DEAD ON THE VINE: LIVING AND CONCEPTUAL ART AND VARA

Charles Cronin
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Poems are made by fools like me,

But only God can make a tree.¹

I. INTRODUCTION

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 makes it his property.²

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1 JOYCE KILMER, Trees, in Poems, Essays and Letters; Volume One: Memoir and Poems, 180 (1918).

2 JOHN LOCKE, Two Treatises of Government 305-06 (Peter Laslett ed., Cambridge Univ. Press, 2d ed. 1970) (1690). Presumably unlike Locke, unless I am clearly referring to a male, “he” means “he or she”.

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Locke’s justifications for personal property undergird the U.S. copyright regime that for over 200 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. Locke makes his arguments using lessons drawn from nature that resonate even today, despite the remove of our lives from the agrarian world of Locke’s seventeenth-century England. The recent federal district court decision in *Chapman Kelley v. Chicago Park District* is somewhat ironic, therefore, insofar as it denies copyright protection to the product of the very labor that Locke uses to make his point about personal property – cultivating a garden.

The property in question in *Kelley*, however, was not the fruits and flowers that we associate with Locke’s discussion of agricultural or horticultural labor, but rather the intangible aesthetic result of the combination of colors and textures of the millions of living leaves and blooms of Chapman Kelley’s *Wildflower Works*. A professional artist specializing in representational works depicting scenes of nature, and of flowers particularly, Kelley created *Wildflower Works* in 1984 in Chicago. *Wildflower Works*

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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.⁵

*Wildflower Works* was initially received enthusiastically in Chicago and beyond.⁶ Within a few years of its installation, however, public enthusiasm for this work began to wane, along with its constituent living plants whose visual appeal wilted over the natural course of their finite lives. Twenty years after *Wildflower Works*’ installation, Chicago Park District officials determined that the project had deteriorated into an unsightly nuisance and, over Kelley’s objections, radically redesigned and reduced the space it occupied in Grant Park, essentially extirpating the work.⁷

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

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⁵ See id. Chapman Kelley has posted his sketch for the project and photos of its realization: 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.

⁶ 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, supra* note 4, at 4-5.

⁷ See id., at 8-9.
under the Visual Artists Rights Act of 1990. 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. The court went on to note, however, that Section 106(a) of the Copyright Statute promulgating moral rights limits their application to copyrightable works only. *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. 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.

The district court’s explanation of its conclusion that *Wildflower Works* is not copyrightable expression is surprisingly brusque following the more sympathetic stance toward Kelley expressed in the court’s analysis finding *Wildflower Works* to be a work of art in the form of both a painting and a sculpture. Rationalizing its decision that the work was not copyrightable, the court takes a slightly blinkered view of the concept of originality required for copyright protection when it complains: “Kelley leaves this Court


9 See Kelley, supra note 4, at 10.

10 See id., at 16.

11 See id., at 18.
to assume that he is the first person to ever conceive of and express an arrangement of
growing wildflowers in ellipse-shaped enclosed area in the manner in which he created
his exhibit.” In fact, whether Chapman Kelley was the first person, or the hundred-and-
first, to create such a work does not, strictly speaking, determine whether his garden
design originated with him, which is required before copyright attaches.  

It is the court’s handling of the question whether Wildflower Works is a work of visual art
within the purview of statutory moral rights, however, that touches upon a broader issue
addressed in this article. Defending its finding that Wildflower Works was a painting and
a sculpture -- rejecting the defendant’s argument that the “plain and ordinary meaning” of
these terms could not possible accommodate a living garden – the court noted:

[t]here 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

12 Id., at 17.

13 Resorting to Learned Hand’s well-worn comment on originality: "… if 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).
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.  

As the court notes, the “tension” between copyright law and art particularly involves new or recent works of art like Kelley’s piece. *Wildflower Works* is, in fact, but 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 the many artistic movements that followed have 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, etc., has tended to become more idiosyncratic as these works exhibit more exclusively the personal expression of their artists rather than of the intentions or tastes of a commissioning party or potential buyer.  

Along with this general trend has come the expansion of media in which artists render their work, which now include living – and once living – objects like plants and animals, and other relatively ephemeral materials.

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14 Kelley, supra note 4, at 11.


16 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
These developments in the visual arts, particularly within the past fifty years or so, have led to artistic endeavors that are not comfortably accommodated by U.S. copyright law that ostensibly fosters and protects the results of such creative enterprise. This is true despite amendments to the Copyright Statute as recently as 1990 that expanded protection for works of visual art and architecture.

This article explores the tension that the *Kelley* court identified between copyright law and certain works of contemporary art. It opens with an overview of the protection U.S. copyright law offers works of visual art, and a discussion of VARA in particular. This is followed by a high-level review of important movements in visual arts over the past century, and some thoughts on how works of these trends challenge our notions of copyrightable material. It then examines in some detail the genre of Conceptual art that uses living media, and the quandaries it raises about copyright fundamentals of fixation, authorship, and expression. This leads to the suggestion that VARA’s moral rights 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.

17 “Congress shall have the power… [t]o promote the progress of science and useful arts…” U.S. Const. art 1 § 8.

While fixation, authorship, and expression are fluid concepts in copyright law, providing copyright protection to volatile works of visual art, and 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 monopolization of concepts and ideas that U.S. copyright law expressly does not protect.

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

Background of VARA

Since VARA’s enactment in 1991, federal court judges, and other writers, have found this act to be a mostly indigestible addition to American copyright law. This is not surprising given the predictably curdling effect of combining a concept grounded in

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19 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 on whether moral rights may apply to site-specific works of art: “Either VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all.” 459 F.3d 128, 140 (1st Cir. 2006). See also, supra note 103. As David Nimmer has remarked on the confusion created by inserting protection for material property into law concerned with protection of immaterial works: “At 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).
author-centric copyright regimes of civil law countries with the more user-oriented and economically based copyright law of the U.S.\textsuperscript{20}

Civil societies’ awareness of ethical responsibilities associated with recognition of individual authors’ expressions as inextricably associated with their personalities can be traced to Ancient Greece and Rome.\textsuperscript{21} Our current 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.\textsuperscript{22}

The text of the founding Berne Convention (1886) promotes authors’ rights by establishing the principle of national treatment, according to which Convention adherents

\textsuperscript{20} Moral rights apart, the rights granted under common law copyright and those of civil law author’s 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).

