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## Creative Quandary: The State of Copyrightability for Organic Works of Art

Lily Ericsson

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Creative Quandary: The State of Copyrightability for Organic  
Works of Art

*Lily Ericsson\**

INTRODUCTION .....	360
I. THE NATURE OF NATURE IN ART: UNDERSTANDING ITS PURPOSE AND GOALS .....	362
II. KELLEY v. CHICAGO PARK DISTRICT .....	364
A. An Artist’s Fight.....	364
B. The Copyright Standard.....	366
C. The Seventh Circuit’s Analysis and Holding.....	368
D. Kelley’s Effect on Contemporary American Art and Artists .....	370
III. QUESTIONING THE SEVENTH CIRCUIT’S DECISION .....	371
A. Original Work of the “Wrong Kind” of Authorship: Untangling the Seventh Circuit’s Oxymoron .....	371
1. Clarifying the Language.....	371
2. The Mistake .....	375
B. Stretching the Language of Fixation.....	378
1. Clarifying the Language.....	378
2. Fixation of “Wildflower Works” .....	380
C. Problematic Results .....	382
CONCLUSION .....	383

## INTRODUCTION

Our society's relationship with contemporary art is not unlike our relationship with mirrors.<sup>1</sup> What we see in contemporary artworks—like what we see when we look in the mirror—may be beautiful, ugly, surprising, or even incomprehensible. Some reflections, like artworks, are generally liked or disliked, and some are a matter of personal taste. While we give shape and form to the images we see in the mirror, these images, in turn, shape us—although perhaps on a deeper level.<sup>2</sup>

The essence of contemporary art as an art form is complex and multifaceted.<sup>3</sup> Some contemporary artworks are more aesthetic-oriented, evoking the traditional era of paintings made with paint and sculptures hewn from marble. Others' works push the artistic envelope into the realm of commentary, either on social issues or on art itself, using unorthodox mediums in surprising ways.<sup>4</sup> In this era of artistic pluralism,<sup>5</sup> art critics and philosophers alike hesitate to answer the question "What is art?";<sup>6</sup> some even claim there

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1. See Arthur Danto, *The Artworld*, J. OF PHILOSOPHY, Vol. 61, No. 19, 571 (Oct. 15, 1964) ("Hamlet and Socrates, though in praise and deprecation respectively, spoke of art as a mirror held up to nature."); see also OSCAR WILDE, *THE DECAY OF LYING*, reprinted in OSCAR WILDE: COLLECTED WORKS 1134, 1146 (Barnes & Noble Publishing, ed., 2006) ("Life imitates art far more than Art imitates life.").

2. See MARY ANNE STANISZEWSKI, *BELIEVING IS SEEING: CREATING THE CULTURE OF ART* 289 (1995) ("The most important artists of our time are visionary in that they continue to challenge us to see our world differently. They represent our culture in enlightened and, at time, beautiful ways. Artists prepare the mind and the spirit for new ideas—new ways of seeing.").

3. "Contemporary" art is the broad temporal genre encompassing art created in the late 20th and early 21st centuries, and the art to come in the future. Scholars have used the label "contemporary" to describe the art of "the present moment" throughout the past century, because an era and its art can only be defined retroactively. See Dan Karlhom, *Surveying Contemporary Art: Post-War, Postmodern, And Then What?*, 32 ART HISTORY 712, 716-33 (Sept. 2009).

4. Peter Plagens, *How Art Has Changed A Lot*, 16 AMERICAN ART 1, 8-10 (Spring 2008).

5. Karlhom, *supra* note 3, at 713 (Noting that art historian Eleanor Heartney describes this generation of art as an "era of apparently anarchic pluralism").

6. Plagens, *supra* note 4.

cannot be an answer.<sup>7</sup>

The result of art's struggle with definition, however, is at times a terribly difficult and strained reconciliation with the clarity desired by United States laws and methods of legal application, especially in the area of copyright law. Granting an artwork intellectual property protection is crucial for the artist to maintain both economic and cultural standing in America's modern society. Nevertheless, current interpretations of copyright law as applied to contemporary works of art may be dictating, and even restricting, the artistic "progress" encouraged by our nation's Constitution.<sup>8</sup>

Part I of this Note introduces a recent victim of such interpretations: works of art created from organic or natural media. While this growing field of art encompasses many sub-genres,<sup>9</sup> natural media artworks all share the common use of the Earth in their creation. Part I will sketch a brief history of this field and its relevant ancestry, in order to explore and understand the aims of natural-media art and of contemporary art in general.

The legal issues addressed in this Note arose in the Seventh Circuit case of *Kelley v. Chicago Park District*,<sup>10</sup> discussed in Part I. After the park district destroyed *Wildflower Works*, a living version of artist Chapman Kelley's floral paintings, Mr. Kelley was denied moral rights—delineated by the Visual Artists Rights Act of 1990<sup>11</sup>—to his work because the court determined it did not pass the basic standard of copyrightability due to its organic flora medium.<sup>12</sup> The court held that a work using natural materials as a medium cannot be authored or fixed for purposes of

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7. See Arthur Danto, *From Philosophy to Art Criticism*, 16 AMERICAN ART 1, 14, 15-17 (Spring 2002) (explaining that as far as modes of artistic production are concerned, nothing is justifiably preferable to anything else (not ruling out distinctions in quality with no objective direction for art to take.).

8. U.S. CONST. art. I, § 8, cl. 8.

9. Sub-categories of natural-media art include, but are not limited to: Earth Art, Land Art, Environmental Art, Ecoart, and Bio-art. See AMY LIPTON AND TRICIA WATTS, ECOLOGICAL AESTHETICS, ART IN ENVIRONMENTAL DESIGN: THEORY AND PRACTICE, Chapter: From Signs to Sculptural Places (2004).

10. *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

11. 17 U.S.C. § 106A (2012).

12. Works must pass a relatively low legal standard to gain copyrightability, consisting of physical fixation and a modicum of creativity. Most works pass these two tests with ease. See Part II, B for further explanation.

copyright.<sup>13</sup> This decision, recently denied certiorari by the Supreme Court,<sup>14</sup> is distressing because of the possibly damaging legal effects on works which incorporate natural or organic media, and on the artists who rely on the copyright system for economic and social protection for their works.

Part II analyzes the Seventh Circuit's holdings in light of the Intellectual Property Clause of the Constitution, the 1976 Copyright Act, and governing case law. After considering the Seventh Circuit's rationale for its decision, this Note argues that the court incorrectly decided *Kelley v. Chicago Park District*, and suggests an alternative interpretation of the governing statute(s) and identifies black-letter law and precedential case law in support of this interpretation. Furthermore, this Article presents the consequential issues this court created by denying basic copyrightability to Mr. Kelley's work.

