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# The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights

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# The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights

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ABSTRACT

*This Article examines the issues of authorship, fixation, and moral rights through the lens of Jewish Process Theology. Jewish Process Theology is an application of Process Thought, which espouses a developmental and fluid perspective with respect to creation and creativity. This discipline offers important insights for how to shape and enforce copyright law. The issue of "change" and authorship is more important now than ever before given how the digital age is revolutionizing the way the world thinks about authorship. By incorrectly maintaining that a living garden is not capable of copyright protection since it is unfixed, changeable, and partially the product of nonhuman authorship, a recent decision by the U.S. Court of Appeals for the Seventh Circuit illustrates the need for interdisciplinary guidance with respect to copyright law and policy.*

TABLE OF CONTENTS



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In the United States, copyright protection subsists from the moment of a work's "creation."[1] This protection is a cardinal rule, and yet, the underlying issues of how and when "creation" occurs are rarely, if ever, explored. The theoretical predicate of the current copyright statute is that as soon as an author creates a copyrightable work of authorship and fixes that work in a tangible medium of expression, the law entitles the work to protection.[2] That said, what is the scope of copyright protection for works designed to continually develop? Moreover, can fluid works of authorship even be capable of copyright protection? Not many scholars have written about how copyright should address works of authorship that are continually in progress or otherwise subject to change on an ongoing basis.[3]

Perhaps copyright scholars are so accustomed to this copyright trope that they fail to contemplate sufficiently the implications of this rule of law from both a theoretical and practical perspective. On a theoretical level, the notion that a work of authorship, once "created," never undergoes change or modification goes against the norms of creativity theory.[4] On a practical level, certain works do indeed evolve and change, necessitating judgments about whether the law should protect them, and if so, in what manner.

This reality is especially important in the digital age. In 2011, the U.S. Court of Appeals for the Seventh Circuit grappled with copyright and moral rights issues concerning a work subject to change.[5] In *Kelley v. Chicago Park District*, the court held that a living garden of wildflowers composed of two enormous elliptical flowerbeds did not embody the type of authorship with fixation capable of supporting copyright protection.[6] As a result, the court also held that the garden was not protectable under the Visual Artists Rights Act (VARA), the moral rights statute that protects an author's

1. 17 U.S.C. § 302(a) (2006) (applying to works created on or after January 1, 1978).

2. *Id.* § 102(a).

3. This dearth of discussion is particularly surprising given that law professors spend a majority of their time writing articles that are constantly in a state of flux. Even after publication, many of this author's colleagues would like to take a crack at revising prior works, and some actually do so in the form of sequels or books.

4. *See infra* notes 66-69 and accompanying text.

5. *See* Kelley v. Chi. Park Dist., 635 F.3d 290 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011).

6. *Id.* at 303.

right to safeguard the integrity of her work by preventing unauthorized modifications and requiring appropriate attribution.[7] VARA requires that a covered work qualify for copyright protection.[8] The case is a difficult one to the extent that it requires interpretation not only of copyright law, but also of the conceptually distinct area of moral rights as embodied in VARA. VARA is the largely flawed federal statute providing the sole source of protection for moral rights in the United States.[9]

This Article relies on *Kelley* as a springboard to discuss certain critical issues of copyright law and policy that, until this case, have largely been overlooked in the discourse. The type of work at issue in *Kelley* is an example of a growing subset of conceptual art composed of plants and their soil, rather than conventional media such as canvas and paint.[10] In recent years, much has been written about creativity theory and its implications for copyright law.[11] In particular, this Article focuses on how a subset of Jewish theology (called "Jewish Process Theology") can guide copyright law and resolve the problem highlighted in *Kelley*.

Legal literature has not yet explored Process Theology in connection with human creativity. Jewish Process Theology is an application of Process Thought, which maintains that "reality [is] relational" and the cosmos is "constantly interacting, constantly social, always in process, and always dynamic."[12] According to this conceptual framework, everything is constantly in flux. This Article draws from the Jewish tradition's version of Process Thought to inform copyright policy concerning how to define eligible works of authorship and determine their appropriate scope of protection.

Part I of this Article lays the conceptual groundwork by discussing Jewish Process Theology. It demonstrates why this philosophy provides a particularly appropriate framework for

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7. *See* 17 U.S.C. § 106A.

8. *See id.* § 101 (defining "a work of visual art"); *Kelley*, 635 F.3d at 291, 306.

9. *See* 17 U.S.C. § 106A; ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 27 (2010).

10. *See* Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 227 (2010). Cronin notes that Conceptual art "is a loosely defined genre of works in which the artist's underlying concept or idea is more important to the ultimate meaning and worth ascribed to the work than is a particular material rendering of it." *Id.* at 225.

11. *See, e.g.*, Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Gregory N. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283 (2010); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 Notre Dame L. Rev. 1999 (2011).

12. Bradley Shavit Artson, *Ba-derekh: On the Way—A Presentation of Process Theology*, 62 CONSERVATIVE JUDAISM 3, 8 (2010).

contemplating human creativity. Part II explores the challenges to the copyright landscape presented by works of authorship that change over time. The types of works of authorship falling under this category extend beyond the living garden at issue in *Kelley*. This Part demonstrates that the issue of change and authorship is more important now than ever before, given how the digital age is revolutionizing the way we think about authorship. Part III discusses these issues in the related but distinct context of moral rights. This Part reveals that the prevailing limited view of authorship is particularly troublesome when the issue is not economic protection, but rather protection for the integrity of the work as a whole.

The goal of this Article is not prescriptive. Rather, it seeks to introduce a relevant interdisciplinary concept into the discourse and to use this perspective to illustrate the basic point that copyright policy and law must address more directly how to define and apply authorship. This Article suggests that the law needs to rethink some of the fundamental assumptions it has historically maintained concerning what types of works it ought to protect, and how it should calibrate the scope of protection.

## I. THE IMPLICATIONS OF JEWISH PROCESS THEOLOGY FOR CREATIVITY THEORY

Process Thought is a methodology that seeks to integrate and reconcile diverse facets of human experience—such as the ethical, religious, aesthetic, and scientific realms—into a "coherent explanatory scheme."[13] Grounded in the metaphysical system of Albert North Whitehead[14] and others,[15] Process Thought emphasizes the developmental essence of reality and the state of *becoming* rather than the stasis of human existence. According to the Center for Process Studies:

> The particular character of every event, and consequently the world, is the result of a selective process where the relevant past is creatively brought together to become that new event. Reality is conceived as a *process* of creative advance in which many past

13. *What Is Process Thought?*, CENTER FOR PROCESS STUD., http://www.ctr4process.org/about/process (last visited Feb. 23, 2012).

14. *See generally* ALFRED NORTH WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY (1978).

15. *See, e.g.*, HAROLD J. MOROWITZ, THE EMERGENCE OF EVERYTHING: HOW THE WORLD BECAME COMPLEX (2004); JOEL R. PRIMACK & NANCY ELLEN ABRAMS, THE VIEW FROM THE CENTER OF THE UNIVERSE (2006); BRIAN SWIMME & THOMAS BERRY, THE UNIVERSE STORY: FROM THE PRIMORDIAL FLARING FORTH TO THE ECOZOIC ERA—A CELEBRATION OF THE UNFOLDING OF THE COSMOS (1994).

> events are integrated in the events of the present, and in turn are taken up by future events.[16]

In the scholarly arena, the most common applications of Process Thought are in philosophy[17] and theology[18].[19]

This Part concentrates on those aspects of Jewish Process Theology that can inform the understanding of human creativity. The essence of Process Thought is that all of creation is constantly in process—always dynamic, and always in motion. Rabbi Professor Bradley Artson, who has written about the connection between Process Thought and Jewish theology,[20] offers the following explanation of this perspective:

> We and the rest of creation are not static substances. We—and everything that exists—are events. To grasp our nature scientifically, we must simultaneously embrace different levels of being, despite our propensity, when we think of ourselves, to focus on our conscious level. But our multi-layered reality complicates any simple self-identity. If we think about humans also as collections of atoms, those atoms do not know when they are part of a particular person and when they are part of the air around us, or

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16. *What Is Process Thought?*, *supra* note 13.

