that a fair appraisal of these arguments provides little or no rationale for the fixation requirement—except to the extent that fixation helps separate idea from expression and determine the “metes and bounds” of creative expression. Dropping the “transitory duration” exclusion would enable fixation to serve this essential purpose while not discriminating against important strains of contemporary art. Recent case law analyzing the transitory duration limitation demonstrates that the requirement has become an ineffective gauge of what it means to “fix” a work in a digital age, and provides little guidance for statutory interpretation. Removing the requirement would better align copyright law with the purposes of the Intellectual Property Clause in the U.S. Constitution.

If, alternatively, one concludes that dropping the transitory duration requirement is unfeasible, this Article argues that the Visual Artists’ Rights Act should provide, for transitory works, a safe harbor from the fixation requirement. In sum, this Article explores two ways to “fix” the fixation requirement for contemporary art: First, by moving away from the “more than a transitory duration” test. Second, by amending VARA to protect statutorily “unfixed” works of contemporary art.

28. *See id.*

I. IMPORTANT STRAINS OF CONTEMPORARY ART ARE NOT PROTECTED UNDER THE TERMS OF THE COPYRIGHT ACT

Works that do not receive copyright protection because they do not satisfy the fixation requirement represent an important segment of contemporary art. Significant and influential contemporary artists create entire bodies of work that are never fixed under the terms of the Copyright Act. Mainstream contemporary art often emphasizes process over product, where the process itself defines the core of the art, and the art does not result in some tangible “product.” These works span various categories covered by copyright, including, *inter alia*, pictorial, graphic, and sculptural works, pantomime and choreography, and dramatic works.

A. Sculpture with Natural Media

Natural media is commonly used as a tool of expression in contemporary art. Indeed, land art has developed a prominence in major museums; the Museum of Contemporary Art in Los Angeles, for example, curated an exhibition in 2012 called “Land Art to 1974,” which purported to be the first large-scale, historical-themed exhibition to feature land art before it became a fully institutionalized category of modern art.²⁹ The show included over eighty artists and projects from around the world.³⁰

Andy Goldsworthy, a British artist living in Scotland, is one of the most famous contemporary land artists.³¹ He uses exclusively natural objects, incorporating materials such as wood, stone, and ice with tools such as thorns, saliva, and water to create temporary and constantly changing works that explore themes of time, destruction and decay, rebirth, and the natural environment.³² Both the viewer and the environment become participants in the art piece itself. Goldsworthy describes his work as follows:

Movement, change, light, growth and decay are the lifeblood of nature, the energies that I try to tap through my work. I need the shock of touch, the resistance of place, materials and weather, the earth as my source. Nature is in a state of change and that change is the key to understanding. I want my art to be sensitive and alert to changes in material, season and weather. Each work grows, stays, decays. Process and decay are implicit. Transience in my work reflects what I find in nature.³³

In this passage, the artist elegantly invokes transience as key to his artistic approach. Works such as Goldsworthy’s are not fixed under the Copyright Act because they are of “transitory duration.” One ephemeral piece that Goldsworthy creates in different environments and with different materials begins with construction of a cairn on the shoreline between the ebb and

29. *See Ends of the Earth: Land Art to 1974*, MOCA, <http://www.moca.org/landart/> (follow “About the Exhibition” hyperlink) (last visited Mar. 25, 2014).

30. *Id.*

31. *Andy Goldsworthy*, CASS SCULPTURE FOUND., <http://www.sculpture.org.uk/artist/119/andy-goldsworthy> (last visited Mar. 25, 2014).

32. *Id.*

33. *Andy Goldsworthy*, MORNING EARTH, http://www.morning-earth.org/ARTISTNATURALISTS/AN_Goldsworthy.html (last visited Mar. 25, 2014).

flow of the tide.³⁴ Goldsworthy must complete this structure in a very limited amount of time according to the tide.³⁵ When the tide flows back in the work evolves further. For a cairn made of sticks, the tide may carry it out to sea where it stays together for a time but gradually begins wearing away.³⁶ For a cairn made of stones, the tides may beat against it as it wears down over the ensuing hours.³⁷ In another piece, Goldsworthy collects leaves and attaches them together with thorns in a long serpentine shape.³⁸ He sends this wending serpent down a river, where the leaves interact with each other, the current, and the rocks above and below, in a dialogue with the natural environment. Throughout the progression of the piece, the leaves break apart in segments and return to the earth.

The core of each of these pieces of art lies in the process and effect of constant change. Goldsworthy's art is important—not just under the *Bleistein* principle—but as recognized by contemporary critics: he has won both national and international awards; he has made temporary installations in some of the world's leading museums; and he has created commissioned works in countries around the world.³⁹

Goldsworthy's ephemeral art is unfixed under section 101 of the Copyright Act because it focuses on the transitory duration of nature. Goldsworthy photographs or videotapes each work once at a certain moment in the process, seeking to show the piece “at its height, marking the moment when the work is most alive.”⁴⁰ While “[t]here is an intensity about a work at its peak that [he hopes] is expressed in the image,”⁴¹ even if aspects of process and decay are somehow implicit, the digital image or stream is not the art itself. While such photographs have the effect of “fixing” the work for copyright purposes, the work itself remains unfixed according to the statutory language. Any fixation of the piece, as that is understood in copyright terms, is merely representational of the piece rather than the piece itself—a fixation by proxy. To highlight the distinctiveness of Goldsworthy's brand of creation in this respect, contrast this situation with, for instance, the *Mona Lisa*, in which the fixed work *is* the work.

Other artists working with natural media suffer a similar fate under the Copyright Act. James Turrell works in the media of light and space. He is one of the most critically acclaimed artists working today and has received both Guggenheim and MacArthur fellowships; critics have described him as

34. *Campus Sculpture Tour: Andy Goldsworthy*, GRINNELL COLL., <http://web.grinnell.edu/faulconergallery/CampusArt/goldsworthy.htm> (last visited Mar. 25, 2014).

35. *See id.*

36. RIVERS AND TIDES: WORKING WITH TIME (Mediopolis Films 2004).

37. *See id.*

38. *Id.*

39. *See Goldsworthy, Andy*, NAT'L GALLERY ART, <http://www.nga.gov/content/ngaweb/Collection/artist-info.28027.html?artistId=28027&pageNumber=1> (last visited Mar. 25, 2014). *See generally Andy Goldsworthy*, *supra* note 33.

40. Stacey Trujillo, *Andy Goldsworthy*, 3D RES. BLOG, <http://sculptureresearch.wordpress.com/andy-goldsworthy> (last visited Mar. 25, 2014).

41. *Id.*

one of the “most multifaceted artists of our time.”⁴² His installations in museums and galleries use the medium of light to make apparently solid objects seem to be hung from walls or suspended in air.⁴³ While pieces may appear to be made of matter, they are comprised of light and ephemeral in nature. He explains, “I like to use light as a material, . . . but my medium is really perception. I want you to sense yourself sensing. To see yourself seeing. To be aware of how you are forming the reality you see.”⁴⁴ In 1980, the Whitney Museum of American Art featured an exhibition that became well known because a visitor to the museum tried to lean against one of Turrell’s pieces and fell through it, breaking her wrist.⁴⁵

Turrell is renowned for creating skyspaces that enclose the participant to control the perception of light and space.⁴⁶ He constructs an environment, often with an opening in the ceiling and benches along the walls, carefully manufactured to frame light in a certain way.⁴⁷ The art takes place not just through the medium of the physical structure but in the constantly fluid space between perception and reality. Turrell explains, “I want to put you directly in front of light, so you see it with your own eyes, not through my eyes.”⁴⁸ Turrell’s art focuses on “light as a physical presence, a material in its own right, not just something that illuminates the rest of the world.”⁴⁹ Like Goldsworthy, Turrell’s inclusion of ephemeral natural media may preclude copyright protection for his works per se. The dynamic nature of his art would likely fail to satisfy the fixation requirement because of the transitory works exclusion. While he can fix his works by proxy, the works themselves—no matter how important to the art world or respected by critics—arguably remain outside the realm of copyright.

B. Performance Art/Pantomime

Marina Abramović is a third example of a contemporary artist seeking to avoid traditional, object-based art materials such as paint and canvas that create a distance between the artist and the audience. Abramović has chosen to cut out the middleman by using her own body as the medium for her visual art. She has had solo shows at major museums in the United States and Europe and has also participated in large-scale exhibitions such as the Venice Biennale and the Whitney Biennial, winning the Golden Lion Award at the Venice Biennale in 1997 for her video installation and

42. Michael Govan, *James Turrell*, INTERVIEW, June 2011, at 100, 104. See generally *James Turrell*, ART 21, <http://ec2-75-101-145-29.compute-1.amazonaws.com/art21/artists/james-turrell> (last visited Mar. 25, 2014).

43. Paul Trachtman, *James Turrell’s Light Fantastic*, SMITHSONIAN MAG., May 2003, at 86, 88.

44. *Id.*

45. *Id.* at 90.

46. See Govan, *supra* note 42, at 105.

47. Trachtman, *supra* note 43, at 90.

48. *Id.*

49. *Id.*

performance piece entitled *Balkan Baroque*.⁵⁰ In 2004, Abramović received an honorary doctorate from the Art Institute of Chicago.⁵¹ In 2010, the Museum of Modern Art in New York (MoMA) selected her works for a major retrospective exhibition.⁵² At the MoMA retrospective, which involved a simultaneous display of several of her works, she was only able to perform one piece; thus, more than forty other artists, under her intense training, reperformed pieces of hers throughout the museum.⁵³ It was the first live reperformance of her works by other people ever undertaken in a museum setting.⁵⁴

Abramović herself performed a piece entitled *The Artist Is Present*, in which she sat in a chair for six days a week, seven hours a day, during each day that the museum was open between March 14 and May 31, 2010.⁵⁵ People who attended the museum were invited to participate in the art by sitting in a chair opposite her for a duration of their choosing, thus contributing to the creation of the art piece itself.⁵⁶ Approximately 1,400 people came to participate in the piece, including celebrities such as Sharon Stone, Bjork, Isabella Rossellini, Lou Reed, Rufus Wainwright, and Christiane Amanpour.⁵⁷ The exhibition was immensely popular; the MoMA estimates that half a million people visited all or part of the retrospective, and a live feed on their website had close to 800,000 hits before the show closed.⁵⁸ A Flickr site that contains headshots of every person who came to sit with Abramović was accessed close to 600,000 times.⁵⁹

From Goldsworthy to Turrell to Abramović, from the earth to the sky to the body within, these artists and their media are not isolated examples but

50. See *Maria Abramović*, SEAN KELLY GALLERY, <http://www.skny.com/artists/marina-abramovi/> (last visited Mar. 25, 2014).

51. *Id.*

52. *Id.*

53. *The Artist Is Present: Marina Abramović*, MOMA, http://www.moma.org/interactives/exhibitions/2010/marinaabramovic/retreat_participants.html (last visited Mar. 25, 2014).

54. *Marina Abramović: The Artist Is Present*, MOMA, <http://www.moma.org/visit/calendar/exhibitions/965> (last visited Mar. 25, 2014).

55. *Marina Abramović: The Artist Is Present—Portraits*, MOMA, <http://www.moma.org/interactives/exhibitions/2010/marinaabramovic/> (last visited Mar. 25, 2014).

56. A series of posts featuring videos, photographs, and interviews with the artist herself and some of the audience members and participants are available at the MoMA blog *Inside/Out*, MoMA, http://www.moma.org/explore/inside_out/category/marina-abramovic (last visited Mar. 25, 2014). The artist herself noted that people sat with her for varying lengths of time, from two minutes to at least 391 minutes. Katie Notopoulos, *Marina Abramović Made Me Cry*, <http://marinaabramovicmademecry.tumblr.com/> (last visited Mar. 25, 2014) (showcasing pictures taken at the MoMA exhibition of audience members who cried while participating, along with the length of time they spent across from the artist); see also Jim Dwyer, *Confronting a Stranger, for Art*, N.Y. TIMES, Apr. 4, 2010, at MB1; *Marina Abramović: The Artist Is Present—Portraits*, *supra* note 55 (featuring a video with portraits of each person who participated in the piece).

57. Holland Cotter, *700-Hour Silent Opera Reaches Its Finale at MoMa*, N.Y. TIMES, May 31, 2010, at C1.

58. *Id.*

59. *Id.*

represent strong currents in the contemporary arts world. The list could go on and on. Another example is Richard Long, who is a painter, photographer, and winner of the Turner Prize on multiple occasions.⁶⁰ His piece called *A Line Made by Walking* is one of his most famous. For that piece, he walks and walks over the same land and makes a line.⁶¹ The art, as he describes it, is not the line itself but the finite process of creating an impression in the earth, as his feet and the earth and his thoughts, the heaviness or lightness of his step, meet time and again. In the end, there is a line—but the line is not the art, the process is the art.⁶² Despite these artists' acclaim, their work is not copyrightable. These artists' dynamic, rather than static, use of natural materials prevents their works from being fixed under section 101 of the Copyright Act.

C. Sculpture with Living Materials

Numerous artists have begun to create works that incorporate live elements from nature. These works are part of a new movement called bioart that explores the intersection of art and science. Bioart is composed of living things, such as live tissues, bacteria, or living organisms, or is created in conjunction with living things.⁶³ The works are produced in laboratories and artists' studios. As Brooke Oliver explains, "In some ways, these pieces are one-of-a-kind originals like traditional sculpture, yet they grow and change in response to their controlled environments."⁶⁴ Bioartists use sculptures and images that incorporate bioengineered living forms to bring about ethical, social, and esthetic inquiry.⁶⁵

Bioart can take a wide variety of forms. *Victimless Leather* was a tiny jacket made up of a biodegradable polymer matrix in the shape of a doll's jacket covered in a layer of living tissue made of embryonic stem cells taken from mice.⁶⁶ By growing living tissue into a leather-like material, the artists hoped to start discussion of the moral implications of wearing parts

60. See Richard Long, GUGGENHEIM, http://www.guggenheim.org/new-york/collections/collection-online/show-full/bio/?artist_name=Richard%20Long (last visited Mar. 25, 2014); *Richard Long Artist Biography*, TATE, <http://www.tate.org.uk/art/artists/richard-long-1525/text-artist-biography> (last visited Mar. 25, 2014). Long has also been nominated multiple times for the Turner Prize. *20 Years of the Turner Prize*, GUARDIAN, <http://arts.theguardian.com/pictures/0,,1062817,00.html> (last visited Mar. 25, 2014).