Part III concludes this Note with an analysis of the broader implication of this decision as an example of the problematic judicial activism which often arises in cases concerning complex works of contemporary art. This Note argues that it is important for the courts to put aside subjective notions of taste, aesthetic preference, and artistic judgment if these courts are to apply a proper and objective analysis of a work's copyrightability, and follow both statutory and precedential case law. This Note argues that straying from this path of taste neutrality impedes artistic development and the cultural and social progress encouraged by the Constitution's Intellectual Property Clause, and by application, leaves many artists without legal paths for relief when their livelihoods are compromised.

## I. THE NATURE OF NATURE IN ART: UNDERSTANDING ITS PURPOSE AND GOALS

In the 1960s, the trajectory of the traditional institutionalized art common to our Western civilization drastically changed direction. Fueled partly by the notorious

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

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

“readymades” of Marcel Duchamp,<sup>15</sup> and partly by the nationwide social upheaval of that era,<sup>16</sup> American artists funneled their sense of rebellion and skepticism of the traditional towards a transcending of art’s status quo.<sup>17</sup> The result was a post-modern explosion of artistic movements founded in the conceptual, including: pop art, minimalism, op art, conceptual art, earth art, land art, environmental art, body art, and photo-realism, to name only a few. These movements persisted into the 1970s and 1980s, when artists continued to expand upon these concepts, often recycling and remolding them to better fit the social climate of their own decades.<sup>18</sup> By the latter half of the 1990s, artists no longer felt the need to rebel against art history, and many returned to the aesthetic-based techniques of Modernism,<sup>19</sup> or at least began to include these methods in their conceptual works.<sup>20</sup>

In the past decade, after centuries of evolution through art’s reflection upon itself, the artistic community has joined the rest of the world in its shift towards globalization.<sup>21</sup> The art of today’s generation focuses on eroding traditional conceptual and geographical boundaries by working in a broad range of media, including new technologies, incorporating more audience involvement and the

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15. See Marcel Duchamp, *Bicycle Wheel* (1913) (bicycle wheel mounted upside down on a stool); *Fountain* (1917) (urinal turned on its side atop pedestal). See also Nat Rosenthal, *Marcel Duchamp (1887-1968)*, Heibrunn Timeline of Art History, Metropolitan Museum of Art (Sept. 17, 2011) [www.metmuseum.org/toah/hd/duch/hd\\_duch.htm](http://www.metmuseum.org/toah/hd/duch/hd_duch.htm). These “readymades” “challenged the boundaries and even the foundations of art as a concept.” Steven Goldsmith, *The Readymades of Marcel Duchamp: The Ambiguities of an Aesthetic Revolution*, 42 J. OF AESTHETICS AND ART CRITICISM 197 (Winter 1983).

16. Rosenthal, *supra* note 15.

17. *Id.*

18. Karlhom, *supra* note 3 at 720- 21.

19. The artistic movement of Modernism is summarized by an attitude of “Art for Art’s Sake,” asserting the artist’s privilege to combine whatever elements he pleases for aesthetic effect alone. Artists effectively reversed all the methods devised since the Renaissance for transmuting a flat surface into a pictorial space, and instead believed “that brush strokes and color patches themselves, not what they stand for, are the artist’s primary reality.” See H.W. JANSON & DORA JANE JANSON, *HISTORY OF ART: A SURVEY OF THE MAJOR VISUAL ARTS FROM THE DAWN OF HISTORY TO THE PRESENT DAY* 492- 93 (18th ed., 1974).

20. Karlhom, *supra* note 3 at 726.

21. *Id.* at 729.

presentation of bigger spectacles.<sup>22</sup> These contemporary artists “are connected to something greater than themselves and art: the world, the human spirit, democracy, or the universe.”<sup>23</sup> In particular, our society’s fixation on the current state of the relationship between humans and the environment inspires many artists to attempt to draw the fast-paced, industry-driven, technology-obsessed American back to nature by utilizing organic materials in their works. Today, our fascination with sustainability and “green living” is reflected not just in the food we eat or the cars we drive, but also in our art. This art ranges from the purely aesthetic to message-laden metaphors, using the Earth’s bounty as a medium for their expressions.<sup>24</sup>

## II. KELLEY v. CHICAGO PARK DISTRICT

### A. *An Artist’s Fight*

Chapman Kelley is a nationally recognized artist, traditionally known for his representational paintings of landscapes and flora—specifically, romantic flora and woodland paintings set within ellipses.<sup>25</sup> In the past sixty years, the Texas native has received many prestigious awards for his paintings and has participated in multiple major exhibitions throughout the country.<sup>26</sup>

In 1984, Mr. Kelley decided to take his artwork beyond the canvas and actualize his wildflower ellipses.<sup>27</sup> He received

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22. See STANISZEWSKI, *supra* note 2, at 255-301 (examples of this new generation of artworks).

23. *Id.*

24. Examples of these works include: Vaughn Bell’s *Personal Forest Floor (Portable Mountain)* (2003-08), small organic landscapes on wheels meant to be tended to and walked around like pets, and *Village Green* (2008), suspended personal and portable biospheres. Rachel Wolff, “Turning Over a New Leaf,” *ARTnews* (April 2009) <http://www.artnews.com/2009/04/01/turning-over-a-new-leaf/>; see also T. Allen Comp’s *The Litmus Garden* (2001), a collection of native trees and shrubs planted alongside a six-pond color-changing water treatment system. T. Allan Comp, *Litmus Garden*, GREEN MUSEUM, [http://greenmuseum.org/content/artist\\_content/ct\\_id-14\\_artist\\_id-15.html](http://greenmuseum.org/content/artist_content/ct_id-14_artist_id-15.html) (last visited Feb. 22, 2013).

25. *Kelley*, 635 F.3d at 291, 293.

26. *Chapman Kelley Biography*, CHAPMANKELLEY.COM (Oct. 22, 2011), <http://chapmankelley.com/3/Asset.asp?AssetID=6098&AKey=JLBK6W2>.

27. *Wildflowers as Art in a Chicago Park*, N.Y. TIMES, June 20, 1985, [www.nytimes.com/1985/06/20/garden/wildflowers-as-art-in-a-chicago-park.html](http://www.nytimes.com/1985/06/20/garden/wildflowers-as-art-in-a-chicago-park.html).

permission from the Chicago Park District to install two oval flower beds the size of football fields in Grant Park along the city's lakefront.<sup>28</sup> Mr. Kelley installed—and personally financed—between 48 and 60 species of wildflowers native to the Chicago region with help from his own team of volunteers.<sup>29</sup> The flowers were selected solely by Mr. Kelley, and planted so that they would blossom sequentially, with colors changing throughout the season and increasing in brightness towards the center of each ellipse.<sup>30</sup> The work was entitled *Chicago Wildflower Work I* (hereinafter *Wildflower Works*).

