Vanderbilt Journal of Entertainment & Technology Law

Volume 12
Issue 2 *Issue 2 - Winter 2010*

Article 1

2010

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VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW

VOLUME 12 WINTER 2010 NUMBER 2

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ABSTRACT

*The Visual Artists Rights Act of 1990 (VARA) broadened general copyright protection under U.S. law by granting to artists who have created certain copyrightable physical works of visual art, the moral rights of attribution and integrity. Since the time of VARA's enactment (and for some time before) many artists have worked with unconventional genres and media to produce art that is not comfortably accommodated among the visual art works contemplated by VARA. An increasing number of recent works of Conceptual and Appropriationist Art raise doubts about fixation and original expression, both of which are required for copyrightability which, in turn, is required for a work to be protected under VARA.*

*This article discusses the uncomfortable fit of VARA and many contemporary works of art, particularly those that incorporate to a significant degree living objects in their natural state. It focuses on the recent dispute involving a VARA claim in a living landscape (Kelley v. Chicago Park District) and discusses similar works of art in which living elements play a critical role in contributing to the meaning and aesthetic value of the work. It argues that in these works, and indeed*

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*in Conceptual Art in general, authorial contributions tend to be ideational rather than expressive, and that the application to them of copyright rights and moral rights is both unnecessary and undesirable in promoting a productive and imaginative cultural milieu.*

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Poems are made by fools like me,

But only God can make a tree.

- Joyce Kilmer[1]

In "Of Property," the fifth chapter of the second of his *Two Treatises of Government*, John Locke argues that the application of human labor to commonly held resources gives rise to private property rights in the fruits of this labor: "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby

1. JOYCE KILMER, *Trees, in* POEMS, ESSAYS AND LETTERS IN TWO VOLUMES, VOLUME ONE: MEMOIR AND POEMS 180 (1918).

makes it his property."[2] Locke's justifications for personal property inform the U.S. copyright regime that, for over two hundred years, has granted private property rights in works of human intellect ranging from literature and music to computer programs, motion pictures, and works in other media quite unknown to Locke and his contemporaries.[3] Locke made his arguments using lessons drawn from nature that resonate even today, despite the remove of our lives from the agrarian world of seventeenth century England. The recent federal district court decision in *Kelley v. Chicago Park District* in *Chapman Kelley v. Chicago Park District* is somewhat ironic, therefore, insofar as it denied copyright protection to the product of the very labor that Locke used to make his point about personal property—cultivating a garden.[4]

The property in question in *Kelley* was not the fruits and flowers typically associated with Locke's discussion of agricultural or horticultural labor, but rather was the aesthetic result of the combination of colors and textures of the millions of living leaves and blooms of Chapman Kelley's *Wildflower Works*.[5] A professional artist specializing in representational works depicting scenes of nature—and of flowers in particular—Kelley created *Wildflower Works* in 1984 in Chicago.[6] *Wildflower Works* occupied one-and-a-half acres of Chicago's Grant Park, comprising two enormous ovoid beds of wild flowers that were defined by gravel paths.[7]

In Chicago and beyond, the general public initially received *Wildflower Works* enthusiastically.[8] Within a few years of its installation, however, public enthusiasm for this work began to wane,

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305-06 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1970) (1690). Presumably unlike Locke, unless clearly referring to a male, "he" means "he or she." *See id.*

3. *See* Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1182 (2008) (summarizing the correlation of Locke's property theories to the foundations of American copyright law).

4. Kelley v. Chicago Park Dist., No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *16 (N.D. Ill. Sept. 29, 2008).

5. *See id.* at *3.

6. *See id.*

7. *See id.* Chapman Kelley has posted his sketch for the project and photos of its realization at http://www.chapmankelley.com. Kelley's posted photos of the project, presumably showing it looking its best, suggest the realized work never quite matched the idealized colorfully dappled sketches for it. *See* Chapman Kelley Portfolio, http://www.chapmankelley.com (last visited Nov. 15, 2009).

8. The court took note of the fact that the work was commended by a number of journalists writing for national newspapers, including the *New York Times* and the *Christian Science Monitor*. *See Kelley*, 2008 U.S. Dist. LEXIS 75791, at *4-5.

along with its constituent living plants whose visual appeal wilted over the natural course of their finite lives.[9] Twenty years after *Wildflower Works*'s installation, Chicago Park District officials determined that the project had deteriorated into an unsightly nuisance.[10] Over Kelley's objections, these officials radically redesigned and reduced the space it occupied in Grant Park, essentially extirpating the work.[11]

Kelley claimed that the Park District's action was an unauthorized destruction of a work of recognized stature, which violated his moral rights in *Wildflower Works* as established under the Visual Artists Rights Act of 1990 (VARA).[12] The district court agreed with Kelley's claim that *Wildflower Works* was a work of visual art that one might legitimately classify as a painting or sculpture.[13] The court went on to note, however, that § 106(a) of the Copyright Act, which promulgates moral rights, limits their application to copyrightable works only.[14] *Wildflower Works* may well be a work of art, but, in the district court's opinion, two plant-filled ellipses did not evince sufficient original expression for this work to be eligible for copyright protection.[15] The court further found that, even if it were copyrightable, *Wildflower Works* could not provide a basis for moral rights to Kelley because case law precedent had established that "site-specific" pieces of visual art like *Wildflower Works* are ineligible for protection under the moral rights provision of the Copyright Act.[16]

The district court's conclusion that *Wildflower Works* was not copyrightable expression was surprisingly brusque given its more sympathetic stance toward Kelley in its statement that *Wildflower Works* was a work of art as both a painting and a sculpture. Rationalizing its decision that the work was not copyrightable, the court took a slightly blinkered view of the concept of originality required for copyright protection when it complained that "Kelley leaves this Court to assume that he is the first person to ever conceive of and express an arrangement of growing wildflowers in ellipse-

9. *See* Deanna Isaacs, *Is Gardening an Art?,* CHICAGO READER, June 16, 2006, at 2.

10. *See id.*

11. *See id.* at 8-9.

12. Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990). VARA provides limited moral rights of integrity and attribution to authors of copyrightable works of fine art. For a discussion of the origins and limited scope of VARA, see *infra* note 19 and accompanying text.

13. *See Kelley*, 2008 U.S. Dist. LEXIS 75791, at *10-16.

14. *See id.* at *18.

15. *See id.* at *16-17.

16. *See id.* at *18-21.

shaped enclosed area in the manner in which he created his exhibit."[17] In fact, whether Chapman Kelley was the first or the hundred-and-first artist to create such a work does not legally determine whether his garden design originated with him, a determination that is required before copyright may attach.[18]

The court's handling of the question of whether *Wildflower Works* was a work of visual art within the purview of statutory moral rights, however, touches upon a broader issue addressed in this Article. Defending its finding that *Wildflower Works* was a painting and a sculpture, the court rejected the Park District's argument that the "plain and ordinary meaning" of these terms could not possibly accommodate a living garden:

> 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. While Andy Warhol's suggestion that "art is whatever you can get away with" is too nihilistic for the law to accommodate, neither should VARA be read so narrowly as to protect only the most revered work of the Old Masters. In other words, the "plain and ordinary" meanings of words describing modern art are still slippery.[19]

As the court noted, the tension between copyright law and art particularly involves new or recent works of art like Kelley's piece.[20] *Wildflower Works* is only one example of a great number of recent works of Conceptual art composed of heterodox media extending far beyond the paints and charcoals of traditional artists. Since the late nineteenth century, when Impressionist painters challenged established tenets of Western art, works associated with many artistic movements that followed have, like *Wildflower Works*, become increasingly problematic in terms of eligibility for copyright protection under U.S. law.

Following the Impressionist era, the aesthetic meaning of works labeled Post-Impressionist, Cubist, Expressionist, Conceptual, Abstract, Minimalist, Appropriationist has tended to reflect more the idiosyncrasies of a particular artist rather than the intentions or tastes of a commissioning party or potential buyer.[21] Along with this

17. *Id.* at *17.

18. Resorting to Learned Hand's well-worn comment on originality: " [I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

19. *Kelley*, 2008 U.S. Dist. LEXIS 75791, at *11.

20. *Id.*

21. *See* JAMES GARDNER, CULTURE OR TRASH? A PROVOCATIVE VIEW OF CONTEMPORARY PAINTING, SCULPTURE, AND OTHER COSTLY COMMODITIES 22–47 (1993).

general trend has come the expansion of media in which artists render their work, which now include living—and once living—objects like plants, animals, and other relatively ephemeral organic materials.[22] These developments in the visual arts, which have mainly occurred within the past fifty years, have led to artistic endeavors that U.S. copyright law does not comfortably accommodate—even though copyright law ostensibly fosters and protects the results of such creative enterprise.[23] This remains true despite amendments to the Copyright Act enacted as recently as 1990 that expanded protection for works of visual art and architecture.[24]

This Article explores the tension that the *Kelley* court identified between copyright law and certain works of contemporary art. Part I provides an overview of the protection that U.S. copyright law offers works of visual art, focusing on how VARA fits within the scheme of copyright law. Part II follows with a broad review of important movements in visual arts over the past century and includes a discussion of how works of these movements challenge our notions of copyrightable material. Part III examines the genre of Conceptual art that uses living media, and the quandaries that this type of art raises in regard to the copyright fundamentals of fixation, authorship, and expression. Part IV suggests that the moral rights that VARA provides should not apply to these works and, furthermore, that even copyright protection for many works in contemporary genres of visual art is neither necessary nor desirable. Fixation, authorship, and expression are fluid concepts in copyright. This Article suggests, however, that providing copyright protection to volatile works of visual art—in particular, to living works of art in which chance and nature hold the laboring oar—could so dilute these copyright prerequisites as to risk the monopolization of concepts and ideas that U.S. copyright law expressly does not protect.

22. *See, e.g.*, Penelope Green, *At Home With Hope Sandrow: Feathering Her Nest*, N.Y. TIMES, July 16, 2009, at D1 (discussing mixed media artist Hope Sandrow's "fowl focused" art installation that includes live feeds from four Web cams and "painterly poultry portraits and ecru-hued eggs whose parentage has been fastidiously documented.").

23. U.S. CONST. art 1, § 8 ("Congress shall have the power . . . [t]o promote the progress of science and useful arts.").

24. *See* Visual Arts Rights Act (VARA) of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990); Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, Title VII, 104 Stat. 5128 (1990).

## I. COPYRIGHT AND MORAL RIGHTS IN THE U.S. FOR VISUAL ART WORKS

### *A. Background of VARA*

Since VARA's enactment in 1991, federal court judges and scholars have found the Act to be a mostly indigestible addition to American copyright law.[25] Such a conclusion is unsurprising given the predictably curdled result of combining a concept grounded in author-centric copyright regimes of civil law countries with the more user-oriented and economically based copyright law of the United States.[26]

The ethical responsibility to recognize an individual's expression as an extension of their personality can be traced to Ancient Greece and Rome.[27] Modern societies' notions about such ethical considerations, or "moral rights" of authors, however, are grounded in the Berne Convention—an outgrowth of nineteenth century French literary and political thought.[28]

The text of the founding Berne Convention, published in 1886, promotes authors' rights by establishing the principle of national treatment, according to which Convention adherents agree to protect the works of authors of other Convention member states.[29] Authors' rights under the Convention were not amplified to include moral rights of integrity and attribution, however, until forty years after

25. In 2006, the First Circuit Court of Appeals overturned a district court's holding in favor of the plaintiff, referring to the ambiguity inherent in VARA regarding whether moral rights may apply to site-specific works of art. *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 140 (1st Cir. 2006). "Either VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all." *Id.* Furthermore, David and Melvin Nimmer have remarked on the confusion resulting from inserting protection for material property into law concerned with protection of immaterial works, stating that "[a]t the abstract (or perhaps fustian) level, traditional copyright law protects art; by contrast, the Visual Artists Rights Act protects artifacts." DAVID & MELVIN NIMMER, NIMMER ON COPYRIGHT § 8D.06 (2009).

26. Moral rights apart, the rights granted under common law copyright and those of civil law authors' rights tend to have a great deal in common. *See* PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT 4 (2001) (noting that the Berne Convention bridges the two traditions).

27. *See* Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 COLUM.-VLA J.L. & ARTS 361, 367 (tracing the moral concept of authorial recognition to the reign of Emperor Justinian).

28. *See generally*, SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 1886 –1986 (1987).

29. *See* Barbara Ringer, *The Role of the United States in International Copyright – Past, Present, and Future*, 56 GEO. L.J. 1050, 1053 (1968) (explaining national treatment as an understanding that "I'll protect your works to the same extent I protect my own works, if you promise to do the same . . . . Perhaps it is no accident that the emergence of the international copyright concept coincided historically with the development of steamships, locomotives, and telegraphy.").

Berne's founding.[30] The rights of integrity and attribution are the two rights that VARA provides, albeit only for certain classes of works of visual art.[31]

Reflecting their Romantic and Victorian era origins, national moral rights laws promulgated pursuant to Berne ostensibly champion the interests of individual authors over those of their readers.[32] The moral rights of integrity and attribution are not so named because they are inherently moral than are copyrights of reproduction and performance. We refer to them as "moral" because they are intended to address authors' concerns that lie beyond the economic and material interests that copyright law protects; moral rights transcend commercial mechanisms of contract and sale.[33]

Commentators have noted, however, that international, national, and state moral rights laws foster the preservation of valuable human expression, thus benefiting the larger populations that they govern.[34] The right of attribution safeguards the public record of authorship existing between the creator and his work.[35] Even after transferring title to a work, the artist has the affirmative right to insist that his name appear as the author of the work as well as the right to disassociate his name from a work he did not create or

30. *See* ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 115-121 (2006).

31. While these rights were expressly rejected by the U.S. under the Berne Implementation Act of 1988, they were incorporated into U.S. copyright law under VARA. The House Report prepared for VARA explains that,

> While the Berne Convention implementation debate crystallized attempts by artists to obtain protection for their creations, efforts to enact artists' rights laws had begun well before that time. Bills seeking to protect visual artists dated from 1979, and H.R. 2400, introduced in the 100th Congress, was designed to grant film directors and screenwriters certain moral rights. Adherence to the Convention did not end the efforts in support of these and similar bills.

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

32. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 DUKE L.J. 455 (1991) ("Law's reception of 'authorship' began well before the heyday of Romanticism in the late eighteenth and early nineteenth centuries . . . [b]ut it is not coincidental that precisely this period saw the articulation of many doctrinal structures that dominate copyright today.").

33. *See generally* NIMMER, *supra* note 25, at § 8D.06.