\textsuperscript{21} 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 (tracing the moral concept of authorial recognition to the reign of Emperor Justinian).

agree to protect works of authors of other Convention member states.\textsuperscript{23} It was not, however, until over forty years after Berne’s founding that authors’ rights under the Convention were amplified to include moral rights of integrity and attribution.\textsuperscript{24} These are the two rights that VARA provides, albeit only for a circumscribed portion of works of visual art.\textsuperscript{25}

\textsuperscript{23} See Barbara Ringer, \textit{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.”).


\textsuperscript{25} 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: “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) as reprinted in 1990 U.S.C.C.A.N. 6915, 6918.
Reflecting their Romantic/Victorian-era origins, national moral rights laws promulgated pursuant to Berne ostensibly champion the interests of individual authors over those of their readers. Commentators have noted, however, that over time, these laws benefit also the larger populations they govern by fostering the preservation of an accurate record of valuable human expression over time. 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.

26 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. Id.

27 See John Merryman, The Public Interest in Cultural Property 77 CALIF. 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 protected 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 COL. 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).

28 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
Following the end of WWII the United States became the largest exporter of works of intellectual property. Late in the twentieth century the United States hoped that by joining Berne it might muster greater foreign support for U.S. efforts to counter rampant piracy of these exports abroad. The United States joined Berne in 1989, and two years later complied with the Convention’s stipulation that members provide moral rights to authors by enacting VARA.

American media, and software industries were supportive of U.S. Berne membership insofar as it offered the possibility of greater protection overseas for their works of information and entertainment. This commercial sector was more skittish, however, about moral rights legislation arriving inevitably in the wake of Berne accession. It 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.

29 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 (noting the steady increase in U.S. trade in intellectual property since the 1947 General Agreement on Tariffs and Trades).

30 See Ringer, supra note 23.

31 See supra note 18.

32 … [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
feared that it might upset the long-established rapport between U.S. media companies and their creative employees by providing these workers rights by which they might obstruct the exploitation of their works by their corporate owners. These industries’ objections shaped moral rights legislation in the U.S., as can be seen in the limited reach of VARA that – as its name implies -- 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”.

Rights to integrity and attribution are not more inherently “moral” than are copyrights of reproduction and performance. We refer to them as “moral” -- stemming from the French “droit moral” – in that they are intended to address authors’ concerns that lie beyond more purely economic and material interests that are protected by copyright, and which transcend commercial mechanisms of contract and sale. The right of attribution safeguards the public record of authorship existing between the creator and his work. 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 and also that his name does not remain attached to a work he did not create or a work of his that has been modified. The right of integrity

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the Enhancement of Author Autonomy in United States and Continental Copyright Law


33 See generally Nimmer, supra note 19, at § 8D.06.
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.\textsuperscript{34}

VARA’s narrow definition of “visual art” excludes not only works made for hire, but also all works of a commercial nature.\textsuperscript{35} Unlike copyright’s term of protection – life-of-author plus seventy years -- VARA’s is relatively meager, lasting only for the life of the author.\textsuperscript{36} The reach of this statute is further hemmed in by exceptions and limitations – e.g. the public display exception allowing unauthorized modifications to VARA-eligible works – that suggest that Congress was begrudging and dubious about its enactment.\textsuperscript{37}

\textit{Cases Involving VARA}

\begin{flushright}
\textsuperscript{34} See id.
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\textsuperscript{35} See VARA, supra note 8.
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\textsuperscript{36} Under French law moral rights are perpetual and inalienable. See C. PROP. INTELL., art. 1.121-1
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\textsuperscript{37} See Monica Pa & Christopher Robinson, \textit{Making Lemons out of Lemons: Recent Developments in the Visual Artists Rights Act} 1 LANDSLIDE 22 (2009) (asserting that the judiciary’s application of VARA betrays the reluctance with which this legislation was enacted, and the limited protection it ostensibly offers to a narrow range of artistic endeavor); Roberta Kwall, \textit{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).\n\end{flushright}
A “Solomonic compromise between many conflicting interests” VARA has, unsurprisingly, displeased virtually everyone who has worked with this law over the past eighteen years.\textsuperscript{38} Law scholars claim that VARA was poorly drafted and offers too little - or too much -- protection to visual artists.\textsuperscript{39} Any hopes that artists may have harbored for VARA’s provision to them of professional and financial improvement have turned to

\textsuperscript{38} See Pa & Robinson, \textit{supra} note 37, at 22.

\textsuperscript{39} See Roberta Kwall, \textit{Originality in Context}, 44 \textit{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, \textit{The Visual Artists Rights Act of 1990: American Artists Burned Again}, 17 \textit{Cardozo L. Rev.} 373, 416-17 (1995); Thomas Cotter, \textit{Pragmatism, Economics, and the Droit Moral}, 76 \textit{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); Amy Adler, \textit{Against Moral Rights} 97 \textit{Cal. L. Rev.} 263, 288 (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 preoccupation in contemporary art. Moral rights law depends on and glorifies a line between art and everyday objects that no longer exists.”).
ashes in their mouths with the growing number of VARA cases decided against them.\textsuperscript{40}

In fact, because federal law preempts state statutes providing attribution and integrity

\textsuperscript{40} See Cotter, \textit{supra} note 39, at 25 (“[t]he 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”).

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. Defendants included the U.S. Government and the Job Corps Center of the YWCA, owners and tenants respectively, of the building one side of which Twitchell covered with his six-story mural of pop artist Ed Ruscha. Prior to settlement the federal court (Central District, California) handling the dispute dismissed on grounds of sovereign immunity, 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. \textit{See} Pa & Robinson, \textit{supra} note 37, at 27; William Brutocao & Eric Bjorgum, \textit{VARA and CAPA: Lessons from the Twitchell Case}, \textit{INTELLECTUAL PROPERTY 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
rights, artists may discover that the rights in these areas that they enjoyed under state law have actually been made scantier by VARA.\(^4\)

Courts have homed in on the ambiguities and the limited scope of VARA, consistently denying artists’ claims of moral rights violations and, in some instances perhaps, unintentionally disparaging the works in question, thereby threatening further distress to the reputations and \textit{amour-propre} of aggrieved artists. 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.\(^5\)

\(^4\) See Nimmer, \textit{supra} note 19, at § 8D.06.