In addition to the aesthetic design, this real-life “painting” was also a test of “the economic and ecological impact of introducing wildflowers into cities,” including possibilities of erosion control, reductions in water consumption and mowing, and gas, manpower, and pollution reduction.<sup>31</sup> The work, promoted as “living art,” was a great success with the public and with state politicians.<sup>32</sup>

*Wildflower Works* was maintained by Mr. Kelley and his volunteers until 2004, when park officials wished to reconfigure *Wildflower Works* to accommodate new construction in the park.<sup>33</sup> When notified of the reconfiguration, Mr. Kelley refused to approve the changes; the park officials nevertheless moved forward with the reconfiguration a week later. *Wildflower Works* was reduced in size by half and the remaining wildflowers were moved into smaller rectangular beds along with new plantings.<sup>34</sup>

Shortly afterward, Mr. Kelley sued the Chicago Park District on the basis that the reconfiguration of *Wildflower Works* violated his moral rights under the Visual Artists Rights Act of 1990 (“VARA”).<sup>35</sup> Mr. Kelley claimed that the

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28. *Id.*

29. *Kelley*, 635 F.3d at 293.

30. *Id.* at 293.

31. *Wildflowers as Art in a Chicago Park*, *supra* note 27.

32. *Kelley*, 635 F.3d at 292; *see also Wildflowers as Art in a Chicago Park*, *supra* note 27 (the chief horticulturalist for the Chicago Park District quoted as stating that “Wildflower Works” is “unique in scope and size, and for its contrast and color.”).

33. *Kelley*, 635 F.3d at 294.

34. *Id.*

35. *Kelley*, 635 F.3d at 295. The Visual Arts Rights Act, 17 U.S.C. § 106A, stems from the French *Droit moral*, which “arise[s] from the belief that an artist, in the

reconfiguration was an intentional “distortion, mutilation, or other modification” of his work, and was “prejudicial to his ... honor [and] reputation.”<sup>36</sup>

In 2008, the United States District Court for the Northern District of Illinois held for the Park District, finding that, even though Kelley’s work could fit the definition of a painting or sculpture required for moral rights protection under VARA, *Wildflower Works* lacked the basic copyright requisites of original authorship and fixation. Thus, VARA protection could not be applied because the work was inherently uncopyrightable.<sup>37</sup> Kelley subsequently appealed this decision to the Court of Appeals for the Seventh Circuit, which affirmed the district court’s holding in January 2011.<sup>38</sup>

### *B. The Copyright Standard*

While the Seventh Circuit Court rejected the district court’s holding that *Wildflower Works* could be considered a work of visual art under VARA,<sup>39</sup> the circuit court did agree that the work did not meet the basic copyrightability standards of original authorship and fixation required for VARA qualification.<sup>40</sup>

Copyright protection is rooted in Article I, § 8, clause 8 of the United States Constitution, which delegates to Congress

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process of creation, injects some of his spirit into the art and that, consequently, the artist’s personality, as well as the integrity of the work, should be protected and preserved.” 2 RALPH E. LERNER AND JUDITH BRESLER, *ART LAW* 1252, (3d ed. 2005). VARA grants artists the right “to prevent any destruction, distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and which is the result of an intentional or negligent act or omission with respect to that work.” 17 U.S.C. § 106A(a)(3) (2012). However, this protection is limited to the following works of visual art: “a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer ... or a still photographic image produced for exhibition purposes only.” 17 U.S.C. § 101 (2012). Furthermore, a work of visual art does not include “any work not subject to copyright protection under this title.”

36. *Kelley*, 635 F.3d at 295.

37. *Kelley v. Chi. Park Dist.*, No. 04C07715, 2008 U.S. Dist. LEXIS 75791 \*17-18 (N.D. Ill. Sept. 28, 2008).

38. *Kelley*, 635 F.3d at 308.

39. *Id.* at 300 (holding that for a work to receive VARA protection, “it cannot just be ‘pictorial’ or ‘sculptural’ in some aspect or effect, it must actually *be* a ‘painting’ or a ‘sculpture.’ Not metaphorically or by analogy, but *really*”) (emphasis in original).

40. *Id.* at 305-6.

the power “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>41</sup> Known as the Intellectual Property Clause, it provides an economic incentive for artists to create art by awarding them the right to profit from their creation for a specific amount of time, in return for their eventual contribution to the public and towards the “progress” fostered by the Constitution.<sup>42</sup>

The most recent codification of the Intellectual Property Clause is the Copyright Act of 1976<sup>43</sup> (“the Act”), which limits copyright protection to “original works of authorship fixed in any tangible medium<sup>44</sup> of expression<sup>45</sup>” Furthermore, when the work at issue is a compilation of preexisting elements with a different end result (as seen in *Wildflower Works*), the copyright in the work “extends only to the material contributed by the author of such work<sup>46</sup>”

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41. U.S. CONST., art. I, § 8, cl. 8.

42. LEONARD D. DUBOFF & CHRISTY O. KING, ART LAW (IN A NUTSHELL) 158 (3d ed. 2000).

43. 17 U.S.C. § 102 (2012).

44. The medium in which a work is executed does not affect its copyrightability, so long as the work complies with the other requirements. See DuBoff & King, *supra* note 42 at 167.

45. 17 U.S.C. § 102(a) (2012) (“Subject matter of copyright: In general: (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) *pictorial, graphic, and sculptural works*; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”) (Emphasis added). Additionally, 17 U.S.C. § 102(b) clarifies that copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery<sup>False</sup>” See also H.R. REP NO. 94-1476, at 51 (1976) (explaining the narrow language change from that used the Intellectual Property Clause to what is used in the Copyright Act, stating: “In using the phrase “original works of authorship,” rather than “all the writings of an author” . . . , the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase.”).

46. 17 U.S.C.A § 103(b). “The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any

*C. The Seventh Circuit's Analysis and Holding*

The Court of Appeals for the Seventh Circuit saw Mr. Kelley's work of art as nothing more than a living garden, which, it claimed, inherently lacked the kind of authorship and stable fixation explicitly required by the Intellectual Property Clause to support copyright.<sup>47</sup> Because works must be the original product of a human author in order to be copyrightable, the court held that *Wildflower Works* could not be copyrighted because "gardens are planted and cultivated, not authored."<sup>48</sup> While the court found *Wildflower Works* to possess the requisite level of originality for copyright,<sup>49</sup> the court rejected the argument that Mr. Kelley's design was an act of authorship, asserting that "[t]o the extent that seeds or seedlings can be considered a 'medium of expression,' they originate in nature, and natural forces—not the intellect of the gardener—determine their form, growth, and appearance."<sup>50</sup>

Furthermore, the court did not find the work to be "fixed," holding that "a garden is simply too changeable to satisfy the primary purpose of fixation"<sup>51</sup> False It may endure from season to season, but its nature is one of dynamic change."<sup>52</sup> The court was also troubled by its inability to determine what the baseline for fixation and copyright infringement may be for a variable work such as *Wildflower Works*, for without a sufficiently permanent and stable copy of the designer's intellectual expression, the work is not as easily susceptible to infringing copying and as such does not require copyright protection.<sup>53</sup>

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copyright protection in the preexisting material."