61. *Richard Long Artist Biography*, *supra* note 60.

62. *See id.*

63. GEORGE GESSERT, *GREEN LIGHT: TOWARD AN ART OF EVOLUTION 1* (2010). Examples of life forms that have been utilized in art include: grasses, trees, bacteria, fungi, fish, frogs, fluorescing tadpoles, crabs, fly larvae, algae, horses, honeybees, pigeons, plant seeds and bedding plants, ants, protozoa, spiders, earthworms, maggots, caterpillars and butterflies, orchids, elephants, dogs, chickens, silkworms, culinary herbs, turtles, mice, and scorpions. *Id.* at 2.

64. Brooke Oliver, *New Media Art Works: BioArt, Digital Media, Installations & CopyLeft 6* (2008) (unpublished manuscript), available at <http://www.osrfirm.com/bios/pubs/New%20Media%20Paper%20071408.pdf>.

65. *Id.* at 1.

66. John Schwartz, *Museum Kills Live Exhibit*, N.Y. TIMES, May 13, 2008, at F3.

of dead animals and humans' responsibility to other living things.⁶⁷ The piece garnered great attention when the MoMA curator had to decide to "turn off the life-support system for the work, basically 'killing' it."⁶⁸ As the curator put it, "I've always been pro-choice and all of a sudden I'm here not sleeping at night about killing a coat . . . That thing was never alive before it was grown."⁶⁹

Many other artists incorporate living elements into their pieces. Damien Hirst, incidentally said to be the world's richest living artist,⁷⁰ has created a work that manifests an entire life cycle, from gestation through death. In his work *A Thousand Years*, maggots hatch inside a white box, turn into flies, and feed on a severed cow's head on the floor of a glass case.⁷¹ An electric fly killer hangs inside the case from above; hatched flies buzz about, some meeting their end through electrocution, and some surviving to continue the cycle of the piece.⁷² There is no question that there is an expression in Hirst's piece, a "work," but yet the dynamic nature of the piece precludes copyright.

Artist George Gessert explores the overlap between art and genetics. His exhibits often involve hybridizing plants, often irises, or documentation of breeding projects.⁷³ Gessert is predominantly interested in plant aesthetics and the many ways in which human aesthetic preferences affect plant evolution.⁷⁴ Eduardo Kac also generated novel life forms in a work entitled *Alba*, a rabbit that fluoresces green under a specific blue light.⁷⁵ He did so by implanting the rabbit with a green fluorescent protein gene from a type of jellyfish.⁷⁶

To expect copyright to be neither under- nor overinclusive is unreasonable. And copyright law may rightfully exclude certain forms of art at the margins—artists will always push the envelope beyond the boundaries of copyrightability. The types of art discussed in this Article, however, are particularly notable because they are at the forefront of an important movement in contemporary art emphasizing process over product, are created by some of the most well-respected artists in the world, and are featured in world-class museums. Notably, conflicts surrounding

67. *Victimless Leather: A Prototype of Stitch-less Jacket Grown in a Technoscientific "Body,"* TISSUE CULTURE & ART PROJECT (2004), <http://tcaproject.org/projects/victimless/leather>.

68. Helen Stoilas, *MoMa Exhibit Dies Five Weeks into Show*, ART NEWSPAPER, May 2008, at 1 (alteration in original).

69. *Id.*

70. Joy Yoon, *The 15 Richest Living Artists*, COMPLEX (Feb. 3, 2012, 11:27 AM), <http://www.complex.com/art-design/2012/02/the-15-richest-living-artists/damien-hirst>.

71. See *A Thousand Years*, DAMIEN HIRST, <http://www.damienhirst.com/a-thousand-years> (last visited Mar. 25, 2014).

72. *Id.*

73. See generally George Gessert, *On Exhibiting Hybrids*, CIRCA, Winter 1999, at S08.

74. *Id.* at S09.

75. Oliver, *supra* note 64, at 10. The ethics of creating art with living subjects is fascinating but outside the scope of this Article.

76. *Id.*

contemporary art and the fixation requirement are beginning to arise in court.

D. Contemporary Art in the Courts

Courts are beginning to confront problems with the application of the “transitory duration” limitation to renowned works of art. Chapman Kelley, the plaintiff in *Kelley v. Chicago Park District*, is an artist known for his representational paintings of foliage, particularly elliptical outlines surrounding landscapes and flowers.⁷⁷ In 1983, he was asked to install a wildflower display in Chicago, Illinois.⁷⁸ The result was *Wildflower Works*, composed of two giant elliptical flowerbeds, approximately a football field in size, featuring a wide variety of native wildflowers set within borders of gravel and steel.⁷⁹ Kelley selected between forty-eight and sixty species of self-sustaining wildflowers for the piece, and he designed the initial placement of the wildflowers so they would “blossom sequentially, changing colors throughout the growing season and increasing in brightness towards the center of each ellipse.”⁸⁰ Kelley sued the Chicago Park District for violating his moral right of integrity under VARA when the Park District decreased the size of *Wildflower Works* to less than half its original size, made the elliptical borders rectilinear, and replanted the wildflowers in a smaller garden without his approval.⁸¹

This case, decided in February 2011, has important legal implications for contemporary art. The court ruled that the carefully designed elliptical gardens failed to satisfy the level of fixation required for copyrightability.⁸² It found that “[a] garden’s constituent elements are alive and inherently changeable, not fixed.”⁸³ Even though *Wildflower Works* could satisfy the definition of fixation because it could be “perceived for more than a transitory duration,” the court still held that it lacked fixation because its essence was dynamic.⁸⁴ The work did not vary minute to minute; instead it “moves gradually, over days, weeks, and season to season,” but the nature of the chosen medium precluded copyright of the final product.⁸⁵ Surprisingly, the court found that the “barrier to copyright [was] not *temporal* but *essential*.” The essence of a garden is its vitality, not its fixedness.⁸⁶ The Seventh Circuit seems to have invented this “essence test” for its fixation inquiry, having provided no citation for this standard. The parameters for the essence test are unclear, however, and offer little guidance for future cases involving visual arts.

77. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 292 (7th Cir. 2011).

78. *Id.*

79. *Id.* at 292–93.

80. *Id.* at 293.

81. *Id.* at 294–95.

82. *Id.* at 303.

83. *Id.* at 304.

84. *Id.* at 305.

85. *Id.*

86. *Id.*

E. Lessons for Copyright

What lessons do we learn from looking at the above examples of contemporary art? First, we learn that this sort of art is not marginal but instead represents a dominant current in contemporary art, recognized by artists and consumers of art, judges of the Turner Prize and the MacArthur grants, as well as renowned art museums worldwide, such as the MoMA, the Whitney, and the Los Angeles Museum of Contemporary Art. This is not some trifling around at the fringes but instead a movement at the heart of contemporary creativity. The renown of the artists and movements involved in particular demonstrate that U.S. copyright law is moving further and further from its core function by requiring that works not contain transitory elements to establish basic copyrightability. Fine art surely comes within the core of that which copyright is meant to encourage, and yet entire schools of art, including some of the most acclaimed contemporary artists of our time, cannot qualify for copyright protection (while works such as this paragraph do).

While the focus of our research has been on recent art, lions of twentieth century art, such as Robert Rauschenberg and Wilhelm de Kooning, also exhibited a broad conception of art that countenanced works with transitory elements. Famously, Rauschenberg asked De Kooning for a drawing and upon receiving it, began slowly erasing it over a period of weeks.⁸⁷ The act of erasing constituted the work.⁸⁸ The fact of their participation in this manner makes the claim that works of transitory duration are not artistically significant even more implausible. Moreover, even if such works were not important art, under the *Bleistein* principle, copyright should be equally interested in protecting them.

The “transitory duration” requirement for fixation means that these sorts of works per se will simply not receive copyright protection, while works that do not have dynamic features will. The fixation requirement in its current state thus serves a pernicious function. Other things being equal, an initial policy prescription appears obvious: abolish the fixation requirement so copyright law better protects new, unfixed forms of art. As mentioned in the Introduction, the obvious question raised by this prescription is why copyright requires fixation.

87. MARK STEVENS & ANNALYN SWAN, *DE KOONING: AN AMERICAN MASTER* 359 (2004) (“Rauschenberg . . . asked [De Kooning] if he might have a drawing. That in itself was not unusual But Rauschenberg wanted the drawing not to hang in his studio, but to *erase* [De Kooning] told Rauschenberg: ‘I know what you’re doing.’ . . . The young artist was engaged in a symbolic act of generational and Oedipal murder, at once comic and deadly serious. He was ridding himself of a burdensome father. He was doing so, moreover, in the joking language of Dada, a movement that did not respect the sanctity of the art object or celebrate the romantic passion of de Kooning’s generation.”).

88. *Id.*

II. PURPOSES OF THE FIXATION REQUIREMENT

In this Part, we examine the origins of the fixation requirement and the rationales supporting it. Common justifications for the fixation requirement include claims that fixation is a constitutional requirement, as well as the use of fixation as a check on the capaciousness of the originality requirement, and fixation as an evidentiary tool. We conclude that the proper function of fixation will be equally supported, and the purposes of copyright more effectively served, if the “transitory duration” language is stricken from the statute.

A. Fixation As a Constitutional Requirement

Numerous courts and commentators have seen fixation as a constitutional requirement, based on the language in Article 1, Section 8 of the U.S. Constitution, which allows Congress to provide copyright for writings of authors.⁸⁹ Many have argued that the notion of a “writing” necessarily implies a work that is “fixed.”⁹⁰ While the presence of a fixation requirement is often assumed, fixation de jure did not exist prior to the 1976 Act.⁹¹ In other words, the U.S. copyright system functioned without the fixation requirement for nearly the first two centuries of its existence. From the first U.S. Copyright Act of 1790 through amendments to the 1909 Act, fixation was, however, a de facto, if not incidental, aspect of copyright law, through both subject matter and formality requirements.⁹² In 1790, the only works that were protected under the Copyright Act were maps, charts, and books, all of which were fixed automatically upon creation due to the nature of the works.⁹³ The 1909 Act broadened copyrightable works to include “all the writings of an author.”⁹⁴ At that time, fixation per se was not an issue because federal copyright protection itself required acts that involved embodying the work in some kind of physical form.⁹⁵ For example, copyright protection hinged upon publication with the required notice of copyright affixed to the work and the deposit of a copy of the work with the Copyright Office.⁹⁶ The requirement to publish and submit a physical copy de facto required fixation.

89. U.S. CONST. art I, § 8, cl. 8.

90. *Kelley*, 635 F.3d at 303 (“‘Without fixation,’ moreover, ‘there cannot be a *writing*.’” (emphasis added) (quoting 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 3:22 (1994))); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03B (2013) (stating that unless a work is reduced to tangible form, it cannot be considered a writing).

91. See Copyright Act of 1909, ch. 320, Pub. L. No. 60-349, 35 Stat. 1075, 1076 (including no fixation language); Act of May 31, 1790, ch. 15, 1 Stat. 124 (same).

92. See, e.g., *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 46 (1939) (discussing deposit formality before and after 1890 Copyright Act revisions); Laura A. Heymann, *How To Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 844 (2009).

93. See Act of May 31, 1790, 1 Stat. at 125.

94. Copyright Act of 1909, 35 Stat. at 1076; Heymann, *supra* note 92, at 844.

95. Heymann, *supra* note 92, at 844.

96. Copyright Act of 1909, 35 Stat. at 1076. Copyright could be secured for work not reproduced in copies for sale by deposit of an identifying reproduction of the work with the Copyright Office. See STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW

Discussions surrounding the fixation requirement first appeared in legislative debate on amendments to the Copyright Act of 1909, although no subsequent proposals were adopted.⁹⁷ Proposed revisions suggested removing the de facto fixation requirement for copyright registration (and thus copyrightability), because the intended subject of protection was the intellectual production of authors, whether or not that creative output was in some concrete form.⁹⁸ During the seventy-first Congress, the House of Representatives considered a proposal to provide copyright protection to an author's work "in any medium or form or by any method through which the thought of the author may be expressed."⁹⁹ Again during the seventy-fourth Congress, the House of Representatives considered a proposal to amend section 4 of the Copyright Act of 1909 to provide for copyright protection for "all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or interpreter of any musical, literary, dramatic work, or other composition, whatever the mode or form of such renditions, performances, or interpretations."¹⁰⁰

By 1965, revision bills were introduced in Congress that proposed fixation language, recommending that "the present implicit requirement of fixation . . . be made explicit in the bill, and that it be stated broadly enough to cover 'any new forms or media [of fixation] that may be developed.'"¹⁰¹ This idea took root in the text of the Copyright Act of 1976, which sought to expand copyright protection to a larger class of works not previously covered under copyright law.¹⁰² The fixation requirement was viewed by Congress as one way of accomplishing this goal; Congress sought to characterize fixation in "broad language" to eliminate "artificial and largely unjustifiable distinctions" drawn between various works by case law under the prior Act.¹⁰³ Thus, replacing the publication requirement with a fixation requirement enabled federal copyright law to reach a new class of artistic works for the first time.

A catalyst for this change came, in part, from the Supreme Court's holding in *White-Smith Music Publishing Co. v. Apollo Co.*¹⁰⁴ There, the Court held that player piano rolls, readable only by machine, were not copies for the purposes of the Copyright Act, which at that time required a

REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY: STUDY NO. 28 COPYRIGHT IN CHOREOGRAPHIC WORKS 96 (Comm. Print 1961) (including a study by Borge Varmer).