\(^5\) See Pavia v. 1120 Avenue 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); Hunter v. Squirrel Hill Associates, 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); Carter v. Helmsley-Spear, 71 F. 3d. 77 (2d Cir. 1995) (artists’ creation was a work made for hire and therefore outside the scope of VARA protection). In Carter v. Helmsley-Spear VARA did not protect the sprawling and eclectic sculptural work involved in this case because the court determined that the artists had the legal status of employees of one of the defendants during the creation of the work. Many, if not most, artists who work on
VARA provides artists lifetime rights of integrity and attribution in original works of visual art created after the enactment of this law in 1990.\(^{43}\) VARA extends these rights also to works created prior to 1990 unless -- or until -- an artist has transferred his title to the physical work.\(^{44}\) Most VARA decisions, however, have turned on the courts’ dissection of the works themselves, which typically has led to the conclusion that the subject of the dispute is ineligible for VARA protection.

In *Lilley v. Stout* the court held that the prints and negatives of photographs taken by the plaintiff -- a professional photographer -- which were ultimately incorporated into a larger work by the defendant, were ineligible for VARA protection.\(^{45}\) Despite the fact that these photographs were taken unequivocally pursuant to the creation of a work of visual art, the court denied them protection under VARA because it did not believe the 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.

\(^{43}\) VARA applies to works created six months or more after the date the bill was enacted. Pub. L. No. 101-650, §610, 104 Stat. 5128 (1990).  See *Nimmer*, supra note 19, at §8D.06.

\(^{44}\) 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.

plaintiff took the photographs “for exhibition purposes only” as required by the statute.\(^{46}\) A political poster, house plans, and a design of an athletic trophy have all likewise been deemed works outside VARA’s protection, as have been “site specific” art works that were integrated within particular geographical locations.\(^{47}\) Furthermore, VARA requires that a work be “of recognized stature” before its creator is granted the right to prevent its destruction.\(^{48}\) 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.\(^49\)

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 -- we should briefly consider the origins of the mélange of genres of recent and contemporary art that implicates moral rights today. The following discussion first considers the broad and lingering influence of Impressionist painting on twentieth-century movements in the visual arts. Then it 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 also, 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.

\(^{49}\) Pollara v. Seymour. 206 F. Supp. 2d 333 (N.D. N.Y. 2002); Scott v. Dixon, 309 F. Supp. 2d. 395 (E.D. N.Y. 2004). Ultimately, of course, it devolves to judges to 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 unquestionable “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 109 and accompanying text.
III. VISUAL ART IN THE TWENTIETH AND TWENTY-FIRST CENTURIES

The Shock of the New

Paintings of, and in the style of, “Impressionist” artists are among the most popular today. Sale prices for works of van Gogh have broken records; Museum galleries devoted to works of Renoir and Pissarro tend to draw the largest number of visitors; and 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 curious 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 implications of marginalization and penury appurtenant to this venue.

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50 “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).


52 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.
The Académie des Beaux-Art’s Salon de Paris that rejected the works of Impressionists like Manet, promoted instead the creation and sale of highly representational portraits, and paintings of historical and religious scenes by artists like Ingrès and Delacroix – at that time considered among the finest exponents of French painting. Impressionist pictures -- portraying hazy quotidian and open-air scenes using bright dabs of color -- we now consider more “painterly” than their more conservative counterparts, despite the opprobrium with which they were initially received by some within the art establishment in Paris. To the extent Impressionist works are less representational than paintings associated with previous schools, they reflect modern-day Romantic notions of authorship in which authors should be privileged to work unfettered by financial concerns, and by mainstream tastes and predilections of consumers of art, to create works expressing to the greatest extent possible the personal genius of the artist.

53 The origins of the Salon des Refusés were, in fact, more complicated than suggested by the conservative/avant-garde dispute of lore, owing much to the attempts of the Beaux-Arts administration’s 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).

54 In the popular imagination today creators of visual works of art are particularly exempt from standards of conventional behavior. Indeed, mental disorders, and 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. This has not
Since the advent of Impressionism in the latter half of the nineteenth century, artists have, of course, continued to develop new genres and sub-genres, like Expressionism, Cubism, Fauvism, Surrealism, and Postmodernism. Like the Impressionists, artists associated with these twentieth-century movements have eschewed representation, and created instead images of objects that are less immediately – if at all -- identifiable by viewers than are images created by representational artists. The origins and objectives of the genres of twentieth-century non-representational art were responsive in varying degrees 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).

55 See generally, Hughes, supra note 51.

56 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 (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 positive response to attempts to capture reality in images plummets when the replication is very close, but not exact. See id.
to political, aesthetic, and economic forces.\textsuperscript{57} The non-representational nature of paintings of many of these categories, however, attest to a broad consensus among active creators and consumers of visual art -- tethered to Impressionist roots -- of the primacy of the interests of artists in “their” output over those of the consumers who commission, purchase, and view their work.

The museum visitor today looking at Impressionist paintings sees depictions of dancers, flowers, scenes of the out-of-doors, and so on, 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 as readily as we do today, the same images of dancers and flowers.\textsuperscript{58} 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 our basic ability to perceive the artist’s intentions, and the objects being 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

\textsuperscript{57} See Hughes, \textit{supra} note 51.