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

48. *Id.* at 304; *see also Id.* (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM II: COPYRIGHT OFFICE PRACTICES § 503.03(a) (1984): "[A] work must be the product of human authorship' and not the forces of nature.").

49. *Kelley*, 635 F.3d at 303.

50. *Id.* at 304.

51. "Fixation serves two basic roles: (1) easing problems of proof or creation and infringement, and (2) providing the dividing line between state common law protection and protection under the federal Copyright Act, since works that are not fixed are ineligible for federal protection but may be protected under state law." *Id.*, quoting 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 3:22 (Year) .

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

53. *Id.* at 305.

The court did attempt to clarify its holding, maintaining that it was “not suggesting that copyright attaches *only* to works that are static or fully permanent (no medium of expression lasts forever), or that artists who incorporate natural or living elements in their work can *never* claim copyright.”<sup>54</sup> Following this analysis, the court would find copyrightability in other variable works, such as Alexander Calder’s wind-activated mobiles, and even works created using natural materials, such as Jeff Koons’ oversized floral topiary *Puppy*.<sup>55</sup> Because the court found *Wildflower Works* to be neither authored nor fixed in the sense required for basic copyright under the Act, it determined that *Wildflower Works* did not qualify for moral-rights protection under VARA.<sup>56</sup> The Seventh Circuit court remanded to the district court with instructions to enter judgment for the Chicago Park District.<sup>57</sup>

Following this holding, on July 18, 2011, Mr. Kelley filed a petition for writ of certiorari to the United States Supreme Court, asking the Court to determine “[w]hether an original work of art that incorporates living elements is ‘unauthored’ and thus not protected under the Copyright Act,” and “[w]hether an original work of art that incorporates living elements can be ‘fixed’ for the purposes of protection under the Copyright Act.”<sup>58</sup> While American artists and their advocates urged the court, in amici briefs,<sup>59</sup> to open[] the door to protecting artists’ rights,” these efforts were unsuccessful.<sup>60</sup> The petition was denied by the Supreme Court on October 3, 2011.<sup>61</sup>

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54. *Id.*

55. *Id.* at 305-06.

56. *Id.* at 306.

57. *Id.* at 308.

58. Petition for Writ of Certiorari at i, *Kelley v. Chi. Park Dist.*, 132 S. Ct. 380 (2011) (No. 11-101).

59. Brief for Volunteer Lawyers for the Arts, et al. as Amici Curiae Supporting Petitioner, *Kelley v. Chi. Park Dist.*, 132 S. Ct. 380 (2011) (No. 11-101); Brief for The Intellectual Property Law Assoc. of Chicago as Amicus Curiae Supporting Petitioner, *Kelley v. Chi. Park Dist.*, 132 S. Ct. 380 (2011) (No. 11-101).

60. Peter Simek, *Dallas Artist Chapman Kelley Takes Wildflower Case to Supreme Court*, DALLAS MAGAZINE (July 26, 2011, 8:50 AM), <http://frontrow.dmagazine.com/2011/07/dallas-artist-chapman-kelley-takes-wildflower-case-to-supreme-court/>.

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

*D. Kelley's Effect on Contemporary American Art and Artists*

With the denial of Mr. Kelley's petition for writ of certiorari, the Seventh Circuit's ruling on copyrightability for works which incorporate natural materials stands as the leading decision on the issue. The impact of this holding on American visual artists is significant; following *Kelley*, works of art employing natural media run a grave risk of being deemed uncopyrightable.<sup>62</sup> As a result, many artists may find themselves unable to protect both their economic rights under the Act and their moral rights under VARA, leaving their art and their well-being as artists without legal protection.

Art enthusiasts argue that the court's muddled analysis of the authorship and fixation elements "has opened up a Pandora's box of copyright issues for a vast spectrum of artwork incorporating natural elements;" and that the court's degradation of Mr. Kelley's artistic and intellectual efforts to the labor of a gardener "greatly undermine[s] the domains of land art, bio-art and any other artwork involving the medium of nature."<sup>63</sup> Since the court cites *Wildflower Works'* vitality as one reason for its uncopyrightability, the opinion leaves in limbo artworks that use lifeless materials which originated in nature, such as Damien Hirst's famed tiger shark suspended in a tank of formaldehyde, and those works which are part nature, part man-made, such as the 7,000 oak tree and stone column pairs Joseph Beuys placed throughout New York City.<sup>64</sup>

The Seventh Circuit's self-comforting rationale that "the law must have some limits"<sup>65</sup> is viewed as the "kiss of death to conceptual art" and detrimental to artists' rights.<sup>66</sup> Art advocates warn that the Seventh Circuit's ruling not only "create[s] an adverse precedent for US artists who use organic material to make their art,' impacting not just Kelley

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62. Chin-Chin Yap, *The Un-Edenic State of Copyright*, ARTASIAPACIFIC (May/June 2011), <http://artasiapacific.com/Magazine/73/TheUnEdenicStateOfCopyright>.

63. *Id.*

64. *Id.* (discussing Damien Hirst's *The Physical Impossibility of Death in the Mind of Someone Living* (1991) and Joseph Beuys' *7,000 Oaks* (1982-87)).

65. *Kelley*, 635 F.3d at 304.

66. Sergio Muñoz Sarmiento, *Court: Not All Conceptual Art May Be Copyrighted*, CLANCCO (Feb. 16, 2011), [http://clancco.com/wp/2011/02/vara\\_moral-rights\\_sculpture\\_originality/](http://clancco.com/wp/2011/02/vara_moral-rights_sculpture_originality/).

but also ‘the broader US arts community and the rights of painters and sculptors,’”<sup>67</sup> but also “challenge[s] and harm[s] the ability to advise and educate artists in the area of copyright law, especially with regard to works of art incorporating living materials and other innovative materials.”<sup>68</sup> Such an undesirable use of American copyright law carries on the practice of judicial misunderstanding towards the arts community in the United States.<sup>69</sup>

### III. QUESTIONING THE SEVENTH CIRCUIT’S DECISION

The art community’s concern that the Seventh Circuit’s decision will significantly hinder future artistic and intellectual advancement if other courts follow in its footsteps demands a detailed assessment of the court’s analysis.<sup>70</sup> Below is an examination of what is required of a work to be eligible for copyrightability, paralleled with the Seventh Circuit’s own interpretation of the § 102(a) requirements. Specifically, we must delve deeper into the two operative holdings of the Seventh Circuit’s ruling: (1) that using materials found in nature in one’s artwork is the “wrong kind” of authorship for copyright protection, as these materials owe their appearance to nature, not the author; and (2) that using living materials in an artwork precludes fixation for purposes of copyright despite the work’s otherwise tangible and perceivable form.<sup>71</sup>

#### A. *Original Work of the “Wrong Kind” of Authorship: Untangling the Seventh Circuit’s Oxymoron*

##### 1. Clarifying the Language

In order to sustain the utilitarian give and take of

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67. Martha Lufkin, *Chicago court denies artist’s copyright appeal*, THE ART NEWSPAPER (Apr. 21, 2011), <http://www.theartnewspaper.com/articles/Chicago+court+denies+artist’s+copyright+appeal/23575>.