97. See Heymann, *supra* note 92, at 846 (citing S. 3008, 88th Cong. (1964) (introduced by Sen. John McClellan); H.R. 11947, 88th Cong. (1964) (introduced by Rep. Emanuel Celler); H.R. 12354, 88th Cong. (1964) (introduced by Rep. William St. Onge)).

98. *Id.* at 844 (citing H.R. 6990, 71st Cong. § 1 (1930)).

99. H.R. 6990, 71st Cong. § 1.

100. H.R. 10632, 74th Cong. (1936).

101. STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REP. OF THE REG. OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, pt. 6, at 4 (Comm. Print 1965) (second alteration in original).

102. See H.R. REP. NO. 94-1476, at 51-52.

103. See *id.* at 52.

104. 209 U.S. 1 (1908).

copy to be “in intelligible notation.”¹⁰⁵ To address this problem, Congress created a compulsory licensing scheme to compensate artists who previously received no compensation for such mechanical reproductions.¹⁰⁶ But the seed had been planted, and the 1976 House Report explained that with the Copyright Act of 1976, “Congress did away altogether with the ‘artificial and largely unjustifiable distinction[]’ that made copyright protection dependent upon the form of fixation.”¹⁰⁷ That this was part of the justification of the fixation requirement is ironic. Due to changes in the world—the emergence of contemporary art and digital media that result in a proliferation of works of “transitory duration,” in particular—the fixation requirement now causes the precise result it was meant to remedy, namely, drawing an “artificial and largely unjustifiable distinction” that serves to preclude certain categories of works from copyright protection.

*B. Statutory Fixation As a Check on the
Capaciousness of the Originality Requirement*

Copyrightability has two basic requirements under U.S. law: fixation and originality. While originality may be the sine qua non of copyright law,¹⁰⁸ the amount of originality or creativity required under U.S. law for purposes of satisfying the originality requirement has a famously low threshold.¹⁰⁹ In a Berne Convention signatory country such as Switzerland, for example, if a person simply pulled out her phone and took an offhand snapshot of a random scene, this photograph would doubtfully qualify for copyright protection.¹¹⁰ In the United States, however, this photograph likely would qualify.¹¹¹ Thus, the requirement gives a very wide berth to

105. *Id.* at 17.

106. See *Rosette v. Rainbo Record Mfg. Corp.*, 354 F. Supp. 1183, 1190 (S.D.N.Y. 1973).

107. Carrie Ryan Gallia, *To Fix or Not To Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators*, 92 MINN. L. REV. 231 (2007) (quoting H.R. REP. NO. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665) (alteration in original). Despite inclusion of a fixation requirement in the 1976 Act, the bill did not contain a definition of “fixation” and the broadcast industry raised concerns about its televised live events. As a result, the current definition of “fixation” was added, including the provision that a transmission is considered “fixed” if “a fixation of the work is being made simultaneously with its transmission.” 17 U.S.C. § 101 (2012).

108. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality.”).

109. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (noting that photographs are sufficiently original to warrant copyright protection); *Baker v. Selden*, 101 U.S. 99, 102 (1879); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (“[T]he standards for patents and copyrights are basically different.”).

110. See generally Lisa A. Zakolski, *Protection Under Berne Convention*, 18 AM. JUR. 2D *Copyright and Literary Property* § 202 (2011) (“The issue of the ownership of copyrights in works created by a country’s nationals and first published in that country will be determined under the law of that country, which is the works’ country of origin pursuant to the Berne Convention and which has the closest relationship to the works.”).

111. See *Burrow-Giles*, 111 U.S. at 60 (“These findings, we think, show this photograph to be an original work of art, the product of plaintiff’s intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish and sell.”).

what can be copyrighted. The fixation requirement cabins the writ of copyright, as a range of original works would be copyrightable but for the lack of fixation.

Professor Douglas Lichtman has argued that “the real purpose of the fixation requirement is to narrow copyright’s purview.”¹¹² In support of his argument, Lichtman cites *Falwell v. Penthouse International, Ltd.*,¹¹³ where the Western District of Virginia worried that including unfixed expression within the purview of copyright would protect “‘every utterance’” and “‘courts would be inundated’ with copyright claims.”¹¹⁴ An early leading case on precisely this issue is *Estate of Hemingway v. Random House, Inc.*¹¹⁵ Ernest Hemingway’s estate sought an infringement judgment against A. E. Hotchner, Hemingway’s biographer, based on his writing down in the biography the contents of discussions he had with Hemingway.¹¹⁶ Hemingway’s estate claimed that there was a common law copyright in the words Hemingway uttered during his conversations with Hotchner.¹¹⁷ Although the New York Court of Appeals recognized that common law copyright protection for “certain limited kinds of spoken dialogue” may exist, the court declined to extend such protection to Hemingway’s conversation because he did not “mark off the utterance in question from the ordinary stream of speech.”¹¹⁸ The court’s remark implies three claims: First, as far as originality is concerned, Hemingway’s ordinary stream of speech colorably contains sufficient originality for copyright protection. Second, this is perniciously overbroad. And third, a copyrightability requirement mandating that such content be “set off” as a work is thus desirable.

C. Statutory Fixation As Evidence

Perhaps the most compelling argument for the fixation requirement is that fixation serves an important evidentiary purpose. As one author has stated, “[O]ne of the most important reasons for requiring fixation . . . as a condition precedent to copyright protection is to ensure that a copyright claimant will be able to provide a court documentary evidence of the copyrightable subject matter.”¹¹⁹ Without fixation, “copyright law would forever be mired in disputes over the definition and boundaries of the works

112. Douglas Lichtman, *Copyright As a Rule of Evidence*, 52 DUKE L.J. 683, 722, 729 (2003).

113. 521 F. Supp. 1204 (W.D. Va. 1981).

114. Lichtman, *supra* note 112, at 722 (quoting *Falwell*, 521 F. Supp. at 1207). While the court in *Falwell* declined to extend copyright protection to the facts at bar, it noted that a “cause of action involving an [unfixed] oral expression can be sustained under a common law copyright theory” in narrow circumstances. *Falwell*, 521 F. Supp. at 1208.

115. 244 N.E.2d 250 (N.Y. 1968).

116. *Id.* at 252–53.

117. *Id.* at 253 (noting that Hotchner wrote the text down, though not with the explicit consent of the author).

118. *Id.* at 256.

119. VerSteege, *supra* note 20, at 132.

claiming copyright protection.”¹²⁰ Professor Laura Heymann has further suggested that fixed art provides a tangible form from which courts can assess the originality requirement: “It is not enough for an author to describe his creative process . . . rather, a court must be able to compare what the putative author has created to what came before to determine if the ‘modicum of creativity’ that the court has required exists.”¹²¹

Copyright seeks to incentivize the creation of works in the public domain by granting artists exclusive rights for a limited time. Justice Potter Stewart stated that “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”¹²² Arguably, commoditizing the creative process so that creators have property rights in tangible goods (even if the works themselves are intangible) is easier; fixation helps to define the metes and bounds of a copyrighted work.¹²³ Professor Wendy Gordon has stated that the fixation requirement serves as a tangible boundary to intellectual property, which allows others to interact appropriately with that property.¹²⁴ She argues that if intellectual property is not given boundaries that define the scope and parameters of a work, and thus the demarcation between public and private property, fair use of such works will be chilled.¹²⁵

III. FIXATION WILL SERVE ITS PURPOSES WITHOUT THE TRANSITORY DURATION LIMITATION

What, then, is the response to these arguments in favor of the fixation requirement? This Article does not argue that the fixation requirement is unnecessary for copyright law. Ironically, the importance of the fixation requirement actually vitiates the need to exclude transitory works from copyrightability. As a practical matter, most creators will embody their works in some form, whether or not doing so is required for copyrightability. A primary reason for this is that fixation is an inherent aspect of many important categories of copyrightable works. Another notable reason is that fixation often provides authors with a strategic advantage in commercializing their works and in the context of infringement suits.

Embodiment in a form for more than a transitory duration—classic “fixation”—serves as a natural “end” to many works within the subject matter of copyright, such as films, books, photos, music, software and more. Along the idea-expression spectrum, fixation for many categories of

120. Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1400 (1997) (“[M]ore precise limitations on ‘writings’ might be *convenient*.” (quoting *CBS, Inc. v. DeCosta*, 377 F.2d 315, 320 (1st Cir. 1967))).

121. Heymann, *supra* note 92, at 853.

122. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

123. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1383 (1989).

124. See *id.* at 1383–84.

125. *Id.* at 1379–80, 1383.

protectable works is the final step across the threshold of expression. Perhaps the most obvious examples are paintings. An oil painting does not exist until an artist puts it down on canvas. The idea for the painting may exist in the artist's head prior to the existence of the painting, but the expression of the painting is the painting.¹²⁶ The expression is the physical object that can be viewed, appreciated, and sold. Likewise, books cannot be read and films cannot be viewed until they are fixed. Indeed, paintings are not paintings, books are not books, and films are not films until they are fixed in a way that comports with the statutory requirements.

Note, by contrast, one of Andy Goldsworthy's works described previously that *does* exist apart from being put down on canvas, so to speak. Unlike a DVD of a commercial film—which Goldsworthy has made, as well¹²⁷—the video is not an instantiation of the work itself. The work itself is “fixed” in exactly the way it is supposed to be for the art itself—using natural materials that change over time—but that method of fixation does not satisfy the terms of the statute, because it is of “transitory duration.” Marina Abramović's performance art pieces are fixed precisely in the way they are supposed to be fixed—so precisely, in fact, that she can train others to perform them for a retrospective at one of the most preeminent modern art museums in the world. But they are not fixed according to the terms of section 101 of the Copyright Act because they are of “transitory duration.”

Statutory fixation for many works provides a commercial advantage. Works that have been embodied in tangible copies are easier to commoditize (and distribute). When a copyrightable work becomes fixed for more than a transitory duration, it becomes an object ready to be sold, licensed, or consumed in the stream of commerce. If tangible evidence is preserved, proving infringement is also much easier. These assertions suggest that in most instances, creators, particularly commercial creators, need no additional incentive to fix their works above and beyond the reasons pertaining to how such types of works are created and channeled into commercial markets.

A. The Constitutional Language Cannot Be Fairly Interpreted To Require Fixation for More Than a Transitory Duration

Contemplate the pertinence of these considerations to the first rationale set forth above that the requirements for fixation are based on the constitutional requirement of a writing. There is a surprising dearth of discussion related to the constitutional definition of “writings” and how courts interpret this requirement under Article 1, Section 8, Clause 8.¹²⁸ It has been suggested that “works of authorship” should extend to the full

126. Which is not to say that the painting, qua physical object, is the work either. The work, per se, is the intangible creative element captured in pigment, linseed oil, and turpentine on canvas.

127. RIVERS AND TIDES: WORKING WITH TIME, *supra* note 36.

128. U.S. CONST. art. I, § 8, cl. 8.

constitutional boundaries of the term “writings,”¹²⁹ but what those boundaries would be is unclear.

Legislative history indicates that the phrase “works of authorship” is “purposely left undefined.”¹³⁰ Congress intended to create a flexible definition result that would neither “freeze the scope of copyrightable technology [n]or . . . allow unlimited expansion into areas completely outside the present congressional intent.”¹³¹ Again, no clear explanation exists as to what is “completely outside the present congressional intent.”¹³²

Taking a markedly different approach than the spirit of this legislative history would indicate, the *Kelley* court ruled that *Wildflower Works* did satisfy “originality” but *did not* satisfy the “authorship” requirement of copyright law.¹³³ It found that *Wildflower Works* “plainly possess[ed] more than a little creative spark,” so it met the threshold for originality.¹³⁴ It even clarified that “[n]o one argues that *Wildflower Works* was copied,” and “an *author’s* expressive combination or arrangement of otherwise noncopyrightable elements . . . may satisfy the originality requirement.”¹³⁵ Although the court determined that *Kelley* did not copy the work and that an *author’s* combination of elements was original, it still held that *Wildflower Works* lacked authorship.¹³⁶ As such, the court’s holding and reasoning are simply not consistent. How the court could find creativity without an author remains unclear.

The *Kelley* court elaborated that even though *Wildflower Works* was expertly designed and planted with great thought, gardens could not be authored because most of the form and appearance are due to natural forces.¹³⁷ The court explained that most of what we experience in a garden is created by nature, rather than by a gardener:

Of course, a human “author”—whether an artist, a professional landscape designer, or an amateur backyard gardener—determines the initial arrangement of the plants in a garden. This is not the kind of authorship required for copyright. To the extent that seeds or seedlings can be considered a “medium of expression,” they originate in nature, and

129. H.R. REP. NO. 94-1476, at 51 (1976). Some tangible embodiment has been implicitly recognized as important since the beginning of U.S. copyright law. Supreme Court opinions and congressional practice have seemingly interpreted the constitutional word “writings” to necessitate a physical manifestation. Brian Danitz, Comment, *Martingon and KISS Catalog: Can Live Performances Be Protected?* 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1159–60 (2005) (citing 1 NIMMER & NIMMER, *supra* note 90, § 1.08[C][2]). A debate exists as to whether it is a constitutional requirement. Stefan Hubanov, *The Multifaceted Nature and Problematic Status of Fixation in U.S. Copyright Law*, 11 INTELL. PROP. L. BULL. 111, 113 (2006). No Supreme Court decision has ever ruled that fixation is explicitly required by the Constitution, and legislative history is inconsistent on the issue. *Id.* at 113–14.

130. H.R. REP. NO. 94-1476, at 51.

131. *Id.*

132. *Id.*

133. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011).

134. *Id.*

135. *Id.* (emphasis added).