34. *See* J. H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, (1989) (discussing the "dual purpose" of national and international laws protecting moral rights to protect artists against damage to their work, and also to protect the public against destruction of the larger culture to which artists contribute); Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297 (2002) (noting that the preservation of art works as part of America's cultural patrimony was a pervasive theme in the Congressional debate over VARA).

35. *See* NIMMER, *supra* note 25, at § 8D.03.

that has been modified.[36] The right of integrity protects the dignity and reputation of artists by prohibiting intentional or neglectful harm that leaves their physical works of art in a state that demeans their creators.[37] In this respect, moral rights are ultimately akin to intellectual property rights in that the objective of both is to balance the interests of authors and users to promote societies' intellectual productivity.[38]

After World War II, the United States became the largest exporter of works of intellectual property.[39] In the late twentieth century, the United States hoped that joining Berne would help the country muster greater foreign support for U.S. efforts to counter rampant piracy of these exports abroad.[40] The United States joined Berne in 1989 and, two years later, through the enactment of VARA, complied with the Convention's stipulation that members provide moral rights to authors.[41]

While American media and software industries supported U.S. Berne membership insofar as it offered the possibility of greater protection overseas for their works, these industries were more skittish, however, about the moral rights legislation arriving inevitably in the wake of Berne accession.[42] They feared that such

36. *Id.*

37. *See id.*

38. The objective of moral rights laws is, therefore, analogous to those of laws governing access to natural resources (e.g., water, air, radio frequencies spectrum) that aim to prevent or mitigate the "tragedy of the commons." By restricting an individual's use of artistic resources, even those whose title rests with the individual, the law promotes the retention for future generations of a rich record of artistic activity.

39. *See* Nicole Telecki, *The Role of Special 301 in the Development in International Protection of Intellectual Property Rights after the Uruguay Round,* 14 B.U. INT'L. L.J. 187 (1996) (noting the steady increase in U.S. trade in intellectual property since the 1947 General Agreement on Tariffs and Trades).

40. *See* Ringer, *supra* note 29.

41. *See* Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990).

42. "[I]n the view of many commentators adherence to Berne will work a gradual but appreciable change in the American copyright system by exposing it to the continuing influence of Continental copyright doctrine." Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 4 (1992); *see also* JOHN WHICHER, THE CREATIVE ARTS AND THE JUDICIAL PROCESS 4 (1965) (arguing—many years before U.S. accession to Berne—against the importation of "an entire body of foreign law" into the U.S. precedent-based system): *see also* Melville Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law,* 19 STAN. L. REV. 499, 524 (1966-67) (noting that interest groups, "primarily the motion picture and television industries," opposed U.S. accession to Berne because they feared it would establish inalienable moral rights not susceptible to contractual modification); Robert C. Bird, *Moral*

legislation might upset the long-established rapport between U.S. media companies and their creative employees. Moral rights might provide these employees means by which they might obstruct exploitation of their works by their employers. Ultimately, these industries' objections shaped moral rights legislation in the United States, as can be seen in the limited reach of VARA. As its name implies, VARA provides moral rights of integrity and attribution only to creators of works of fine art that are meant to be distributed and exhibited as "originals."[43]

VARA's narrow definition of "visual art" excludes not only works made for hire, but also all works of a commercial nature.[44] Unlike copyright's term of protection—life of the author plus seventy years—VARA's term is relatively meager, lasting only for the life of the author.[45] The reach of this statute is further hemmed in by exceptions and limitations—for example, the public display exception allowing unauthorized modifications to VARA-eligible works—suggesting that Congress was begrudging and dubious about its enactment.[46]

### *B. Cases Involving VARA*

A "Solomonic compromise between many conflicting interests," VARA has, unsurprisingly, displeased virtually everyone who has worked with this law over the past eighteen years.[47] Law scholars claim that VARA was poorly drafted and offers too little—or too much—protection to visual artists.[48] Any hopes that artists may have

*Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L. J. 407 (2009) (discussing various economic and political interests behind American ambivalence to joining Berne).

43. *See* Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, § 101, Title VI, 104 Stat. 5128 (1990).

44. *See id.*

45. *Id.* § 106A(d)(1). Under French law moral rights are perpetual and inalienable. *See* C. PROP. INTELL., art. l.121-1 (Fr.).

46. *See* Roberta Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 4 (1997) (describing the slovenly drafting and sketchy politicking associated with this legislation); Monica Pa & Christopher Robinson, *Making Lemons Out of Lemons: Recent Developments in the Visual Artists Rights Act,* LANDSLIDE , Jan.-Feb. 2009, at 22 (asserting that the judiciary's application of VARA betrays: (1) the reluctance with which this legislation was enacted, and (2) the limited protection it ostensibly offers to a narrow range of artistic endeavor).

47. *See* Pa & Robinson, *supra* note 46, at 22.

48. *See* Amy Adler, *Against Moral Rights,* 97 CAL. L. REV. 263, 287, 295, 297 (2009):

> Moral rights law therefore rests on a vision of art at odds with contemporary art practice. The law obstructs rather than enables the creation of art . . . I would argue that the incoherence of the category of "art" has become *the subject* of contemporary art. The lack of distinction between art and other objects is now a central

harbored that VARA would enable their professional and financial improvement have turned to ashes in their mouths with the growing number of VARA cases decided against the artists who filed them.[49] Even more, because federal law preempts state statutes providing attribution and integrity rights, artists may discover that the rights in these areas that they enjoyed under state law are actually scanter because of VARA.[50]

VARA provides artists with lifetime rights of integrity and attribution in original works of visual art created after 1990, the year of VARA's enactment.[51] The artist may waive these rights, but not transfer them to another.[52] VARA also extends these rights to works created prior to 1990 unless—or until—an artist has transferred his

> preoccupation in contemporary art. Moral rights law depends on and glorifies a line between art and everyday objects that no longer exists.

*Id.* (emphasis added); Thomas Cotter, *Pragmatism, Economics, and the Droit Moral,* 76 N.C. L. REV. 1 (1997) (asserting that waivable moral rights in the U.S. provide little benefit to artists and society at large, and that non-waivable moral rights—in countries like France and Germany—actually inhibit the production of works of art); Roberta Kwall, *Originality in Context,* 44 HOUS. L. REV. 871 (2007) (asserting that while functional works should be excluded from moral rights, artistic works in genres other than visual art also should be protected under moral rights law as long as they demonstrate sufficient originality as determined by judicial evaluation); Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 416-17 (1995).

49. *See* Cotter, *supra* note 48, at 26 ("The suggestion that the statutes have had little effect is consistent with some of the findings disclosed in a recent Copyright Office Report on the Waiver of Moral Rights in Visual Artworks."). Moreover, in 2008, muralist Kent Twitchell settled for $1.1 million his moral rights claim arising over the obscuration of his Ed Ruscha mural in Los Angeles. The mural, which covered six stories and one side of a building, was painted over. Defendants included the U.S. Government and the Job Corps Center of the YWCA, the building's owners and tenants, respectively. Prior to settlement the Central District of California dismissed the dispute on grounds of sovereign immunity, and dismissed the moral rights claim under VARA against the U.S. The plaintiff sought to pursue the matter based not only on his VARA claims against non-U.S. parties but, alternatively, on California moral rights law under the California Artist Protection Act. *See* Pa & Robinson, *supra* note 46, at 27; William Brutocao & Eric Bjorgum, *VARA and CAPA: Lessons from the Twitchell Case,* INTELL. PROP. TODAY, Sept. 2008, at 18. While the plaintiff, and others, hailed news of the apparently generous settlement as a vindication of artists' moral rights under VARA, the case provides no judicial precedent on this matter. Given the tortured factual ambiguities of the case—in particular on the essential question of who owned title to the mural when—and the thicket of government and private parties, and federal and state law involved, it appears likely the defendants may have determined the most economical and expedient resolution of the matter would be to settle on this plaintiff with a litigious history an amount that might permit him to restore his mural. *See id.*

50. *See* NIMMER, *supra* note 25, at § 8D.06.

51. VARA applies to works created six months or more after the date the bill was enacted. VARA, Pub. L. No. 101-650, § 610, 104 Stat. 5128 (1990); *see also* NIMMER, *supra* note 25, at § 8D.06.

52. *See* VARA, Pub. L. No. 101-650, § 610, 104 Stat. 5128 (1990).

title to the physical work.[53] Most VARA decisions, however, have turned on the courts' dissection of the works themselves, a method of analysis that has typically led courts to conclude that the work in dispute is ineligible for VARA protection.

Courts have homed in on the ambiguities and limited scope of VARA and have consistently denied artists' claims of moral rights violations. In several VARA disputes, courts have decided against the artist on temporal grounds, or upon a finding that the art in question was "made for hire," and therefore outside VARA's scope.[54] Additionally, in some instances, courts, perhaps unintentionally, have even disparaged the works in question, thereby threatening further distress to the reputations and *amour-propre* of aggrieved artists.

In *Lilley v. Stout*, a district court held that the prints and negatives of photographs that the plaintiff, a professional photographer, took, which the defendant ultimately incorporated into a larger work, were ineligible for VARA protection.[55] Despite the fact that the plaintiff took the photographs in order to create a work of visual art, the court denied them protection under VARA because it did not believe that they were taken "for exhibition purposes only," as the statute requires.[56] The court found that the photographs were merely "studies" that might be used for a number of unrelated purposes.[57] Courts have likewise deemed a political poster, house plans, and a design of an athletic trophy to be works outside VARA's

53. 17 U.S.C. § 106A (d) (2006). Because moral rights under VARA attach only to the material fixation(s) of an artist's expression, this extension of moral rights to works created before 1990 is not very meaningful given the artist/owner's legal dominion over the work through property and copyright law. 17 U.S.C. § 102(a).

54. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d. 77 (2d Cir. 1995) (artists' creation was a work made for hire and therefore outside the scope of VARA protection); Hunter v. Squirrel Hill Assocs., 413 F. Supp. 2d 517 (E.D. Pa. 2005) (plaintiff's VARA complaint could not be entertained because it was brought outside the statute of limitations); Pavia v. 1120 Ave. of the Americas, 901 F. Supp. 620 (S.D.N.Y. 1995) (VARA claim barred because both the creation of the work and the allegedly illegal conduct concerning it occurred prior to VARA's enactment). In *Carter*, VARA did not protect the sprawling and eclectic sculptural work involved because the court determined that the artists had legal status as the employees of one of the defendants during the creation of the work. *See* 71 F.3d at 87-88. Many, if not most, artists who work on commissioned pieces are not legally the employees of the commissioning party, and the commissioned pieces would not be considered works made for hire under VARA. *See* Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, § 101, Title VI, 104 Stat. 5128 (1990).

55. 384 F. Supp. 2d 83 (D.D.C. 2005).

56. *Id.* at 87.

57. *Id.* at 88.

protection, as well as "site-specific" art works that were integrated within particular geographical locations.[58]

Furthermore, VARA requires that a work be "of recognized stature" before its creator is granted the right to prevent its destruction.[59] Courts have rigorously interpreted this requirement, thereby undoubtedly bruising artists' egos in determining, for instance, that Joanne Pollara's *Gideon Coalition* mural, and Linda Scott's *Swan* sculpture, were not works "of recognized stature" worthy of protection under VARA.[60]

## II. VISUAL ART IN THE TWENTIETH AND TWENTY-FIRST CENTURIES: THE SHOCK OF THE NEW[61]

> Not this modern stuff I hope—you know, 'Portrait of a Lampshade Upside Down' to represent a soul in torment.
>
> - Robert Hughes[62]

To gain perspective on the challenges facing those charged with developing what the *Kelley* court called the "taxonomy" of VARA-protected works—i.e., what constitutes a "work of visual art" under the statute—it may be useful briefly to consider the mélange of genres of modern and contemporary art that implicates moral rights today. The following discussion first considers the broad and lingering

58. *See* Phillips v. Pembroke Real Estate, Inc., 459 F. 3d 128 (1st Cir. 2006) (finding untenable the notion that VARA could both apply to site-specific art and simultaneously also allow its destruction by permitting its removal under the "public presentation" exception); Nat'l Ass'n For Stock Car Auto Racing, Inc. v. Scharle, 184 Fed. Appx. 270 (3d Cir. 2006) (finding trophy designs were merely drafts of works, not single or limited quantity pieces contemplated by VARA); Landrau v. Solis Betancourt, 554 F. Supp. 2d 102, 111 (D.P.R. 2007) (finding Landrau's architectural plans for a house were merely "technical drawings" and therefore ineligible for VARA protection); Pollara v. Seymour, 206 F. Supp. 2d 333 (N.D.N.Y. 2002) (state did not violate artist's VARA rights in summarily removing and rending her political mural that was deemed as having no lasting value).

59. 17 U.S.C. § 106A(a)(3)(B) (2006).

60. Scott v. Dixon, 309 F. Supp. 2d. 395 (E.D.N.Y. 2004); Pollara v. Seymour, 206 F. Supp. 2d 333 (N.D.N.Y. 2002). Ultimately, of course, judges determine whether a work is "of recognized stature." This statutory category of works is difficult to square with the reality that most works of art that are unquestionably "of recognized stature" did not achieve this status until many years if not decades after their creation. On judicial unease about the courts' role in aesthetic determinations see *infra* note 141 and accompanying text.

61. ROBERT HUGHES, THE SHOCK OF THE NEW: THE HUNDRED YEAR HISTORY OF MODERN ART—ITS RISE, ITS DAZZLING ACHIEVEMENT, ITS FALL (Rev. ed. 1991).

62. "Not this modern stuff I hope—you know, 'Portrait of a Lampshade Upside Down' to represent a soul in torment." *See* REBECCA (Selznick International Pictures 1940) (remark by the genial and bumbling brother-in-law of the work's protagonist—a line appearing in the screenplay of Alfred Hitchcock's movie, but not in Daphne du Maurier's underlying novel).

influence of Impressionist painting on twentieth-century movements in the visual arts. It then focuses on characteristics shared among works of certain twentieth and twenty-first century genres of visual art and suggests how these traits represent a departure from previous genres not only in how works of art are created, but also in how they are perceived in the eyes of the public and in the eyes of the law. This departure signals a rejection of the traditional genres of visual art that copyright law and moral rights law under VARA were designed to protect. A logical consequence of this rejection is the loss—or abandonment—of these legal protections for art and artists.