17. *See* WHITEHEAD, *supra* note 14; *see generally* William S. Hamrick, *A Process View of the Flesh: Whitehead and Merleau-Ponty*, 28 PROCESS STUD. 117 (1999); Mark C. Modak-Truran, *Prolegomena to a Process Theory of Natural Law*, *in* 1 HANDBOOK OF WHITEHEADIAN PROCESS THOUGHT 507 (Michel Weber & Will Desmond eds., 2008); Anne Fairchild Pomeroy, *Process Philosophy and the Possibility of Critique*, 15 J. SPECULATIVE PHIL. 33 (2001); Daniel D. Williams, *Moral Obligation in Process Philosophy*, 56 J. PHIL. 263 (1959).

18. *See generally* Artson, *supra* note 12; J.E. Barnhart, *Incarnation and Process Philosophy*, 2 RELIGIOUS STUD. 225 (1967); James Goss, *Camus, God, and Process Thought*, 4 PROCESS STUD. 114 (1974); David Ray Griffin, *Process Philosophy of Religion*, 50 INT'L J. FOR PHIL. RELIGION 131 (2001); Bernard M. Loomer, *Christian Faith and Process Philosophy*, 29 J. RELIGION 181 (1949).

19. *What Is Process Thought?*, *supra* note 13.

20. Artson, *supra* note 12. A detailed exploration of Jewish Process Theology outside of the topic of human creativity is beyond the scope of this Article, but a few words about Artson's overall thesis are useful. He describes Process Theology as "a constellation of ideas sharing the common assertion that the world and God are in continuous, dynamic change, of related interaction and becoming." *Id.* at 3. From a theological standpoint, those who embrace Process Thought within the Jewish religion believe it offers "the opportunity to sandblast the philosophical overlay of ancient Greece and medieval Europe off the rich, burnished grain" of Torah and Rabbinics "so that we can savor the actual patterns in the living word of religion . . . and appreciate Judaism for what it was intended to be and truly is." *Id.* at 4. Artson argues that despite the Jewish tradition's tendency to portray God as "immutable, impassible, omnipotent, and omniscient," the vision of God in the Torah and the Talmud evidences "portrayals of an engaged, relating, interacting God." *Id.* at 6-7. In his view, "Process Thinking offers a way to recover a biblically and rabbinically resonant, dynamic articulation of God" that meshes "with contemporary scientific knowledge of the cosmos and of life." *Id.* at 8. Indeed, the Covenant, which represents the foundational relationship between Jews and God, exemplifies Process Thought in that, like the cosmos, it "is always interactive, always connecting, and always relational." *Id.* He also discusses Revelation, "chosenness," evil, suffering and the afterlife from the standpoint of Jewish Process Theology. *See id.* at 22-31. Rabbi Artson is writing about Process Theology from the perspective of a Conservative rabbi. For a Reform rabbi's perspective, see Toba Spitzer, *Why We Need Process Theology*, 59 CCAR J.: Reform Jewish Q. 84 (2012).

> when they are part of nearby objects. They float in and out of what we think of as "us" all the time. . . . [W]e are not stable substances at all. We are constantly engaging in a give-and-take with the rest of creation, all simultaneously. We are immediately connected to all that came before us, up until this very instant, and with all that exists at this very moment. Each of us immediately contains in ourselves everything that has led to each of us.[21]

Significantly, Artson invokes Process Thought to emphasize that God's nature is fluid and dynamic: "The details of [His] creating—once we move away from the abstract to the concrete—are always incomplete, in process, on the way."[22] According to Process Thought, "God is to be found in the fact that a universe that is established through fixed, changeless laws still generates novelty all the time: new unprecedented things that did not previously exist."[23]

Artson's application of Process Thought in connection with the Creation is steeped in both current scientific thinking as well as Biblical and rabbinic perspectives. Like most Process thinkers, his view of Creation reflects a developmental perspective rather than being characterized by a moment in time when God began to create.[24] Drawing from the second verse in the Book of Genesis stating "the earth being unformed and void, with darkness over the surface of the deep and a wind from God sweeping over the water,"[25] Artson reads the Creation narrative contextually rather than literally. He sees Divine Creation as "not necessarily one of instantiating *ex nihilo* from without, but rather a process of mobilizing continuous self-creativity from within."[26] He demonstrates that a number of other Jewish sources reflect this "richer view of continuous creation,"[27] beginning with the very first line in Genesis that translates to "[w]hen God began to create heaven and earth."[28] This imagery acknowledges that God's spirit hovered over the preexisting chaos.[29]

Moreover, Artson argues that Creation is not a one-time event. On the contrary, the Talmud states that God "renews every day the work of creation."[30] Further, the cosmos is a partner in its own creation. This concept is a bit esoteric, but one can best understand it as a belief that Creation contains an element of internal power in that

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21. Artson, *supra* note 12, at 8-9 (footnotes omitted).
22. *Id.* at 11.
23. *Id.* at 12.
24. *See id.* at 17-22.
25. ETZ HAYIM: TORAH AND COMMENTARY 4 (David L. Lieber et al. eds., Jewish Publ'n Soc'y trans., 2001) [hereinafter ETZ HAYIM] (corresponding to *Genesis* 1:2).
26. Artson, *supra* note 12, at 17.
27. *Id.* at 17-18.
28. ETZ HAYIM, *supra* note 25, at 3 (corresponding to *Genesis* 1:1).
29. *See* Artson, *supra* note 12, at 18.
30. Babylonian Talmud, Hagigah 12b.

the universe is "co-creating"[31]: "It is not that God, once and for all, speaks everything that currently lives into existence from the outside."[32] Rather, "God coaxes, summons, and invites" each stage of Creation to materialize.[33] In other words, Artson understands Creation as an invitation from God "into the process of becoming."[34]

Artson acknowledges that his articulated theory of Creation may be disconcerting for those who understand the Old Testament through "dominant theological lenses," but he also demonstrates how the sources in the Jewish tradition can accommodate the insights of Process Thought.[35] Artson's theory of the Divine Essence and Creation also has significant implications for how the Jewish tradition understands human creativity. According to Rabbi Joseph Soloveitchik, a leading modern authority on Jewish law, the Torah chose to relate to man "the tale of creation" so that man could derive the law that God obligates humans to create.[36] Thus, the Jewish religion introduced to the world that "[t]he most fundamental principle of all is that man must create himself."[37] The rabbinic literature provides that "[a]ll that was created during the six days of creation requires improvement."[38] Moreover, it is man's function to partner with God in creating an improved world and to renew the cosmos with his creative enterprise.[39] Another early rabbinic narrative involving a dialogue between the great Talmudic Sage Akibah and the evil governor of the Judean province, Tinius Rufus, also expresses this fundamental concept.[40] Rufus challenged Akibah by asking whether the work of God or man is more beautiful.[41] Akibah replied that man's work is better with respect to those things where his art is effective (as opposed to those matters such as the creation of heaven and earth which man cannot imitate).[42] Pressing further, Rufus asked why male babies are not already born

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31. Artson, *supra* note 12, at 19.

32. *Id.* at 18.

33. *Id.*

34. *Id.* at 19.

35. *See id.* at 20-22.

36. JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 101 (Lawrence Kaplan trans., 1983). According to Soloveitchik, "[t]he peak of religious ethical perfection to which Judaism aspires is man as creator." *Id.*

37. *Id.* at 109.

38. *Genesis Rabbah* 11:6.

39. *See* SOLOVEITCHIK, *supra* note 36, at 81. According to Jewish law, man was not intended to be a passive recipient of the Torah, but rather "a partner with the Almighty in the act of creation." *Id.*

40. Midrash Tanhuma, Tazria 5.

41. *Id.*

42. *Id.*

circumcised and Akibah replied they do not come out already circumcised because God gave the commandments in order to refine the people of Israel.[43]

According to this perspective, "[t]he cosmos is a partner with God in its own becoming" and humans "are partners with the cosmos and with God in our own becoming."[44] Thus, since Jewish Process Theology understands man as having the choice whether or not to do God's will, God is reaffirmed as "a dynamic, relating God who suffers, a God who becomes vulnerable in having created us."[45] The imagery about Noah and the Great Flood is an expression of this fundamental concept; the text in Genesis recounts that God experienced "heartfelt sadness."[46] Rashi, the celebrated eleventh-century French biblical commentator, explains this phrase as meaning that God, in preparing for the Flood, "mourned over the destruction of His handiwork."[47] The sense of relation—of "a dynamic interconnection between God, humanity, and all creation"—lies at the heart of Jewish Process Theology in its vision of how God and man relate to one another.[48]

The way in which humans partner with and relate to God according to Jewish Process Theology has important implications for human creative enterprise. A traditional Jewish approach to artistic creation emphasizes that the underlying motivations for physical creative action are rooted in the concept of mirroring the Divine.[49] The Creation narrative in Genesis states: "God created man in His image, in the image of God He created him."[50] God commanded man to "fill the earth and master it."[51] Through this language, the text illustrates that man's capacity for artistic creation mirrors or imitates God's creative capacity.[52] Soloveitchik has argued that the term "image of God" as used in this narrative underscores "man's striving

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43. *Id.*

44. Artson, *supra* note 12, at 9.

45. *Id.* at 14.