136. *Id.*

137. *Id.* at 304.

natural forces—not the intellect of the gardener—determine their form, growth, and appearance.¹³⁸

The court also reasoned that authors of copyrighted works must be human, concluding that works reliant on natural elements for their form accordingly are not copyrightable.¹³⁹

One of the first cases to consider what constituted “writings” was *Burrow-Giles Lithographic Co. v. Sarony*.¹⁴⁰ In that case, the Court noted that a “writing” could not be limited to the actual script of the author; rather, copyrightability must focus on the creative expression and output of the author, not the form of it.¹⁴¹ Thus, “writings” should “include all forms . . . by which the ideas in the mind of the author are given visible expression.”¹⁴² In light of copyright’s goals of encouraging intellectual creation, the First Circuit has stated that the constitutional protection “extends to any concrete, describable manifestation of intellectual creation,” and works will only be ineligible for protection where they are simply ineffable.¹⁴³ More than a hundred years later, in *Goldstein v. California*,¹⁴⁴ the Supreme Court reaffirmed *Burrow-Giles* and noted that the “writings” requirement has not over time “been construed in [its] narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles.”¹⁴⁵ The Court went on to say that “although the word ‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”¹⁴⁶ Thus, contrary to the facile claim often made that the constitutional requirement of a writing would mandate fixation, the opposite turns out to be true, namely, much interpretation and commentary on this requirement suggests that it is to be broadly interpreted to accommodate and encompass new forms of creative expression as they emerge.

While the Supreme Court in this early case displayed the sort of broad, policy-oriented mode of analysis necessary to refashion the role of fixation in a changing world, Congress is arguably more wedded to the fundamental importance of a fixation requirement that excludes transitory works. This is best seen in Congress’s approach to “bootlegging.” Following the passage of the Sound Recording Act of 1971,¹⁴⁷ a void of federal protection still remained for the live musical performances of artists. One could surreptitiously record a copy of a performance and later sell it, a practice known as bootlegging. Congress amended Title 17 of the U.S. Code by adding a § 1101, separate from the Copyright Act (which is codified in

138. *Id.*

139. *Id.* (citing 2 PATRY, *supra* note 90, § 3:19 n.1).

140. 111 U.S. 53 (1884).

141. *Id.* at 58.

142. *Id.*

143. *CBS, Inc. v. DeCosta*, 377 F.2d 315, 320 (1st Cir. 1967).

144. 412 U.S. 546 (1973).

145. *Id.* at 561.

146. *Id.*

147. Pub. L. No. 92-140, 85 Stat. 391.

Chapters 1 to 8 of Title 17), which provided for a new civil cause of action for unauthorized fixation of, or trafficking in, live musical performances.¹⁴⁸ Simultaneously, Congress also added a parallel criminal statute, codified at 18 U.S.C. § 2319A. Many commentators questioned whether a court would find such a law, which gave copyright-like protection to a statutorily unfixed work, was within the purview of the Constitutional requirement giving protection only to “writings.”¹⁴⁹

In *United States v. Moghadam*,¹⁵⁰ the Eleventh Circuit rejected a constitutional challenge to the criminal statute.¹⁵¹ Defendant “Moghadam argue[d] that a live performance, by definition, ha[d] not been reduced to a tangible form or fixed as of the time of the performance” and thus did not qualify for federal protection.¹⁵²

While declining to decide whether the fixation concept would expand to encompass unrecorded live performances, the court went on to hold “that the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term ‘[w]ritings.’”¹⁵³ This holding leaves the door open for Congress to legislate other copyright-like, quasi-copyright or *sui generis* protections for unfixed classes of work. In dictum, the court expanded on quasi-copyright protection:

Extending quasi-copyright protection to unfixed live musical performances . . . actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause. . . . Extending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author. . . . [A]lthough a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed.¹⁵⁴

While this statement is consistent with the current law that unfixed performances are ineligible for federal copyright protection, the language of the court clearly recognizes the value in transitory works and that the fixation requirement may not fully further the promotion of the arts as

148. 17 U.S.C. § 1101 (2012).

149. See, e.g., *United States v. Moghadam*, 175 F.3d 1269, 1275–76 (11th Cir. 1999); 5 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 10:12 (3d ed. 2004); Barbara J. Van Arsdale, Annotation, *Anti-bootlegging Provisions of Uruguay Round Agreements Act §§ 512 and 513, Imposing Civil (17 U.S.C.A. § 1101) and Criminal (18 U.S.C.A. § 2319A) Liability for Unauthorized Fixation of and Trafficking in Sound Recordings and Music Videos of Live Musical Performances*, 41 A.L.R. FED. 2D 429 (2009) (summarizing cases discussing the constitutional validity of § 2319A).

150. 175 F.3d 1269.

151. *Id.* at 1281.

152. *Id.* at 1274.

153. *Id.* at 1280.

154. *Id.* (dictum).

intended. In sum, the constitutional language cannot be fairly interpreted to exclude transitory works from copyright protection.

B. To Use Fixation As a Gatekeeper for Originality Is Inapt

Now consider our response to the second argument, which suggests that the fixation requirement adds value by curbing the effects of an overly capacious originality standard. This is a suboptimal means to deal with originality. If the originality standard is too broad, it should be directly hemmed in to whatever degree is desirable. Seeking to address the low originality threshold in the United States by means of fixation produces odd results. For example, copyright protects billions of emails sent every day, despite the fact that such protection is not necessary to achieve the goals of copyright. The fixation happens as a byproduct of the fact that online speech of this sort is fixed on computer servers simply due to how such machines function, not because authors are encouraged to engage in fixation due to the prospect of commercial gain. The court in *Hemingway* worried that extending copyright protection to all speech would be too capacious.¹⁵⁵ But this is precisely the result in a world of ubiquitous text messages and email. Meanwhile, the works of an important contemporary artist such as Andy Goldsworthy go unprotected unless artificially fixed by proxy. Clearly this odd and dysfunctional juxtaposition represents the unintended results of old rules applied in a new context. The new context is one in which people write brief but fixed messages by the billions without the goal of promoting the arts and sciences, while contemporary artists like Goldsworthy do seek to add to the world of original art, and do so very successfully, but in a manner that leaves their works unfixed (at least as the term is currently understood). Abolishing the fixation requirement alleviates this odd juxtaposition in which Goldsworthy's work is not encouraged by copyright but random emails are.

One may counter this by arguing that abolishing the fixation requirement solves the problem of underinclusion, but it worsens the problem of overinclusion since more works would now be copyrightable. But the originality threshold is a substantive culprit in both under- and overinclusion.¹⁵⁶ To use fixation as a gatekeeper for originality is inapt,

155. See *Estate of Hemingway v. Random House, Inc.*, 268 N.Y.S.2d 531, 537 (N.Y. Sup. Ct. 1966) (“Conversation cannot be catalogued as merely the cumulative product of separate and unrelated individual efforts, but, on the contrary, it is rather a synthesized whole that is indivisibly welded by the interaction of the parties involved. . . . In light of the interaction which renders conversation indivisible, it is difficult to see how conversation can be held to constitute the sort of individual intellectual production to which protection is afforded by way of a common law copyright.”).

156. There are significant problems with the overinclusiveness of the originality requirement as we have noted here, but the originality requirement ironically is underinclusive, as well. While it includes within the parameters of copyrightability countless emails and the *Yellow Pages*, courts have used the originality requirement to exclude forms of realistic art, such as the hand-blown, glass-in-glass jellyfish sculptures at issue in *Satava v. Lowry*, 323 F.3d 805, 811–12 (9th Cir. 2003) (“The selection of the clear glass, oblong shroud, bright colors, proportion, vertical orientation, and stereotyped jellyfish form, considered together, lacks the quantum of originality needed to merit copyright

because there are fixed works that have a very low level of originality and unfixed works that have a very high level of originality. No rational or proportional relationship exists between fixation and originality. Important contemporary art that is unfixed simply makes this point in the extreme because such work is at the cutting edge of creativity, as recognized objectively by the art world establishment.¹⁵⁷

*C. Evidentiary Hurdles Provide No Reason To Disallow
Copyright Protection for Transitory Works*

The evidentiary rationale for the fixation requirement posits that when a work exists in a tangible, stable physical form, it makes evidentiary issues, such as who owns a work and what precisely is the owned work, more tractable. Two strong arguments demonstrate that the evidentiary justification is not persuasive. First, the degradation of the copyright does not parallel the degradation of the work itself, provided the work was fixed at one point for “more than a transitory duration.” Postcreation destruction of an originally fixed work does not affect the status of the underlying copyright in the work. In fact, there is no requirement that the first fixation of the work (the “original”) *exist in any form* at the time of the infringement or the litigation.¹⁵⁸ Professor Lichtman has stated: “There is barely any difference between a case where there was never any fixation at all, and a case where there was a fixation that was destroyed before the relevant litigation commenced. Yet that is exactly the line drawn by the modern fixation requirement.”¹⁵⁹

Second, the fact that unfixed works can be infringed upon also refutes copyright exclusion for transitory works. To the contrary, only the reproduction right requires the defendant’s activity to consist of unauthorized “copies or phonorecords”; the derivative work and public performance rights contain no such requirement.¹⁶⁰ The House Report accompanying the 1976 copyright revision expressly states:

The exclusive right to prepare derivative works . . . overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies . . . whereas the preparation of a derivative work, such as a ballet, pantomime,

protection.”). Other forms of contemporary art that have their place well within the structure of galleries and museums may also be excluded from the shelter of copyright law because of the inadequacy of the originality requirement. Found art, a movement that began with Duchamp’s readymades and derives meaning from the artist’s intention and context, is one example. While a thorough explication of the meaning of originality in copyright law is outside the scope of this Article, our argument is merely that to the extent there are issues with originality, we should address them on those terms rather than using the fixation requirement as a quick “fix,” if you will.

157. See *supra* Part I.

158. See Heymann, *supra* note 92, at 854.

159. Lichtman, *supra* note 112, at 732–33.

160. See 17 U.S.C. § 106 (2012).

or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.¹⁶¹

Thus, a transitory dramatic interpretation of a novel may infringe the derivative work right or the performance right without infringing the reproduction right.¹⁶² What are these infringements if not *works* of infringement?

To see another instance of the purported evidentiary value of fixation at work, let us shift from high art to low art: consider a relatively typical infringement case such as *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*¹⁶³ The plaintiff in this case made very specific claims regarding the defendant's acts of putative infringement, including that the defendant took a certain number of lines of dialogue from episodes of *Seinfeld*.¹⁶⁴ Now imagine a world in which there was no copy of the plaintiff's work to compare to the defendant's putatively infringing book. Suppose, for example, that the plaintiff had never filmed the television episodes but instead had performed them live and had not fixed them via a script or a video. As an evidentiary matter, the plaintiff would have a harder time making out its factual allegations regarding access and substantial similarity. For instance, the plaintiff might have to rely on testimony of the performers or of the audience regarding claims such as which lines were uttered by the plaintiff's troupe.¹⁶⁵

Two points are important to note here. First, the plaintiff would have a harder time meeting the evidentiary burden of establishing an unauthorized taking by the defendant than she would if the work were fixed. Indeed, the burden would seem doubly difficult if both the plaintiff's work and the defendant's work were transitory. This might occur if, for example, the

161. Tyler T. Ochoa, *Symposium Review: Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or does the Form(gen) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 1001 (2004) (citing H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5657, 5675); *see also* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 968 (9th Cir. 1992) (stating that the definition of a derivative work does not require fixation).

162. H.R. REP. NO. 89-2237, at 53 (1966) (“[R]eproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.”).

163. 150 F.3d 132 (2d Cir. 1998) (affirming the ruling of then Southern District of New York Judge Sonia Sotomayor that a game that tested players' knowledge of lines of dialogue, characters, and plot elements from *Seinfeld* without the permission of the show's producers was an act of copyright infringement that did not fall under the fair use exception).

164. *See id.* at 138 (“By copying not a few but 643 fragments from the *Seinfeld* television series, however, *The SAT* has plainly crossed the quantitative copying threshold under *Ringgold*.”).

165. Relatedly, the archival rationale focuses on how fixation furthers the goal of preserving expression. Lichtman, *supra* note 112, at 723. The claim is that because fixation is durable and transferable, it increases the likelihood that the work will be passed from place to place and generation to generation. *Id.* It further contends that fixation benefits society by making works more accessible and long lasting. *Id.* Yet, these goals could be achieved through other means, and fixation does not necessarily maintain the expression for a lengthy period of time since it does not demand permanence. *Id.* Moreover, as argued above, even without an explicit fixation requirement, there is a strong incentive to fix.

defendant had instead engaged in a live performance based on the plaintiff's live performance instead of creating a book using *Seinfeld* material.

While such a situation might indeed present evidentiary problems for the plaintiff's case, it is the exception that proves the rule. This scenario is unlikely to occur because, in the normal course of their creative endeavors, plaintiffs and defendants of this sort will have reason to fix their works, regardless of whether fixation is a requirement for copyright protection. Doing so is a strategic business choice.

Thus, there will be less physical evidence for courts to consider in cases involving transitory works. Evidentiary problems in litigation serve as a caution to keep good records. However, these evidentiary hurdles are no reason to disallow copyright protection. By analogy, if a crime occurs with little evidence, a court would not deal with this shortcoming by denying that a crime took place.

Fixation does serve an important evidentiary purpose, however, insofar as it provides a method of discerning the parameters of a work. The fixation requirement helps delineate an idea from its expression. For this reason, we do not advocate eliminating the fixation requirement entirely, but merely removing the "transitory duration" exclusion from the statute. Removing the transitory duration exclusion would enable the fixation requirement to separate idea from expression, but still extend copyright protection to a class of works containing transitory elements. If the transitory duration exclusion is removed, the parameters of a work would be defined according to its "embodiment," which "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated."¹⁶⁶ A fixation of a work in this context would be consistent with the *Burrow-Giles* Court's call for a "physical rendering" of some sort. This term would appear applicable to, for instance, one of Andy Goldsworthy's works; we recast this as a requirement for "perception" or "communication." Congress could adopt a policy similar to France,¹⁶⁷ Germany, Spain,¹⁶⁸ Switzerland,¹⁶⁹ the Netherlands, and other countries where copyright protection is granted once the work is in a form that others can perceive.¹⁷⁰ A perception requirement would be a logical alternative

166. 17 U.S.C. § 101 (2012).

167. See CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L111-1 (Fr.). An English language translation of this is available at LEGIFRANCE.GOUV.FR, <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (last visited Mar. 25, 2014) (follow the "Intellectual property code (legislative part, regulatory part)—pdf—451 ko" hyperlink).