Paintings by, and in the style of, Impressionist artists are among the most popular today. Sale prices for works of van Gogh have broken records.[63] Museum galleries and exhibitions devoted to works of Renoir, Cezanne, and Pissarro are among the most reliable draws for visitors. Reproductions and imitations of works by Monet and Sisley are predictable fixtures on the walls of the professionally decorated houses of the *haute bourgeoisie* of a certain age. It is indeed curious therefore, that this genre of painting has become one of the most commercialized and accessible given its origins in the *Salon des Refusés* in Paris in 1863 and the implications of marginalization and penury appurtenant to the venue.[64]

The Académie des Beaux-Art's *Salon de Paris* rejected the works of Impressionists like Manet and instead promoted the creation and sale of more traditional highly representational portraits.[65] It also promoted paintings of historical and religious scenes by artists like Ingrès and Delacroix, who at that time were considered among the finest exponents of French painting.[66] Today, we consider Impressionist pictures, portraying hazy quotidian and open-air scenes

63. In 1990, the Japanese entrepreneur Ryoei Saito bought van Gogh's *Portrait of Dr. Gachet* for $82.5 million and Renoir's *At the Moulin de la Galette* for $78.1 million. Headliners, *Art Appreciator*, N.Y. TIMES, May 20, 1990, at D5. *Dr. Gachet* has had a particularly parlous provenance given Ryoei Saito's threat to have the painting cremated along with his body, in order to avoid death taxes associated with it. *See* Nicole B. Wilkes, Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute, 24 COLUM.-VLA J.L. & ARTS 177 (2001) at 186.

64. *See* ROSS KING, THE JUDGMENT OF PARIS: THE REVOLUTIONARY DECADE THAT GAVE THE WORLD IMPRESSIONISM (2006).

65. *Id.* at 8.

66. The origins of the *Salon des Refusés* were more complicated than suggested by the conservative/avant-garde dispute of lore, owing much to the attempts of the Beaux-Arts administrations to improve the quality of works submitted for exhibition by requiring artists to provide a limited number of finished works. *See* Albert Boime, *An Unpublished Petition Exemplifying the Oneness of the Community of Nineteenth-Century French Artists*, 33 J. WARBURG & COURTAULD INSTITUTES 345 (1970).

using bright dabs of color, more "painterly" than their conservative counterparts, like those of Géricault, despite the opprobrium visited upon them by the art establishment in mid-nineteenth century Paris.[67] To the extent that Impressionist works are less representational than are paintings associated with previous schools, they reflect modern-day notions of Romantic authorship.[68] Ideally, according to the Romantic perspective, creators should be privileged to work unfettered by financial concerns, mainstream tastes, and art consumers' predilections, in order to make works expressing to the greatest extent possible the personal genius of the artist.[69]

Since the advent of Impressionism in the latter half of the nineteenth century, artists have continued to develop new genres and sub-genres, including Expressionism, Cubism, Fauvism, Surrealism, and Postmodernism.[70] Like the Impressionists, artists associated with these twentieth century movements eschewed representation and created images that viewers were less immediately—if at all—able to identify than the recognizable images of representational artists.[71]

67. *See* Ross King, *supra* note 64. Art historians refer to "painterly" works as those in which the brushwork and paint qualities are visible and emphasized. *See* CONCISE OXFORD DICTIONARY OF ART TERMS (2001).

68. *See* Jaszi, *supra* note 32, at 462. Romantic authorship implies a hierarchy of artistic production, in which art contains greater value if it results from "true imagination rather than mere application." *See id.*

69. In the popular imagination today, creators of visual works of art are particularly exempt from standards of conventional behavior – consider the archly fatuous "Bad Boy" appellation sedulously nurtured by merchandisers like Damien Hirst. *See* Roberta Smith, "Swagger and Sideburns; Bad Boys in Galleries," NY TIMES, Feb. 12, 2010 at C25. Indeed, mental disorders, alcoholism, and other addictions are perceived as validations of the creative personalities of artists like van Gogh and Jackson Pollock, and works created under the influence of these regrettable influences are often as—if not more—valuable than works that were not. One of the Getty Museum's most prized works is van Gogh's *Irises,* which was painted while the artist was living in an asylum in St. Rémy during the last year of his life. *See* ALBERT LUBIN, STRANGER ON THE EARTH; A PSYCHOLOGICAL BIOGRAPHY OF VINCENT VAN GOGH (1996) 186. This has not been the case for serious musicians. Consider, for instance, Rossini, Donizetti, and Schumann–all three musicians suffered periods of dreadful mental disorder, and to the extent they were able to compose any music during these times of distress, these works are generally considered inferior to those works written in times of sanity. *See generally,* ASHBROOK, ET AL., THE NEW GROVE MASTERS OF ITALIAN OPERA: ROSSINI, DONIZETTI, BELLINI, VERDI, PUCCINI (1980).

70. *See generally* Hughes, *supra* note 61.

71. The late art historian E.H. Gombrich claimed that a great work of representational art tends to appear more real and compelling because the artist deliberately avoids creating a facsimile of an existing image or scene but rather creates one in which dimensions, colors, etc., are slightly askew. *See* EDWARD DOLNICK, THE FORGER'S SPELL 136 (Harper Collins 2008). The appeal of these works lies in the fact that humans respond positively to attempts to replicate an image or object, but only up to a point. According to the theory of the "Uncanny Valley," our

The origins and objectives of the genres of twentieth century, non-representational art responded in varying degrees to political, aesthetic, and economic forces.[72] The non-representational nature of paintings of many of these categories, however, attests also to the broad consensus among active creators and consumers of visual art—tethered to Impressionist roots—that the interests of artists take priority over the interests of the consumers who commission, purchase, and view their work.[73]

The museum visitor looking at Impressionist paintings today sees depictions of dancers, flowers, scenes of the out-of-doors, and many other aspects of ordinary life. These images are rendered in articulated daubs or strokes of paint that are quite perceptible as such even when viewed at some distance from the painting. Nineteenth-century viewers who first saw these works by Degas, Monet, and others perceived the same images of dancers and flowers as readily as we do today.[74] The painterly renderings of these images may have been more novel or distracting to these initial viewers than they are to museum visitors today, but the basic ability to perceive the artist's intentions and the objects depicted in these works has not changed over time.

Paintings of the Cubist and Surrealist movements from the first half of the twentieth century are more challenging to the casual museum visitor seeking appealing and original depictions of recognizable objects, individuals, events, and locales. Coming across Cubist works by Picasso and Braque, for instance, the casual visitor's eye will likely dart to the surrounding wall, searching for textual information that may confirm his hunch that he is looking at a depiction of a guitar, or a bowl of fruit. Moving forward, this visitor will find the abstract Expressionist works of Mark Rothko and Jackson Pollock from the middle of the twentieth century to be even more opaque, depicting little or nothing that is identifiable beyond the works themselves.

Finally, arriving at rooms filled with works of late twentieth century and present-day artists, the visitor will suddenly return to readily identifiable images in the Appropriationist and Conceptual

positive response to attempts to capture reality in images plummets when the replication is very close, but not exact. *See id.*

72. *See* Hughes, *supra* note 61.

73. *See* GARDNER, *supra* note 21.

74. *See* OTTO FRIEDRICH, OLYMPIA: PARIS IN THE AGE OF MANET (HarperCollins 1992). *L'Oeuvre*, Émile Zola's *roman à clef* from 1886, evokes the reception by Paris fine art circles of Manet's once-notorious *Le déjeuner sur l'herbe*, first shown at the Salon des Refusés in 1863.

works of Andy Warhol, Robert Gober, Jeff Koons, and Damien Hirst.[75] The wall tags of these works need no descriptive information, as the giant images and sculptures of consumer products, pop singers, and slaughtered and balloon animals are instantly recognizable. There is often little virtuosity in the execution of these works—they are meant to be flagrantly depictive of commonplace images, and their effect depends upon the viewer's recognition of these images. One of the artists' objectives is to prompt the viewer to consider why the museum privileges these works by displaying them in the first place. The viewer, in turn, will likely wonder why he might gaze thoughtfully upon literal reproductions of images encountered elsewhere that he otherwise may find insipid, distasteful, or simply inconsequential.

One might have to step beyond the walls of the museum to experience many works of Conceptual art created over the past fifty years.[76] Conceptual art, as the term implies, 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.[77] To view Robert

75. The collages of Picasso, Georges Braque, Juan Gris, and others in the early twentieth century are colorably Appropriationist works in that they combine portions of pre-existing finished images. They differ, however, from works by contemporary Appropriationist artists like Jeff Koons in that the materials they use are "found" rather than "appropriated." While one can readily identify the bits of newspaper, caning, string, etc. worked into these collages, viewers are mainly struck by their artful deployment within a larger work whose meaning is *greater than* the sum of its parts. he meaning of Appropriationist works by Jeff Koons, Andy Warhol, et al.—soup tins, cereal boxes, and balloon toys—is bound to the fact that the works themselves are *no more than* the sum of their parts, albeit tricked out by their deified presentation within the hallowed precincts of art galleries and museums.

76. Conceptual artists may use media in which senses other than sight may play a significant role in our perception of a particular work. Even art works in traditional media may appeal to senses other than sight.

77. *See* Holland Cotter, *The Collected Ingredients of a Beijing Life*, N.Y. TIMES, July 15, 2009, at C1 ("[Zhao Xiangyuan] is often referred to as a Conceptualist, meaning an artist who trades as much in ideas as in materials. And it was he who had the idea of turning the contents of his mother's home, which was also his childhood home, into the installation titled 'Waste Not.'").

Many widely known recent musical and choreographic works share the conceptual impulse found in certain Postmodern works of visual art. John Cage's "aleatoric" music and the late Pina Bausch's difficult-to-categorize *Tanztheater* choreographies are akin to Andy Warhol's renditions of soup tins in that much of their meaning and appeal we trace to the works' underlying ideas and sources rather than to a particular realization of them. *See, e.g.*, JOHN CAGE, MUSIC OF CHANGES (1951) (an indeterminate work in which the music is created anew according to divination principles set out in the *I Ching*); Pina Bausch, *Nelken* [Carnations] (2005) (in which thousands of freshly cut pink carnations are trampled over a two-hour performance of surrealist and unrelated anecdotes).

Computer-generated and computer-assisted compositions—particularly musical works—tend also toward the conceptual because our experience of them is strongly influenced by

Smithson's original *Spiral Jetty*, for instance, one must visit Utah's Great Salt Lake, the location of the man-made formation of rock and earth.[78] To have experienced Anna Schuleit's *Bloom*—comprised of recorded sound and twenty-eight thousand flowers placed inside a psychiatric hospital—one would have had to have visited the Massachusetts Mental Health Center during a period of four days in November of 2003.[79]

Conceptual works of Installation art depend largely upon forces that are extrinsic or quasi-extrinsic to the works themselves.[80] When these forces are natural, like climate, vegetation, and geography, the artist cedes at least some degree of control over the ultimate work. Robert Smithson's *Spiral Jetty* would lose its appeal entirely were the remarkable pink-hued water of the Great Salt Lake in which it lies to turn bilious.[81] Likewise, Jeff Koons's *Puppy* would lose all of its essential campy charm—indeed its *raison d'etre*—and would become merely, and unintentionally, grotesque if the leaves and flowers comprising it wilted and died.[82]

Jeff Koons's gigantic floral dog is, of course, a Conceptual work, an arch reference to irredeemably kitschy works like chia-coated pottery (of which it is flagrantly derivative), ice and butter sculptures, and renderings of objects in macaroni, seashells, toothpicks, and the

non-musical attributes, especially the knowledge that a mechanical force is participating in the production of the music itself, and not merely the performance of the work we ultimately hear. *See* Charles Cronin, *Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology*, 28 COLUM. J.L. & ARTS 1, 16-20 (2004) (discussing copyright protection for indeterminate and computer-generated musical works); Arthur Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 1072 (1993).

78. *See* DIA Art Foundation, Robert Smithson: Spiral Jetty, http://www.spiraljetty.org/ (last visited Nov. 15, 2009).

79. *See* State Hospitals of Massachusetts, Anna Schuleit, Bloom, http://www.1856.org/anna/bloom.html (last visited Nov. 15, 2009).

80. On this point one need only think of the installations of Christo Javacheff and their dependence on natural and man-made works like the Cliffs of Dover or Central Park.

81. The DIA Art Foundation, which now owns *Spiral Jetty*, is aware of this work's dependence upon its natural surroundings. This can be seen in DIA's recently voiced concerns about a fertilizer company's plans to increase the number of solar evaporation ponds on the Great Salt Lake. *See* DIA Art Foundation, Robert Smithson: Spiral Jetty, http://www.spiraljetty.org/ (last visited Nov. 15, 2009). In 2008, DIA objected to a Canadian oil company's application for permission to conduct exploratory drilling in the Great Salt Lake, fearful of potential change in the appearance of the Lake, and thereby, of *Spiral Jetty*. DIA Art Foundation, Robert Smithson: Spiral Jetty, Preservation, http://www.diaart.org/sites/page/59/1245 (last visited Nov. 15, 2009).

82. *Puppy* was first installed in 1992 in Bad Arolsen (Germany) and has been recreated since in several locations including Sydney, New York, and Bilbao (Spain). *See* Wikipedia, Jeff Koons, http://en.wikipedia.org/wiki/Jeff_Koons (last visited Nov. 15, 2009).

like.[83] As such, the primary locus of meaning and appeal in this work lies in the artist's use of particular compositional materials—in this case, living flowers that are universally appealing.[84] Koons's work brings us back to Chapman Kelley's *Wildflower Works*—his "living piece of art"—and matters of copyrightability.[85]

Each one of the many genres comprising the taxonomy of visual art over the past century has distinctive attributes distinguishing works of that genre from those of another. While the resultant diversity of media this has implicated has fostered some disagreement among audiences on the basic question "what is art?," one finds that works in these various new genres share certain commonalities on matters pertinent to copyright—fixation, originality, and sufficiency of expression, in particular.

## III. COPYRIGHT, MORAL RIGHTS, AND LIVING WORKS OF VISUAL ART

### *A. Living Plants as an Artistic Medium*

Chapman Kelley's *Wildflower Works* is one example of a growing number of works by Conceptual artists whose medium is not paint and canvas but rather plants and the soil in which they are rooted. Practitioners of this horticultural artistic method include, in addition to Chapman Kelley, the American sculptor Meg Webster, the late Brazilian architect Burle Marx, and the French artist Patrick Blanc, best known for his *murs végétaux* (plant walls) in which he aggressively claims copyright.[86] Sharon Louden, another American

83. Mocking references to such works are common in popular entertainment to signal the bumpkinly nature of certain characters, while simultaneously offering subtle reassurance to those partaking of such mainstream entertainments of their superior cultural sophistication. *See* LE DÎNER DE CONS (Gaumont 1998) (the story's "con" [idiot] creates toothpick models of monuments like the Eiffel Tower); *Seinfeld: The Understudy* (NBC television broadcast May 18, 1995) (character Cosmo Kramer builds figurines of living persons using variously shaped uncooked macaroni); STEEL MAGNOLIAS (Tri-Star 1989) (outdoor Nativity scene in rural Louisiana town rendered in sparklers).