46. THE CHUMASH: THE TORAH, HAFTAROS AND FIVE MEGILLOS WITH A COMMENTARY ANTHOLOGIZED FROM THE RABBINIC WRITINGS 29 (Nosson Scherman et al. eds., Stone ed. 1993) [hereinafter THE CHUMASH] (corresponding to *Genesis* 6:6).

47. RASHI, THE TORAH: WITH RASHI'S COMMENTARY TRANSLATED, ANNOTATED, AND ELUCIDATED 62 (Yisrael Isser Zvi Herczeg et al. trans., Sapirstein ed. 1993).

48. Artson, *supra* note 12, at 15.

49. *See* KWALL, *supra* note 9, at 11-22 (exploring this principle and related themes in more detail).

50. *Genesis* 1:27.

51. *Genesis* 1:28.

52. *Cf.* Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 11 (2002) ("'[S]ome creative spark' . . . if unpacked could be shown to carry a numinous aura evocative ultimately of the original divine act of creation itself.").

and ability to become a creator."[53] Even historians who are not writing about the Bible from a theological perspective view this language as furnishing a path leading man to regard himself as a potential creator, thus underscoring an unprecedented parallel between God and humanity.[54]

Jewish theology also teaches that man's speech reflects his creative capacity in the same way that God's speech reveals His creative capacity.[55] In describing the Divine act of Creation, the Torah does not say that God made a world, but that He spoke the world into existence by preceding every creative act with a statement of what He was going to do. For example, "God said, 'Let there be light,' and there was light."[56] Scholars refer to these "speakings" as the "Ten Utterances" with which, according to the text, God created the world.[57] Later in Genesis, the text states that God "blew into [Adam's] nostrils the breath of life, and man became a living being."[58] The renowned Jewish commentator Nahmanides[59] interprets this passage as meaning that God blew his own breath into Adam's nostrils.[60] Scholars understand God's breath to mean "the soul of life,"[61] thus establishing the way in which the creation of human beings differs from all other creations.[62] Moreover, the purpose of this special soul was to enable man to speak and express himself.[63] These vivid images

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53. JOSEPH B. SOLOVEITCHIK, THE LONELY MAN OF FAITH 12 (1965).

54. DANIEL J. BOORSTIN, THE CREATORS: A HISTORY OF HEROES OF THE IMAGINATION 41 (1992).

55. *Eliezer's Story*, WK. REV., Nov. 22, 1997.

56. THE CHUMASH, *supra* note 46, at 3 (corresponding to *Genesis* 1:3).

57. *See* BEREL WEIN, PIRKEI AVOS: TEACHINGS FOR OUR TIMES 184-85 (Birnbaum ed. 2003); *see also* Artson, *supra* note 12, at 18 ("By the end of the first chapter of Genesis, God has spoken creation into a symphony of diverse becoming.").

58. RASHI, *supra* note 47, at 23-24 (corresponding to *Genesis* 2:7); *see also* YAAKOV CULI, THE TORAH ANTHOLOGY (YALKUT ME'AM LO'EZ): GENESIS-I 245 (Aryeh Kaplan trans., 1977); *cf.* MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION 178-79 (1976) (likening authentic speech—that which is the creative, original descriptions of feelings—to the expression of artists); Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1339, 1365 (1996) (affirming communication as the essential component of authorship).

59. Nahmanides, who lived in the thirteenth century, is also referred to as the Ramban. NINA CAPUTO, NAHMANIDES IN MEDIEVAL CATALONIA: HISTORY, COMMUNITY, & MESSIANISM 1 (2007), *available at* http://www3.undpress.nd.edu/excerpts/P01210-ex.pdf.

60. RAMBAN (NACHMANIDES), COMMENTARY ON THE TORAH: GENESIS 66 (Charles B. Chavel trans., 1971) [hereinafter RAMBAN]; THE CHUMASH, *supra* note 46, at 11 (corresponding to *Genesis* 2:7); *see also* CULI, *supra* note 58.

61. CULI, *supra* note 58; RASHI, *supra* note 47, at 23.

62. According to classical Jewish belief, although man was created alive, he did not attain his true form until God took this further step of infusing him with the soul. CULI, *supra* note 58; *see also* RAMBAN, *supra* note 60 (discussing the creation of man's soul).

63. Onkelos, the Roman convert to Judaism who wrote an Aramaic translation of the Five Books of Moses in the second century, translates the words "living being" found in the second Creation narrative as "a speaking spirit." THE CHUMASH, *supra* note 46, at 11

of how God created man to mirror Himself by using his own creative capacities furnish a striking parallel between God's connection to man and man's connection to his own works of creation—a "parental metaphor of authorship."[64] Again, the sense of a dynamic and ever-changing "relationship" is what supports man's relationship to God[65] and man's relationship to the products of his own creativity.

Understanding human creativity through the lens of Jewish Process Theology illustrates that the characteristic ingredients of both Divine and human creativity are fluidity, partnership, and relationship. Both creativity theory and first-hand narratives of human creators support this description of human output. The process of human creativity is fluid and developmental. Individual creators attest to the "gestational period" underscoring creativity—that timeframe in which the creative juices flow internally, almost imperceptibly.[66] This inner labor—termed "the unconscious machine" by mathematician Henri Poincaré—is what creators underscore as the pivotal component of creativity.[67] Moreover, the testimonial narratives of creators also illustrate that creativity entails a partnership between the author and the work itself. Bertrand Russell emphasized "the fruitless effort he used to expend in trying to push his creative work to completion by sheer force of will before he discovered the necessity of waiting for it to find its own subconscious development."[68] Author Madeleine L'Engel wrote that in order for an artist to realize her goals, she must allow the work to take over so that the artist can "get out of the way" and not interfere.[69]

Current psychological theories reinforce these author testimonials. These theories recognize that human creativity features an element of artistic self-transcendence among its multifaceted components.[70] Modern scholars of creativity believe self-transcendence is critical to the development of an artistic soul

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(commenting on *Genesis* 2:7). Onkeles thus describes God's endowing man with the ability to speak as the purpose of this special soul. Rashi explains that the soul of man is more alive than the souls of animals because man's soul contains the powers of speech and reasoning. *See* sources cited *supra* note 58.

64. KWALL, *supra* note 9, at 13-14.

65. In this regard, Artson has observed: "Our suffering pains God. God is diminished by our not rising to the best choice. The God of Israel is not merely an unchanging, external perfection (although there is an aspect of God that is unchanging and eternal); we encounter the Divine in the dynamism of *b'rit*, relationship." Artson, *supra* note 12, at 15.

66. KWALL, *supra* note 9, at 12.

67. *See id.* (developing this point more thoroughly).

68. *See id.* (internal quotation marks omitted).

69. *Id.* at 17 (quoting MADELEINE L'ENGLE, WALKING ON WATER: REFLECTIONS ON FAITH AND ART 24 (1980)) (internal quotation marks omitted).

70. *Id.* at 15.

because it reaffirms that, to maximize creative output, an artist must get beyond herself and become a partner with her work.[71] Thus, the renowned psychiatrist C.G. Jung observed: "The work in process becomes the poet's fate and determines his psychic development. It is not Goethe who creates Faust, but Faust who creates Goethe."[72] The idea that an artist must get beyond her own ego and "listen" to her work embodies the very same partnership concept as Artson describes in discussing God's Creation of the Universe. According to Jewish tradition, God commands humans to mirror Him and create; thus, humans must similarly partner with their works of authorship in order to maximize their creative potential. Even man's need for self-transcendence in human creativity has a parallel in Divine creation. Recall that according to the account of Creation in Genesis, God spoke the world into existence.[73] According to the Jewish tradition, for both God and man, speech is singularly reflective of the ability to transcend the self and relate to someone or something else.[74]

The foregoing narratives reveal that the partnership component of creativity—emphasized in Process Thought—has relevance for any creative work because "partnership" encompasses the idea of self-transcendence, which requires the creator to submerge her ego and pay attention to the voice of the work itself. The idea of a work being a "partner" in its own creation is especially relevant for works involving random or accidental moments, or works resulting in part from the forces of nature. Process Theology provides a valuable way to reconcile the motivations that are reflective of an author's intrinsic creative process with other forms of nonintentional expression.[75] Indeed, if human creativity is seen as a "partnership" between the creator and the work, different works will fall on different places along the partnership spectrum. Perhaps works of authorship that the author does not create with a strong degree of intentionality do not reflect as strong a sense of partnership as other types of works, but they nonetheless encompass a degree of mutuality; the human author still is allowing these "chance" or partially natural works to emerge and develop.[76]

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71. *Id.* at 15-16.