68. See Brief for Volunteer Lawyers for the Arts, et al. as Amici Curiae Supporting Petitioner, *Kelley v. Chi. Park Dist.*, 132 S. Ct. 380 (2011) (No. 11-101).

69. Simek, *supra* note 60.

70. *Advocacy*, VOLUNTEER LAWYERS FOR THE ARTS, [www.vlany.org/advocacy/index.php](http://www.vlany.org/advocacy/index.php) (last visited Oct. 25, 2011).

71. Petition for Writ of Certiorari, *supra* note 58, at 1.

protection and progress embodied in the Intellectual Property Clause, § 102(a) of the Act requires that a work must be an “original work of authorship” in order to be awarded copyright protection.<sup>72</sup> The 1976 Act does not define the terms within this requirement. Instead, Congress deferred to case law under the previous 1909 Act for its desired interpretation of the standard.<sup>73</sup> While the 1909 Act did not expressly require originality, the courts uniformly inferred the requirement from the fact that only “authors” could claim copyright protection for their works.<sup>74</sup> The term “author” was defined as “the beginner ... or first mover of anything ... creator, originator.”<sup>75</sup> Today, the “author” is more specifically recognized as the intellect behind the matter—the person who conceptualizes and directs the development of the work’s form and content rather than the person who simply follows orders to physically execute the work.<sup>76</sup>

These definitions suggest that the terms “authorship” and “originality” are mutually exclusive—a work is not the product of an author unless the work is original.<sup>77</sup> It follows that we must also determine the intended meaning of “originality” for copyright purposes. While the term might seem to imply the need for a new and unique work as a whole, in application it only calls for independent creation by a person as an expression of one’s imaginative spark or minimal degree of creativity—not novelty.<sup>78</sup> Therefore, “a work will not be denied copyright protection simply because it is substantially similar to a work previously produced by others, and hence, is not novel.”<sup>79</sup> The terms “original” and “author”

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72. U.S. CONST., art. I, § 8, cl. 8; 17 U.S.C. § 102(a) (2012).

73. See 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2011) (hereinafter NIMMER ON COPYRIGHT) (quoting H.R. REP. NO. 94-1476, at 51: “The phrase ‘original works or authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present [1909] copyright statute.”)

74. *Id.*

75. *Id.* (quoting *Remick Music Corp. v. Interstate Hotel Co. of Neb.*, 58 F. Supp. 523, 531 (D. Neb. 1944)).

76. Jane C. Ginsberg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1072 (2003).

77. 1-2 NIMMER ON COPYRIGHT § 2.01.

78. See *infra* note 84 for a compiled list of relevant sources for this definition.

79. 1-2 NIMMER ON COPYRIGHT § 2.01 at [A] (explaining that “novelty” is a requirement reserved for patent law, and should not be confused with copyright’s

signify codependent, almost identical, requirements for copyright: when a work is independently created—not copied from other works—it is original, and an original work’s creator must be an author.<sup>80</sup>

The Supreme Court took pains to highlight this inherent interconnectedness in *Burrow-Giles Lithographic Co. v. Sarony*.<sup>81</sup> In determining original authorship of a photograph, the Court looked for the imprint of the author in the subject’s pose, expression, costume, and accessories, and in the photograph’s arrangement of light and shadow on both the subject and the background.<sup>82</sup> Because these visible elements owed their origin to the author of the photograph, the court found originality for copyright purposes.<sup>83</sup> This understanding of originality and authorship is not only dictated by the Supreme Court,<sup>84</sup> but is also accepted by almost every federal circuit—including the Seventh<sup>85</sup>—and is

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“originality” requirement).

80. *Id.* (“Originality in the copyright sense means only that the work owes its origin to the author, *i.e.*, is independently created.”).

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

82. Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 390 (2004).

83. *Burrow-Giles*, 111 U.S. at 58 (indicating that writings as indicated in the Intellectual Property Clause include all forms of visible expression of the author’s ideas).

84. *See Mazer v. Stein*, 347 U.S. 201, 214 (1954) (original pieces of art are tangible expressions of an artist’s ideas); *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (requiring only a minimal degree of creativity in original works).

85. *See Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1112 (1st Cir. 1993) (describing “original elements” as those that were “contributed by the author”); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1921) (“‘Original’ in reference to a copyrighted work means that the particular work ‘owes its origin’ to the ‘author.’”); *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 207 (3d Cir. 2005) (finding that the addition of the artist’s own imaginative spark is enough to denote originality, and therefore copyrightability.); *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (explaining that this definition is appropriate because “any more demanding requirement would be burdensome to enforce and would involve judges in making aesthetic judgments, which few judges are competent to make.”); *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986) (“Originality denotes only enough definite expression so that one may distinguish authorship.”); *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 837 (10th Cir. 1993) (“Originality in the field of copyright requires that the work be independently created by the author and that it poses a minimal degree of creativity.”); *Warren Publ’g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1523 (11th Cir. 1997) (“What does originality mean? The selection must be made independently by the compiler not copied, and must owe its origin to the author.”).

thus, without question, dispositive on both the Seventh Circuit and our investigation here.

For compilation works, such as *Wildflower Works*, copyright protection requires an additional step: an analysis of the work's specific identifiable components to determine the scope of the work's protection. While a work as a whole may be original enough to receive copyright protection, specific components within the work may not qualify as "original" and "authored," and therefore the artist cannot receive piecemeal copyright protection for those components.<sup>86</sup> Interpretation of this requirement for copyright universally follows the Supreme Court's holding in the seminal case of *Feist Publications Inc. v. Rural Telephone Service Co.*,<sup>87</sup> which held that even if facts are not copyrightable because they do not owe their origin to an act of authorship,<sup>88</sup> compilations of facts may receive copyright protection if the compilation is sufficiently original.<sup>89</sup>

Once again, while the originality factor is the *sine qua non* of copyright, the requisite level of originality in a compilation is extremely low; even a slight amount will suffice.<sup>90</sup> As long as the choices of selection and arrangement "are made independently by the compiler and entail a minimal degree of

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86. See *Bucklew*, 329 F.3d at 929 (7th Cir. 2003) (stating "[e]very expressive work can be decomposed into elements not themselves copyrightable. The presence of such elements obviously does not forfeit copyright protection of the work as a whole . . . ; it is the combination of elements, or particular novel twists given to them, that supply the minimal originality required for copyright protection." Note that this decision is dispositive precedent for *Kelley*).