84. *See* Ken Johnson, *Well-Behaved Street-Corner Sculpture,* N.Y. TIMES, July 24, 2009, at C19 (commenting on recently installed public sculptures in New York that include giant "Hello Kitty" dolls: "Outdoor art isn't what it used to be. Once it honored heroic individuals and upheld values that whole populations could embrace. Today . . . outdoor art serves rather to divert, amuse and comfort.").

85. In promoting Kelley's *Wildflower Works* the Chicago Park District used the expression "living piece of art." *See* Isaacs, *supra* note 9, at B1.

86. *See* Patrick Blanc, Vertical Garden, http://www.verticalgardenpatrickblanc.com/mainen.php (last visited Nov. 15, 2009). "The Vegetal Wall is protected in particular by copyright. Any reproduction, representation or exploitation of the Vegetal Wall that is not strictly private and no [sic] commercial or promotional will require the preliminary and written

artist, also used vegetation as a significant component of one of her works, *Reflecting Tips*, which blends reflective metal wire with wild grasses.[87]

Unlike Jeff Koons, who used flowers in an ironic manner by exploiting their sentimentality and immediate appeal, horticultural artists like Chapman Kelley and Patrick Blanc use flowering plants for more painterly purposes—in particular, for their colors and textures.[88] Red carnations, might, therefore, serve for these artists the same purpose that a patch of oil paint of the same color would serve a traditional painter. The obvious difference between these two media is the fact that the carnation is not merely a shade of red; it is also an easily identified living object and, as such, carries a great deal more meaning standing alone than does an inert red paint chip.[89] It is precisely because plants and flowers are universally recognizable objects that horticultural artists use them only in abstract, non-representational works.[90] To use them otherwise would result in works of questionable taste, conjuring images of shrubbery clipped in the shape of corporate names and logos, and ranks of marching bands,

authorization of Patrick Blanc." *Id.* The French seem particularly inclined to extend the concept of authorship beyond traditional media--to man-made fragrances, for instance. *See, e.g.*, Éditions de Parfums Frédéric Malle, www.editionsdeparfums.com (last visited Nov. 15, 2009) (promoting fragrances created by particular perfumers as a publishing house would promote books by writers they publish).

87. *See* Sharon Lounden Home Page, http://www.sharonlouden.com (last visited Nov. 15, 2009). Like Chapman Kelley's *Wildflower Works*, *Reflecting Tips* was the subject of a VARA dispute when Louden claimed that the commissioning party, the Yahoo! Corporation, violated her moral rights when it trimmed the vegetal "tips" of her eponymous work in response to the City of Mountain View's complaints about unkempt premises at Yahoo!'s corporate headquarters. Sharon Louden v. Yahoo! Inc., No. C07-05053 (N.C. Cal. filed Oct. 1, 2007). The dispute settled prior to trial and *Reflecting Tips* was restored sufficiently to mollify the plaintiff. *See* e-mail message from Sharon Louden to Charles Cronin (May 7, 2009, 20:02 EST) (on file with author).

88. While the *murs végétaux* of Patrick Blanc, for instance, tend to be constituted mainly of green-leaved plants like philodendrons and ferns, the interplay of the very different textures of these plants make the works visually interesting. *See* Patrick Blanc, Vertical Garden, http://www.verticalgardenpatrickblanc.com (last visited Nov. 15, 2009).

89. *See generally* PAUL FUSSELL, CLASS: A GUIDE THROUGH THE AMERICAN CLASS SYSTEM (Summit Books 1983). Fussell's mordantly brilliant taxonomy of taste and class in America deals at length with the influences of camp and archaism in cultural life and social status in the U.S. It includes an analysis of flowers:

> Other prole flowers include anything too vividly red, like red tulips. Declassed also are phlox, zinnias, salvia, gladioli, begonias, dahlias, fuchsias, and petunias. Members of the middle class will sometimes hope to mitigate the vulgarity of bright-red flowers by planting them in a rotting wheelbarrow or rowboat displayed on the front lawn, but seldom with success.

*Id.* at 80.

90. *See generally* MICHAEL JUUL HOLM ET AL., THE FLOWER AS IMAGE (Louisiana Museum of Modern Art 2004).

or corps of water ballerinas, deployed to depict recognizable symbols or objects.[91]

### *B. Living Works and the Question of Fixation*

Fixed works of human intellection are arguably more socially valuable than are those that are unfixed because, to a far greater extent than ephemeral creations, a greater number of individuals can access them, in numerous locations, and for an indefinite period of time.[92] Some argue, however, that society should award an author a temporary monopoly—a copyright—even in his fixed works of original expression only if the author provides society with a tangible record of the expression.[93] Like the many means of delineating borders of real property, this fixed record serves both authors and readers of works by establishing the scope of an author's exclusive rights in what is ultimately an intangible asset.[94]

Fixation—which is not a prerequisite for protection under certain civil law copyright regimes like that of France—was not expressly required under U.S. law until the current Copyright Act took effect in 1978.[95] Fixation was implicitly required, however, under the prior U.S. copyright statute.[96] Under that system, only works of authorship that had been published or registered, – neither of which is possible without fixation, were eligible for protection.[97]

91. Sophisticated gardeners and artists never deploy plants in their works—unless done with ironic intent—to depict images of recognizable objects, lest they conjure associations with theme parks and similar cultural catastrophes in which there is a reasonable chance that one may encounter a word, or an image of an object or animal, rendered in marigolds or zinnias. Topiary is less aesthetically dicey, in part because of its archaic associations with the dilapidated country houses of erstwhile British aristocrats and landed gentry, and the fussy parterres of French seventeenth-century gardens.

92. Thus, had Shakespeare not fixed his works, we would not be able to enjoy them today, hundreds of years later, and thousands of miles from place they were written.

93. *See* Stefan Hubanov, *The Multifaceted Nature and Problematic Status of Fixation in U.S. Copyright Law*, 11 INTELL. PROP. L. BULL. 111, 113-15 (2006).

94. *See id.*

95. Article 2(1) of the Berne Convention leaves it to member countries to determine whether fixation in some material form is required for copyright protection. *See generally*, GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 3-42 (2008) (referring to the copyrighted laser light display at the Eiffel Tower, and noting how difficulties could arise when country A does not require fixation while country B does, and a country A non-fixed work is at stake).

96. Act of March 4, 1909, ch. 320, 35 Stat. 1075.

97. *See* Hubanov, *supra* note 93. *See also* NIMMER, *supra* note 25, at § 2.03 (noting that fixation is not merely a statutory condition to copyright but also a constitutional necessity; unless a work is reduced to tangible form it cannot be regarded as a "writing").

Fixation has been a less complex and less disputed copyright requirement than that of original expression because, until fairly recently, most works of authorship were unambiguously fixed in tangible artifacts like printed books, journals, music scores, and sheet music.[98] With the advent of digital technologies and the ephemeral and transient nature of copyrightable expression, fixation has become a more troublesome matter than it used to be.[99] Additionally, new media, used in rendering works in genres of contemporary art, have challenged us to examine our understanding of what constitutes fixation, and to ask whether and why it should remain a prerequisite for copyright protection.[100]

The 1976 Act's definition of fixation embraces works in many media, even those that have not yet been developed.[101] The definition is similarly expansive regarding how long a work must be perceptible in a static material form to be considered fixed, requiring only that the period must be "of more than transitory duration."[102] All man-made material objects embodying works of intellectual expression decay, or are rendered obsolete, at varying rates over time. A sculpture rendered in Cor-Ten steel will retain its structural integrity longer than one built of sand, but the steel structure will ultimately succumb to natural corrosives and the laws of physics and will eventually turn into sand itself. The color and texture of materials like paint and stone change over time in response to external forces like atmosphere and light. These changes occur gradually, almost imperceptibly, and these works' custodians, whose goal is to thwart these mutations and to preserve or restore the works as they existed at the time they were created, view with regret this deterioration, known as "inherent vice."[103] Fixation, then, is a matter of degree, and, ultimately, an issue

98. Since the 1960s, the U.S. Copyright Office has accepted sound recordings as fixations of musical works. *See* U.S. COPYRIGHT OFFICE, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 136 (1961). Query whether the Copyright Office's relaxation of its earlier requirement that musical works be registered in symbolic form was not merely a practical adjustment to technological developments but also an unwitting reflection upon the state of musical literacy in the United States.

99. *See* Hubanov, *supra* note 93.

100. *See* NIMMER, *supra* note 25, at § 2.03 (2009) (noting the problem of fixation for Conceptual art works, referring to "anti-object" artist Le Ann Wilchusky's 1977 work consisting of crepe-paper streamers thrown from an airplane).

101. 17 U.S.C. § 102(a) (2006).

102. 17 U.S.C. § 101 (2006).

103. "Some objects are made of unstable materials that change irreversibly over time. This phenomenon is often referred to as 'inherent vice.'" Yale University Art Gallery's Exhibition *Time Will Tell: Ethics and Choices in Conservation* (May 22–Sept. 6, 2009).

that courts must decide in copyright disputes involving works of ambiguous stability.[104]

While artists like Chapman Kelley assert that plants serve the same purpose for them as oils do for traditional painters, plants are profoundly different than inorganic paint, chalk, crayon, and other traditional media.[105] As every gardener and farmer is ruefully aware, plant cultivation is an undertaking characterized , for good and for ill, by uncertainty and change.[106] Plants, like animate organisms, go through a life cycle and ultimately die, reflecting in their odor, flavor, and appearance the particular qualities of extrinsic elements of their milieu like water, air, and soil.[107]

The volatility of plants was the most seductive—and ultimately the most nettlesome—aspect of this living medium that artists Chapman Kelley and Sharon Louden used in *Wildflower Works* and *Reflecting Tips*, respectively.[108] Both works were initially popular, in large measure because of the wonder that their changing and colorful landscapes elicited.[109] Over the course of several years, however, with the natural evolution of their constituent materials causing the atrophying of foliage and diminished efflorescence, these same collections of plants came to be considered blights.[110]

104. *See* NIMMER, *supra* note 25, at § 2.03[A][2] (discussing cases applying the fixation analysis to live television broadcasts).

105. *See* Barbara Sullivan, *Gone to Seed: How One Artist's Dream of a Wildflower Garden Turned into a Blooming Nightmare,* CHI. TRIB., July 6, 1989 ("It's not a garden. It's a painting.").

106. Essential for the production of the finest flowers, fruits, and vegetables is the grower's toleration of uncertainty, and acceptance of some risk in letting nature take its course. This is one reason why we pay premium prices for flowers and produce that have been exposed to natural elements rather than under the artificial conditions of agribusiness—i.e., forced with electric light to grow out of season; sheltered from wind, precipitation, and chill air to prevent visual imperfections; over-watered and regularly doused with petroleum-based fertilizers, pesticides, and fungicides to produce uniformly large, coarse, flowers and large, but typically insipid, fruits and vegetables.

107. It is well known that the hue of the common hydrangea blossom, for instance, correlates directly to the acidity of the soil surrounding the plant's roots; acidulous soil produces blue flowers while alkaline soil produces pink ones (rather like litmus paper). *See* KATHLEEN BRENZEL, SUNSET WESTERN GARDEN BOOK 401 (8th ed. 2007). Similarly, the flavors of grapes used for winemaking are intimately linked to the *terroir* in which they are grown."). *See* ED MCCARTHY, MARYANNE EGAN, TONY ASPLER, WINE FOR DUMMIES (2009) at 125 ("[terroir] is the whole package of natural, interactive forces that affect the grapevine and its fruit.").

108. *See supra* notes 9, 84 and accompanying text.

109. *See* Kelly Crow, "It's Yahoo's Lawn, But This Artists Says Keep Off the Grass," WALL ST. J., Oct. 1, 2007, *available at* http://online.wsj.com/public/article_print/SB119101266764543043.html; Sullivan, *supra* note 104, at 105.

110. *See id.*

Reactions by the public and municipal authorities to this inevitable diminishment in the once-appealing appearances[111] of these works instigated the events that provoked their respective VARA disputes. This relatively swift diminishment in turn raises questions about U.S. copyright law's fixation prerequisite where works of art in which living materials are the principal medium are concerned. Moreover, even if we were to assume that a visual or textual record, like a photograph or narrative description, of a living work is a fixation of it, who is the author of such a work? Should a work whose meaning and value we attribute mainly to naturally occurring phenomena be considered copyrightable expression, and, if so, what is the appropriate scope of that protection, and to whom should it be provided?

In *Kelley*, the Chicago Park District claimed that *Wildflower Works*, as a living work, was ineligible for copyright because it was insufficiently fixed.[112] The district court alluded to this fixation argument in its discussion of copyrightable expression but found it unnecessary to pass judgment on the matter because it determined that *Wildflower Works* was not copyrightable on independent grounds of insufficient originality.[113]

The district court did, however, obliquely consider the question of fixation in rationalizing its determination that *Wildflower Works* was a painting and a sculpture under the Copyright Act's definition of "visual art."[114] Countering the defendant's argument that *Wildflower Works* was not a work of art because it was comprised of living plants, the court identified other recognized works of art in which continual changes in appearance are essential to the value and effect of the works.[115] The dynamic aspect of an Alexander Calder mobile, the court noted, does not lessen its standing as a fixed work of art. Likewise, the court noted that the fact that Jeff Koons used topiary for his *Puppy* does not preclude it from consideration as a work of visual art, in this case a sculpture.[116]

On the issue of fixation, the court's comparison of *Wildflower Works* to Calder's mobiles and Koons's plant sculpture is not entirely apt. While Calder's mobiles depend upon dynamic external elements,

111. *Id.*

112. Kelley v. Chicago Park Dist., No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *16 (N.D. Ill. Sept. 29, 2008)..

113. *See id.* at *17.

114. *See id.* at *12-13.

115. *Id.*

116. *Id.*

such as air currents, the dependence is relatively slight compared to the virtually total reliance of *Wildflower Works* on natural elements that are mostly beyond the artist's control. A Calder mobile placed in a dark storeroom ultimately loses none of its economic or artistic worth. This is because Alexander Calder, to a much greater extent than naturally occurring wind currents, is responsible for the aesthetic expression in these works. The material object in which Calder fixed this expression, even in an inert state, retains the same aesthetic potential it had prior to being stored.