72. *Id.* at 16; *see also id.* at 15-17 (citing further examples).

73. *See supra* notes 55-57 and accompanying text.

74. *See Eliezer's Story*, *supra* note 55.

75. KWALL, *supra* note 9, at 21.

76. This may be what Justin Hughes had in mind when he "posited that personhood interests justifying protection of some type 'can arise from simply being the human source of an intellectual property *res*.'" *See id.* (quoting Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 83 (1998)). It appears that Process Theology would allow for a similar description of God's creations as well. Specifically,

The text of Genesis also reveals that when God created the world, He evaluated His activity at the end of each day.[77] Speaking from a Process Theology perspective, Robert Gnuse has remarked that "the statement that God found the creative act of each specific day to be good is highly important, for it means that at each stage of the creative endeavor God stopped and took account of what was unfolding."[78] According to this perspective, God also functioned like an editor who viewed and reviewed daily. This imagery underscores both the relational and the fluid essence of Divine creativity in keeping with Process Theology. The parallel for human creativity is quite clear. Most human creators experience the same type of ongoing evaluative process, resulting in works that evolve and progress.

This foray into Jewish Process Theology leads to the question of whether any work of human creativity is ever really completed any more than humans are considered "finished." This query poses an interesting dilemma for copyright law in the United States. Decisions such as *Kelley* exclude works from copyright's scope that manifest fluidity and incorporate elements other than an author's direct intentionality. Part II explores further the nature of this problem.

## II. APPLYING PROCESS THEOLOGY TO AUTHORSHIP AND FIXATION

Artist Chapman Kelley's experience illustrates the nature of the problem regarding copyright law as applied to ongoing or fluid works. Chapman Kelley creates representational paintings of landscapes and flowers.[79] In 1984, he installed Wildflower Works in Chicago's Grant Park.[80] The Seventh Circuit described his work as "two enormous elliptical flowerbeds, each nearly as big as a football field, featuring a variety of native wildflowers and edged with borders of gravel and steel."[81] Kelley promoted the work as "living art" and it was widely acclaimed on both a critical and popular level.[82] Kelley, along with a group of volunteers, tended the garden, pruned and replanted it as needed.[83] In 2004, however, the Chicago Park District

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Process Theology would contend that to the extent that man accepts God's invitation to participate in ways that represent good choices, man reflects the Godly part of himself and his mutual partnership; to the extent man makes bad choices and rejects God's invitation, he asserts his individuality in negative ways. *See* Artson, *supra* note 12, at 14-15.

77. *Genesis* 1:4, 10, 12, 18, 21, 25.

78. ROBERT K. GNUSE, THE OLD TESTAMENT AND PROCESS THEOLOGY 102 (2000).

79. Kelley v. Chi. Park Dist., 635 F.3d 290, 291 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011).

80. *Id.*

81. *Id.*

82. *Id.* (internal quotation marks omitted).

83. *Id.*

drastically modified the garden, reduced it to less than half its original size, changed some of the material, and reconfigured the flowerbeds.[84] Kelley sued the Park District for violating his moral right of integrity under VARA.[85]

The district court did not grant Kelley his requested relief. The court held that viewers could consider his work as both a painting and a sculpture under VARA, and therefore it met the statutory requirements of a work of visual art under VARA.[86] Oddly, however, the court denied relief to Kelley on the ground that the work also lacked sufficient originality for the law to consider it copyrightable under the copyright statute.[87] The district court's ruling in this regard was completely flawed because VARA cannot protect works if they do not otherwise qualify for copyright protection.

On appeal, the Seventh Circuit cast doubt upon the district court's conclusions that Wildflower Works qualified for protection under VARA and that it failed copyright's originality test.[88] Ultimately, however, the appellate court affirmed the district court's ruling on the ground that the work did not manifest the requisite expressive authorship and fixation and, therefore, was not copyrightable.[89] The U.S. Supreme Court subsequently denied certiorari in the case, thus foreclosing the opportunity to revisit the significant implications of the decision.[90] This Part examines and critiques more closely the authorship and fixation aspects of the Seventh Circuit's decision in light of the Process Theology discussion in Part I above.

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84. *Id.*

85. *Id.*; *see supra* note 7 and accompanying text.

86. *Kelley*, 635 F.3d at 292.

87. *Id.* The VARA aspect of the decision also included an issue concerning site-specific art. The district court concluded that Kelley's work was site-specific art and therefore, following the U.S. Court of Appeals for the First Circuit's opinion in *Phillips v. Pembroke Real Estate, Inc.*, it was also categorically excluded from protection under VARA. *Id.* at 291; *see also* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 128 (1st Cir. 2006). Given the Seventh Circuit's disposition on the "copyrightability" of Wildflower Works, it did not need to address the issue of whether the work was site-specific art and the impact of this determination. *Kelley*, 635 F.3d at 306. The appellate court did appear to accept the work's classification as site-specific art. *Id.* Nevertheless, it questioned the district court's conclusion that as such, it is categorically excluded from protection under VARA. *See id.* at 306-07. The case also involved a breach of contract claim on which the district court ruled in favor of Kelley but awarded nominal damages in the amount of $1.00. *Id.* The Seventh Circuit reversed on the breach of contract claim, thus holding that the Park District was entitled to prevail in this matter. *Id.* at 308. This Article does not address either the site-specific art or the contract claim issues.

88. *Kelley*, 635 F.3d at 292.

89. *Id.*

90. *Id.* at 306-07.

The court correctly held that in order to qualify for moral rights protection under VARA, a work must first satisfy basic copyright requirements.[91] Almost everywhere, moral rights apply to works that are copyrightable, or in the context of civil law systems, to works that are capable of giving rise to economic rights.[92] Copyright statutes of particular countries typically contain moral rights, as is the case in the United States.[93] Thus, the district court's conclusion that Wildflower Works qualified as a work of visual art under VARA but lacked originality under copyright law simply made no sense. The appellate court correctly recognized this flaw in the lower court's opinion.[94] It did not evince concern about whether Wildflower Works satisfied the relatively low standard for originality under copyright law.[95] Instead, the Seventh Circuit stated that "[t]he real impediment to copyright here is not that Wildflower Works fails the test for originality . . . but that a living garden lacks the kind of authorship and stable fixation normally required to support copyright."[96]

Interestingly, the Seventh Circuit acknowledged that "copyright's prerequisites of authorship and fixation are broadly defined."[97] Still, the Seventh Circuit appeared to ground its objections to the copyrightability of Wildflower Works on two somewhat related rationales: 1) the work is "alive and inherently changeable, not fixed," and 2) the work lacks human authorship because its appearance depends on the forces of nature.[98] Moreover, the work's changeability appears to be attributable to nonhuman forces of nature that, according to the court, are primarily responsible for shaping the garden's appearance. Since the court understood authorship as "an entirely human endeavor,"[99] it posited that "works owing their form to the forces of nature cannot be copyrighted."[100] Also, the court observed that "a garden is simply too changeable to satisfy the primary purpose of fixation; its appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement."[101] The court was obviously troubled with issues of proof and perceived practicality:

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91. *Id.* at 299.
92. *Id.* at 296.
93. 17 U.S.C. § 106A (2006); KWALL, *supra* note 9, at 40.
94. *Kelley*, 635 F.3d at 299 ("VARA supplements general copyright protection . . . .").
95. *Id.* at 303.
96. *Id.*
97. *Id.* at 304.
98. *Id.*
99. *Id.* (internal quotation marks omitted).
100. *Id.*
101. *Id.* at 304-05.