87. *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). In this case, the court held that alphabetical listings of names, accompanied by towns and phone numbers, in a telephone book's white pages were not copyrightable because the listings were uncopyrightable facts, and the telephone company did not select, coordinate, or arrange these uncopyrightable facts in an original way sufficient to satisfy the minimum standards for copyright protection.

88. "The most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates.'" *Id.* at 344-45 (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)).

89. *Id.* at 344. The Court followed the definition of "compilation" as found in § 101 of the Copyright Act: "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." *Id.* at 356 (quoting 17 U.S.C. § 101 (1976) (emphasis in original)); see also 17 U.S.C. § 103(b) (1988) ("copyright in a compilation or derivative work extends only to the material contributed by the author of such work").

90. *Feist Publ'ns*, 499 U.S. at 345.

creativity, [the compilation is] sufficiently original that Congress may protect such compilations through the copyright laws.”<sup>91</sup> Again, such copyright protection is limited only to the elements of the work that are original to the author.<sup>92</sup>

Like compilation works containing facts, those works which utilize elements found in nature, such as *Wildflower Works*, must also undergo analytical scrutiny to separate the authored elements from the uncopyrightable in order to determine the scope of copyright protection. The United States Copyright Office dictates that a work “must owe its origin to a human being. Materials produced solely by nature, by plants, or by animals are not copyrightable.”<sup>93</sup> Examples of such uncopyrightable works include those produced by mechanical process or random selection without any contribution by a human author, such as a multi-colored pebble design on a linoleum floor, and those owing their forms exclusively to the forces of nature, such as a polished and mounted piece of driftwood.<sup>94</sup>

## 2. The Mistake

In determining that *Wildflower Works* was created by the “wrong kind” of author, the Seventh Circuit strayed from both the Supreme Court’s binding precedent in *Feist* and the accepted interpretation of this requirement in the Copyright Act, and contradicted rulings on compilation works by multiple circuits, including the Seventh itself.<sup>95</sup> While the court was given the difficult task of understanding and deconstructing a nonconventional conceptual work of art, this difficulty does not justify its erroneous analysis of the law.

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91. *Id.* at 348. The Court later clarified “that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever.” *Id.* at 362.

92. *Id.* at 348 (1991); *see also* 17 U.S.C. § 103(b) (“copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material”).

93. U.S. COPYRIGHT OFFICE, COMPENDIUM II: COPYRIGHT OFFICE PRACTICES § 202.02(b) (1984).

94. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3.19, n.1 (2011) (hereinafter “PATRY ON COPYRIGHT”).

95. Petition for Writ of Certiorari, *supra* note 58, at 1.

The following paragraphs explain why the Seventh Circuit's application of the original authorship requirement is flawed and how this application threatens the scope of copyright as envisioned by the Constitution.

First, it is clear that *Wildflower Works* is both original and authored as defined by the statutory interpretation and legislative history of § 102(a) of the 1976 Copyright Act.<sup>96</sup> In *Kelley*, the Seventh Circuit conceded the inherent interconnectedness of the statute's relevant terms,<sup>97</sup> yet failed to apply this theory in its analysis. The court first appropriately rebuked the district court's holding that the work was not original because it was not novel.<sup>98</sup> It was plain to the Seventh Circuit that *Wildflower Works* was not copied and possessed more than a little creative spark,<sup>99</sup> although the court did not elaborate on how it came to this conclusion.

The facts of the case show that *Wildflower Works* was independently created by its author, using more than a minimal degree of creativity.<sup>100</sup> As a work which clearly utilizes uncopyrightable materials to create the work as a whole, we must look to the rules for compilation works outlined in *Feist* and § 103 of the Act and separate the uncopyrightable elements created by nature from the rest of the work.<sup>101</sup> While the individual wildflowers themselves are not original to Mr. Kelley, the selection, coordination, and arrangement of the flowers are completely original to him.<sup>102</sup> Mr. Kelley was the sole mind behind the concept and development of the artwork.<sup>103</sup> Furthermore, witnesses of the artwork state that it was "unique in scope and size, and for its contrast and color."<sup>104</sup> This is more than enough to

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96. See Yap, *supra* note 62.

97. *Kelley*, 635 F.3d at 303 (quoting 2 PATRY ON COPYRIGHT § 3:20: "[w]ritings are what authors create, but for one to be an author, the writing has to be original").

98. *Kelley*, 635 F.3d at 302-03 (stating that the district court's analysis "mistakenly equates originality with novelty; the law is clear that a work can be original even if it is not novel").

99. *Kelley*, 635 F.3d at 303.

100. And thus fulfilling the elements required for "originality."

101. *Feist*, 499 U.S. at 348; 17 U.S.C. § 103(b).

102. This is analogous to the photograph in *Burrow-Giles*, 111 U.S. at 55: the photographer's copyright lay in the selection, coordination, and arrangement of the elements within the photograph.

103. *Kelley*, 635 F.3d at 291-93.

104. See *supra* note 33.

substantiate a finding of originality in *Wildflower Works* for the purposes of copyright.

After discussing originality, however, the Seventh Circuit took a questionable turn in holding that, despite its originality, *Wildflower Works* lacks the requisite “authorship” needed to establish basic copyrightability.<sup>105</sup> As a work which utilizes uncopyrightable materials, protection will depend on the authorship of the selection, coordination, and arrangement of the materials.<sup>106</sup> If the artist’s variations of these elements are original, they may earn copyright protection.<sup>107</sup> Following Supreme Court precedent,<sup>108</sup> these elements were original to Mr. Kelley, and as such were *per se* “authored” by Mr. Kelley, and thus *Wildflower Works* is an “original work of authorship.”

Yet, in its analysis of the work’s “authorship,” the Seventh Circuit ignored both precedent to determine original authorship as well as its own reasons for finding originality in *Wildflower Works* in the first place. The court did recognize that Mr. Kelley specifically chose each wildflower according to his concept and deliberately arranged and planted them in a unique sculptural format.<sup>109</sup> However, in its analysis of “authorship,” the court mistakenly focused on the natural materials used in the work and the overall creation’s basic resemblance to a flower garden: “[s]imply put, gardens are planted and cultivated, not authored.”<sup>110</sup> According to the court, *Wildflower Works* is just a garden, nothing more.<sup>111</sup> The court’s decision turns on the authorship of the work’s primary medium. The floral components of this compilation inarguably owe their individual form and appearance to natural forces;<sup>112</sup> however, the selection, coordination, and arrangement of the flowers were not results of nature, and may be considered the product of an author if they are

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105. *Kelley*, 635 F.3d at 303-04.