Jeff Koons's *Puppy* is a sculpture built of plants, but it is not, strictly speaking, topiary, as the court claims.[117] Objecting to the court's use of this term may appear caviling, but it leads to a larger observation on fixation and expression. Topiary refers to the shaping of living trees and shrubs through pruning, pollarding, trimming, and training, into recognizable images and ornamental shapes.[118]

Like sculptures in stone and wood, topiary involves the transformation of a naturally occurring object into a work expressing the aesthetic intentions of its creator. In *Puppy*, however, the artist has made no attempt to transform naturally occurring flowering plants to express something unrelated to the medium. Koons simply inserted living plants into a metal mesh frame shaped like a puppy. Thousands of gardeners do the same thing every spring when they plant the frames of hanging flower baskets and other similar horticultural ornamental frames.

It is only by physically transforming naturally occurring materials into man-made objects that artists create something recognizably their own, and simultaneously fix their original expression. In the case of topiary, this original expression tends to be relatively slight given that this sculptural media, whose primary tool is hedge clippers, particularly emphasizes "sweat of the brow"—not to mention that of other parts of the body—over cerebration. Without this transformation of the living shrubbery the impact of naturally occurring materials predominates over that of the artist's work, as does the ephemeral, rather than the fixed, nature of the work in question. In the case of *Puppy,* Koon's virtual complete reliance upon plants in their naturally occurring state perforce lessens his authorial responsibility for the work.

117. *Id.* at *13.

118. *See* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining topiary as "[c]onsisting in clipping and trimming shrubs, etc. into ornamental or fantastic shapes.").

With respect to fixation, Kelley's *Wildflower Works*, like similar living works of Sharon Louden, Anna Schuleit, and Patrick Blanc, is more similar to *Puppy* than to a Calder mobile. *Wildflower Works* capitalizes upon the colors, textures, and scents of natural plants that change from week to week—even day to day—at certain times of the year. This volatility lends his work an appealing delicacy and ephemerality. Kelley could have used artificial plants and flowers to create an unambiguously fixed work. The repugnance of such an idea, however, underscores the vital importance of unfixed natural forces in his work.[119]

### *C. Living Art Works and Original Expression—"The Medium is the Message"*[120]

Many of the works from the past fifty years or so that are considered serious noteworthy visual art are Conceptual works. The aesthetic effect of these pieces rests more on the abstract intentions of the artist rather than upon an actual finished artifact revealing the technique and skill associated with a particular practitioner.[121] This is true of both non-representational works and Appropriationist works whose effect depends not on simulacrums but rather on literal copies of commonplace images and objects.[122]

Despite the typically ironic artistic elevation of commonplace images and objects, novelty, in terms of underlying concept or conceit, has overtaken discernable personal style as the locus of principal worth in many works of contemporary art.[123] Related to this

119. Had Kelley used artificial flowers, however, *Wildflower Works* would take on a significantly ironic cast, not only because of the jarring juxtaposition of this medium with the word "wild" in the title of the work, but also given the distaste such simulacra evoke within the artistic and culturally attuned worlds in which Kelley operates. *See* Fussell, *supra* note 89. "[F]lowers usually appear in upper [class] living rooms. (*Fresh flowers,* the middle-class housewife will call them to distinguish them from the plastic ones assumed in her world.)" *Id.* at 88.

120. This phrase was first coined by Marshall McLuhan in 1964. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7-21 (MIT Press 1994).

121. *See* Denis Dutton, *Has Conceptual Art Jumped the Shark Tank?*, N.Y. TIMES, Oct. 16, 2009, at A27 (claiming that Conceptual art is a dubious undertaking because it shuns technique and virtuosity). Paradoxically, while the underlying ideas are more valued than the finished artifacts of Conceptual art, the physical materials used in the renderings of Conceptual works are often more vital to the particular significance ascribed to these works than they are to more traditional works in oils, watercolors, gouache, etc. *See id.*

122. For a brief discussion of the term "appropriationist," see *supra* note 75.

123. Jackson Pollock's drip paintings are famous and of significant economic value in large measure because of our awareness of the artist's unorthodox physical method of creating

development is a heightened emphasis upon the particular media in which contemporary works are rendered and an increased significance of the larger contexts in which these works of art are displayed or experienced.

As noted above, artists' use over the last century of unexpected materials like string or bits of fur within works of traditional genres like painting can be traced to artistic currents in the nineteenth century.[124] The colored blots of Impressionist paintings, while curious and even grotesque when closely examined, are transformed when viewed at a distance into a whole whose greater meaning overtakes our knowledge of its constituent articulated parts. Unlike the quasi-mosaic technique found in certain Impressionist works, however, the use of non-traditional compositional materials in more recent paintings is often a ploy to lure the viewer closer to the work.[125] Artists generally use this technique to satisfy the viewer's often morbid or prurient curiosity as to how and where *outré* materials have been incorporated into a work identified as a painting or sculpture.[126] The use of unconventional materials often contributes to the conceptual flavor of these works. This is particularly true when the materials themselves are provocative or disgusting, like condoms, pornographic images, excrement, and urine. The calculated frisson that an artist's use of such materials imposes tends to overwhelm any other purported message or meaning embodied in the images and objects built of these materials.[127]

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these works that involved a sort of emotive dancing about while holding a dripping paintbrush. The ceiling of the Sistine Chapel, on the other hand, is famous—and of incalculable value—only in *small* part because we are aware of the physical contortions Michelangelo endured in creating this work.

124. *See supra* note 75 and accompanying text.

125. *See e.g.*, CAROLEE SCHNEEMANN, IMAGING HER EROTICS: ESSAYS, INTERVIEWS, PROJECTS 149 (MIT Press 2003) (Scheemann's *Blood Work Diary* (1972), menstrual blotting on tissue, egg yolk, silver paper).

126. *Id.*

127. This "Where's Waldo?" aspect to the viewing of some works of contemporary art is fostered by the standard practice of listing media on labels accompanying works of art. Artists are, obviously, aware of this practice, which plays a role in their decisions to use media that might generate publicity and notoriety and, thereby, profits. *See* Dan Barry and Carol Vogel, *Giuliani Vows to Cut Subsidy Over 'Sick' Art*, N.Y. TIMES, Sept. 23, 1999, at A1.

> The purpose of exhibition of works including a bust of a man made from blood and a portrait of the Virgin Mary stained with elephant dung may have been to inflate the value of the collection owned by advertiser Charles Saatchi . . . The Brooklyn Museum sought to create . . . excitement for the show . . . it announced that children under 17 would have to be accompanied by an adult.

*Id.*; *see also* Roberta Smith, *Art in Review*, N.Y. TIMES, May 30, 1997, at C24 (noting artist Meg Webster's predilection for using dirt, egg white, and thick slabs of butter as media for her works). An exhibit at New York's Museum of Sex features an Adriana Bertini couture condom cocktail

Works of Conceptual art, whether large-scale Installation works or more modestly proportioned works in more conventional media, rely upon extrinsic circumstances like location, weather, and lighting to a much greater extent than do works in traditional genres.[128] It is axiomatic that the meaning of a work of Installation art—generally speaking a sub-genre of Conceptual art—depends largely on the location and other contextual circumstances of the work. The meanings of works of Conceptual art in more conventional media too, however, rely upon extrinsic circumstances to a much greater extent than do earlier works in traditional genres. Most people recognize a Monet painting, regardless of where they see it, as a work by this artist—even if it is stripped of the sumptuous frame and the rarified surroundings typically associated with Monet's works. The same individuals would see the works of Marcel Duchamp, Joseph Kosuth, and Jeff Koons, on the other hand, as urinals, unremarkable chairs, and balloon figures, with little or no aesthetic appeal, were they to come across them outside a museum or similar context.[129]

Thus, works of Conceptual art are less resilient than more traditional works, because they are more closely associated with a particular time and place that largely determines their more fragile import.[130] Paradoxically, the ascendancy of Conceptual art, with its

dress, made from 1200 hand-dyed condoms and fashioned after the Valentino dresses of the 1960s. *See* Edward Rothstein, "Unrolled, Unbridled and Unabashed," N.Y. TIMES, Feb. 4, 2010, at C25. Andres Serrano's "Piss Christ" became notorious simply because its creator used urine in making the piece. *See* Frank Rich, "Pull the Plug on Brooklyn," N.Y. TIMES, Oct. 9, 1999, at A17 (discussing controversial works using excrement and urine).

128. *See infra* Part III.E.

129. Marcel Duchamp, *Fountain* (1917) *available at* http://www.duchamp.org/symposium/images/fountain.jpg; Jeff Koons, *Celebration* (1995-98), *available at* http://artnews.org/gallery.php?i=618&g_cai=36863&Jeff%20Koons (one piece in larger series); Joseph Kosuth, *One and Three Chairs* (1965), *available at* http://www.moma.org/modernteachers/large_image.php?id=207. Some would claim that certain works of Conceptual art owe even their concept to someone other than the putative artist. *See* Peter E. Rosenblatt, Letter to the Editor, N.Y. TIMES, May 4, 2008, *available at* http://query.nytimes.com/gst/fullpage.html?res=990DE1DD1230F937A35756C0A96E9C8B63.

> Why is 'Balloon Dog,' the large construction currently atop the Metropolitan Museum roof, said to be by Jeff Koons? Mr. Koons did not conceive the original balloon figure of a dog, nor did he create the gigantic finished piece, made by Carlson & Company. Mr. Koons simply found something to duplicate and suggested making it big and shiny.

*Id.*

130. They are also more vulnerable to destruction because most people do not regard Conceptual works, and even non-representational works in general, with the same reverence they accord even second-rate representational paintings. Unintentionally comical illustrations of this vulnerability include janitors' discarding rubbish comprising works by Damien Hirst and Gustav Metzger at London galleries, and scrubbing a filthy bathtub that was part of a work by

inherent ephemerality and external dependencies, occurred within the same era in which legal protection for art was expanded under VARA, which ostensibly ensures the preservation of unambiguously fixed original works of art for the edification of future generations.[131]

In *Kelley,* Judge Coar based his decision that *Wildflower Works* was not eligible for VARA protection on finding that this work was not copyrightable in the first place.[132] As set forth in the Copyright Act, works that are not copyrightable cannot qualify as works of visual art that VARA protects.[133] Furthermore, although graphical works that are fixed and original may be copyrightable, VARA protects only the small portion of these copyrighted works that manage further to comport with the narrow statutory definition of "works of visual art."[134]

Judge Coar believed that *Wildflower Works* was a work of visual art—a painting or sculpture, as the plaintiff claimed—but determined that the work did not contain sufficient original

artist Joseph Beuys. *See* Lawrence Van Gelder, *Arts Briefing,* N.Y. TIMES, Aug. 30, 2004, at E2; *see also* David Itzkoff, *Missing Moore Sculpture May Have Been Sold for Scrap,* N.Y. TIMES (ARTSBEAT), May 19, 2009, *available at* http://www.nytimes.com/pages/arts/index.html (reporting that, in 2005, an abstract bronze sculpture by Henry Moore worth several million dollars was stolen and sold for $2,300 as scrap metal).

131. *See supra* note 28 and accompanying text. Conceptual art works may tend towards the ephemeral, but this genre itself is now well established in the mainstream of contemporary art. The first page of the July 3, 2009, Weekend Arts section of the *New York Times*, for instance, offered reviews of three exhibitions, all dealing with works of Conceptual art. Roberta Smith's "Bouncing Around a Visual Echo Chamber" reports on a Dan Graham retrospective at the Whitney Museum that included his *Schema*—"[A] marvel of contextual self-reference. Intended to be printed in different magazines, it would be different each time, since it consists of a list of information about itself: its own typeface, the magazine's paper stock and page size." Roberta Smith, *Bouncing Around a Visual Echo Chamber,* N.Y. TIMES, July 3, 2009, *available at* http://www.nytimes.com/2009/07/03/arts/design/03graham.html. Holland Cotter covered Rachel Harrison's *Consider the Lobster* at Bard College, prefacing his discussion of the work of "a stage set, and a tacky one," with the proviso: "Ms. Harrison . . . is often called a sculptor . . . but she is also, and simultaneously, a painter, photographer, video maker, collagist, and installation artist." Holland Cotter, *The Museum as Stage Set, Filled With Glamorous Mess*, N.Y. TIMES, July 3, 2009, *available at* http://www.nytimes.com/2009/07/03/arts/design/03harrison.html. Carol Vogel reviewed Serpentine Gallery's (London) *Jeff Koons: Popeye Series.* Carol Vogel, *Koons and a Sailor Man in London*, N.Y. TIMES, July 3, 2009, *available at* http://www.nytimes.com/2009/07/03/arts/design/03vogel.html?_r=1. Given Jeff Koons's prior bruising scrapes with copyright owners, one wonders whether he obtained licenses for his literal reproductions of images of the famous cartoon character and inflatable toys that comprise this exhibition. *See also* JOHN MERRYMAN & ALBERT ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 452 (4th ed., 2002) ("Jeff Koons is a seasoned defendant in copyright infringement suits, and the decisions involving him, each citing the previous one, have been merciless.").

132. Kelley v. Chicago Park Dist., No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *18 (N.D. Ill. Sept. 29, 2008).

133. 17 U.S.C. § 101 (2006).

134. *Id.* § 101.

expression to be copyrightable.[135] In denying VARA protection to Chapman Kelley's *Wildflower Works,* Judge Coar gingerly approached the question of whether VARA should cover works in non-traditional media when he alluded to the "tension between the law and the evolution of ideas in modern or avant garde art."[136] Indeed, VARA's legislative history indicates Congress's intent that courts use common sense in considering whether a particular work falls within VARA's scope and not base their determinations solely upon the particular medium in which a work of art is rendered.[137] This hortation for liberality, however, is checked by the fact that VARA's drafters also went to "extreme lengths to very narrowly define the works of art that will be covered . . . . [T]his legislation covers only a very select group of artists."[138]

Given that one of the two arguably orthogonal objectives of VARA is to preserve a record of artistic achievement for future generations, it is reasonable to assume that Congress intended copyrightability to be merely a threshold requirement for VARA protection.[139] Using common sense, one can assume that the fact that a work of visual expression may be copyrightable does not mean it qualifies for VARA's more rarified category of work of visual art. Inclusion in this "very select" group logically demands a greater

135. The court separates the question of *Wildflower Work's* copyrightability from whether it is a "work of visual art." The statutory definition of "work of visual art," however, indicates that a determination of the latter depends upon a positive finding on the former. In other words, hewing to a literal reading of the statute, a painting or sculpture is not a "work of visual art" under VARA unless it is also a copyrightable work. *Kelley,* 2008 U.S. Dist. LEXIS 75791, at *10-17.