> If a garden can qualify as a "work of authorship" sufficiently "embodied in a copy," at what point has fixation occurred? When the garden is newly planted? When its first blossoms appear? When it is in full bloom? How—and at what point in time—is a court to determine whether infringing copying has occurred?[102]

According to the court's definition of authorship, the scope of copyright protection excludes that which is in a state of perpetual change, given the fixation requirement.[103] The fact that the garden's "nature is one of dynamic change"[104] means that copyright protection fails.

The Seventh Circuit distinguished Wildflower Works from other examples of copyrighted works that are not entirely fixed or stable.[105] It therefore acknowledged that copyright does not attach "*only* to works that are static or fully permanent" and denied "that artists who incorporate natural or living elements in their work can *never* claim copyright."[106] In acknowledging the possibility that some changeable works can qualify for protection, the court leaves the copyright window open to include some types of works that are less traditionally stable.

In sum, the Seventh Circuit couched its first objection to the copyrightability of Wildflower Works on the dual grounds of lack of fixation and the work's inherent fluidity; it based its second objection on the contribution of nonhuman elements to the work. Despite the court's analysis, the fixation and inherent fluidity components of the court's first objection present two distinct issues that should be addressed separately. Once the parameters of both of these elements are more properly understood, this Article introduces the relevance of Process Theology as Part I discusses above. Process Theology can also facilitate a dialogue concerning the issue of nonhuman authorship upon which the court's second objection hinges.

### *A. Fixation and the Writing Requirement*

In *Kelley*, the Seventh Circuit observed that "fixation" is an explicit constitutional requirement in light of the use of the term

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102. *Id.* at 305.

103. *Id.*

104. *Id.*

105. *Id.* (distinguishing Wildflower Works from the Crown Fountain, a sculpture whose surfaces "are embedded with LED screens that replay recorded video images of the faces of 1,000 Chicagoans," on the basis that "the Copyright Act specifically contemplates works that incorporate or consist of sounds or images that are broadcast or transmitted electronically, such as telecasts of sporting events or other live performances, video games, and the like"). The court also distinguished Wildflower Works from a puppy-shaped metal sculpture covered in blooming flowers, because "[Wildflower Works] is quintessentially a garden; 'Puppy' is not." *Id.* at 306.

106. *Id.* at 305.

"writings" in the Copyright Clause.[107] Nevertheless, the original meaning of this term is not clear:

> The constitutional grant of authority concerning copyrights does not require Congress to act with respect to all categories of materials that may meet the constitutional definitions. Instead, "whether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of Congress." In discussing the term *writings* in this context in 1879, the Supreme Court in the *Trademark Cases* stated that the writings that are to be protected are the "fruits of intellectual labor." Moreover, in *Goldstein v. California*, the Supreme Court emphasized that the "history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy."[108]

Based on this rationale, "the tremendous impact of commercial celebrity endorsements on our consumer culture . . . provides additional support for recognizing celebrity personas as within the scope of 'writings' within the meaning of the Copyright Clause."[109] If the national importance of any given product is a factor to consider in whether a particular work qualifies as a "writing," the positive environmental impact of Wildflower Works should also be a factor.[110] Thus understood, the constitutional requirement of a "writing" may be seen as encompassing a concern with appropriate copyrightable subject matter.

Thus, the 1976 Act's concept of "fixation" is not necessarily coterminous with the Constitutional predicate of a "writing."[111] As discussed, the Constitution's "writing" requirement may stem from a

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107. *Id.* at 303 ("Unlike originality, authorship and fixation are explicit constitutional requirements; the Copyright Clause empowers Congress to secure for 'authors' exclusive rights in their 'writings.'" (citing U.S. CONST. art 1, § 8, cl. 8)).

108. KWALL, *supra* note 9, at 111-12 (citations omitted).

109. *Id.* at 112.

110. According to the court in *Kelley*, "[i]n promoting Wildflower Works, Kelley variously described the project as a 'living wildflower painting,' a 'study on wildflower landscape and management,' and 'a new vegetative management system that beautifies [the] landscape economically with low-maintenance wildflowers.'" *Kelley*, 635 F.3d at 300 (second alteration in original).

111. *See* Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 844-46, 853 (2009) (providing a similar argument on this point). Heymann's thesis is that the fixation requirement represents not a Constitutional mandate but rather "a deliberate decision on the part of Congress to afford protection only to certain types of artistic endeavors—those that can be propertized and thus subject to the economic incentives at the heart of copyright law." *Id.* at 849. It is also significant that the Berne Convention for the Protection of Literary and Artistic Works, which the United States joined in 1988, gives participating countries the option to include a fixation requirement in their copyright laws. *See* Berne Convention for the Protection of Literary and Artistic Works art. 2(2), Sept. 9, 1886, 1161 U.N.T.S. 30 ("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.").

concern with subject matter,[112] whereas the statutory requirement that a copyrightable work be "fixed in any tangible medium of expression"[113] arguably embodies a concern for proof in infringement situations.[114] Specifically, the fixation requirement provides notice to the public of exactly what falls within the scope of the copyright, and in this way functions to "mark off" the protected work. The Seventh Circuit in *Kelley* clearly recognized this purpose by articulating concern regarding when a fluid work is deemed "fixed" for purposes of demonstrating infringement.[115] In discussing the statutory language of the 1976 Act, the House Report stated that "it makes no difference what the form, manner, or medium of fixation may be."[116] Wildflower Works is capable of being "fixed" in ways such as videotape or photography, which would satisfy the statute's explicit fixation requirement.[117]

Fixation can occur at various stages of a work's development; therefore, courts should not conflate this issue with the fluid nature of a given work. Indeed, the definitional section of the Copyright Act provides that a work is created when it is fixed in a copy or phonorecord for the first time; "*where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time*, and where the work has been prepared in different versions, each version constitutes a separate work."[118] As the copyright statute itself recognizes, works evolve over a period of time, and the statute does not intend to require that a work

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112. *See supra* note 110.

113. 17 U.S.C. § 102(a) (2006).

114. *See* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2012) (suggesting that fixation eases "problems of proof of creation and infringement").

115. *See Kelley*, 635 F.3d at 304-05.

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

117. For a work to be fixed, the Copyright Act requires that it be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of *more than transitory duration*." 17 U.S.C. § 101 (emphasis added). The scope of this durational requirement has been the subject of much litigation, especially in the age of digital copyright infringement. *See* Cartoon Network, LLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008) (holding that data stored for 1.2 seconds in a cable company's Broadband Media Router was not sufficiently fixed so as to constitute a "copy"); CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 551 (4th Cir. 2004) (holding that an Internet Service Provider could not be held liable for direct copyright infringement when its servers were used to upload infringing photographs because its servers were mere conduits for transmission and "[w]hile temporary electronic copies may be made in this transmission process, they would appear not to be 'fixed' in the sense that they are 'of more than transitory duration'"); Mai Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that loading a computer program into RAM constituted fixation because it was capable of being perceived by computer technicians for diagnostic purposes). *See generally* Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067 (2010) (providing an in-depth discussion of this issue).

118. 17 U.S.C. § 101 (emphasis added).

be "frozen" at any given point in time in order to pass constitutional muster.[119]

There may be some types of fluid works for which fixation can be problematic. Performance art, which interacts directly with the viewer and the exhibition space, comes to mind because its very essence depends upon constant and significant degrees of fluidity from one performance to another. Thus, a "fixed" version of one performance would likely not be able to satisfy the fixation requirement for a subsequent performance that is very different from the previously fixed version. As discussed below, however, not all works that are characterized by a sense of fluidity present the same challenges for fixation.

Process Theology emphasizes that everything changes over time. This reality of change supports the idea that, although a court should take into account the degree of fluidity of a given work in determining its copyrightability, the presence of fluidity should not, in and of itself, act as a bar to copyright protection based on the work's inability to satisfy the fixation requirement. Therefore, this Article recommends incorporating a standard of "substantial compliance" for satisfying the fixation requirement. This standard would entitle a particular fixed version of a work to protection not only for itself, but also for other works, provided only minimal differences exist between the prior fixed work and subsequent versions. This standard could be useful for works with certain degrees of fluidity. For example, if a given performance artist typically introduces minimal variations into her work from day to day, the fixation of one performance could satisfy fixation of the work generally under this substantial compliance standard for fixation.