168. See Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions art. 10 (R.D.L. 1996) (Spain), *translated in Spain, WORLD INTELL. PROP. ORG.*, http://www.wipo.int/wipolex/en/text.jsp?file_id=126674 (last visited Mar. 25, 2014).

169. See LOI FÉDÉRALE DU 9 OCTOBRE 1992 SUR LE DROIT D'AUTEUR ET LES DROITS VOISINS [COPA] [FEDERAL ACT OF OCTOBER 9, 1992 ON COPYRIGHT AND RELATED RIGHTS] Oct. 9, 1992, SR 231.1, RS 231.1, art. 29, § 1 (Switz.). An English language translation of this law is available at *Documentation*, FED. AUTHORITIES SWISS CONFEDERATION, http://www.admin.ch/ch/e/rs/231_1/index.html (last visited Mar. 25, 2014).

170. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 232 (2013).

because the copyright statute mentions works that can be “perceived” when delineating the boundaries of copyrightable subject matter.¹⁷¹

D. Excluding Transitory Works from Copyrightability Fosters Inconsistency in U.S. Copyright Policy

In addition, the present situation raises a fundamental problem for U.S. copyright policy. Why should authors working in media that is unfixed by copyright standards be better treated abroad than they are in the United States? For decades, the United States has been a mecca of artistic works. Incentivizing contemporary creators to work outside the United States contradicts Congress’s goal to promote the arts and sciences by means of the exclusive and limited rights afforded by copyright protection. Many countries have copyright regimes that do not require fixation.¹⁷² Furthermore, no U.S. international treaty requires fixation for copyright protection.¹⁷³ The Berne Convention Implementation Act of 1988 recommended fixation but did not require it.¹⁷⁴ If exclusion for transitory works is not considered crucial enough to be included in such international agreements, U.S. copyright should not require it either.

Indeed the same is true for individual U.S. states that do not always require fixation for state copyright protection. Some states, such as California, have enacted state copyright statutes that protect works that are either not fixed in a tangible medium or works that are fixed for merely a transitory duration.¹⁷⁵ Other states, including Montana, North Dakota, and South Dakota, have similar statutes that protect unfixed “products of the mind.”¹⁷⁶ Legislation under these statutes is limited, but lends support for

171. 17 U.S.C. § 102(a). Copyright protection is granted to “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.” *Id.*

172. Civil law countries often grant copyright protection to a work once it is in a form in which others can perceive it, regardless of whether it is also fixed. GOLDSTEIN & HUGENHOLTZ, *supra* note 170, at 229. Additionally, Article 2(2) of the Berne Convention leaves it to the different member countries to determine whether fixation in some form is required for copyright protection. Berne Convention for the Protection of Literary and Artistic Works art. 2(2), Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3 (amended Sept. 28, 1979) [hereinafter Berne Convention]. Berne Convention Article 2(1) states: “The expression ‘literary and artistic works’ shall include *every* production in the literary, scientific and artistic domain, *whatever may be the mode or form* of its expression, such as . . . three-dimensional works relative to geography, topography, architecture or science.” *Id.* art. 2(1) (emphasis added). It also states, “It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.” *Id.* art. 2(2).

173. Hubanov, *supra* note 129, at 115.

174. *Id.*

175. See CAL. CIV. CODE § 980(a)(1) (West 1982).

176. MONT. CODE ANN. § 30-13-131 (2013); N.D. CENT. CODE § 47-07-04 (2011); S.D. CODIFIED LAWS § 43-43-1 (2012). All three statutes are nearly identical; the North Dakota statute reads:

The author of any product of the mind, whether it is an invention, a composition in letters or art, a design, with or without delineation or other graphical representation, has an exclusive ownership therein and in the representation or

the proposition that a copyright system can function while including transitory works. The California statute reads:

The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work. A work shall be considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device.¹⁷⁷

The California legislature drafted the statute in its present form to avoid preemption problems by clearly indicating that California common law copyright protects works that fall outside of the scope of federal copyright law.¹⁷⁸

It seems the types of works brought in to copyright protection under this statute are either extemporaneous—or semi-extemporaneous—performances, or works not yet in their final form. A California appellate court held, for example, that academic lectures are protectable as unfixed works under California common law copyright.¹⁷⁹ The court briefly contemplated the challenges of determining unfixed works boundaries.¹⁸⁰ Referring to the nature of professors to build and develop their lectures over time while working for different institutions, the court commented that if the common law copyright in the plaintiff's unfixed lectures had to be split up, it would be nearly impossible to distinguish which parts of the plaintiff's lectures were created during the plaintiff's employment at UCLA and what parts were created at another time.¹⁸¹

Another type of performance protected by the California statute is a radio program broadcast but not simultaneously recorded. In *Trenton v. Infinity Broadcasting Corp.*,¹⁸² a radio show creator and host argued that his on-air performances were an unfixed work.¹⁸³ The court disagreed, finding that the radio station did record the performances for a sufficient time to create a fixation under federal copyright law. But, the court said that if the plaintiff could show certain individual programs were not recorded while broadcast they would fall within the California unfixed works statute.¹⁸⁴ An

expression thereof which continues as long as the product and the representations or expressions thereof made by the author remain in the author's possession.

N.D. CENT. CODE § 47-07-04.

177. CAL. CIV. CODE § 980(a)(1).

178. *Lukens v. Broder/Kurland Agency*, No. CV 00-08359 NM (JWJx), 2000 WL 35892340 (C.D. Cal. Sept. 14, 2000).

179. *Williams v. Weisser*, 78 Cal. Rptr. 542, 545 (Ct. App. 1969).

180. *Id.* at 546-47.

181. *Id.* at 546.

182. 865 F. Supp. 1416 (C.D. Cal. 1994).

183. *Id.* at 1423-24.

184. *Id.* at 1425.

unpublished and unperformed play was not fixed to qualify for federal copyright protection, but did qualify as an unfixed work under California law. In a plagiarism suit under section 980, the court ultimately found no substantial similarity between the play and the allegedly infringing television show.¹⁸⁵

The existence of such state statutes proves that a copyright system without an exclusion for transitory works is feasible, even in the United States. The fixation language used is consistent with federal law, so a similar policy retaining the fixation requirement but extending protection to transitory works seems reasonable. Moreover, section 301(b) of the Copyright Act refuses to preempt state law that may protect an unfixed work.¹⁸⁶ Thus, works that are of transitory duration have been given some limited rights in the U.S. system.¹⁸⁷ Clearly, providing federal copyright protection to the same works would be compatible with both the purposes and the functioning of U.S. copyright law.

As the conventional understanding goes, the 1976 Act contained fundamental changes in order to comply with obligations under the Berne Convention.¹⁸⁸ The most important conceptual change in the 1976 Act was to move away from a formalistic system. It has long been a core feature of the Berne Convention that due to copyright's nature as a basic right of artists, copyrightability cannot be made susceptible to formalities, because the existence of formalities inevitably results in authors' inability to secure copyright due to a failure of some formal act or requirement.¹⁸⁹ Accordingly, the 1976 Act brought big changes toward this end, including doing away with the previous formalities necessary to gain copyright protection, such as the registration and publication requirements altogether.¹⁹⁰ Designed in part to eliminate formalities, the 1976 Act ironically first introduced a statutory fixation requirement.¹⁹¹ Because of

185. *Ware v. CBS, Inc.*, 61 Cal. Rptr. 590, 594 (Ct. App. 1967). The court applied an earlier version of the California statute, which at the time stated, "The author or proprietor of any composition in letters or art has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition." *Id.* at 592-93.

186. 17 U.S.C. § 301(b)(1) (2012) ("Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression . . .").

187. For the two cases *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341 (N.Y. 1968), and *Falwell v. Penthouse, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981), there were rights of publicity statutes on point, but no state copyright statutes.

188. See Ancel W. Lewis, Jr., Bruce E. Hayden & Sandeep Seth, *Recent Developments in Copyright Law: The Berne Convention*, 22 COLO. LAW. 2525, 2525 (1993).

189. See Universal Copyright Convention art. III, para. 1, done July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 (entered into force July 10, 1974) ("Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities . . . shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention.").

190. Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490, 1501-02 (1979).

191. See *id.* at 1495.

its emphasis on form over function in excluding works that contain dynamic elements, the fixation requirement has become one of the most significant formalities ever codified in U.S. copyright law. As has been discussed, fixation is ultimately justified on a variety of practical grounds, and it is precisely these sorts of rationales that the Berne Convention sought to diminish in importance.

Considering all of the above factors, the rationales for fixation do not amount to anything approaching a sufficient reason to deny the protections of copyright to important categories of creative works.

IV. CASE LAW DEMONSTRATES THAT THE TRANSITORY DURATION LIMITATION IS OUTDATED

The doctrine of fixation is becoming more complex and uncertain as events in the real world overtake the law's ability to adapt. A few recent cases illustrate this rapidly increasing complexity. Fixation, which has historically been a relatively uncontroversial doctrine in copyright law, has moved front and center with developments in technology and the arts. As media for creative expression have evolved, courts have wrestled with the parameters of fixation—specifically, what it means for a work to be fixed for “more than a transitory duration.” Cases in the areas of digital media, performances, and conceptual art have all recently challenged the meaning of “transitory duration.” These cases demonstrate that the transitory duration limitation on fixation is increasingly outdated.

A. The Transitory Duration Standard Is Unworkable for Digital Technologies

As computer technology has become faster and more ubiquitous, the copyright exclusion for transitory works has come into question. Perhaps the most notorious case to consider the duration needed for fixation has been *MAI Systems Corporation v. Peak Computer, Inc.*,¹⁹² which crystallized the fixation problem when considering “copies” in terms of a copyright infringement action.¹⁹³ The Ninth Circuit agreed with MAI's claims that maintenance by Peak was an infringing use of MAI's protected software.¹⁹⁴ Because the software was loaded into memory, and a technician could then view the error log and diagnose the problem, the court held that the representation created in the RAM satisfied the fixation requirement.¹⁹⁵ The court noted that the Copyright Act requires embodiment, “in a copy . . . by or under the authority of the author,” and stability, “sufficiently permanent . . . to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁹⁶ Relying on language from *Apple Computer, Inc. v. Formula*

192. 991 F.2d 511 (9th Cir. 1993).

193. *Id.* at 519.

194. *Id.* at 518.

195. *Id.*

196. *Id.* (quoting 17 U.S.C. § 101 (1988)).

International, Inc.,¹⁹⁷ the court held that the copy made in RAM was “fixed” under the Copyright Act.¹⁹⁸ Building on *Vault Corp. v. Quaid Software, Ltd.*,¹⁹⁹ the Ninth Circuit proposed that the act of loading software onto RAM creates a copy under copyright law.²⁰⁰

More recently, the Second Circuit revisited the question of fixation as applied to RAM technology and provided some (slight) measure of clarity. In *Cartoon Network LP v. CSC Holdings, Inc.*²⁰¹ (*Cablevision II*), the court considered whether, by buffering data in a remote server, Cablevision was reproducing someone else’s copyrighted work by making a copy.²⁰² The Second Circuit in *Cablevision II* took a different approach from *MAI Systems* in determining a similar issue of electronic storage, reaching a different conclusion regarding infringement and the creation of copies.²⁰³ The district court had agreed with the plaintiff’s reliance on *MAI Systems*, finding that the temporary buffering of bits of data from the live feed into a remote server (at the request of a customer wishing to record a program) at a rate of 1.2 seconds before automatically being erased was more than a transitory duration and that a fixed copy had been improperly obtained.²⁰⁴

The Second Circuit recognized the lower court’s attempt to focus the issue using the two-step analysis from *MAI Systems*, but found that it had mistakenly limited the analysis primarily to the embodiment requirement.²⁰⁵ It distinguished the holding in *MAI Systems*, that loading *did* create a copy, by emphasizing the need to consider the durational aspect of fixation and that loading into RAM *can* create a fixed copy.²⁰⁶ Reasoning from *Advanced Computer Services*,²⁰⁷ the court held that the works were not fixed in the buffers because they were not embodied in the

197. 594 F. Supp. 617 (C.D. Cal. 1984). The Ninth Circuit quoted the *Apple Computer* court in support of its view:

RAM can be simply defined as a computer component in which data and computer programs can be temporarily recorded. Thus, the purchaser of [software] desiring to utilize in his computer all of the programs on the diskette could arrange to copy [the software] into RAM. This would be only a temporary fixation. It is a property of RAM that when the computer is turned off, the copy of the program recorded in RAM is lost.

MAI Sys. Corp., 991 F.2d at 519 (quoting *Apple Computer*, 594 F. Supp. at 622).

198. *MAI Sys. Corp.*, 991 F.2d at 519.

199. 847 F.2d 255, 260 (5th Cir. 1988) (“The act of loading a program from a medium of storage into a computer’s memory creates a copy of the program.”).

200. *MAI Sys. Corp.*, 991 F.2d at 519.

201. 536 F.3d 121 (2d Cir. 2008).

202. *Id.* at 125.

203. *Cablevision II*, 536 F.3d at 127–29; see *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.* (*Cablevision I*), 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

204. *Cablevision I*, 478 F. Supp. at 621.

205. *Cablevision II*, 536 F.3d at 127 (“As a result of this error, once [the district court] determined that the buffer data was ‘clearly . . . capable of being reproduced,’ i.e., that the work was embodied in the buffer, the district court concluded that the work was therefore ‘fixed’ in the buffer, and that a copy had thus been made.” (citing *Cablevision I*, 478 F. Supp. 2d at 621–22)).

206. *Id.* at 128.