136. *Id.* at *11.

137. *See* H.R. REP. NO. 101-514 (1990).

> The courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition. 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.

*Id.*

138. *See id.* (quoting testimony of Rep. Edward Markey).

139. *See* Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul,* 81 NOTRE DAME L. REV. 1945, 2002 (2002) (arguing that the fact that artists' motivations to create are typically more intrinsic than economic indicates that moral rights should apply only to works demonstrating substantial creativity, and not merely the "modicum of creativity" for copyright protection under Feist Pubs., Inc. v. Rural Tel. Svc. Co., 499 U.S. 340, 345 (1991)).

showing of creative expression than the mere "creative spark" that copyright requires.[140]

Ultimately, the courts must determine whether disputed works are fixed and demonstrate sufficient original expressionto qualify for copyright protection and also for moral rights protection as works of visual art.[141] In *Kelley*, the court arrived at the singular determination that *Wildflower Works* contained sufficient originality to be called a sculpture or a painting "within the definition of VARA," yet VARA did not protect it because this work was not sufficiently original to be copyrightable.[142] Surely, under the common sense standard that VARA's proponents recommended, if a work does not evince sufficient original expression to be copyrightable, the work should belong in a category other than "visual art" as this term is contemplated under VARA. This conclusion leads to the related question of what level of original expression should be required of works that *are* copyrightable in order to be considered "visual art works" eligible for VARA protection. More particularly, it is questionable whether living works of art can *ever* evince original expression that would garner VARA protection or even copyright protection.

140. *See* Feist Pubs., Inc. v. Rural Tel. Svc. Co., 499 U.S. 340, 345 (1991) (establishing this standard for copyrightability that exceeds a lower threshold of mere industrious application or "sweat of the brow" on the part of the creator).

141. The fact that courts determine such questions troubled Justice Holmes, who expressed his reservations in this well-known excerpt:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . some works of genius would be sure to miss appreciation . . . It may be . . . doubted . . . whether paintings of Manet would have been sure of protection when seen for the first time.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). Holmes was concerned that while judges might be insufficiently educated in visual art to discern the aesthetic value of a work by Manet they might also be too sophisticated to appreciate artistic merit in the realistic images of advertisements. *See id.* Holmes's conclusion that commercial illustrations may be copyrightable expression seems correct—although they could never qualify as works of visual art under VARA—but his suggestion that, upon first encountering their works, courts might have denied protection under modern standards of copyrightability to non-commercial paintings and drawings of artists like Manet and Goya, does not. Some contemporaries of these artists may have found their works disturbing or even pornographic, but no one doubted that they contained a significant quantity of perceptible personal expression that was immediately apparent to all viewers even if not entirely understood or appreciated.

142. *See* Kelley v. Chicago Park Dist., No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *17 (N.D. Ill. Sept. 29, 2008).

### *D. The Elusive Definition and Quantification of Creative Expression*

As with fixation, there are degrees to which works of authorship are original and expressive. At one end of the spectrum of creativity are works barely clearing the "creative spark" threshold; at the opposite end are canonical works of music, literature, and the fine arts.[143] While there is some general agreement as to the minimal quantum of original expression required for copyright as set forth in *Feist*, there is rather less consensus as to what amount of creativity must be demonstrated for something to be considered a work of art.

The late art historian Ernst Gombrich defined art in the broadest terms, as anything done superbly well.[144] This catholic definition could include the living results of expert cosmetic surgery, a deftly executed serve in a tennis game, or even the performance of an unfortunate animal in a circus act. Such a freewheeling view of art would embrace innumerable useful and ephemeral works that fall far outside the ambit of copyright protection. This broad definition is not, therefore, ultimately helpful in answering the narrower question of what should be considered a work of visual art that is worthy of moral rights protection under VARA.

One of VARA's objectives is to ensure a tangible and enduring record of original human expression in the visual arts.[145] This objective, and the Copyright Act's persnickety definition of visual art that expressly excludes, among other works, those of a commercial and promotional ilk, indicates that VARA's legislators had in mind a narrower definition of art than that proposed by Ernst Gombrich.[146] Thus, a more plausible reading of "visual art" as used in VARA is based on a belief that one of VARA's core purposes is to protect tangible works of visual art that record significant human creativity,

143. *See Feist*, 499 U.S. at 340 (noting that works must show some "creative spark" on the part of their authors to be protected by copyright).

144. ERNST GOMBRICK, THE STORY OF ART 475 (12th ed., 1972 ("[W]e speak of art whenever anything is done so superlatively well that we all but forget to ask what the work is supposed to be, for sheer admiration of the way it is done.").

145. *See* Visual Artists Rights Act (VARA) of 1990, Pub. L. No. 101-650, Title VI, 104 Stat. 5128 (1990).

146. 17 U.S.C. § 101 (2006). "A work of visual art does not include any poster, map, globe, chart, technical drawing, diagram, model, applied art . . . electronic publication, or similar publication . . . any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container." *Id.*

i.e., "the process by which a symbolic domain in the culture is changed."[147]

Only within the past several hundred years have paintings, sculptures, and other visual works of art come to be considered works of intellectual expression like music and poetry. In Leonardo da Vinci's time, painting was viewed as "vulgar to its very roots."[148] In the opinion of Leonardo's contemporary, the classical scholar Mario Equicola, it was "a work and a labor of the body rather than of the mind, and [was], more often than not, exercised by the ignorant."[149] The same perspective still existed over a hundred years later in connection with Dutch painting and artists now reverentially referred to as "Old Masters": "[I]n Holland, Vermeer and his peers were 'generally ignored or completely forgotten.' Painters were tradesmen who worked with their hands. Poets, who worked with words rather than pestles and powders, were the figures held in esteem."[150] Unlike Renaissance painters and sculptors, poets and musicians of that era as well as those of previous and subsequent eras, used symbolic systems of language and music, allowing them to create works more purely "of intellect."[151]

By calling painters "ignorant," Equicola alludes to the fact that only those educated in the symbols of words and notes can create and

147. MIHALY CSIKSZENTMIHALYI, CREATIVITY : FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION 7-8 (1996) .

> [Creativity] does not deal with great ideas for clinching business deals, new ways for baking stuffed artichokes, or original ways of decorating the living room for a party. These are examples of creativity with a small *c*, which is an important ingredient of everyday life, one that we definitely should try to enhance. But to do so well it is necessary first to understand Creativity.

*Id.*

148. *See* GARDNER, *supra* note 21, at 1 (quoting Mario Equicola). It was during the Italian Renaissance, however, that painters, sculptors and architects began to achieve broad recognition as creators of works of great intellectual expression. In the sixteenth century Georgio Vasari chronicled this development among Italian artists, in his seminal treatise. *See* LE VITE DE' PIÙ ECCELLENTI PITTORI, SCULTORI E ARCHITETTORI [THE LIVES OF THE ARTISTS] (1550).

149. *See* GARDNER, *supra* note 21, at 1 (quoting Mario Eqicola).

150. DOLNICK, *supra* note 71, at 95. In other words, painters and sculptors work with material objects, whereas writers and musicians work primarily with symbols and ideas. Given the long-standing view that works of visual art are more the products of skilled physical labor than of purely intellectual endeavor, the Conceptual art movement—in which visual artists have waded into political and social criticism associated more with the work of those of more cerebral métiers—is anomalous. *See id.*

151. The development of the symbolic systems of literature and music has enabled writers and musicians to create and record their expression with great precision. The *fin de siècle* scores of orchestral works by Mahler and Schoenberg, for instance, present not only fundamental musical information—i.e., pitches over time—but also, in excruciating detail, information on how performers should interpret this information.

read important works of literature and music. A long history of successful self-taught painters and sculptors indicates that the ability to create fine works of visual and tactile art does not necessarily demand the same formal, and typically early, education in the formation and combination of the symbols of language and music prerequisite to becoming a serious writer or musician.[152]

The symbols of music and language—in many respects like those of physics and other hard sciences—hold great expressive potential and freedom to those capable of using them.[153] A skilled writer or musician isolated with nothing more than rudimentary materials in which to record his expression need—indeed, ultimately must—resort to his intellect alone to create an original work.[154] His mastery of a symbolic language affords him immediate and universal access to tools of the trade that, being non-material, allow him virtually complete control over them, limited only by the scope of his knowledge and imagination.

Because the musician and writer's work is expressed in their medium's symbolic language, it can be readily and accurately replicated; as a result, their work is less vulnerable to the corruption and disintegration that haunt works of visual art, and musical works conceived and fixed only as sound. If the musician or writer creates an extraordinarily expressive work using symbols, it will ultimately

152. One of the best known examples of a late-blooming visual artist is Anna Mary Robertson ("Grandma Moses") who began painting seriously when she was in her seventies, and without any formal education in the arts. Her paintings and embroideries of rural New England scenes swiftly became enormously popular and valuable in the U.S. and abroad. *See* OTTO KALLIR, GRANDMA MOSES (1973). Although they may exist, any similar success stories involving septuagenarian symphonists, novelists, or poets who had similarly scant formal education in the respective fields of music, literature, etc are not readily known.

153. *See* CSIKSZENTMIHALYI, *supra* note 147, at 37.

> Knowledge mediated by symbols is extrasomatic . . . it must be intentionally passed on and learned . . . . [K]nowledge conveyed by symbols is bundled up in discrete domains--geometry, music . . . each domain describes an isolated little world in which a person can think and act with clarity and concentration . . . . The existence of domains is perhaps the best evidence of human creativity.

*Id.*

154. Not surprisingly, apocryphal stories about playful incarceration and material deprivation to force the production of creative work, have arisen in connection with Mozart, the most preternaturally gifted composer. *See* Visit Salzburg, Fun Facts, http://www.visit-salzburg.net/funfacts.htm (last visited Nov. 16, 2009) (advertising the charms of the Zauberflötenhäuschen ("Magic Flute Cottage") in which Emanuel Schikaneder purportedly imprisoned Mozart until the composer finished the score for *Die Zauberflöte*); City of Prague, Villa Bertramka, www.prague.cz/bertramka/ (last visited Nov. 16, 2009) (promoting Prague's Villa Bertramka, where Josefa Duskova, a professional singer and chatelaine of this villa in the late eighteenth century, is reported to have locked Mozart in a little garden pavilion until he completed a new aria that would flatter her voice, called *Bella mia fiamma, addio*).

transcend time, space, and materiality more freely than non-symbolic works fixed in media like paint or stone because it is not bound to a particular rendering or performance.[155]

While visual artists do not use symbolic languages as do writers, mathematicians, and musicians, they can resort to many media, ranging from elemental chalk and paint to highly manufactured materials like plastics and moving images, to create their works.[156] The more elemental and inert the medium an artist uses, however, the more the significance of the work will depend upon the artist's technique. Likewise, the more elemental the medium, the greater the potential that the work rendered in it will be recognized as the expression of the unique personality of the particular artist. The purpose of copyright is to protect and encourage such revelatory expression.[157] It is not, therefore, too extravagant a corollary that works created from elemental media are more likely to enjoy more robust copyright protection than are those created using media—e.g., digital image or sound creation software—that depend largely on preexisting expression of others.

Since time immemorial, artists have used materials like wet plaster, stone, clay, tempera, and oil because of their durability. It is perhaps because of the expertise demanded to work effectively with

155. Bach's *Goldberg Variations* (1741) is magnificent whether performed on a harpsichord or a marimba; Rilke's poetry is exquisite even in translation; the charm of a great novel like Austen's EMMA can withstand radical updating and even a change of media. *See* CLUELESS (Paramount Pictures 1995). "Updated" iconic works of visual art—like gay and lesbian versions of Grant Wood's *American Gothic* (1930), or cut-outs of Michelangelo's *David* with clip-on bits of exiguous underwear, or Duchamp's mustachioed *Mona Lisa*—are inevitably humorous or grotesque precisely because the underlying works themselves are closely bound to the era and media in which they were created, and the updating glosses appear therefore, outrageous or incongruous.

156. While the visual arts do not have symbolic languages like those of music or literature, visual artists may use motifs, forms, and colors that carry symbolic or iconographic significance. To understand these uses viewers must have a certain degree of "visual literacy." Florigoraphy—the language of flowers—and similarly arcane means of communication, is not so much a symbolic system as it is a semaphore. This is because flowers are remarkably polysemous. Roses are red and violets are blue, but these flowers also appear in a myriad of other colors, represent love and humility respectively, and are claimed as "state flower" by no fewer than seven states. *See* 50 States, Official Flowers, www.50states.com/flower.htm (last visited Nov. 16, 2009).

157. *See* JOHN WHICHER, THE CREATIVE ARTS AND THE JUDICIAL PROCESS: FOUR VARIATIONS ON A LEGAL THEME (1965).

> When we read Frost's poetry, we feel, somehow, that we have met the poet. But when we see a stylish coiffure on a lady's head, we may admire the lady, but we certainly do *not* feel that we have met her hairdresser. Art is, we may generally conclude, in some sense revelatory . . . of an artist's personality . . . but a tradesman's skill is not similarly revelatory of the personality of the tradesman.

*Id.* at 79-80.

these materials that works rendered in wet plaster, stone, and the like tend to last longer than works created in more ephemeral media. Such works are also among those that we have traditionally prized most as records of our cultural legacy.[158] Because these materials hold little aesthetic interest apart from their application by artists, they are unobtrusive in a finished work, allowing the artist's expression to capture viewers' attention practically to the point that those viewing the work are unaware of the medium.

The media used in works like collages and mosaics tend to intrude on the viewer's consciousness to a greater extent than the more static media of drawings, oils, watercolors, and the like. In Picasso's relief constructions, for instance, the bits of string, fringe, and the like incorporated into these works jump out at the viewer. This is true even when these media are literal representations of these objects within the image.[159] This is because those viewing these works realize that these media "have a life of their own" apart from the painting, to a greater extent than do the oils or charcoals used in traditional paintings and drawings.

Recognition of "found objects"—like a piece of string—in a work of art may generate appreciation of the artist's cleverness in adapting an object to such use. However, it also dilutes, to varying degrees, the viewer's sense of the artist's exclusive authorship in the work. The more a medium conveys meaning beyond its pure utility as a means of expressing an author's intentions, the greater the portion of the meaning and authorship of a work the artist cedes to preexisting materials created by others or nature. Accordingly, by using vacuum cleaners as a primary media for his work, Jeff Koons cedes to the Hoover Company most of the creativity involved in his *New Hoover Convertibles*.