Moreover, the film of any given performance would satisfy the Constitution's requirement of a "writing" under this approach. The copyright statute already evinces this approach to fixation by

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119. *Cf.* Heymann, *supra* note 111, at 858-59 (critiquing the fixation requirement on the ground that "when creators seek to avail themselves of copyright protection, they must choose a particular performance or creative output that becomes the fixed work"). With respect to copyrighted Internet websites, the Copyright Office has taken the position that "copyrightable revisions to online works that are published on separate days must each be registered individually." *See* U.S. COPYRIGHT OFFICE, CIRCULAR 66: COPYRIGHT REGISTRATION FOR ONLINE WORKS 2 (2009). According to the Amicus Brief filed by the Volunteer Lawyers for the Arts and the Arts & Business Council of Greater Boston, although

> this statement suggests that the registration of a particular website at a particular moment covers only that iteration of the website, it demonstrates that works in a constant state of change—even if change is known and expected at the moment of registration—are still undoubtedly fixed for purposes of the fixation requirement of the Copyright Act.

Brief for Blane De St. Croix et al. as Amici Curiae Supporting Petitioner at 13, Kelley v. Chi. Park Dist., 132 S. Ct. 380 (2011) (No. 11-101) [hereinafter Brief for Blane De St. Croix].

extending its protection to choreography, which is explicitly protected under the statute.[120] Choreography satisfies the fixation requirement through videotape or film.[121] Yet, any given performance of a dance will vary from time to time. In much the same way, works such as Wildflower Works could satisfy the fixation requirement through a written document with a detailed plan for what the garden would entail—very similar to architectural plans that are also protected under copyright law.[122] The fact that the precise contents of the garden may change from time to time thus does not force the garden outside the bounds of copyright law.[123] Under this approach, the real issue would come down to the question of the extent to which the fluidity of a given work excludes protection on subject matter grounds, not due to lack of fixation.

### *B. Fluidity and Process Theology*

The foregoing discussion has argued that satisfaction of the fixation requirement, as a concept distinct from the fluidity of a given work, should not be an insurmountable obstacle for most works of authorship. Assuming, therefore, that a given work can satisfy the fixation requirement, the question remains how to address the issue of fluidity. The court in *Kelley* was concerned about the degree of fluidity of Wildflower Works and used this as a basis to bar it from copyright protection.[124] In approaching this issue, it is useful to consider the law concerning copyright protection for other types of works that may evolve over time. Fictional characters represent an interesting example of this genre. The copyright statute does not contain express protection for fictional characters, and commentators have differed in their views regarding whether such protection is appropriate.[125]

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120. 17 U.S.C. § 102(a)(4).

121. *See generally* Anne K. Weinhardt, Note, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 850 (1988).

122. 17 U.S.C. § 102(a)(8).

123. *Cf.* Heymann, *supra* note 111, at 854 ("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; indeed, the post-creation destruction of the original fixation does not affect the status of the copyright in the work at all.").

124. *See supra* note 105 and accompanying text.

125. *Compare* David B. Feldman, Comment, *Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection*, 78 CALIF. L. REV. 687, 720 (1990) (arguing that fictional characters should be expressly protected by the Copyright Act because courts often confuse the "copyrightability" inquiry with the infringement inquiry when characters are at issue), *with* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 460 (acknowledging that fictional characters should be copyrightable, but arguing that courts should analyze character infringement cases in terms of the similarities between the

In addressing the question of literary characters specifically, the U.S. Court of Appeals for the Ninth Circuit devised a rigorous test[126] requiring that such characters were only protected if they "constitute[d] the story being told."[127] However, neither the case nor subsequent interpretations of the test invoked by the court have been clear on what the "story being told" test means.[128] A reasonable interpretation is that literary characters only receive protection to the extent that they embody the story to such a degree that the copyrightable story and the character itself become one. The law seems to reflect a requirement that characters be sufficiently delineated in order to receive copyright protection.[129] Still, this legal position ignores the reality that, no matter how delineated a given character may be—either physically or through a word portrait—characters change and develop over time and often take shape over the course of several works. The fact that a character may be delineated one way at one point in time does not mean that it becomes "fixed" forever in this format; looks can change and so can personalities. Some courts have demonstrated a willingness to protect the personality traits of fictional and graphic characters that are sufficiently distinctive to merit protection.[130] This willingness to protect characters' personality traits, which are fluid by their very

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infringed and allegedly infringing characters rather than the copyrightability of the protected character).

126. Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1165 (C.D. Cal. 1989) (arguing that the Ninth Circuit's test for infringement of literary characters, as set forth in *Warner Bros. v. Columbia Broadcasting System, Inc.*, is more rigorous than that of the Second Circuit, as set forth in *Nichols v. Universal Pictures*).

127. Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc. (*Sam Spade*), 216 F.2d 945, 950 (9th Cir. 1954).

128. The only guidance provided by the *Warner Brothers* court with respect to the application of "the story being told" test is that "if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright." *Id.*; *see also Anderson*, 11 U.S.P.Q.2d at 1166 ("*Air Pirates* can be interpreted as either attempting to harmonize granting copyright protection to graphic characters with the 'story being told' test enunciated in the Sam Spade case or narrowing the 'story being told' test to characters in literary works.").

129. *Anderson*, 11 U.S.P.Q.2d at 1166 ("This Court has no difficulty ruling as a matter of law that the *Rocky* characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author.").

130. *See, e.g.*, Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1213 (9th Cir. 2008) (recognizing protection for the physical and conceptual qualities of the character Eleanor the automobile); Gaiman v. McFarlane, 360 F.3d 644, 662 (7th Cir. 2004) (noting that an otherwise stock comic book character's "speech" and other "expressive content" ultimately contributed to its being copyrightable); Warner Bros. Inc. v. American Broad. Cos., 720 F.2d 231, 243 (2d Cir. 1983) (examining both physical and personality traits of fictional superhero characters at issue); Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 607 (7th Cir. 1982) (holding that the video game K.C. Munchkin infringed upon PACMAN's copyright based not only on graphic similarities but also on similarities in the characters' portrayal).

nature, underscores the judiciary's overall comfort in dealing with copyright matters involving works that change.

Thus, as both Process Thought and copyright law's concern with characters illustrate, change is a fact of life. Indeed, "all works of art succumb to the forces of nature and change over time."[131] A system of copyright protection that fails to consider the relevance of fluidity of works of authorship is out of step with how creation occurs in theory and in practice. Perhaps because of the fixation requirement in the United States, the "lore" of copyright law tends to assume stability of eligible works. This narrative of copyright law is far less reflective of reality than society might otherwise think, especially in a digital era when change is so easily accomplished. Professor Margaret Chon has studied the Chain Art project, one interesting example of fluidity in the digital era.[132] This work was a collaborationist category of visual digital art housed on a website for which its design and its execution "depended on the deliberate changing by many authors of a single author's original image."[133] Moreover, the case law involving video games presents another genre of copyrightable works for which content is subject to variability.[134] These examples underscore the fluidity that is often characteristic of the growing number of digital works of authorship.

Courts should view the issue of eligibility for copyright protection as distinct from how to prove infringement of fluid works in the context of an actual case. In *Anderson v. Stallone*, a case involving copyright protection for the *Rocky* movie characters, the court quoted *Nimmer on Copyright* for the proposition that the question whether characters are copyrightable is "more properly framed [in terms of] . . .

131. Brief for Blane De St. Croix, *supra* note 119, at 7. An interesting—and perhaps extreme—illustration of this point is furnished by Christo's "Running Fence," which consists of an 18-foot tall "fence" composed of white nylon fabric, "stretched over 24.5 miles of undulating hillside terrain, where the appearance of the fence was affected by wind and light." DAVID LANGE ET AL., INTELLECTUAL PROPERTY: CASES AND MATERIALS 863 (3d ed. 2007).

132. Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 266 (1996).

133. *Id.* Chon also observed that "the notion of fluidity . . . is so crucial to a networked environment." *Id.* at 270.