\textsuperscript{58} \textit{L’Oeuvre}, Émile Zola’s \textit{roman à clef} from 1886, evokes the reception by Paris fine art circles of Manet’s once-notorious \textit{Le déjeuner sur l’herbe}, first shown at the Salon des Refusés in 1863.
Cubist works by Picasso and Braque, for instance, the visitor’s eye will 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, 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 living artists, our visitor may suddenly again see readily identifiable images, in the Appropriationist and Conceptual works of Andy Warhol, Robert Gober, Jeff Koons, and Damien Hirst. These works need no identifying tags as the giant images and sculptures of consumer products, pop singers, slaughtered and balloon animals, are instantly recognizable. There

59 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 we can readily identify the bits of newspaper, caning, string, etc. worked into these collages, we are mainly struck by their artful deployment within a larger work whose meaning is greater than the sum of its parts. The 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.
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 our recognition of these
images. One of the artists’ objectives is to prompt the viewer to consider both why the
museum has privileged these works by displaying them in the first place, and also why
one is thoughtfully gazing upon literal reproductions of images encountered elsewhere
that we may find insipid, distasteful, or simply inconsequential.

One might have to step beyond the walls of the museum to experience many works
created over the past fifty years or so that are classified as Conceptual art. To view
Robert Smithson’s original “Spiral Jetty,” for instance, one must visit Utah’s Great Salt
Lake, the location of this man-made formation of rock and earth. To have experienced
Anna Schuleit’s “Bloom” – comprised of recorded sound and 28,000 flowers placed
inside a psychiatric hospital – one would have to have visited the Massachusetts Mental
Health Center during a period of four days in November of 2003.  We realize that, as
the term implies, Conceptual art is a loosely defined genre of works in which the artist’s

60 Conceptual artists may use heterodox 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.

61 See http://www.spiraljetty.org/.

underlying concept or idea is more important to the ultimate meaning and worth we
ascribe to the work than is a particular material rendering of it.\textsuperscript{63}

\textsuperscript{63} See Holland Cotter, The Collected Ingredients of a Beijing Life, N.Y. TIMES, July 15,
2009, at C1 (“He [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. \textit{See, e.g.}, John Cage, \textit{Music of Changes} (1951) (an
indeterminate work in which the music is created anew according to divination principles
set out in the \textit{I Ching}); Pina Bausch, \textit{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 – musical works
particularly – tend also toward the conceptual because our experience of them is strongly
influenced by 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. \textit{See} Charles Cronin, \textit{Virtual Music Scores, Copyright and the
Conceptual works of installation art depend largely upon forces that are extrinsic -- or quasi-extrinsic – to the works themselves. When these include natural forces like climate, vegetation, and geography, the artist has ceded 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. 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.

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64 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 http://www.spiraljetty.org. 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”. See id.

65 *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 http://en.wikipedia.org/wiki/Jeff_Koons.
Jeff Koons’ 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 like.\footnote{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. \textit{See} \textit{Steel Magnolias} (Tri-Star 1989) (outdoor Nativity scene in rural Louisiana town rendered in sparklers); \textit{Le Dîner de Cons} (Gaumont 1998) (the story’s “con” [idiot] creates toothpick models of monuments like the Eiffel Tower); \textit{Seinfeld: The Understudy} (NBC television broadcast May 18, 1995) (character Cosmo Kramer builds figurines of living persons using variously shaped uncooked macaroni).} 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. Koons’s work brings us back to Chapman Kelley’s *Wildflower Works* -- his “living piece of art” -- and matters of copyrightability.

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. One finds, however, that works in these various new genres share certain commonalities on matters pertinent to copyright -- fixation, originality and sufficiency of expression, in particular.

**IV. COPYRIGHT, MORAL RIGHTS, AND LIVING WORKS OF VISUAL ART**

*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

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67 *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.”).

68 In promoting Kelley’s *Wildflower Works* the Chicago Park District used the expression “living piece of art.” *See* Deanna Isaacs, *Is Gardening an Art?*, CHICAGO READER, June 16, 2006 at B1.
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. Sharon Louden, another American artist, also has used plants as the primary material of her work and, like Chapman Kelley, has claimed that her moral rights in one of her works (Reflecting Tips, 2001) were violated by the commissioning party -- Yahoo Corporation -- when it trimmed the vegetal “tips” of her eponymous work in response to complaints by the City of Mountain View about unkempt premises at Yahoo’s corporate headquarters.

69 See http://www.verticalgardenpatrickblanc.com/mainen.php (“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 authorization of Patrick Blanc.”). 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 (promoting fragrances created by particular perfumers as a publishing house would promote books by writers they publish).

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, and for their colors and textures in particular. Red carnations, might, therefore, serve for these artists the same purpose as a patch of oil paint of the same color would serve a traditional painter. The obvious difference, however, 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. It is precisely because plants and flowers are universally recognizable objects that these artists use them only in abstract, non-representational works.\textsuperscript{71} 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, or corps of water ballerinas, deployed to depict recognizable symbols or objects.\textsuperscript{72}

\textit{Living Works and the Question of Fixation}

\textsuperscript{71} \textit{See generally} Michael Juul Holm et al., \textit{The Flower as Image} (2004).

\textsuperscript{72} 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 infra dig 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.
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, they can be accessed by a great number of individuals, in numerous locations, and for an indefinite period of time. It has been argued, however, that society should award an author a temporary monopoly in his fixed works of original expression only if the author provides us, in turn, a tangible record of the expression in which this monopoly will be granted. Like the many means of delineating borders of real property, this fixed record serves both authors and readers of works of authorship in establishing the scope of an author’s exclusive rights in what is ultimately an intangible asset.

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. Fixation was implicitly required, however, also under the prior U.S. statute (1909 Act) because only works of authorship that had

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74 See id.

75 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* (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).
been published or registered -- neither of which is possible without fixation – were eligible for protection under that federal statute.\(^{76}\)

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 and journals, and music scores and sheet music.\(^{77}\) With the advent of digital technologies, and the “ephemeral” and “transient” copies of works of information that they entail, fixation has become a more nettlesome matter than it used to be.\(^{78}\) New media used in rendering works in genres of contemporary art also have challenged us to examine our understanding of what

\(^{76}\) See Hubanov, supra note 73. See also Nimmer, supra note 19, 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").

\(^{77}\) Since the 1960’s 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.