207. *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994).

buffers for more than a transitory duration of time—no more than 1.2 seconds, in fact—before being automatically overwritten.²⁰⁸ The court declined, however, to offer the 1.2 second duration as a benchmark to measure the still amorphous “transitory duration” standard.²⁰⁹ While this new analysis of the fixation requirement seems at odds with the *MAI Systems* court’s holding, the Second Circuit determined that the *MAI Systems* line of cases concluded that a copy was fixed without addressing the duration requirement of the embodiment analysis.²¹⁰ Thus, the court reasoned, *MAI Systems* did not hold that loading a program into a form of RAM *always* results in copying: “Such a holding would read the ‘transitory duration’ language out of the definition.”²¹¹

Although focusing more on liability of an ISP in an infringement action, the Fourth Circuit in *CoStar Group, Inc. v. LoopNet, Inc.*²¹² has come close to providing a test for transitory duration. The court discussed the process of creating the copies at issue, noting that the larger infrastructure of the internet is designed as a conduit for data and within that automatic system ISPs passively store material.²¹³ The court held that the process of transmission creates a temporary, automatic response and that those electronic copies made during the transmission were not “fixed,” because such copies were used to automatically transmit users’ material and they were not “of more than transitory duration.” The court recognized that transitory duration had both a qualitative and quantitative characteristic that needed to be considered: “It is quantitative insofar as it describes the period during which the function occurs, and it is qualitative in the sense that it describes the status of transition.”²¹⁴

A third case concerning digital fixation, *Micro Star v. Formgen, Inc.*,²¹⁵ held that even a descriptive fixation would suffice for copyright protection.²¹⁶ The court stated that if something is “described in sufficient detail to enable the work to be performed from that description,”²¹⁷ then it would be “fixed” for purposes of copyright law. In that case, “descriptive fixation” was satisfied by the audiovisual display of the Duke Nukem game. The court relied on *ProCD, Inc. v. Zeidenberg*²¹⁸ and analogized the rigid, exact replication of the displayed information to transposing onto sheet

208. *Cablevision II*, 536 F.3d at 130.

209. *Id.* at 129–30.

210. *Id.* at 128 (“The *MAI Systems* court referenced the ‘transitory duration’ language but did not discuss or analyze it.”).

211. *Id.* (“Accordingly, we construe *MAI Systems* and its progeny as holding that loading a program into a computer’s RAM *can* result in copying that program.”).

212. 373 F.3d 544 (4th Cir. 2004).

213. *Id.* at 555 (“[Internet service providers], when passively storing material at the direction of users in order to make that material available to other users upon their request, do not ‘copy’ the material in direct violation of § 106 of the Copyright Act.”).

214. *Id.* at 551.

215. 154 F.3d 1107 (9th Cir. 1998).

216. *Id.* at 1111–12.

217. *Id.* (citing 1 PATRY, *supra* note 90, at 168).

218. 86 F.3d 1447, 1453 (7th Cir. 1996) (finding that computer files on a CD are fixed in a tangible medium of expression).

music in order for a musician to be able to sufficiently perform the same composition.²¹⁹ The court in *Torah Soft Ltd. v. Drosnin*²²⁰ built on the premise of fixation being satisfied by an identical, repetitive sequence. In that case, database query results were fixed based on the rationale that the output was repeatable when the input was identical.²²¹

These cases demonstrate the difficulty of applying the fixation requirement generally, and the transitory duration limitation in particular, to digital technologies. From these cases, it is clear that there is a trend toward a more flexible judicial interpretation of what it means to be “fixed.” Nevertheless, it is also apparent that as technology continues to advance, the courts will continue to be faced with drawing increasingly precise distinctions between “fixed” and “unfixed” bytes of data. The sense of permanence historically associated with fixation is inapt for many digital technologies, and the question moves away from whether or not the work is of transitory duration at all, toward a consideration of how much transitory duration is acceptable for copyrightability.

*B. The Transitory Duration Limitation Has Artificially Excluded
Live Performances from the Purview of Copyright
Unless Fixed by Proxy*

Copyright law encompasses many kinds of live performances.²²² These live performances easily satisfy the minimal level of creativity necessary for originality, but fixation has historically presented a stumbling block to copyright protection. The medium of performance presents a problem that is not easily addressed by flexible interpretation of the statute; instead, courts rely on the second clause of the definition of “fixation”²²³ and let either the transmission and broadcast of an event serve as an alternate answer to the fixation problem, or force authors to fix their works by proxy.

Further defining this alternative to fixation in developing the modern statute, live broadcasts are fixed “if the program content is transmitted live to the public while being recorded at the same time.”²²⁴ This “workaround” option of simultaneous transmission creates a legal fiction that (especially when considering infringement) “fixation occurs before the transmission.”²²⁵ The original work, however, never had any copyright protection because of the lack of fixation; an unknown recording of the

219. *Micro Star*, 154 F.3d at 1111–12.

220. 136 F. Supp. 2d 276, 283 (S.D.N.Y. 2001).

221. *Id.*

222. 17 U.S.C. § 102(a)(3)–(4) (2012).

223. *Id.* § 101 (“[A] work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ . . . if a fixation of the work is being made simultaneously with its transmission.”).

224. H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.

225. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg LP*, 808 F. Supp. 2d 634, 637 (S.D.N.Y. 2011).

original work therefore could not infringe the original unless a simultaneous recording is made under the authority of the author.²²⁶

With the addition of choreography and dramatic performance to the 1976 Act as copyrightable subject matter, fixation's emphasis on tangibility and permanence remains a problem in seeking protection for those types of works. Because of the transitory duration limitation, fixation for choreography, for example, involves recording the work either as a separate audiovisual work,²²⁷ through photographs,²²⁸ or as a literary work in the form of notations.²²⁹ These options for a creator enable a fixation by proxy; the problem still exists that the actual performance remains unfixed, but the newly created "fixation" is eligible for protection. The Second Circuit came close in *Horgan v. MacMillan* to recognizing this dichotomy between fixation and communication of the performance when responding to the defendant's argument that no infringement occurred because a "central characteristic of choreography is movement."²³⁰ The court held that the photographs of Balanchine's ballet infringed: "A snapshot of a single moment in a dance sequence may communicate a great deal,"²³¹ and freezing the moment allowed for communication of the work into the public sphere.

Choreography represents an internal copyright disagreement; the statute with its reliance on a exclusion for works of a transitory duration suggests that the work is only important insofar as it can be reproduced in the future, but the language of being "perceived . . . or communicated"²³² suggests that a work is eligible for protection as long as some concept is expressed and communicated regardless of how long that communication persists.²³³

226. 1 NIMMER & NIMMER, *supra* note 90, § 2.03[B][2] n.33; *see also* Prod. Contractors, Inc. v. WGN Cont'l Broad. Co., 622 F. Supp. 1500, 1503 (N.D. Ill. 1985) (holding that a Christmas parade itself was not copyrightable, and the transmission of the event by a rival network did not constitute infringement, but the rebroadcast of the simultaneous transmission, shown on ABC, would be an infringement because that work was protected as both fixed and original).

227. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 632 (2d Cir. 2004) (noting that dances are available for copyright if they satisfy fixation).

228. *Horgan v. MacMillan*, 789 F.2d 157 (2d Cir. 1986) (concerning a dispute between the owner of a copyright in choreography and an alleged infringer that published a book containing photographs of the choreography).

229. *See* 1 NIMMER & NIMMER, *supra* note 90, § 2.07[C] ("The preferable forms were either the Laban system of notation or a motion picture of the dance.").

230. *Horgan*, 789 F.2d at 161–62.

231. *Id.* at 163.

232. 17 U.S.C. § 102(a) (2012).

233. *See* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY: STUDY NO. 28 COPYRIGHT IN CHOREOGRAPHIC WORKS 96 (Comm. Print 1961) ("[D]ance must convey a dramatic concept or idea" (emphasis added)).

*C. Courts Struggle When Applying the Transitory Duration
Limitation to Contemporary Works of Art*

In examining conceptual and process-oriented art,²³⁴ courts are still fixated on the end-goal and the potential for a product to persist by reproduction. Courts wrestle with the transitory duration exclusion for creative works that emphasize process over product. These creative works may sometimes be seen as an ongoing expression of the artist or a permanent expression of an idea—both of which traditionally resist protection.²³⁵ Two modern cases, *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*²³⁶ from the First Circuit and *Kelley v. Chicago Park District*²³⁷ from the Seventh Circuit highlight not only the disagreement among courts' approaches to the fixation requirement as applied to these forms of creative works, but also the internal disconnect in trying to show that these media of expression come within the purview of copyright law.

In *Massachusetts Museum of Contemporary Art Foundation, Inc.*, the First Circuit considered whether an unfinished and conceptual work—Christoph Büchel's large-scale installation *Training Ground for Democracy* for the Massachusetts Museum of Contemporary Art (MassMoCA)—was copyrightable under the fixation requirement.²³⁸ The First Circuit adhered to precedent in concluding that the unfinished work fell within the scope of the Copyright Act.²³⁹ Although the court saw the narrowly defined VARA rights as just compensation for the artist, they ignored the fundamental disagreement about the work itself; for the artist the work of art exists as soon as it is expressed into an experience (for public viewing), but in the eyes of the law art is only recognized after the artist steps away from it.²⁴⁰

The Seventh Circuit, however, in evaluating Chapman Kelley's *Wildflower Works* project, focused on the transitory duration limitation in

234. Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967, at 79, 80 (“In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. *The idea becomes a machine that makes the art.*” (emphasis added)).

235. Lily Ericsson, *Creative Quandary: The State of Copyrightability for Organic Works of Art*, 23 SETON HALL J. SPORTS & ENT. L. 359, 378 (2013) (noting that the guarantee of copyright law is protection for the expression but not the idea); see also *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 170–71 (D. Mass. 2008) (“The Copyright Act thus does not use materiality in its most obvious sense [I]t refers to materiality as a medium in which a copyrighted work can be ‘fixed.’”); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1195–96 (2007).

236. 593 F.3d 38 (1st Cir. 2010).

237. 635 F.3d 290 (7th Cir. 2011).

238. *Mass. Museum of Contemporary Art Found., Inc.*, 593 F.3d at 41–42; see also Michael J. Madison, *The End of the Work As We Know It*, 19 J. INTELL. PROP. L. 325, 342 (2012) (“The law does not concern itself with trifles. In a related sense, a creative thing may emerge as a work from early or preliminary effort, and in doing so it crosses a kind of copyright boundary.”).

239. *Mass. Museum of Contemporary Art Found., Inc.*, 593 F.3d at 51–52.

240. Cf. Madison, *supra* note 238, at 335 (suggesting that the fixation requirement is just an outgrowth of the pre-1976 requirement of publication for protection).

terms of copyrightability;²⁴¹ its decision highlights an internal confusion with the comparison to artist Jeff Koons's plant-based sculpture *Puppy*. While holding that a "work" should communicate the fact that humans actually produced it,²⁴² the court stumbled in categorization of Kelley's artwork, which it called "infinitely malleable."²⁴³ The court was skeptical that the plaintiff's work could be treated as painting or sculpture²⁴⁴ and found that the fixation requirement precluded copyright protection for his work. The "denial of copyright protection for works with an 'essence' of 'vitality'"²⁴⁵ rests on the interplay of fixation and medium of expression; fixation is defeated if the work is presented in a medium that is subject to change.²⁴⁶ But the court contradicted its ruling when comparing Kelley's *Wildflower Works* installation to Koons's *Puppy*, which it noted was fixed even though the sculpture²⁴⁷ at each different exhibition site bloomed differently and created a "noticeably different 'Puppy'"²⁴⁸ at each new location.

V. OTHER COUNTRIES PROVIDE A MODEL FOR A COPYRIGHT SYSTEM THAT INCLUDES TRANSITORY WORKS

From the moral rights perspective ensconced in the Berne Convention, the increasing complexity and uncertainty regarding the fixation standard and the exclusion for transitory works can be seen as a formalistic legal trap that will deny copyright protection to work that is otherwise creative, original, and worthy of protection.

A. Copyright Systems in Civil Law Countries Often Function Without a Fixation Requirement

The Berne Convention allows nations to choose whether to require fixation.²⁴⁹ Generally, common law countries—such as the United States and England—require fixation, while civil law countries—including France,²⁵⁰ Spain,²⁵¹ and Switzerland²⁵²—do not.²⁵³ Continental European

241. *Id.* at 350 ("The work is, fundamentally, something that we assume should remain the same . . . across artistic disciplines . . .").

242. *Id.* at 351.

243. *Kelley*, 635 F.3d at 301.

244. *Id.*

245. Ericsson, *supra* note 235, at 382.

246. *Id.* at 381.

247. *Id.* (describing Koons's *Puppy* as consisting of a wire fame, soil, geotexture fabric, an internal irrigation system, and constructed on the exterior entirely of plants and flowers).

248. *Id.*

249. Berne Convention, *supra* note 172, art. 2(2) ("It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.").

250. See CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L111-1 (Fr.). An English language translation of this is available at LEGIFRANCE.GOUV.FR, <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (last visited Mar. 25, 2014) (follow the "Intellectual property code (legislative part, regulatory part)—pdf—451 ko" hyperlink).

civil law nations view copyright as a tool for protecting an author's relationship to his or her work.²⁵⁴ At the policy level, one reason these countries do not require fixation is to give authors the right of divulgation.²⁵⁵ The core principle is that authors have the right to choose to keep their work private by withholding publication.²⁵⁶ Fixation as a requirement is inconsistent with the core philosophy of French copyright law. The right of divulgation often comes into play in situations where an author's extemporaneous or unfinished work is copied without consent.

Despite the absence of a fixation requirement, most civil law countries require that a work exist in an expression to qualify for copyright protection. An expression must be perceptible and display organization to a degree that the work is more than an idea, but shows the author's input. An expression may be perceptible by a machine, rather than a human (such is the case for computer software). In Germany, a work must exist in perceptible form, rather than a material form.²⁵⁷ The broader concept of an "expression" includes works that U.S. copyright law would consider fixed for only a transitory duration. It also includes media that are stable enough for the expression to be perceived sufficiently, such as ice sculptures, air cutting, and hairstyles.²⁵⁸ A speech by famed psychoanalyst Jacques Lacan, for example, was later published by a third party.²⁵⁹ The Paris Court of First Instance held that the speech qualified for copyright protection once it was made perceptible, here by spoken word.²⁶⁰ Thus, Lacan and his assignees have the right to prevent others from fixing the speech.²⁶¹ In addition, the Paris Supreme Court for Judicial Matters found that unauthorized photographs of a fashion show infringed the copyright over the shows as performances.²⁶² This decision was not entirely expected

251. See Revised Law on Intellectual Property, Regularizing, Clarifying and Harmonizing the Applicable Statutory Provisions art. 10 (R.D.L. 1996) (Spain), translated in Spain, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/text.jsp?file_id=126674 (last visited Mar. 25, 2014).