134. *See, e.g.*, M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 433 (4th Cir. 1986) ("Even though 'audiovisual works' are proper subjects for copyright, the actual copyrighting of such audiovisual works and their qualifying for copyright protection depends on whether the works meet the tests for originality and fixation . . . ."); Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 873-74 (3d Cir. 1982) (rejecting the argument that video game graphics are "transient" and therefore not fixed for purposes of copyright protection); Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 852 (2d Cir. 1982) (affirming the copyrightability of video games despite variability of images on the screen depending on actions of a given player); Midway Mfg. Co. v. Dirkschneider, 543 F. Supp 466, 480 (D. Neb. 1981) (holding that Plaintiff's coin-operated video games, an "audiovisual work," were fixed in printed circuit boards—"tangible objects from which the audiovisual works may be perceived for a period of time more than transitory").

the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability per se."[135] Likely, the court meant that since characters are not explicitly protected by copyright law, other courts can only determine the extent to which copyright law protects characters in the context of an overall infringement inquiry with respect to the work in which the character appears.[136]

Significantly, an approach that embraces fluidity as a characteristic of copyrightable subject matter is more consistent with the practice of artistic creativity and the belief that change is inevitable. The underlying theories of Process Thought and Theology illuminate this belief. Once the law accepts that fluidity does not necessarily preclude copyright protection, the subject matter issue should depend on whether a given work constitutes an "original work of authorship" as copyright law requires.[137] Moreover, if copyright law protects fluid works, the extent to which courts will protect them in practice depends on how similar an allegedly infringing work appears to the work being infringed.

Copyright law contains precedent for this approach with respect to less conventionally expressive subject matter. For example, in *Kregos v. Associated Press*, the U.S. Court of Appeals for the Second Circuit concluded that the plaintiff's selection of baseball statistics in a particular form embodied sufficient originality and creativity as a matter of law to support a denial of summary judgment to the defendant in a copyright infringement action.[138] Still, the court warned the plaintiff that if he prevailed at trial regarding the originality and creativity requirements for copyright protection, he would only be able to obtain copyright protection commensurate with the type of work at issue.[139] Ultimately, the defendant's competing compilation escaped liability because the court determined that its selection of statistics was sufficiently different from that of the

135. Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1167 (C.D. Cal. 1989) (quoting 1-2 MELVILLE NIMMER, NIMMER ON COPYRIGHT § 2.12 (2011)) (internal quotation marks omitted).

136. *See generally* Feldman, *supra* note 125.

137. 17 U.S.C. § 102 (2006).

138. Kregos v. Associated Press, 937 F.2d 700, 704 (2d Cir. 1991) ("It cannot be said as a matter of law that in selecting the nine items for his pitching form out of the universe of available data, Kregos has failed to display enough selectivity to satisfy the requirement of originality.").

139. *Id.* at 709 ("If Kregos prevails at trial on the factual issues of originality and creativity, he will be entitled to protection only against infringement of the protectable features of his form."). Specifically, the plaintiff will only be able to enjoin infringements of his selection of statistics, but not his arrangement. *Id.*

plaintiff's.[140] The *Kregos* litigation provides an example of how courts have used Nimmer's approach regarding character protection in determining infringement with respect to other types of copyrighted works whose subject matter may be less clear-cut than conventionally copyrighted works. Simply put, courts should understand whether a work is copyrightable in the first place as a distinct issue from how to prove infringement in any given situation.

### *C. Nonhuman Elements of Authorship*

Landscape art such as Wildflower Works raises the issue of what it means to "author" a work. In the amicus brief to the U.S. Supreme Court submitted by the Volunteer Lawyers for the Arts and the Arts & Business Council of Greater Boston, the attorneys for amici curiae wrote: "On authorship, the Seventh Circuit drew a bright line in the sand, stating that 'works owing their form to the forces of nature cannot be copyrighted,' irrespective of what an artist may do to control the visual perception of his subject."[141]

Although "authorship" lies at the heart of copyright law, the governing law is easily stated but difficult to apply. In *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court defined an "author" with the often-quoted language: "He to whom anything owes its origin; originator; maker."[142] The problem, however, is that "he to whom anything owes its origin" can mean different things in different contexts. Is "origin" to be understood as "physical origin," or does it mean when an individual embraces the work intellectually, emotionally, or both? Focusing on the physical origin emphasizes the physical act of creativity, whereas focusing on the emotional or intellectual origin emphasizes the process the creator used to make the work of authorship. In this way, it is possible to understand the difference between "physical origin" as product centered, and the "emotional or intellectual" origin as process centered.

Although case law and legal commentary discuss physical origin more commonly, both contain support for the process view of "origin" that entails the author's intellectual or emotional validation of

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140. Kregos v. Associated Press, 795 F. Supp. 1325, 1330 (S.D.N.Y. 1992), *aff'd*, 3 F.3d 656 (2d Cir. 1993). On remand, the district court held that the three-year statute of limitations contained in section 507 barred a cause of action based on one of the defendant's forms. *Id.* With respect to the more recent form, the court held, as a matter of law, that the defendant's form was not substantially similar to the plaintiff's form, and therefore granted the defendant's motion for summary judgment on the copyright claims. *Id.* at 1331.

141. Brief for Blane De St. Croix, *supra* note 119, at 5 (quoting Kelley v. Chi. Park Dist., 635 F.3d 290, 304 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011)).

142. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

the work. One famous example of this perspective appears in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*: "A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it."[143] Professor Laura Heymann explicitly discusses this process perspective in her work on authorship. She focuses on the creator's "decision to assert that the work created is attributable to oneself."[144] "[T]he Copyright Act's 'author' is the individual (or entity) who names herself as owner of the intellectual content of the work—who looks at the paint inadvertently splattered on the canvas or reviews the draft prepared by an assistant and declares, 'That is mine.'"[145] Heymann boldly concludes that "[c]opyright law might . . . better accomplish its goals if it took better account of the activities and interests of authors rather than focusing on the products of their creativity."[146]

The authorship determination should consider both the tangible, physical actions of the creator, as well as the emotional and intellectual components of the creative enterprise. The physical components of authorship are easier to conceptualize, although the Seventh Circuit's opinion in *Kelley* reveals that this determination still can be problematic.[147] Landscape art such as Wildflower Works exemplifies a dynamic rather than static medium: "[i]ts primary medium is organic; it is always in process and is never perfected."[148] Yet, fluidity and growth do not negate the presence of human authorship because landscape art requires "constant curatorial concern if the work is to be appreciated as envisaged."[149] The court in *Kelley* did not understand that Wildflower Works "was entirely and intentionally conceived, modeled, designed, organized, and physically executed—and thus authored—by Mr. Kelley."[150] Although the court recognized "that Mr. Kelley specifically chose each plant bulb according to his concept, brought the bulbs into a foreign environment, deliberately planted and framed the bulbs with steel partitions and

143. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951) (footnote omitted).

144. Laura A. Heymann, *A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product*, 34 J. CORP. L. 1009, 1015 (2009).

145. *Id.* at 1016 (noting that the Copyright Act is not "particularly clear on this point").

146. *Id.* at 1012.

147. *See infra* notes 150-52 and accompanying text.

148. John Nivala, *The Landscape Art of Daniel Urban Kiley*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 267, 284 (2005).

149. *Id.*

150. Brief for Blane De St. Croix, *supra* note 119, at 6.

gravel, and simultaneously arranged them in a unique sculptural format," it rendered a decision concerning lack of authorship that "is at odds with these undisputed facts."[151] The existence of "physical authorship" in this case profitably compares to that which exists when a surveillance camera takes a photograph. In the latter case, meaningful physical human authorship is lacking; such is not the situation with Wildflower Works.

The intellectual or emotional component of creativity presents a more difficult area for decision, particularly with respect to works that are fluid and dependent on the forces of nature to some degree. Internationally renowned landscape artist Daniel Urban Kiley has elucidated this area of inquiry by noting that there was an element of his work that could not "really be designed at all; it consists of the phenomena that occur as a landscape evolves throughout seasons and time."[152] According to Professor John Nivala, Kiley's work "'[i]s . . . not understood as something that has been designed and deliberately constructed.' It looks as if it grew naturally in place."[153]

This carefully nurtured sense of fluidity, combined with the artist's embrace of the organic, natural development of the art, is what lies at the core of creativity from the perspective of Jewish Process Theology. It is steeped in a developmental perspective that reflects an emphasis on Divine creativity as "a process of mobilizing continuous self-creativity from within."[154] Jewish Process Theology embraces the internal evolution of life. This perspective emphasizes Divine encouragement of each stage of creation to materialize, thus culminating in Creation being understood as the result of God's invitation "into the process of becoming."[155] Thus, Creation can be understood as a partnership between the Divine and that which is created. The type of art created by people such as Chapman Kelley and Daniel Urban Kiley exemplify this parallel. Their art is a testament to the internal power possessed by their landscape creations. As Part I discusses above, creativity theory evidences numerous testimonial accounts of a partnership between authors and

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151. *Id.* at 6 n.3.