The mostly inert bits of wire, fringe, and caning that Picasso inserted into his works do not significantly affect the general perception that Picasso is solely responsible for the aesthetic meaning of these works. However, the use of less static "found objects," like urinals, and the use of these media to occupy a considerable portion of the work's literal and figurative space raise legitimate doubts about the authorial responsibility of the putative artist. Such use also calls into question the validity or scope of any claim the artist might assert

158. Since cave-painting eras, such works are also among those that societies have traditionally prized most as records of their cultural legacy.

159. *See* Pablo Picasso, *Still Life* (1914) (Tate Collection, London).

in original expression associated with the work.[160] This is particularly true in the case of Appropriationist works that are comprised almost entirely of preexisting recorded expression by others.[161] Marcel Duchamp's graffito from 1916, *L.H.O.O.Q.*, on an image of the *Mona Lisa* depends entirely on Leonardo's iconic expression, just as the effect of the burning of a flag or an effigy relies upon a well-established meaning associated with the flag or effigy. Appropriationist works like these, whose meaning tilts heavily towards the preexisting expression of another, are Conceptual works. The contribution of the Appropriationist artist is merely a notion or idea, rather than original expression.

One can easily tease apart the preexisting from the newly added expression in Appropriationist works like Duchamp's *L.H.O.O.Q.* or the myriad of parodies of Grant Wood's *American Gothic*, which was created in 1930. The preexisting work continues to exist in its permanently fixed state, in which form one can readily compare it to the derivative work. In fact, the import of these later derivations depends entirely upon widespread awareness of the preexisting work in its original state.

### *E. Authorship and Expression in Living Works of Art*

It is more difficult to apportion authorship in works rendered in living—or once living, or even animate—media than it is to separate the new from the old expression in Appropriationist works that comprise extant inert documents like paintings and drawings. Living media like plants and flowers change constantly. This volatility captivates artists and viewers, but it makes elusive the

160. *See* Marcel Duchamp, *Fountain* (1917) (the original urinal is lost).

161. Legitimate doubts about authorial responsibility arise with respect to Appropriationist works in other areas of creative endeavor as well. Lee Siegel nicely sums up these doubts in his reflection on the briefly famous Appropriationist GREY ALBUM, the mash-up recording in which Brian Burton (aka "Danger Mouse") superimposed a rap recording onto a Beatles song. "Most mash-ups are sheepish imitations disguised as bold new creations or attacks. (Danger Mouse indeed). They put you in mind of Christopher Lasch's definition of the clinical narcissist . . . . As someone 'whose sense of self depends on the validation of others whom he nevertheless degrades'". AGAINST THE MACHINE 142 (2008). Works like GREY ALBUM are not part of the long tradition in which composers have created original works based upon a recognizable melody of a previous work by another musician. Even if Paganini's 24TH CAPRICE (1819) were protected by copyright, composers of the innumerable sets of variations on its theme—by Brahms, Rachmaninoff, and Lutosławski, among many others—would have a colorable argument of fair use of Paganini's melody because of their transformative uses of the pre-existing expression. In these works Paganini's pre-existing work is, literally, reduced to merely thematic material—i.e. a concept or genre, like a Nativity scene, or a Classical myth, in the visual arts.

fixation of works created in these media and in turn obscures the apportionment between the artist and the media in the meaning and appeal of a particular work.

Looking at one of Patrick Blanc's copyrighted living walls (*murs végétaux*), one is likely to be at least dimly aware of Blanc's skill in combining plants of varied textures and colors into a visually pleasing whole.[162] Because Blanc's walls do not depict any recognizable image, the unusual medium, i.e., living plants, of these works is primarily responsible for their meaning and appeal.[163] In these works, then, nature, to a far greater extent than the human artist, is the source of the delectation a viewer may take in the color or fragrance of a bloom, or the texture and shape of the leaves, or the knowledge that the appearance of the living wall will change along with the seasons.

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.[164] Like the conductor or director, the artist/gardener may carefully choose and nurture the individual contributing members, i.e., plants, in the case of the artist/landscape architect. The ultimate effect of the production, however, hinges mainly upon the conduct of the individual members. Viewers may intuit this dependency when they attend an opera or concert, just as they do when they see a lovely garden. The realization of the possibility that there may be an ill or disaffected tenor or horn player lurking among the musicians makes a successful performance all the more savory to opera-goers. Likewise, the knowledge that plants are susceptible to any number of malevolent and parasitical forces underscores our appreciation of the work of an artist/gardener who has successfully coaxed a variety of individual plants into coexisting within an aesthetically pleasing whole.

The same inherent volatility of works of art created from living media distinguishes them from architectural works. Buildings, like all man-made creations, change and deteriorate over time from exposure to natural elements and man-made corrosives like air

162. *See* Kristin Hohenadel, *All His Rooms are Living Rooms*, N.Y. TIMES, May 3, 2007 ("[Blanc] has been careful to copyright his walls, like works of art.").

163. For the same reason, photographs of these *murs végétaux* capture very little of the allure of the physical garden walls themselves. *See id.* (providing photographs of several of Patrick Blanc's works).

164. Musical and dramatic performances are not protected by copyright unless they are fixed in recordings: "A work is created when it is fixed in a copy or phonorecord." 17 U.S.C. § 101 (2006).

pollution. Additionally, buildings, unlike gardens, tend to reflect the express intentions of their architects, regardless of where they are located.[165] While the climate, topography, and geography of the location of a particular building heavily influence an architect's work, these forces do not dictate the parameters of the building to the same extent that they do those of the works of a landscape architect or an artist working with living plants. New York's Guggenheim Museum would be immediately recognizable as the work of Frank Lloyd Wright even if it were placed in Riyadh or Helsinki; Chapman Kelley's *Wildflower Works* would swiftly vaporize into unrecognizable desiccated and tangled dross if it were moved to either location.[166]

However, in the legal context, the line is often blurred between works of architecture and landscape architecture. Among the items in Article 2 of the Berne Convention's rambling list of literary and artistic works are "three-dimensional works relative to geography, topography, architecture or science."[167] This language suggests that works of landscape architecture could be considered copyrightable expression. Berne's expansive ethos of copyrightable expression notwithstanding, the U.S. Congress prescribed more limiting language for the protection of architectural works in the United States, not only avoiding reference to works relating to geography and topography, but also limiting protection of architectural works to those rendered in buildings.[168] This deliberate narrowing of the language of Berne

165. Some golfers claim that certain golf courses clearly indicate the hand of a particular designer. *See* Charles McGrath, *Author, Author: Did Tillinghast Really Design Bethpage Black?*, N.Y. TIMES, June 14, 2009, at D1 (comparing the dispute over who designed the Bethpage Golf Course in Long Island to the debate between the Stratfordians and the Oxfordians on the authorship of Shakespeare's works).

166. Over time, even situated in the relatively more temperate climate of Chicago, *Wildflower Works* was susceptible to natural forces and the lifecycles of its constituent plants that led to its demise. *See* Kelley v. Chicago Park Dist., No. 04 C 07715, 2008 U.S. Dist. LEXIS 75791, at *8-9 (N.D. Ill. Sept. 29, 2008).

167. Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), Sept. 9, 1886, as last revised, Paris, July 24, 1971, 25 U.S.T. 1341, art. (2)(1) (Paris text).

168. In 1990 Congress enacted the Architectural Copyright Protection Act (ACPA) that added architectural works to the list of works expressly eligible for copyright. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 701, 104 Stat. 5089 (1990). Like VARA, which was enacted simultaneously through the same bill, the scope of the ACPA is limited to the architectural designs of buildings. *See id.* Congress enacted both acts in the wake of the United State's joining in 1989 the Berne Convention. *See* NIMMER, *supra* note 25, at § 2.20 (noting that domestic copyright laws of Berne member states have never been uniform on the matter of copyright protection afforded architectural plans); *see also* Todd Hixon, Note, *The Architectural Works Copyright Protection Act of 1990: At Odds With the Traditional Limitations of American Copyright Law*, 37 ARIZ. L. REV. 629, 653 (1995).

implies Congress's potential unease in flirting with the possibility of an unintentional extension of copyright protection beyond buildings to volatile works like landscapes in which natural media challenge our notions of fixation and human expression.[169]

## IV. COPYRIGHT AND MORAL RIGHTS UNDER VARA APPLIED TO CONCEPTUAL AND LIVING WORKS OF ART

### *A. Conceptual/Living Art: Authenticity, Value, Originals, and Copies*

The economic potential of copyright as it applies to many works of intellectual expression is self-evident. Copyright owners of popular novels, songs, and movies benefit financially from their exclusive rights to copy and distribute these works. The economic benefit of copyright to authors is more ambiguous however, in connection with works of fine art—and works of Conceptual art in particular—in which monetary value tends to attach mainly to original artifacts rather than copies.

Critic Walter Benjamin famously asserted that the "mechanical reproduction" of an art object would tarnish the "aura" of the original work.[170] Art critic James Gardner claims that, having lived for more than a century with the results of "mechanical reproduction," Benjamin's thesis is "palpably wrong."[171] Indeed, the near universal availability of mechanically produced images of works by Old Masters,

With respect to the application of copyright law to architectural works, a "building" according to the U.S. Copyright Office refers to "structures that are habitable by humans and intended to be both permanent and stationary, such as houses and office buildings and other permanent and stationary structures designed for human occupancy, including, but not limited to, churches, museums, gazebos, and garden pavilions." U.S. COPYRIGHT OFFICE, CIRCULAR 41, COPYRIGHT CLAIMS IN ARCHITECTURAL WORKS (2009).

169. Prior to the enactment of ACPA, U.S. law provided no copyright protection for buildings unless they were essentially pictorial, graphic, or sculptural works lacking the utility of most buildings (habitation, education, worship, etc.). Expanding the scope of copyright protection to designs fixed in useful buildings introduces a "can of worms . . . [and] a whole new concept into the copyright law," claimed Paul Goldstein in his testimony before Congress on this legislation. *See* Hixon, *supra* note 168, at 634. Hixon suggests that Congress should have followed the American Institute of Architects' suggestion that the Copyright Act be amended to provide the copyright holder of architectural drawings the exclusive right to execute those plans. *See id.* at 654. This would not offer protection to the building per se, and others would be free to derive "measured drawings" from their permissible observation of the building's exterior and erect buildings that appear similar, much as engineers and scientists may legitimately "reverse-engineer" the work of another to create a similar product that competes in the marketplace with the former. *See id.*

170. *See* WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS 217 (Hannah Arendt ed., Harry Zohn trans., 1968) (1955).

171. *See* GARDNER, *supra* note 21, at 34.

among others, may have diminished the aesthetic impact of these works, but it has only enhanced the iconic status of these works and their commensurate economic worth.[172]

The reproduction and distribution of images of non-representational works of art and Conceptual works is arguably even more useful for enhancing the value of, and markets for, the original objects of these works than for those of works of earlier eras.[173] The meaning and appeal of these works are less immediately accessible than they are of representational works, and successful efforts to implant images of these works on as many minds as possible enhance their value.[174] For many of these works, however, the reproductions *themselves* are arguably less valuable than are the reproductions of pre-Modern works. Photographs, and even video recordings, of Anna Schuleit's *Bloom* merely hint at the complexity one would have experienced through sight, smell, and touch during the work's brief run in the sensitive location of a psychiatric hospital. The same is true, for instance, of Christo Javacheff's *Gates*, the Central Park installation whose effect depended largely on visitors being physically present to appreciate this peculiar intrusion of hundreds of pieces of orange fabric on the bleak landscape of Central Park mid-winter.[175]

Reproductions of Appropriationist art works are similarly less valuable than those of representational works, but the relationship between the reproduction and the original object for these works is more complex. Photographs of works like Andy Warhol's *Campbell's Soup Cans* and Jackson Pollock's drip paintings carry less of the aesthetic impact of the original objects than do, say, photographs of Old Master paintings. This is because the effect of these more recent works, like the installation art of Anna Schuleit and Christo Javacheff, depend upon extrinsic environmental influences to a greater degree than do works in earlier genres.[176]

172. *Id.*

173. The increased ease of mechanical—more specifically, digital—reproduction today for virtually all works of expression also lends some justification for Congress's recent twenty-year extension of the term of copyright protection. Sonny Bono Copyright Term Extension Act, P.L. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C.S. §§ 101-505 (LexisNexis 2009)). Given the ease with which their works can be copied without authorization, creators may legitimately argue that they need greater protection under the law today than they did in pre-digital eras.

174. *See* Dutton, *supra* note 121.

175. *See* Web Site of Christo Jeanne Claude, http://www.christojeanneclaude.net/tg.shtml (last visited Nov. 16, 2009). The "gates" simply traced established paths within the park; any design resulting from the deployment of the "gates" would therefore have to be attributed to Frederick Law Olmstead and Calvert Vaux, who designed Central Park. *See id.*

176. *See supra* note 75 and accompanying text.

The value of reproductions of original objects of Appropriation artists like Andy Warhol and Jeff Koons is further lessened because many of them are themselves near-literal copies of existing images or objects.[177] Paradoxically, the more literally an Appropriation artist depicts an existing manufactured image or object, the more closely the aesthetic value of the work is associated exclusively with the original object rather than with reproductions of images of it.[178] In other words, if Andy Warhol had depicted images of soup tins with labels of his own devising rather than those of Campbell's soup, photographs of these works of Warhol's original images would arguably be more aesthetically valuable, yet less so economically, insofar as they express more of Warhol's personality than do his literal depictions of preexisting expression of others.[179] It was, after all, Warhol's capitalizing on the work of those who had built goodwill, or simply on widespread recognition associated with certain images—e.g., trademarks or faces of famous people—that made his works popular and thereby monetarily valuable.

Also paradoxical is that while the economic value of works by Andy Warhol and other Appropriationist artists is closely tied to original works, the creation of many Appropriationist and Conceptual works involves less hands-on participation by the artist relative to that of painters and sculptors working in more traditional genres. This therefore raises the question whether assistants at a factory or an overseas manufacturing plant may create an artist's original object if they follow the artist's instructions.[180]

177. Works of artists like Claes Oldenburg, e.g., his giant lipstick, ice bag, and clothes peg sculptures, are less aggressive than those of artists like Jeff Koons and Andy Warhol, perhaps because they do not deliberately mock or challenge images of commercial art that are often legally protected by copyright and trademark.