106. 1-3 NIMMER ON COPYRIGHT § 3.04(b)(2); *See also Feist*, 499 U.S. at 351.

107. *Satava v. Lowry*, 323 F.3d 805, 809 (9th Cir. 2003).

108. *See Feist*, 499 U.S. at 345.

109. Brief for Volunteer Lawyers for the Arts et al. as Amici Curiae in Support of Petitioner at 6, n. 3, *Kelley*, 132 S. Ct. 380 (2011) (No. 11-101) (citing *Kelley*, 635 F.3d at 293).

110. *Id.* at 304.

111. *Id.* at 306.

112. *Id.* at 304.

original.<sup>113</sup> The court disregarded this second step, dictated by the Supreme Court in *Feist*, and, in confusing the concepts of artistic materials with artistic works, stopped short of considering the elements beyond the individual flowers which make *Wildflower Works* an original work.

The Seventh Circuit's holding on authorship as dictated by the author of the medium is also clearly inconsistent with already-copyrighted works that use materials found in nature.<sup>114</sup> For example, the Copyright Office has granted numerous copyright registrations to the floral and fruit sculptures created by the well-known food retailer Edible Arrangements, and also to the American Sand Art Corporation for its sand sculptures.<sup>115</sup> Even though the mediums of fruit and sand are authored solely by nature, the authorship requirement for copyright is not concerned with the medium of the work, and so these original sculptures authored by humans can be granted copyright protection.

## *B. Stretching the Language of Fixation*

### 1. Clarifying the Language

The second requirement for basic copyright, fixation of the work, is Congress's method of ensuring that in exchange for copyright protection, the work can be later made available for others to copy in the public domain.<sup>116</sup> A "fixed" work is crucial to the "deal" between society and the author of a work; without fixation, the author deposits nothing into the public domain.<sup>117</sup> It also guarantees that only the expression of the idea is protected, rather than the idea itself, and thus

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113. See *Feist*, 499 U.S. at 351.

114. Petition for Writ of Certiorari, *supra* note 58, at 20-21.

115. *Id.* (referring to Edible Arrangements' "Berry Bouquet," Reg. No. VA0001021475; "Blooming daisies," Reg. No. VA0001021473; "Delicious celebration," Reg. No. VA0001021474; "Delicious fruit design," Reg. No. VA0001021472; and "Hearts and berries," Reg. No. VA0001021476, and to American Sand Art Corporation's "Large flamingo," Reg. No. VA0000603490; "Macaw parrot," Reg. No. VA0000603407; and "Extra large castle," Reg. No. VA0000603493).

116. Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1195-96 (2007).

117. Joseph C. Merschman, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress's Copyright Power*, 34 CONN. L. REV. 661, 681 (2002).

preserves the idea/expression dichotomy of the copyright system.<sup>118</sup> This necessary separation of ideas from expressions owes its origin to the “Writings” created by “Authors” as stated in the Intellectual Property Clause.<sup>119</sup> As codified, § 102(a) of the Copyright Act dictates that a work be fixed in a “tangible medium of expression.” The fixation is sufficient if the work “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>120</sup>

The accompanying House Report explains that the reason for the sufficiency standard is “to avoid the artificial and largely unjustifiable distinctions ... under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.”<sup>121</sup> These “certain cases” referred to by Congress are those live audible transmissions—such as music performances, sports broadcasts, and news coverage—that reach the public in unfixed form but can be simultaneously recorded.<sup>122</sup> The relevant case law also supports a broad interpretation of what may qualify as a “fixed” work. In *Goldstein v. California*, the Supreme Court held that “writings ... may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”<sup>123</sup> Overall, both Congress and the courts highlight the broad interpretation of fixation, allowing, for the most part, a “material object” enough of a vehicle for the fixation requirement.<sup>124</sup>

The fixation requirement withholds from copyrightability those works that are not “sufficiently permanent or stable to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>125</sup> Examples of these include “those [works] projected briefly on a screen,

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118. *Id.* at 683 (referring to § 102(b) of the Copyright Act).

119. U.S. CONST. amend. 1, § 8, cl. 8.

120. 17 U.S.C. § 102(a) (2012).

121. H.R. REP. NO. 94-1476 at 52.

122. *Id.*

123. *Goldstein v. California*, 412 U.S. 546, 561 (1973). *See also Burrow-Giles*, 111 U.S. at 58, stating that “Writings” includes all ways “by which the ideas of the mind of the author are given visible expression.”

124. *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 171 n. 23 (D. Mass. 2008) (discussing H.R. REP. NO. 94-1476 at 52).

125. 17 U.S.C. § 101 (2012).

shown electronically on a television or other cathode ray tube, or captured momentarily in the ‘memory’ of a computer.”<sup>126</sup>

## 2. Fixation of “Wildflower Works”

The Seventh Circuit held that *Wildflower Works* was not “fixed” for copyright purposes because of the work’s “changeable” nature, that “its appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement.”<sup>127</sup> The court’s assessment, however, does not follow the test for fixation presented in plain language in § 102(a).<sup>128</sup> In fact, the court’s reasoning behind its decision is unmistakably at odds with both Congress’s statutory interpretation in the accompanying House Report, and with the relevant case law on this issue.

For *Wildflower Works* to be recognized as “fixed,” it must be (1) a tangible medium of expression, and (2) must be permanent or stable enough to be perceived by an audience for longer than a transitory duration.<sup>129</sup> The Seventh Circuit conceded that *Wildflower Works* is both tangible and can be perceived for more than a transitory duration, and so the question of whether *Wildflower Works* meets the element of “fixation” should have ended there.<sup>130</sup> Instead, the court continued to reason that the work’s essence of dynamic and perpetual change dictates that it is not stable or permanent enough to be called “fixed.”<sup>131</sup> This last inquiry is neither required by the Copyright Act nor relevant to determine “fixation” for copyright purposes. The court’s argument that the essence of change embodied in *Wildflower Works* as a garden precludes copyrightability is on its face insignificant. Establishing “fixation” is not a matter of a work’s essence, but rather of its ability to express the author’s idea for more than a transitory duration. In addition, the court’s argument is focused on the medium of the work rather than the overall expression of the work.<sup>132</sup> As it did with “authorship,” the

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126. H.R. REP. NO. 94-1476 at 53.

127. *Kelley*, 635 F.3d at 304-305.

128. *See supra* note 46, for the test delineated in § 102(a) of the Copyright Act.

129. 17 U.S.C. § 102(a) (2012).