152. Nivala, *supra* note 148, at 276 (quoting DAN KILEY & JANE AMIDON, DAN KILEY: THE COMPLETE WORKS OF AMERICA'S MASTER LANDSCAPE ARCHITECT 109 (1999)) (internal quotation marks omitted).

153. *Id.* (quoting Anne Whiston Spirn, *Seeing and Making the Landscape Whole*, 72 PROGRESSIVE ARCHITECTURE 92, 92 (1991)). For a contrary, and perhaps a too simplistic, perspective, *see* Cronin, *supra* note 10, at 245 ("The work of an artist who uses living materials for his creations is more akin to that of a conductor or director than to that of a composer or dramatist.").

154. Artson, *supra* note 12, at 17.

155. *Id.* at 18-19.

their artistic creations.[156] In other words, artistic works become a "partner" in their own creation.[157] The existence of this partnership should not preclude a work's copyrightability.

## III. VARA, MORAL RIGHTS, AND FLUID NATURE-DEPENDENT WORKS OF AUTHORSHIP

Recall that because the Seventh Circuit determined that Wildflower Works was not capable of copyright protection, it could not gain protection under VARA either.[158] The Seventh Circuit's opinion noted that *Kelley v. Chicago Park District* "raises serious questions about the meaning and application of VARA's definition of qualifying works of visual art—questions with potentially decisive consequences for this and other moral rights claims."[159] The court correctly identified that the VARA issue presented in the case involved the right of integrity delineated in section 106A, which precludes any "intentional distortion, mutilation, or other modification" of a covered work that "would be prejudicial to" the "honor or reputation" of the author.[160] VARA provides a definition for qualifying works of visual art as "a painting, drawing, print, or sculpture, existing in a single copy."[161] This same definition also provides a number of exclusions, including the catch-all limitation that VARA does not apply to "any work not subject to copyright protection under this title."[162]

The district court determined that Wildflower Works was both a painting and a sculpture.[163] Unfortunately, the Seventh Circuit was unable to review this particular determination because the Chicago Park District did not challenge this ruling—a move the court deemed "an astonishing omission."[164] Nonetheless, the realities of the litigation process did not prevent the court from making some very pointed observations with respect to the status of Wildflower Works under VARA:

> 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.... Copyright's broad general coverage extends to "original works of

156. *See supra* notes 66-69 and accompanying text.

157. *See supra* text accompanying note 71.

158. *See supra* note 7 and accompanying text.

159. Kelley v. Chi. Park Dist., 635 F.3d 290, 302 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011).

160. 17 U.S.C. § 106A(a)(2)-(3) (2006).

161. *Id.* § 101.

162. *Id.*

163. Kelley v. Chi. Park Dist., No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008), *aff'd in part, rev'd in part*, 635 F.3d 290 (7th Cir. 2011).

164. *Kelley*, 635 F.3d at 300.

> authorship," and this includes "pictorial, graphic, and sculptural" works. The use of the adjectives "pictorial" and "sculptural" suggests flexibility and breadth in application. In contrast VARA uses the specific nouns "painting" and "sculpture." 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*.[165]

The history of VARA's enactment reveals the existence of insufficient thought or attention to the content of the statute, resulting in numerous problematic areas.[166] One point that is clear, however, is that the statute's intent was to provide very circumscribed federal statutory protection for only certain types of visual art.[167] In enumerating those works of visual art covered by VARA, the statute establishes some basic parameters with respect to the requisite originality, creativity, and aesthetics of the eligible works.[168] Moreover, the case law supports an interpretation of VARA that reinforces the statute's narrowly crafted scope of coverage.[169] In light of this statutory posture, the Seventh Circuit was correct in its ruling that the law should not consider Wildflower Works either a painting or a sculpture under VARA. As the court observed, "VARA plainly uses the terms 'painting' and 'sculpture' as words of *limitation*."[170]

Although the Seventh Circuit properly applied VARA as written, the statute fails to address critical issues concerning the scope of moral rights protection in the United States. First, VARA's limitations are too confining in that moral rights protection should apply to works of authorship other than just visual art. Moreover, only works satisfying a heightened standard of originality, as manifested by substantial rather than "a modicum" of creativity, should qualify for moral rights protection.[171] *Kelley* requires consideration of how such a statute with respect to moral rights generally would incorporate issues specifically presented by fluid works with nonhuman elements of authorship.

Part II argued that Jewish Process Theology supports a copyright model that would include protection for such works.[172] The issue regarding moral rights protection is whether and how the presence of fluidity and nonhuman elements of authorship mesh with

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165. *Id.* (citation omitted).

166. KWALL, *supra* note 9, at 27-30, 74-75.

167. *See* 17 U.S.C. § 101 (2006).

168. *See id.*

169. *See* KWALL, *supra* note 9, at 75 (providing a more complete discussion of these issues).

170. Kelley v. Chi. Park Dist., 635 F.3d 290, 301 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011).

171. KWALL, *supra* note 9, at 72 (internal quotation marks omitted).

172. *See supra* Part II.

a standard requiring a heightened degree of originality with substantial creativity. These considerations should not preclude moral rights protection if the work in question otherwise manifests an adequate degree of "heightened" original and creative human input. This should remain true despite the existence of some forces of nature that contribute to the work's ultimate form and appearance, and render the work more seemingly fluid than some works of authorship.

As Part I discusses above, the key ingredients of both Divine and human creativity according to Jewish Process Theology are fluidity, partnership, and relationship.[173] Throughout the Seventh Circuit's opinion in *Kelley*, these characteristics drive the court's description of Wildflower Works. According to the facts recounted in the opinion, Kelley selected the plant material for aesthetic and other reasons and designed the initial placement of the flowers.[174] He supervised numerous volunteers who planted the seedlings and continually nurtured the garden.[175] A temporary permit subsequently issued to Kelley provided that he would "have responsibility and control over matters relating to the aesthetic design and content" of Wildflower Works.[176] The court also observed, however, that "the forces of nature—the varying bloom periods of the plants; their spread habits, compatibility, and life cycles; and the weather—produced constant change."[177] Kelley was a "partner" with the work and with nature in the creation of Wildflower Works. His work manifested not only fluidity due to nature, but also the necessary collaborative relationship in its creation and cultivation. This perspective is a markedly different one from that which the court expressed:

> Simply put, gardens are planted and cultivated, not authored. A garden's constituent elements are alive and inherently changeable, not fixed. Most of what we see and experience in a garden—the colors, shapes, textures, and scents of the plants—originates in nature, not in the mind of the gardener. At any given moment in time, a garden owes most of its form and appearance to natural forces, though the gardener who plants and tends it obviously assists. All this is true of Wildflower Works, even though it was designed and planted by an artist.[178]

The perspective of Jewish Process Theology developed in Part I above reveals an alternate—and preferable—way of understanding the creation of works of authorship and the consequent scope of copyright and moral rights protection. Although the Seventh Circuit made the foregoing observation in the context of denying the

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173. *See supra* Part I.
174. *Kelley*, 635 F.3d at 293.
175. *Id.*
176. *Id.* at 294 (internal quotation marks omitted).
177. *Id.*
178. *Id.* at 304.

copyrightability of Wildflower Works, Wildflower Works should qualify not only for copyright but also moral rights protection. A standard for moral rights that requires a heightened standard of originality, would protect a work that manifests the requisite degree of human creativity despite the presence of apparent fluidity and nonhuman elements of authorship.[179] The theoretical predicate for this view derives from the fluidity that exists in all of Creation and the author's relationship to the work's internal creative force.

## IV. CONCLUSION

In denying copyright protection for Wildflower Works, the Seventh Circuit stated: "[T]he real barrier to copyright . . . is not *temporal* but *essential*. The essence of a garden is its vitality, not its fixedness. It may endure from season to season, but its nature is one of dynamic change."[180] Copyright law conventionally invokes this perspective. Instead, copyright law might be better informed by an alternative perspective focusing on Process Thought and Theology as it has been developed in the Jewish tradition. This alternative perspective would facilitate a more nuanced view regarding what types of works of authorship deserve both copyright and moral rights protection.

179. *See* Cronin, *supra* note 10, at 239, 252-53 (providing a contrary perspective reflecting the more conventional understanding of copyright and moral rights protection in connection with living works of art).

180. *Kelley*, 635 F.3d at 305.