252. See LOI FÉDÉRALE DU 9 OCTOBRE 1992 SUR LE DROIT D'AUTEUR ET LES DROITS VOISINS [COPA] [FEDERAL ACT OF OCTOBER 9, 1992 ON COPYRIGHT AND RELATED RIGHTS] Oct. 9, 1992, SR 231.1, RS 231.1, art. 29, § 1 (Switz.). An English language translation of this law is available at Documentation, FED. AUTHORITIES SWISS CONFEDERATION, http://www.admin.ch/ch/e/rs/231_1/index.html (last visited Mar. 25, 2014).

253. GOLDSTEIN & HUGENHOLTZ, *supra* note 170, at 229.

254. Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 552 (2006).

255. Antoine Latreille, *From Idea to Fixation: A View of Protected Works*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 133, 141 (Estelle Derclaye ed., 2009).

256. *Id.*

257. Elizabeth Adeney, *Authorship and Fixation in Copyright Law: A Comparative Comment*, 35 MELB. U. L. REV. 677, 682 (2011).

258. Piotraut, *supra* note 254, at 572.

259. Latreille, *supra* note 255, at 141.

260. *Id.*

261. *Id.*

262. Estelle Derclaye, *French Supreme Court Rules Fashion Shows Protected by Copyright—What About the UK?*, J. INTELL. PROP. L. & PRAC., May 2008, at 286 (providing a summary of the 2008 case *Roberts A.D. v. Chanel*).

because fashion shows fall within the category of choreographic works, and the French code only protects choreographic works that are fixed.²⁶³ However, in interpreting the requirement, the court held that the fixation was merely an evidentiary requirement for the infringement action, not a prerequisite for the existence of copyright.²⁶⁴

A Dutch case addressed the contours of copyrightability and fixation when it considered whether a perfume was copyrightable.²⁶⁵ The Dutch high court held that the smell of the perfume was copyrightable, but not the mixture.²⁶⁶ Lancôme defined the bounds of the perfume as that scent that is inside the bottle.²⁶⁷ The court agreed that the scent inside the bottle is sufficiently stable and objectively determinable to be perceived; that is not to say that it is fixed for more than a transitory duration, as the smell moves and changes, but the defined bounds of that scent in the bottle were perceptible.²⁶⁸ The court noted some practical problems associated with protecting works that are not perceptible visually or aurally. For example, it is extremely difficult for an average observer to determine if one perfume takes enough of the scent of a competitor's perfume to find the Dutch version of substantial similarity. The court contended that copyright law is accustomed to dealing with these problems, pointing to computer software infringement cases, which are highly expert dependent.²⁶⁹

These countries provide an illustration of copyright systems that function without a fixation requirement. While our recommendation is to maintain a fixation requirement to determine the metes and bounds of an artistic

263. *Id.*

264. *Id.*

265. HR 16 juni 2006, NJ 2006, 327 m.nt. JH Spoor (Kecofa/Lancôme) (Neth.), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2006:AU8940>. The Dutch court found that the exclusion of works not perceptible visually or aurally was unintentional, but widespread among nations. Reviewing English and French law, the Dutch court noted that the realm of copyright is limited to works that are visually perceptible in most other nations. This limit (restricting copyright to visually and aurally perceptible works) is created by nations' respective statutes that define the categories of protectable works (for example 17 U.S.C. § 102). The Dutch version of this statute is not an exclusive list—meaning things on the list are protectable, but so are some things that are not. The Dutch court reviewed the legislative history and found that failure to include works that are not perceptible by sight or sound was not an intentional omission, but merely a subject matter that the drafters never contemplated, comparing perfume to video games.

266. *See id.*

267. *See id.*

268. *See id.* The court also noted that perfumes mirroring naturally occurring smells would not be protectable. For a fuller description of the standard of perceptibility, see *supra* text accompanying note 265.

269. Perhaps part of the Dutch court's ease in finding the scent of perfume protectable has to do with the different standard of originality. Originality seems to be more of a limit under Dutch law than it would be under U.S. law, although the court describes it as a low standard and one that judges should not decide. The court seems to require a higher level of creativity compared to the United States. The Dutch court states that industrially produced perfumes would not be sufficiently original. Perfumes that are the product of individual creativity would be protected. The Dutch court used phrases (roughly translated) like "carrying the stamp of the author" and "owing its original character to the author" to describe an original work. HR 16 juni 2006, NJ 2006, 327 m.nt. JH Spoor.

expression, these countries demonstrate that it is possible to do so even while including transitory works.

B. In Countries Without a Fixation Requirement, Fixation Still Serves a Valuable Practical Function

In countries that do not require fixation for copyright protection, a fixation requirement still serves a valuable evidentiary function. Often the only way an author can prove that an alleged infringing work is substantially similar to a protectable work of the author is by producing a fixation. According to one French law scholar, for certain types of works, such as performances, a fixation's evidentiary value is so important that it is nearly a *de facto* requirement, although not a statutory requirement.²⁷⁰ As discussed above, we argue that extending copyrightability to transitory works would not have much of an impact on the tendency of creators to fix their works. Countries without a fixation requirement can serve as a model in this regard. Fixing a work in a form that is not transitory can be of great practical value; however, works that are transitory in nature should not be excluded from the purview of copyright.

VI. VISUAL ARTISTS RIGHTS ACT AS AN
ALTERNATIVE PROPOSAL

There will undoubtedly remain commentators who do not find the overall benefit of removing the "transitory duration" exclusion sufficient to outweigh the perceived negative impact of extending copyright protection to a whole new class of previously unprotected works.²⁷¹ As we noted above, if removal of the "transitory duration" exclusion in the Copyright Act is not justified, contemporary art should nonetheless receive preferential treatment under U.S. copyright law via its moral rights provisions.

A. VARA's History Suggests That Courts Have Interpreted Moral Rights Too Narrowly

The enactment of VARA, as an amendment to the Copyright Act, introduced moral rights to U.S. federal law.²⁷² Moral rights exist independently of economic rights; they are personal rights that vest in the author of a creative work.²⁷³ Unlike the rest of American copyright law, moral rights are not linked to economic interests, but rather focus on the intrinsic nature and cultural value of art.²⁷⁴

270. Piotraut, *supra* note 254, at 573.

271. *E.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 489–90 (2004).

272. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128, 5128–33 (codified as amended at 17 U.S.C. §§ 101, 106A (2012)).

273. Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 373 (1995).

274. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (1995).

VARA grants to the author of a "work of visual art" the moral rights of attribution and integrity.²⁷⁵ The right of attribution ensures both that artists are correctly identified with the works of art that they create, and that they can disclaim authorship of works that are not theirs or that have been distorted, mutilated, or otherwise modified in such a way that would be prejudicial to their honor or reputation.²⁷⁶ The right to integrity allows an artist to prevent or claim damages for (1) an intentional distortion, mutilation, or modification of a work that would be prejudicial to the artist's honor or reputation, or (2) an intentional or grossly negligent destruction of a work of recognized stature.²⁷⁷ While there are certain limitations on the works and the artists that are covered by the statute, VARA seeks to protect both reputations of certain visual artists and the works that they create.²⁷⁸

Works of visual arts are granted additional protection because of the unique character of such art and the special societal purpose served by such works. While other copyrightable material can be copied and reproduced, works of visual art exist only in the original; thus, the original is justified in earning special privileges.

[T]he works of visual art covered by H.R. 2690 are limited to originals: works created in single copies or in limited editions. They are generally not physically transformed to suit the purposes of different markets. Further, when an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies is altered.²⁷⁹

275. 17 U.S.C. § 106A.

276. H.R. REP. NO. 101-514, at 5 (1990), *reprinted* in 1990 U.S.C.C.A.N. 6915, 6915. As delineated by § 106A:

- (a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—
- (1) shall have the right—
 - (A) to claim authorship of that work, and
 - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
 - (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
 - (3) subject to the limitations set forth in section 113(d), shall have the right—
 - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
 - (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

277. 17 U.S.C. § 106A(a)(2).

278. For example, VARA limits protections to "works of visual art," as defined in section 101 of the Copyright Act. In addition, some VARA protections are only available to works "of recognized stature." H.R. REP. NO. 101-514, at 6.

279. H.R. REP. NO. 101-514, at 9.

Therefore, Congress's intent was to grant additional rights to works that have the risk of being irrevocably lost if the original is damaged, altered, or destroyed, as opposed to a mass-produced work that is not similarly vulnerable.²⁸⁰ Moreover, Congress recognized that visual arts meet a special societal need; their protection and preservation serve an important public interest.²⁸¹ Representative Edward Markey elaborated,

Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.²⁸²

As such, while Congress was initially reluctant to include moral rights in U.S. copyright law, the genuine importance of such rights is recognized and given some measure of weight.

The concept of moral rights is derived from the nineteenth-century French concept of *droit moral*, wherein the personal intangible relationship is protected separately from financial interests and ownership of a work.²⁸³ Moral rights derive from the theory of natural rights and are based on the notion that "an author has the right to reap the fruits of his creations, obtain rewards for his contributions to society, and protect the integrity of his creations as extensions of his personality."²⁸⁴

European moral rights laws are significantly more extensive than those recognized in the United States.²⁸⁵ First, many European countries grant artists other moral rights in addition to attribution and integrity, such as the right of divulgation and the right to repent or retake a work at any time in exchange for payment.²⁸⁶ Second, moral rights in most countries are inalienable, unlike VARA in which moral rights can be waived and only last during the artist's lifetime.²⁸⁷ Thus, artists in other countries have greater noneconomic rights to their work than they have in the United States.²⁸⁸

Most civil law countries have long recognized moral rights and afford moral rights protection in compliance with the Berne Convention.²⁸⁹ The Berne Convention states in Article 6bis:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the

280. Virginia M. Cascio, *Hardly a Walk in the Park: Courts' Hostile Treatment of Site-Specific Works Under VARA*, 20 DEPAUL J. ART TECH. & INTELL. PROP. L. 167, 188 (2009).

281. H.R. REP. NO. 101-514, at 5-6.

282. *Id.*

283. Michelle Moran, *Quilt Artists: Left Out in the Cold by the Visual Artists Rights Act of 1990*, 14 MARQ. INTELL. PROP. L. REV. 393, 399 (2010).

284. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 266 (2009).

285. *Id.* at 268.

286. *Id.* The right of divulgation gives the artist the right to decide when and whether the work is complete and can be shown. *Id.*

287. *Id.*

288. Moran, *supra* note 283, at 400.

289. Adler, *supra* note 284, at 266.

work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.²⁹⁰

Thus, the Berne Convention creates (1) the right to claim paternity of the work and (2) the right to the work's integrity.

The United States was the last major industrialized country to join the Berne Convention, and one of the reasons for this delay was debate over moral rights protection.²⁹¹ Subsequently, Congress did not provide explicit protection for moral rights in the Berne Convention Implementation Act of 1988, because it found that existing legal protection with other causes of action such as defamation, unfair competition, breach of contract, and violation of the Lanham Act satisfactorily met all obligations under Berne.²⁹² The Act was passed only after Congress determined that U.S. copyright law would not have to be amended to meet the requirements of Article 6.²⁹³ Two years later, VARA was finally approved when the approach to moral rights was minimalist.

While the Berne Convention implementation prompted greater debate about the rights of artists, efforts to enact artists' rights laws had begun well before that time. In fact, bills seeking to protect visual artists were introduced in Congress in 1979.²⁹⁴ States even took action to protect moral rights. California was the first state to statutorily protect artists, and it passed the California Art Preservation Act in 1979.²⁹⁵ This was followed by New York's enactment of the Artist's Authorship Rights Act in 1983, and nine other states have since passed similar moral rights statutes.²⁹⁶

VARA has a very limited scope, and only certain types of visual art are offered the extra protection of moral rights.²⁹⁷ As such, VARA does not provide moral rights to all authors of works that are otherwise copyrightable. The definition of protected art under VARA is a narrower subcategory of "pictorial, graphic, and sculptural works" that are eligible for copyright.²⁹⁸

More precisely, VARA only protects works falling into the carefully delineated and narrow category of "works of visual art,"²⁹⁹ which is defined as:

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and

290. Berne Convention, *supra* note 172, art. 6bis.

291. See generally Susan Stanton, *Development of the Berne International Copyright Convention and the Implications of United States Adherence*, 13 HOUS. J. INT'L L. 149, 169 (1990).

292. See *id.* at 170 (citing S. REP. NO. 100-352, at 9-11 (1988); H.R. REP. NO. 100-609, at 32-40 (1988)).

293. Sherman, *supra* note 273, at 374-75.

294. H.R. REP. NO. 101-514, at 8 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6918.

295. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (1995).

296. *Id.*

297. 5 PATRY, *supra* note 90, § 16:7.

298. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 301 n.7 (7th Cir. 2011).

299. 17 U.S.C. § 106A (2012).

consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.³⁰⁰

Therefore, the rights granted by VARA pertain only to certain physical embodiments of works present in single copies or in fewer than 200 copies if they are signed and consecutively numbered. Moreover, VARA excludes certain types of visual arts from the purview of moral rights. It omits many utilitarian and mass-produced works.³⁰¹ Specifically, the statute explicitly does *not* include:

- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
- (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
- (iii) any portion or part of any item described in clause (i) or (ii);
- (B) any work made for hire; or
- (C) *any work not subject to copyright protection under this title.*³⁰²

Noticeably, the list of works that fail to qualify is much longer than the list of works that are entitled to extra protection. Congress meant to distinguish works of visual art from other media, such as audio-visual works and motion pictures, due to the different circumstances surrounding how works of each genre are produced and disseminated.³⁰³ According to legislative history, Congress excluded these particular works because it did not believe that the authors of these types of work would have the same type of close personal connection to the work that painters or sculptors would have to their pieces.³⁰⁴

The language of the statute also makes it clear that VARA supplements general copyright protection. A “work of visual art” explicitly excludes any uncopyrighted work,³⁰⁵ so, to be eligible for moral rights protection under VARA, a work must first satisfy standards of basic copyrightability.³⁰⁶ Therefore, limiting the scope of the Copyright Act simultaneously constricts the types of works available for protection under VARA.