130. Petition for Writ of Certiorari, *supra* note 58, at 22.

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

132. *See supra* note 45.

court once again ignored the analytical path mandated by the Copyright Act, and instead devised a new test for basic copyrightability.<sup>133</sup>

The majority opinion in *Kelley* is also internally inconsistent in its analysis of fixation. While the court held firm to its impression that a medium subject to change within a work defeats the work's potential copyrightability, it later states that it is "not suggesting that copyright attaches *only* to works that are static or fully permanent (no medium of expression lasts forever), or that artists who incorporate natural or living elements in their work can *never* claim copyright."<sup>134</sup> Despite its attempt to redeem itself from its disconcerting holding, the Seventh Circuit's failure to provide examples of what it was "suggesting" brings us one step forward and two steps back.

The Seventh Circuit's holding on "fixation" is especially counter-intuitive when we consider the copyrightability of the examples discussed in the opinion in juxtaposition to the court's standard. One example discussed by the court is an artwork entitled *Puppy* by the popular contemporary American artist Jeff Koons.<sup>135</sup> This work, exhibited worldwide, is a model of a puppy almost three stories high – and made using a metal frame, soil, geotextile fabric, an internal irrigation system, and live flowering plants.<sup>136</sup> In fact, at each exhibition the blooms on *Puppy* are noticeably different in color, pattern, and growth. While this work includes the same kinds of organic materials as *Wildflower Works* and the same changeable nature, the Seventh Circuit posited—without any explanation—that *Puppy* is likely to be considered "fixed" and thus copyrightable.<sup>137</sup> This is a glaring contradiction, as in its opinion the court had just previously declared that, because the "essence" of living flowers is to change, works using them as a medium are ineligible for protection.<sup>138</sup>

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133. Petition for Writ of Certiorari, *supra* note 58, at 22.

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

135. *Kelley* 635 F.3d at 305-06.

136. Jeff Koons, [jeffkoons.com/site/index/html](http://jeffkoons.com/site/index/html) (follow "Puppy" hyperlink).

137. *Kelley*, 635 F.3d at 306.

138. Brief for Volunteer Lawyers for the Arts, et al. as Amici Curiae Supporting Petitioner at 11, *Kelley*, 132 S. Ct. 380 (2011) (No. 11-101).

Furthermore, the Seventh Circuit's standard for fixation cannot be reconciled with types of works which are granted copyright protection directly by the language of the statute. Choreography,<sup>139</sup> though fixed only in the fleeting movements of a dancer, is copyrightable so long as there is a written explanation of the steps, or a taped recording; it can be protected even from infringers looking to copy the choreography from a live stage performance instead of from the written description of the steps.<sup>140</sup> Certainly this does not comply with the Seventh Circuit's denial of copyright protection for works with an "essence" of "vitality," yet it is enough for the guidelines set by the Copyright Act.<sup>141</sup>

### *C. Problematic Results*

The Seventh Circuit's dual holding on authorship and fixation presents two problems. First, the standard creates a bar against granting copyright protection to any work made of a natural or living medium – a drastic blow to the art community. Such a disservice to innovative contemporary artists will significantly hinder development in groundbreaking fields such as bio-art and eco-art, as well as in more traditional art forms that use natural materials.<sup>142</sup> Without the possibility of copyright protection, artists who work in these fields will be less likely to take artistic risks, thus potentially stunting our society's cultural growth.

Second, the resulting inconsistencies between this court's holding and the statutory language and case law threaten the uniform enforcement of copyright protection in the United States. The court's holding on "authorship" indicates that there are "right" and "wrong" kinds of authorship for copyright purposes, and that the human creator of an original work might not always be an author after all. Additionally, the court's problematic fixation standard and its reluctance to exemplify the scope of this standard add nothing but

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139. As an enumerated subject of copyright 17 U.S.C.A. § 102(a)(4), *see supra* note 46.

140. Brief for Volunteer Lawyers for the Arts, et al. as Amici Curiae Supporting Petitioner at 11, *Kelley*, 132 S. Ct. 380 (2011) (No. 11-101).

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

142. Brief for Volunteer Lawyers for the Arts, et al. as Amici Curiae Supporting Petitioner at 4, *Kelley*, 132 S. Ct. 380 (2011) (No. 11-101).

unnecessary confusion to this already inconsistent opinion. Not only do these new rules leave artists, specifically those working with organic materials, in the dark as to the scope of potential copyright protection for their works, but they also challenge and harm the ability of legal advocates to advise and educate these artists in the area of copyright law.<sup>143</sup>

## CONCLUSION

The relationship between law and culture is an interdependent one, characterized by cycles of definition, slippage, and redefinition.<sup>144</sup> Our legal regime, and the Constitution's Intellectual Property Clause specifically, is meant to promote progress, and the copyright system is a key vehicle to both promoting and dictating this progress.<sup>145</sup> As such, copyright is a powerful engine for stimulating and facilitating creative and artistic outlets, and in organizing the private cultural production and distribution of our artistic goods.<sup>146</sup>

In recognition of this power, and in deference to the progressive goals of the Constitution, it is important for courts to refrain from using copyright to dictate or restrict our cultural progress in the name of promoting it.<sup>147</sup> While contemporary art may pose many questions—or even perhaps concerns—about the artwork's meaning or its level of artistic taste, the courts must not twist the statutory standards for basic copyrightability in an effort to prove a cultural point. The question “Is it art?” is not one to be determined in a court of law. Such “judicial activism” in the art world is unwarranted and arguably harmful. When the courts put aside notions of artistic taste and judgment, a proper copyright analysis can be applied to an artwork. The courts must remain objective in their determination of copyrightability in order for cultural progression in the arts to remain uninhibited and forward-thinking.

The present fate of Mr. Kelley and his *Wildflower Works*

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143. *Id.* at 11, 4.

144. Cohen, *supra* note 116, at 1194-95.

145. *Id.* at 1170, 1177.

146. *Id.* at 1193.

147. Xiyin Tang, *That Old Thing, Copyright...: Reconciling the Postmodern Paradox in the New Digital Age*, 39 *AIPLA Q.J.* 71 (2011).

384      *Seton Hall Journal of Sports and Entertainment Law* [Vol. 23.2

exemplifies judicial activism wielded through the powerful copyright system. The Seventh Circuit's holding not only opens up a Pandora's Box of copyright issues for those artworks which incorporate natural elements, but also greatly undermines the domains of such already nontraditional art.<sup>148</sup> We are fortunate to live in an era in which groundbreaking artistic developments happen daily. However, it is precisely these innovative, and at times avant-garde, creations that are most in need of supportive legal practices and policies if they are to survive and contribute in our increasingly commercial and litigious society.<sup>149</sup>

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148. Yap, *supra*, note 62.

149. *Id.*