\(^{78}\) See Hubanov, supra note 73.
constitutes fixation and whether, and why, it should remain a prerequisite for copyright protection.\textsuperscript{79}

The 1976 Act’s definition of fixation embraces works in many media, even those that have not yet been developed.\textsuperscript{80} The definition is similarly expansive on 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.”\textsuperscript{81} 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 turn into sand itself. The color and texture of materials like paint, and even stone, change over time, in response to external forces like atmosphere and light. These changes occur gradually, almost imperceptibly, and this “inherent vice” is viewed with regret by these works’ custodians whose goal is to thwart these mutations and to preserve -- or restore -- the work in as it existed at the time.

\textsuperscript{79} See Nimmer, supra note 19, 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).


\textsuperscript{81} Id.
it was created. Fixation, then, is a matter of degree, and ultimately a question courts must decide in copyright disputes involving works of ambiguous stability.

While artists like Chapman Kelley assert that plants serve the same purpose for them as oils do for traditional painters, plants, as organisms, are profoundly different from inorganic paint, chalk, crayon, etc. As every gardener and farmer is ruefully aware, plant cultivation is an undertaking characterized, for good and for ill, by uncertainty and change. Plants, like all animate organisms, go through a life cycle and ultimately die, and reflect in their odor, flavor, and appearance – to an even greater extent than do

82 “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).

83 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.

84 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 grown 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.
animals – the particular qualities of many extrinsic elements of their milieu like water, air, and soil.\(^8\)

The volatility of plants was the most seductive, but ultimately the most troublesome, aspect of this medium as used by artists Chapman Kelley and Sharon Louden in *Wildflower Works* and *Reflecting Tips* respectively. Both works were initially popular, in large measure because of the wonder elicited by a changing and colorful landscape. Later, however, with the natural evolution of their constituent materials, these same collections of plants came to be considered blights.

Such changes in the perception of these works -- that instigated the events that provoked their respective VARA disputes -- raise questions, where works of art in which living materials are the principal medium are concerned, about the U.S. copyright law’s prerequisites of fixation and originality. 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, or what, should it be provided?

\(^8\) 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 Kathleena Brenzel, Sunset Western Garden Book* 400 (8\(^{th}\) ed. 2007).
In *Kelley* the Chicago Park District claimed that as a living work, *Wildflower Works* was ineligible for copyright because it was insufficiently fixed.\(^{86}\) The district court alluded to this 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 the independent grounds of insufficient originality.\(^{87}\)

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”. 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. The dynamic aspect of a Calder mobile, the court notes, does not lessen its standing as a fixed work of art. The fact that Jeff Koons used topiary for his “Puppy” does not preclude our reasonably considering it to be a work of visual art, in this case a sculpture.\(^{88}\)

On the issue of fixation, the court’s comparing *Wildflower Works* to mobiles by Calder and plant sculptures by Jeff Koons is not entirely apt. While Calder’s mobiles depend upon dynamic external elements (air currents) this dependence is relatively slight

\(^{86}\) *See Kelley supra* note 4, at 12.

\(^{87}\) *See id.*, at 17.

\(^{88}\) *See id.*, at 13.
compared to the virtually total reliance of *Wildflower Works* on natural elements 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 we consider Alexander Calder, to a much greater extent than naturally occurring wind currents, to be responsible for the aesthetic expression in this work. 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 but it is not, strictly speaking, topiary, as the court claims. Objecting to the court’s use of this term may appear caviling, but may lead 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.\(^89\) 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 the naturally occurring objects -- flowering plants -- that comprise this work, to express something unrelated to the medium. By physically transforming naturally occurring materials into man-made objects artists create something recognizably their own, and simultaneously fix their original expression. Without this transformation, the impact of the naturally occurring materials like living plants predominates over that of

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\(^89\) *See* OXFORD ENGLISH DICTIONARY (2nd Ed. 1989) (“Consisting in clipping and trimming shrubs, etc. into ornamental or fantastic shapes.”).
the artist’s work, as does the ephemeral, rather than the fixed, nature of the work in question.

With respect to fixation, Kelley’s *Wildflower Works* -- like similar living works of Sharon Louden, Anna Schuleit, and Patrick Blanc – lies much closer to *Puppy* than to a Calder mobile. In fact, *Wildflower Works* is less fixed than *Puppy* because Kelley, to a greater degree than Koons, intentionally capitalized upon nature’s volatility – the changing colors, textures, scents, of *Wildflower Works*, from week to week, even day to day at certain times of year -- and the appealing delicacy and ephemerality that this volatility lends his work. Kelley could have created an unambiguously fixed work by using artificial plants and flowers. The repugnance of such an idea, however, underscores the vital importance of unfixed natural forces in his work.  

*Living Art Works and Original Expression -- “The Medium is the Message”*  

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. As set forth in the Copyright Act, works that are not copyrightable cannot qualify as works

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90 Had he used artificial flowers Kelley’s copyright claim would have been stronger not only because his work would have been more fixed, but also because it would be more exclusively his own creation – particularly if he made the artificial flowers himself.


92 See *Kelley* supra note 4 at 18.
of visual art that VARA protects.\textsuperscript{93} Furthermore, graphical works that are fixed and original may be copyrightable, but VARA protects only a small portion of these copyrighted works that manage further to comport with the narrow statutory definition of “works of visual art.”\textsuperscript{94}

Much of what is generally considered serious visual art from the past fifty years or so is Conceptual art insofar as its aesthetic effect rests more on the abstract intentions of the artist rather than upon an actual finished artifact that reveals the technique and skill associated with a particular practitioner.\textsuperscript{95} This is true both of non-representational works and also Appropriationist works whose effect depends not on simulacrums but rather on literal copies 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.\textsuperscript{96} Related to this


\textsuperscript{94} \textit{Id.}

\textsuperscript{95} Paradoxically, while we value the underlying ideas more 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 we ascribe to these works than they are to more traditional works in oils, watercolors, gouache, etc.

\textsuperscript{96} Jackson Pollock’s drip paintings are famous – and remarkably expensive – in \textit{large} measure because of our awareness of the artist’s unorthodox physical method of creating these works that involved a sort of emotive dancing about while holding a dripping
development are a heightened emphasis upon 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 earlier, artists’ use, over the last century, of unexpected materials like string or bits of fur within works in traditional genres like painting can be traced to artistic currents in the nineteenth century. The colored blots of Impressionist paintings, while curious and even grotesque when closely examined, are transformed through 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, if for no other reason, to satisfy one’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. The use of unconventional materials often thereby 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 imposed by an artist’s use of such

paintbrush. The ceiling of the Sistine Chapel, on the other hand, is famous – and of incalculable value – in small part because we know of the physical contortions Michelangelo endured in creating this work.