178. *See* Lori Petruzzelli, *Copyright Problems in Post-Modern Art,* 5 DEPAUL-LCA J. ART & ENT. L. 115, 118 (2007) (noting that a moral aspect of copyright law contradicts appropriation art; postmodern artists use copyrighted images of others for their own financial gain).

179. The same forces are in play in works of entertainment like TV shows and popular movies. Ralph Nader's Commercial Alert organization drubs TV and movie studios for product placement in their productions, implying that these are craven and commercially driven attempts to brainwash and seduce viewers. *See* Commercial Alert, http://www.commercialalert.org/ (last visited Nov. 16, 2009). It is likely, however, that many TV and movie viewers share the flickering irritation upon seeing generic brand consumer products appearing in productions of studios that have capitulated to the scolding of Nader and others. It is not merely the sanctimony of such efforts that is distasteful, but also the phoniness of the images leading us into the dreadful "uncanny valley." *See supra* note 71 and accompanying text.

180. *See* Amy Adler, *Against Moral Rights,* CALIF. L. REV. 263, 297 (2009) (discussing Andy Warhol's work as that of a "vacant" artist; "mass-produced photo-silkscreens that never even touched the romantic hand of the artist"); Michael Glover, *Jeff Koons: King of Comic Relief,* THE INDEP., July 1, 2009 ("[I]n his studio in Chelsea, New York, Koons employs up to 100 studio

Given the consistently strong sales for the Appropriationist art works of Andy Warhol, Jeff Koons, and Damien Hirst, this significant intermediation by others—whether laborers working in foundries or silk screening shops or commercial artists createing soup tins or scrubbing pad labels—in their creations does not undermine the value of these works as long as they are authoritatively ascribed to the putative well-known artist.[181] Authenticity, James Gardner claims, is more valuable than quality for Postmodern art, and encomia are meted out by praise of a "tepid, hedging, irresolute variety" by critics resolved "never again . . . to miss the boat."[182] Accordingly, what Gardner alludes to as the artist's "thaumaturgic touch" generates the economic value of many Postmodern works, as well as the individual or institutional owner's sense of communion with, or at least proximity to, the personality of the artist himself.[183]

Authenticity of works of Postmodern art is a concept both more precious and also more fragile than it is for works from earlier periods. It is both easier to forge Modern and Postmodern works than it is earlier representational works and more difficult to distinguish between forged and authentic works of non-representational and

assistants at a time, making all those stainless-steel replicas of inflatable toys with such loving care, beneath Koons's ever-attentive eye."). In many respects the work of these artists is like the ghost-written autobiographies of politicians and entertainers who, having become famous, merely provide their name and ideas in order to sell a work ultimately created by others. *See id.*

181. *See* Carol Vogel, *Win One, Lose One for Dallas Museum,* N.Y. TIMES, June 27, 2008 (discussing the irresistible appreciation in value that prompted a couple who had paid about $1 million for a work by Jeff Koons in 2001 to sell it for more than twenty times that price seven years later).

182. *See* GARDNER, *supra* note 21, at 19; *see also* Dolnick, *supra* note 71 (discussing how prominent art experts in the 1930s and 1940s were duped into enthusiastically embracing as authentic "Vermeers," a series of increasingly dreadful howlers from an allegedly previously unknown "period" of the artist's career, forged by the living painter Han van Meegeren). "Each time [one of the forgeries] won a new admirer, it made the downfall of the next connoisseur that much more likely." *Id.,* at 230.

183. GARDNER, *supra* note 21, at 9. "It all comes down to a question of charisma, of anointing, for which some people are willing to pay $40,000." *Id.* at 31. For the same reason, people have paid large sums to acquire, for example, fripperies owned by the late Jacqueline Kennedy Onassis; the vaguely disgusting toe shoes in which great ballerinas have performed—query why the slippers worn by male dancers are not similarly on offer on the souvenir tables at ballet performances—and mediocre watercolors by Hitler; *see* James Barron, *Reporter's Notebook, The Auction Aftermath: Was it Worth the Price?,* N.Y. TIMES, April 28, 1996, at A35.

> [The collection of Jacqueline Kennedy Onassis's personal effects] was a "load of rubbish"[according toThomas Devenish, an antiques dealer with a shop on Madison Avenue]. Perhaps the lesson to be learned from last week's touched-by-fame frenzy over Kennedy collectibles at Sotheby's is this: Don't throw out anything, including that tape measure (which fetched $48,875).

*Id.*; Dave Itzkoff, *Paintings Attributed to Hitler Sold,* N.Y. TIMES (ARTSBEAT), April 24, 2009 (thirteen works by Hitler recently sold in Britain for $143,000).

Postmodern art.[184] I could replicate one of Jeff Koons's balloon dogs and Jeff Koons himself would likely be unable to distinguish the copy from his original. On the other hand, even resorting to photography and a paint-by-number technique, my copy of an Old Master painting would be risible, even without a side-by-side comparison. Accordingly, upon learning that his "Rembrandt" is a forgery, the crestfallen collector would likely feel less disdain for his painting than would the chagrined owner of an unauthorized copy of a *Balloon Dog* that is utterly indistinguishable from an original.[185]

In the case of Conceptual and living works of art, questions of forgery, mechanical copying, and copyright infringement are even less relevant than they are for Modern and Postmodern works. Apart from the administrative and physical obstacles to reproducing or imitating works like *Wildflower Works* or Christoph Büchel's Conceptual monstrosity *Training Ground for Democracy,* there are no clear incentives to do so, economic or otherwise.[186] The economic and

184. This is true even of enormous works of Conceptual art. My abilities as a visual artist are nugatory yet, if provided the same material resources and permissions as was Christo Javacheff, I could create a copy of *Gates* that is indistinguishable from his original. In 2005 Alex Matter, the son of erstwhile neighbors of Jackson Pollock, claimed to have discovered in his parents' effects a cache of early drip paintings by Pollock. *See* Randy Kennedy, *Scientist Presents Case Against Possible Pollocks,* N.Y. TIMES, November 29, 2007. Pollock experts and enthusiasts readily authenticated the works as Pollock's until a forensic scientist established that pigments used in the paintings were not available until well after Pollock's death in 1956. *See id.*

There have always been far more attempts to pass off spurious works of visual art than literary and musical works by important writers and musicians. This is true in part because the economic value of works of visual art is much more closely tied to an original artifact than is the worth of a musical or literary work. But it is also much more challenging, perhaps impossible, to create a spurious great work of literature or music. This may be because there is a greater consensus among literary and music critics as to what constitutes a great work of literature or music than there is among art critics on the same question concerning the fine arts.

185. Abraham Bredius, one of the most respected connoisseurs of Old Master paintings in the first half of the twentieth century, authenticated several forgeries as paintings by Vermeer. *See* Dolnick, *supra* note 71. He continued to believe in the aesthetic quality of the works even after it was unequivocally established that they were forgeries made by Han van Meegeren in the 1930s and 40's. *See id.; see also* GARDNER, *supra* note 21, at 35 ("Anyone who will withdraw his admiration from Rembrandt's *Polish Rider* if it turns out, as some Dutch experts now contend, to be by a student of the master, can never have truly loved it at all. Such a viewer has been enamored of a name, nothing more.").

186. *Training Ground for Democracy* was the work at issue in a VARA dispute in Massachusetts in which the district court held that a museum was permitted to display the defendant's work despite his objections under VARA that the work was incomplete. *See* Mass. Museum of Contemporary Art Found. v. Büchel, No. 07-30089, 2008 WL 2755842, at *13 (D. Mass., July 11, 2008). The installation was roughly the size of a football field. *See id.* The First Circuit recently overturned portions of the district court decision, finding that a genuine issue of material fact exists as to whether the museum intentionally distorted or modified Büchel's *Training Ground,* thereby violating the artist's right of integrity in this work. *See* Mass. Museum of Contemporary Art Found., Inc. v. Büchel 2010 U.S. App. LEXIS 1842 (1st Cir. Mass. Jan. 27,

cultural value of these works—and of less sprawling Conceptual creations involving pickled animal carcasses and such—is grounded in ideas rather than expression, and in particular manifestations of those ideas through material objects with which the author is identified. While I might legally create works involving ovals of wildflowers, slaughtered animals, or inflatable toys that are virtually indistinguishable from those of Chapman Kelley, Damien Hirst, and Jeff Koons respectively, consumers of art will reject them as pathetic derivations of works by artists who first successfully marketed such works. Unless I attempt illegally to pass off these works as "originals," my copies will likely have little negative economic effect on the artists I have copied. Unlike unauthorized copies of works of genuinely copyrightable expression, my copies of the Conceptual works—living or otherwise—may even suggest that the ideas behind these works are worth copying or imitating in the first place, thus boosting the economic value of the authentic works.

## V. CONCLUSION

The preceding discussion has aired the difficulties in squaring the fixation and original expression requirements of copyright in the case of Conceptual and living works of art. The notion of extending copyright protection to these works often borders on the untenable. Long before Damien Hirst, Andy Warhol, and Chapman Kelley, scientists and others had submerged animal carcasses in formaldehyde, silk-screened images of celebrities, and grown circular beds of wild flowers in urban spaces. The fact that these artists elevated the status of these materials to that of art by addressing them as such, and attaching their names to them, does not allow these individuals to monopolize ideas and processes commonly used since time immemorial.

The awkward rapport between copyright and Conceptual and living works of art comes down to the fact that these works tend not to express the personality of a particular artist, and certainly not to the extent that copyrightable Pre-Modern works, and works rendered in traditional media, do. Animal carcasses, silk-screened images of photographs of celebrities, and wild flowers in ovoid beds may be

2010). The court also determined that the question whether the museum also violated the defendant's public display copyright was a viable one that also should be considered at trial. *Id.* The question of curatorial authority that this unusually acrimonious dispute has raised has been a topic of lively discussion among artists, and museum and gallery personnel. *See* Randy Kennedy, *Artists Rights Act Applies in Dispute, Court Rules,* N.Y. TIMES, Jan. 28, 2010, at C3.

associated with certain artists at the moment, but no one could distinguish my artfully executed animal carcasses, silk-screened photos, and wild flower beds from those of Damien Hirst, Andy Warhol, and Chapman Kelley respectively. Once again, this is because there is little authorial expression in these works; their meaning depends largely upon the medium in which they are rendered.

A fundamental objective of moral rights is to prohibit conduct injurious to the artists' unique characters as revealed in their work in order to protect their reputation and honor.[187] There is relatively little in most Conceptual and living works of art that could be reasonably perceived as an expression of an author's personality, and thereby protected as such under moral rights.[188] The deliberate destruction of a cultivated field of flowers in order to build a profitable strip mall might spark opprobrium like the rending of a Picasso painting into small pieces to realize the greatest profit from the sale of the work might generate.[189] Even without knowing the Picasso work—or even disliking it—one finds objectionable the intentional destruction of an expressive work by a renowned artist. In the case of the field of flowers, however, one's distress can be attributed almost entirely to the destruction of something universally appealing that natural—rather than human—forces produced. Viewers are less concerned about the sensitivities of the individual who cultivated the flowers. Despite the considerable "sweat of the brow" undoubtedly expended on cultivation of the field, we do not perceive the flowering plants as expressions or extensions of the artist/gardener's unique personality.

This Article has also touched upon another underlying purpose of moral rights as implemented by VARA, namely the safeguarding for posterity of a record of artistic expression over time. Conceptual and living art works typically evade this worthy desideratum, deriving much of their meaning and impact from their ephemerality and composition of mixed media that resist long-term preservation. Moreover, and somewhat ironically, VARA's moral rights that extend only to original physical works of visual art were promulgated at the dawn of our digital era, in which artists increasingly create virtually

187. *See supra* note 41 and accompanying text.

188. *See supra* note 121 and accompanying text.

189. *See* Edward Markey, *Congress, Taxes and the Arts; Let Artists Have a Fair Share of Their Profits*, N.Y. TIMES, Dec. 20, 1987, at C2.

intangible works using the infinitely malleable medium of digital information.[190]

Much of the commentary about moral rights, and VARA in particular, applauds the provision of these rights to artists in the United States, regretting only that what VARA provides artists may be too little and too late.[191] The prevailing sentiment about the institution of moral rights as a positive reflection on American society is nicely expressed by one commentator as "emblematic of a civil society that affirms the intrinsic worth of such artistic contributions to the cultural landscape."[192] It seems equally likely, however, that the imposition of moral rights is emblematic of a paternalist government that is skeptical about the aesthetic sensibilities of its constituents, let alone their ability to create and re-create valuable works of art. In many respects, the preservationist/conservationist thrust of VARA is fundamentally antithetical to the artistic impulse that has always thrived on the freedom to rethink and re-create existing works of art.[193]

Moral rights have a potentially inhibiting effect upon the production of creative works. Indeed, many mainstream, popular works of art in various disciplines might never have been created had moral rights been in force at the time of their creation. Leopold Stokowski and Eugene Ormandy's luscious elephantine orchestral arrangements of Bach's works, many of the chestnuts of opera and ballet (typically the products of decades of musical and choreographic accretions), and countless works of visual art that were repainted or otherwise altered by later artists, might have been prohibited under the integrity rubric of moral rights, and "integrity rights" in particular.[194] Ministrations of later artists, and even attempts at mockery, may enhance significantly creative works—for example,

190. MIT's Media Lab is one of the most prominent exponents of the application of these technologies in the arts. *See* MIT Media Lab, http://www.media.mit.edu/ (last visited Mar. 2, 2010).

191. *See e.g.*, Kwall, *supra* note 46, at 1.

192. Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 303 (2002).

193. *See* Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009) ("[T]he right of integrity threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist").

194. Purists might argue that where visual arts are concerned the institution of moral rights years, even centuries ago, might have prevented atrocities like the draperies added to Michelangelo's *Last Supper* for modesty's sake by Daniele da Voltera.

Duchamp and Leonardo's *Mona Lisa.*[195] Conceptual and living works, like Chapman Kelley's *Wildflower Works*, may not physically survive but, even plowed back into the ground, may nonetheless hold seeds in the collective artistic conscience for the creation of works of more lasting significance in the future.

195. An old suit might have received gentler treatment than an old master, one standard account tells us. "An eighteenth-century owner of a Vermeer would not have thought a great deal more about hiring another painter to change the picture than a housewife would think today about having an easy chair re-upholstered." DOLNICK, *supra* note 71, at 98 (quoting HANS KONINGSBERGER, THE WORLD OF VERMEER, 1967).