300. *Id.* § 101.

301. Cascio, *supra* note 280, at 173–74.

302. 17 U.S.C. § 101 (emphasis added). Note that the statute does not apply to art.

303. See H.R. REP. NO. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919.

304. Moran, *supra* note 283, at 401 (citing H.R. REP. NO. 101-514, at 9).

305. 17 U.S.C. § 101.

306. Kelley v. Chi. Park Dist., 635 F.3d 290, 299 (7th Cir. 2011).

For modern artists who work in dynamic media, this exclusion from VARA protection is yet another blow. Not only do they lack economic rights to their works, but the absence of that protection also necessarily means they are devoid of any personal moral rights in their works. While moral rights have been carefully and cautiously granted, intended only for a very specific type of art, excluding valuable art that happens to be in a potentially unfixed medium cannot be the goal.

In *Kelley*, the Seventh Circuit found that VARA's scope was markedly limited. It stated:

VARA's definition of "work of visual art" operates to narrow and focus the statute's coverage; only a "painting, drawing, print, or sculpture," or an exhibition photograph will qualify. These terms are not further defined, but the overall structure of the statutory scheme clearly illuminates the limiting effect of this definition. . . . To qualify for moral-rights protection under VARA, *Wildflower Works* cannot just be "pictorial" or "sculptural" in some aspect or effect, it must actually *be* a "painting" or a "sculpture." Not metaphorically or by analogy, but *really*.³⁰⁷

But the court's rigid conclusion is not explicitly conveyed in the statute or legislative history. The lack of universal support for such a severe reading of VARA is illustrated by the ruling of the district court in which it found *Wildflower Works* could be classified as both a painting and a sculpture for VARA purposes.³⁰⁸ The language of the scant legislative history offers more latitude than the Seventh Circuit indicates. Congress understood the constantly evolving nature of art, so it created a somewhat flexible statute and instructed the courts to "use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition."³⁰⁹ Generally accepted standards can vary at a particular time and can evolve, so this offers some freedom for interpretation.

Importantly, the legislative history continues on to provide guidance for what Congress intends to fall within the definition of "work of visual art":

Artists 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. For example, the term "painting" includes murals, works created on canvas, and the like. The term "sculpture" includes, but is not limited to, castings, carvings, modelings, and constructions.³¹⁰

Therefore, the plain language of VARA and the legislative history is not as inflexible as the *Kelley* court interprets it to be. The legislative history suggests that Congress wanted to protect general categories of art.³¹¹ For

307. *Id.* at 300.

308. *Kelley v. Chi. Park Dist.*, No. 04 C 07715, 2008 WL 4449886, at *4 (N.D. Ill. Sept. 29, 2008), *rev'd*, 635 F.3d 290.

309. H.R. REP. NO. 101-514, at 11.

310. *Id.*

311. *Cascio*, *supra* note 280, at 187.

instance, the examples of acceptable “paintings” and “sculptures” are nonexhaustive, so Congress leaves room for other options.³¹² Furthermore, the language discussing media and materials is crucial for contemporary works at issue. The materials chosen, such as flowers, and animals are precisely what exclude them from copyright protection (due to fixation and authorship issues), but the legislative history of VARA indicates Congress wanted the opposite result.

Depending on how broadly Congress intended the words to be defined, contemporary artworks may fall under the language of VARA if not excluded because of uncopyrightability. The protected art, “a painting, drawing, print or sculpture,” could potentially apply to works such as *Victimless Leather* and other pieces composed of living matter because the groupings are not finite, and the materials chosen should not determine eligibility. This possibility indicates that VARA should not be a subunit of copyright, but should rather be a separate inquiry altogether.

B. VARA Protection Should Be Offered for Contemporary Art

VARA protection should be expanded to include various forms of contemporary art, regardless of the chosen medium. This advance would further the goals of the Intellectual Property Clause, would move to greater align the United States with other countries, would underscore the importance that Congress places on the value of visual arts to culture, and would protect works that are otherwise vulnerable.

European moral rights laws are far more comprehensive than the limited moral rights available in the United States, and this disparity seems to undermine the underlying purpose of the Intellectual Property Clause to promote the progress of useful arts.³¹³ Moral rights incentivize creativity in a way that economic rights simply do not. They both complement each other, but each is important on its own. Since other countries offer more moral rights than merely attribution and integrity, and they do so for a wider range of types of works, it is not far-fetched for the United States to broaden VARA protection and offer limited moral rights to a larger scope of works under the visual arts umbrella. As Congress stated, “The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.”³¹⁴ Thus, including artists that work in dynamic media within the coverage of moral rights would be consistent with the purpose behind copyright “[t]o promote the Progress of . . . useful Arts.”³¹⁵ Encouraging the development of new and inventive types of art would further the central goal of nurturing creativity, and works that would otherwise fall under the language of the statute—if

312. H.R. REP. NO. 101-514, at 11.

313. Adler, *supra* note 284, at 268.

314. H.R. REP. NO. 101-514, at 5.

315. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

not denied VARA protection because they are uncopyrightable—would finally be included.

The rationale for statutory exclusions, that the artists in such works do not have an intimate connection to the piece, is understandable for genres such as motion pictures and audiovisual works; however, it is unfounded in works of visual arts that simply fail to achieve copyright protection. While the work is currently uncopyrightable because of the chosen medium, the artist still has a profound relationship to the work. As Andy Goldsworthy states,

I enjoy the freedom of just using my hands and “found” tools—a sharp stone, the quill of a feather, thorns. I take the opportunities each day offers I stop at a place or pick up a material because I feel that there is something to be discovered. Here is where I can learn.³¹⁶

The artist is just as passionate and connected to the final product as if it were in a more permanent form. Consequently, the exclusion from VARA is unjustified.

Additionally, each congressional justification for additional rights for visual arts applies as strongly to contemporary visual arts. Bioart and temporary installations exist in only one form, that of an original, so they have the same vulnerabilities as works of copyrightable visual art. Furthermore, as Representative Markey recognized, visual artists benefit the public by capturing aspects of the culture; consequently, preserving their creative expressions is a worthy endeavor.³¹⁷ Contemporary visual artworks are similarly valuable to society, so they are equally deserving of moral rights.

Moreover, moral rights may even be more important to contemporary works than others. Postmodern art is more susceptible to forgery than representational works, and it is more difficult to determine the difference between the counterfeit and authentic works of contemporary art.³¹⁸ Thus, rights to paternity are crucial for artists to maintain the integrity of their name and their work. Currently, the issues of copying are less prevalent because there is less incentive to do so, but this could change in the future. Additionally, pieces that gradually grow and evolve may eventually stray from the parameters of the original idea or design. In such an instance, the artist's integrity is at issue and he should dictate the adjustments to the work to maintain the original concept.³¹⁹ In certain works of bioart, “the integrity or wholeness of the piece is a developing construct, and the integrity of the piece encompasses this motion and development in ways that are often more difficult to anticipate than traditional moving sculptures.”³²⁰

As Congress has acknowledged, because of the limited nature of VARA, it protects the legitimate interests of visual artists without infringing on the

316. *Andy Goldsworthy*, *supra* note 33.

317. H.R. REP. NO. 101-514, at 6.

318. Cronin, *supra* note 6, at 251.

319. Oliver, *supra* note 64, at 6.

320. *Id.* at 10.

rights of copyright owners and without undue interference with the operation of the copyright system.³²¹ Thus, including cutting-edge contemporary works within such curtailed protections would similarly not impede, or in any way burden, the current copyright system. But it would have a greater symbolic effect as to the acknowledged value and contribution of such works.

CONCLUSION

As demonstrated by the movements in contemporary art that emphasize process over product, modern art is exploring new media of expression. These advances are exciting and have been recognized for their value, but copyright law currently fails to protect major strains of this visual art. Excluding works that have transitory elements—through natural materials, living or digital media, or aspects of performance—leaves many contemporary artists without economic rights. Demanding copyright protection as a prerequisite for VARA protection further disadvantages modern artists by additionally denying them moral rights. This end result runs counter to the central purpose of copyright law to promote useful arts. Similarly, excluding works that use transitory materials violates the *Bleistein* nondiscrimination principle by conveying the unstated message that copyright law values it less.

As it stands today, copyright law and VARA leave many contemporary artists without economic or moral rights. But, this end result runs counter to the central purpose of copyright law: to encourage creative expression. Because the current state of the law does not comply with its stated goals, action must be taken. In encapsulating the preceding discussion the following policy prescriptions appear appropriate.

First, Congress should expand the scope of copyright law. The protections afforded by copyright law have consistently expanded since the original Act of 1790, and Congress should act to broaden coverage once again.³²² Historically, as new forms of creative expression developed, Congress extended copyrightability to reach these new types of media.³²³ Such is the case today. Contemporary artists are using new media that involve dynamic materials, and Congress should change the language and current understanding of the law to make such modern works copyrightable. This goal could be achieved by eliminating the “transitory duration” exclusion for copyrightability. This language is not necessary to the

321. H.R. REP. NO. 101-514, at 10.

322. This is not to say, however, that copyright law is not overbroad in many other respects. The low originality standard and narrow interpretations of fair use are two (of many) areas where copyright law is overbroad.

323. See H.R. REP. NO. 94-1476, at 51 (“The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. . . . In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.”).

copyright system, so Congress should eliminate such a requirement from the copyright statute. As discussed, it is unnecessary to a determination of the parameters of artistic expression. In addition, other countries do not require it, and state copyright systems that protect unfixed works prove that the U.S. system would function well without such a demand. Moreover, case law leads to great uncertainty about the threshold necessary to satisfy the “more than a transitory duration” requirement for fixation. The level of stability required is unclear, and the *Kelley* court created an ill-defined “essence test” that offers little guidance for future cases.³²⁴ Congress could adopt a policy similar to Belgium, France, Brazil, and others wherein copyright protection is granted once the work is in a form that others can perceive, even if that perception involves change over time. A perception requirement would be a logical alternative because the copyright statute mentions works that can be “perceived” when delineating the boundaries of copyrightable subject matter.³²⁵ Even the current definition of fixation focuses on the perceivability of the work rather than offering much insight into the necessary stability.³²⁶ Consequently, the “transitory duration” language should be stricken from the statute.

Second, courts should interpret “fixation,” “authorship,” and VARA language broadly. The task of deciphering the scope of the statutory grant of copyright protection and VARA rights has been left to the courts in many ways. Numerous core terms are left undefined, such as “works of authorship” in the Copyright Act and “painting, drawing, print or sculpture” in VARA. Legislative history suggests an expansive reading of each, so courts retain a great deal of interpretive power. Further, much ambiguity remains even in the language that defines crucial components like “fixation.” Because courts have been entrusted with the power of determining the breadth of the vague statutory language, they should do so flexibly and according to the purpose of copyright. Thus, if Congress chooses not to modify the Copyright Act, courts should respond by furthering the stated goals of copyright by interpreting “fixation,” “authorship,” and “painting, drawing, print or sculpture” more broadly.

As discussed, the limits of “fixation” have become blurred, and the nebulous nature of that requirement allows courts great leeway in their final determination. By conceptualizing fixation very broadly, that statutory demand could, in effect, be eliminated. This result may be achieved by interpreting the demands of “fixation” as being very similar to, if not nearly equal to, “perception.” This would be reasonable because perception is stated in the definition of fixation and also functions well as the rule in other countries. Alternatively, courts could interpret fixation with even less onerous standards. Therefore, if Congress fails to remove the “transitory

324. See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 305 (7th Cir. 2011).

325. 17 U.S.C. § 102(a) (2012). Copyright protection is granted to “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.” *Id.*

326. *Id.* § 101.

duration” language from the Copyright Act, the superfluous requirement can be muted for all intents and purposes through court action.

Additionally, courts should interpret the scope of VARA, particularly the definitions of “painting, drawing, print or sculpture,” more expansively than they have in the past.³²⁷ Legislative history’s examples of the different categories of visual arts are nonexhaustive, and it indicates that courts should use common sense and generally accepted standards of the artistic community to determine VARA coverage.³²⁸ These guidelines offer courts significant interpretive latitude, so courts can, and should be, more inclusive. Moreover, the chosen medium should not eliminate a work from protection.³²⁹ The use of living matter does not undermine the suitability of works for VARA coverage, so contemporary works have a greater likelihood of earning moral rights. Because Congress intended for the definition of “painting, drawing, print or sculpture” to retain some flexibility, courts should offer works more leeway when considering whether they fall within the realm of VARA.

Finally, VARA moral rights should not be linked to copyrightability. If the boundaries of the current Copyright Act remain in place, VARA should be expanded to offer moral rights to visually artistic works, even if the work is not otherwise copyrightable. Legislative history and the district court in *Kelley* indicate that contemporary works using live and impermanent media can be “paintings” or “sculptures” of visual art, thereby falling within the scope of VARA coverage. Thus, eliminating the copyrightability requirement from VARA would provide contemporary artists with some protection. Moreover, the language of the statute suggests that isolating VARA coverage from copyright protection would be a reasonable move. Section 106A says, “*independent* of the exclusive rights provided in section 106,” so the VARA and copyrightability inquiries could easily be separate considerations.³³⁰ Furthermore, equitable concerns suggest that economic rights and moral rights do not need to be an all-or-nothing scenario: if works that include dynamic media are not granted copyright protection, that decision should not eliminate valuable works from VARA coverage as well.

327. See *Kelley*, 635 F.3d at 300.

328. H.R. REP. NO. 101-514, at 11 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6921.

329. *Id.*

330. 17 U.S.C. § 106A (emphasis added).