97 E.g., Carolee Schneemann’s Blood Work Diary (1971) (media is “blood on tissue with egg yolk”).
materials tends to overwhelm any other purported message or meaning embodied in the images and objects built of these materials.\textsuperscript{98}

The meaning of a work of Installation Art – essentially a sub-genre of Conceptual Art -- depends, obviously, 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. No matter where we see any painting by Monet we recognize it as a work of art by this particular artist even if it is stripped of the sumptuous frame and rarified surroundings typically associated with the works of this artist. The works of Marcel Duchamp, Joseph Kosuth, and Jeff Koons, on the other hand, we would see as

\textsuperscript{98} 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. \textit{See} Dan Barry and Carol Vogel, \textit{Giuliani Vows to Cut Subsidy Over ‘Sick’ Art}, N.Y. TIMES, September 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.”). \textit{See also}, Roberta Smith, \textit{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).
urinals, unremarkable chairs, and balloon figures, with little or no aesthetic appeal were we to come across them out of context.  

In this respect works of Conceptual art are less resilient than more traditional works, their more fragile import determined largely by a particular time and place. Paradoxically,  

99 Marcel Duchamp, *Fountain* (1917); Joseph Kosuth, *One and Three Chairs* (1965); Jeff Koons, *Celebration* (1995-98). Some would claim that certain works of Conceptual art owe even their concept to someone other than the putative artist: “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.” Letter from Peter E. Rosenblatt to the editor, *N.Y. Times*, May 4, 2008.  

100 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 artist Joseph Beuys. See Lawrence Van Gelder, *Arts Briefing*, *N.Y. Times*, August 30, 2004, at E2. See also, David Itzkoff, *Missing Moore Sculpture May Have Been Sold for Scrap*, *N.Y. Times* (ARTSBEAT) May 19, 2009, http://www.nytimes.com/pages/arts/index.html (reporting that in 2005 an abstract bronze
the ascendancy of Conceptual art, with its inherent ephemerality, and external dependencies, occurred roughly around the same time as legal protection for art was expanded under VARA – an ostensible purpose of which is to ensure the preservation of unambiguously fixed original works of art for the edification of future generations.  

sculpture by Henry Moore worth several million dollars was stolen and sold for $2300 as scrap metal).

101 See supra note 27 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…” 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.” Carol Vogel reviewed Serpentine Gallery’s (London) “Jeff Koons: Popeye Series.” 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
Judge Coar believed that *Wildflower Works* was a work of visual art – a painting or sculpture, in fact, as claimed by the plaintiff – but determined that the work did not contain sufficient original expression to be copyrightable.  The court’s rationale for this determination is perfunctory – reflecting its dismissive view of the plaintiff’s arguments for copyrightability that the court found conclusory and tautological.

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102 See Kelley *supra* note 4, at 17 (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.)

103 *Id.* The court also found that even were *Wildflower Works* a copyrightable “work of visual art,” it was compelled to follow case law precedent establishing VARA’s inapplicability to “site-specific” works. *Id.* at 18. In 2006, in *Phillips v. Pembroke*, the First Circuit Court of Appeals established that a work otherwise meeting the requirements of a “work of visual art” under VARA, was not protected under this statute if the meaning of the work depended upon the work’s integration within a particular milieu, or site. 459 F. 3d 128 (1st Cir. 2006). *Phillips* involved a number of aquatic sculptures,
walls, and paths created by Phillips for a park by the Boston Harbor. The Phillips court found that the import of these man-made features depended heavily upon their harbor location, and that the removal of these features from this place – which was legally justified under the “public presentation” exemption within the same statute -- was tantamount to destruction of the work. VARA’s “public presentation” exemption permits modifications unauthorized by the artist to works of visual art shown to the public. See 17 U.S.C. §106(a) (c) (2) (2006). The circuit court claimed that the lower court misconstrued this statutory exemption: “By concluding that VARA applies to site-specific art, and then allowing the removal of site-specific art pursuant to the public presentation exception, the district court purports to protect site-specific art under VARA's general provisions, and then permit its destruction by the application of one of VARA's exceptions.” Phillips v. Pembroke, 459 F. 3d 128, 140 (1st Cir. 2006). Given that VARA implicitly permits, under its “public presentation” exemption, what amounts to the destruction of site-specific works, the court inferred that Congress apparently never intended VARA to apply to such works in the first place.

As with the related issue of fixation, “site-specificity” of visual works of art is a matter of degree. A painting by Rembrandt is site-specific insofar as there are certain locations in which the work – at least temporarily – would lose all meaning or integrity, e.g., under water, or in an unlighted room. The monument on Mount Rushmore is more site-specific than the Rembrandt because this particular monument cannot exist elsewhere. Chapman Kelley’s Wildflower Works is more site-specific than a Rembrandt, but less so than the Mount Rushmore monument. While it might be possible to replicate the work elsewhere (even indoors, in a sports stadium or shopping center, for instance)
In denying VARA protection to Chapman Kelley’s *Wildflower Works*, Judge Coar gingerly approached the question whether works in non-traditional media should be covered by VARA when he alluded to the “tension between the law and the evolution of ideas in modern or avant garde art.”¹⁰⁴ Indeed, VARA’s legislative history indicates Congress’s intent that courts would 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.¹⁰⁵ 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.”¹⁰⁶

much of the work’s effect lay in the engaging juxtaposition out-of-doors of colorful and unruly wildflowers with the symmetrical, bitonal buildings surrounding Chicago’s Grant Park.

¹⁰⁴ See Kelley *supra* note 4 and accompanying text.

¹⁰⁵ “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.” H. R. REP. NO. 101-514 (1990).

¹⁰⁶ See id. (quoting testimony of Representative Edward Markey).
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. 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 showing of creative expression than the mere “creative spark” that copyright requires.

It is, ultimately, for courts to determine whether disputed works demonstrate original expression qualifying them for copyright protection and also for moral rights protection as works of visual art. In Kelley the court arrived at the singular determination that

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107 See Roberta Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 *Notre Dame L. Rev.* 1945, (2002) (argues 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*).

108 See *Feist Publications, Inc. v. Rural Telephone Service 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).

109 The fact that courts determine such questions troubled Justice Holmes, who expressed his reservations in this well-known excerpt from *Bleistein v. Donaldson Lithograph:*
Wildflower Works contained sufficient originality to be called a sculpture and/or a painting “within the definition of VARA,” yet was not protected by VARA because this work was not sufficiently original to be copyrightable.110 Surely, under the “common sense” standard recommended by VARA’s proponents, if we determine that a work does not evince sufficient original expression to be copyrightable, we should likewise

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.

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. I agree with Holmes’s conclusion that commercial illustrations may be copyrightable expression – although they could never qualify as works of visual art under VARA -- but disagree with 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. 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.

110 See Kelley, supra note 4, at 17.
conclude that the work belongs in a category other than "visual art" as this term is contemplated under VARA. This leads us to the related question of what level of original expression should be required of works that are copyrightable, before they should be considered "visual art works" eligible for VARA protection. More particularly for this inquiry is the question whether living works of art can ever evince original expression that would garner VARA protection, or even copyright protection.

*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.\(^ {111} \) 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.

\(^ {111} \) See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991) (works must show some "creative spark" on the part of their authors to be protected by copyright).
The late art historian Ernst Gombrich defined art in the broadest terms, as anything done superbly well.\textsuperscript{112} 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 a poor 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 and it is not, 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.

We have noted that one of VARA’s objectives is to ensure for posterity a tangible record of original human expression in the visual arts works of original expression.\textsuperscript{113} 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.\textsuperscript{114} A more plausible reading of “visual art” as contemplated by VARA is one based on a belief that one of VARA’s core purposes is to protect tangible works of visual

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} “[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.”  
THE STORY OF ART (12\textsuperscript{th} ed., 1972) at 475.
\item \textsuperscript{113} See supra note 27 and accompanying text.
\item \textsuperscript{114} “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…” 17 U.S.C. §101 (2006).
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art that record significant human creativity – i.e., “the process by which a symbolic
domain in the culture is changed.” 115

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’s time painting was viewed as “vulgar to its very roots.” 116 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.” 117 We find the same perspective over a hundred years later in
connection with Dutch painting and artists now reverentially referred to as “Old
Masters”:

115 MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF
DISCOVERY AND INVENTION (1996) at 7-8 (“[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…”).

116 See Gardner, supra note 15, 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
Le vite de’ più eccellenti pittori, scultori e architetti [The Lives of the Artists] (1550).

117 Id.
… in 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.\textsuperscript{118}

Unlike Renaissance painters and sculptors, poets and musicians of that era – and previous and following eras as well -- used symbolic systems of language and music allowing them to create works more purely “of intellect.”\textsuperscript{119}

“The ignorant” in the comment by Mario Equicola alludes to the fact that only those educated in the symbols of words and notes can create – and 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

\textsuperscript{118} See Dolnick, \textit{supra} note 56, 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.

\textsuperscript{119} 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 \textit{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.
demand the same formal -- typically early -- education in forming and combining the symbols of language and music prerequisite to becoming a serious writer or musician.  

The symbols of music and language, like those of physics and other “hard” sciences, hold great expressive potential and freedom to those capable of using them. A skilled writer or musician isolated with nothing more than rudimentary materials in which to record his expression need -- indeed, must -- resort to his intellect alone to create an original work. His mastery of a symbolic language affords him immediate and universal access 

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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 (1975). I am unaware of any similar success stories involving septuagenarian symphonists, novelists, or poets who had similarly scant formal education in the respective fields of music, literature, etc.

Mihaly Csikszentmihalyi explains: “[k]nowledge mediated by symbols is extrasomatic… it must be intentionally passed on and learned… knowledge 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.” See Csikszentmihalyi, supra note 115, at 37.

Not surprisingly, apocryphal stories about playful incarceration and material deprivation to force the production of creative work, have arisen in connection with
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 symbols, it can be readily and
accurately replicated, and is less vulnerable to the corruption and disintegration that haunt
non-symbolic 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 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.123

Mozart, the most preternaturally gifted composer. See www.visit-
salzburg.net/funfacts.htm (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); www.prague.cz/bertramka/ (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 – Bella mia
fiamma, addio).

123 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
While visual artists do not use symbolic languages as do writers, mathematicians, musicians, etc., they can resort to many media to create their works, ranging from elemental chalk and paint to highly manufactured materials like plastics and moving images. 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 we will recognize the work as the 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. 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”. Florigraphy – 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 www.50states.com/flower.htm.
expression of the unique personality of the particular artist. The purpose of copyright is
to protect and encourage such revelatory expression.\textsuperscript{125}

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 these materials that works rendered in wet plaster, stone, etc. tend
not only to last longer than works created in more ephemeral media, but also to be among
those works we have traditionally prized most as records of our cultural legacy. Because
these materials hold little aesthetic interest for us apart from their application by artists,
they are unobtrusive in a finished work, allowing the artist’s expression to capture our
attention practically to the point that those viewing the work are unaware of the medium.

The media used in works like collages and mosaics tends to intrude on the viewer’s
consciousness to a greater extent than the more static media of drawings, oils,
watercolors, etc. In Picasso’s relief constructions, for instance, the viewer is more aware

\textsuperscript{125} 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 \textit{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.

\textit{Id.} at 79-80.
of the fact that there are actual bits of string, fringe, and the like incorporated into these works -- even when these media are literal representations of these objects within the image -- than one would be had Picasso painted or sketched these materials.\textsuperscript{126} This is because we realize that these media “have a life of their own” apart from the painting, to a greater extent than do the oils, charcoals, etc. of traditional paintings and drawings.

Our recognition of “found objects” -- like a piece of string -- in a work of art may generate our appreciation of the artist’s cleverness in adapting an object to such use, but it also dilutes, to varying degrees, our 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.

The mostly inert bits of wire, fringe, caning, etc. that he inserted into his works do not significantly affect our perception that Picasso is solely responsible for the aesthetic meaning of these works. The use of less static “found objects,” like urinals, and also the use of these media to occupy a considerable portion of the work’s literal and figurative space, however, raise legitimate doubts about the authorial responsibility of the putative artist, and the validity or scope of any claim he might assert in original expression associated with the work.\textsuperscript{127} This is particularly true in the case of Appropriationist

\textsuperscript{126} See Pablo Picasso, \textit{Still Life} (1914) at the Tate Collection, London.

\textsuperscript{127} See Marcel Duchamp, \textit{Fountain} (1917) (the original urinal is lost).
works that are comprised almost entirely of preexisting recorded expression by others. 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 burned flag or effigy. Appropriationist works like these, whose meaning tilts heavily towards the preexisting expression of another, are Conceptual works; the contribution of the

128 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…. [a]s 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 Lutoslawski, 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.
Appropriationist artist is mainly the realization of a notion or idea, rather than an original expression of it.

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* (1930). The preexisting work continues to exist in its permanently fixed state and one can readily compare it – or a copy -- to the later derivative work. In fact, the import of these later derivations depends entirely upon widespread awareness of the preexisting work in its original state.

*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 fixation of works created in these media that, 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. 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. 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. Like the conductor or director, the artist/gardener may carefully choose and nurture the individual contributing participants (i.e. plants, in the case of the artist/landscape architect) for his work, but the ultimate effect of the production hinges mainly upon the conduct of the individual members. We sense this fragility intuitively when we attend an opera or concert, just as we do when we see a lovely garden. Our realization of the possibility that there may be an ill or disaffected tenor or horn player among the musicians makes us savor all the

129 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.”).

130 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).

131 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).
more a successful performance. Likewise, our knowledge of plants’ susceptibility 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 and from exposure to natural elements, and man-made corrosives like air pollution. Buildings however, unlike gardens, tend to reflect ongoing the express intentions of their architects, regardless of where they are located.\(^{132}\) An architect’s work is heavily influenced by the climate, topography, geography, etc. of the location of a particular building he designs, but these forces do not dictate the parameters of the building to the same extent 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

\(^{132}\) 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).
Helsinki; Chapman Kelley’s *Wildflower Works* would swiftly vaporize into
unrecognizable desiccated and tangled dross if it were moved to either location.\(^{133}\)

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.”\(^{134}\) This language suggests that works of
landscape architecture, according to Berne, could be considered copyrightable
expression. Berne’s catholic stance on copyrightable expression notwithstanding,
the U.S. Congress prescribed more limiting language for the protection of
architectural works in the U.S., not only avoiding reference to works relating to
geography and topography, but also limiting protection of architectural works to
those rendered in buildings.\(^{135}\) This deliberate narrowing of the language of

\(^{133}\) 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, supra* note 4, at 8-9.

\(^{134}\) Berne Convention (Paris text), art. 2(1).

\(^{135}\) In 1990 Congress enacted the Architectural Copyright Protection Act (“ACPA”) that
added architectural works to the list of works expressly eligible for copyright. This act
was incorporated as Title VII of the Judicial Improvements Act of 1990 (Pub. L. No. 101-
650, §701, 104 Stat. 5089 (1990)). Like VARA -- enacted simultaneously through the
same bill – the scope of the ACPA is limited to the architectural designs of buildings.
Congress enacted both acts in the wake of the United State’s joining in 1989 the Berne
Convention. *See* Nimmer, *supra* note 19, at §2.20 (noting that domestic copyright laws
Berne implies Congress’s potential unease in flirting with the possibility of an unintentional extension of copyright protection even beyond buildings, to volatile works like landscapes in which natural media challenge our notions of fixation and human expression.  


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).

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… a whole new concept into the copyright law…” claimed Paul Goldstein in his testimony before Congress on this legislation.  See Hixon, *supra* note 135, at 634. Hixon suggests that Congress should have followed the American Institute of Architects suggestion that
V. CONCEPTUAL/LIVING WORKS OF ART: COPYRIGHT, AND MORAL RIGHTS UNDER VARA -- SNARES AND DELUSIONS?

*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, movies, etc., obviously 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.

Walter Benjamin famously asserted that the “mechanical reproduction” of an art object would tarnish the “aura” of the original work. Art critic James Gardner claims 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.

137 See *WALTER BENJAMIN, The Work of Art in the Age of Mechanical Reproduction,* in
having lived for more than a century with the results of “mechanical reproduction,” we know now that Benjamin’s thesis is “palpably wrong.”\textsuperscript{138} Indeed, the near universal availability of mechanically produced images of works by Old Masters, 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.\textsuperscript{139}

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.\textsuperscript{140} The meaning and appeal of these works are less immediately accessible than they are of representational works, and their value is enhanced by successful efforts to implant images of these works on as many minds as possible. 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 complex work one would have experienced

\textsuperscript{138} See Gardner, supra note 15, at 34.

\textsuperscript{139} Id.

\textsuperscript{140} 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. 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.
through sight, smell, and touch, during its brief “run” in the sensitive location of a psychiatric hospital. The same is true, for instance, of Christo’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 in the middle of winter.141

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.

The value of reproductions of original objects of Appropriation artists like Andy Warhol and Jeff Koons is further lessened by the fact that many of them are themselves are near-

141 See http://www.christojeanneclaude.net/tg.shtml. 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.
literal copies of existing images or objects. Paradoxically, the more literal the depiction of an existing manufactured image or object by an appropriation artist, the more closely the aesthetic value of the work is associated exclusively with the original art object rather than with reproductions of images of it. 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 economically-- insofar as they express more of Warhol’s personality than do his literal depictions of preexisting expression of others. It was, after all, Warhol’s capitalizing on the work of those who had built goodwill, or simply widespread recognition associated with certain images – e.g., trademarks, faces of famous people – that made his works popular and thereby monetarily valuable.

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.

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

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
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 raises, then, the question whether an original object by an artist may be created by assistants at a “factory,” or an overseas manufacturing plant, following the artist’s instructions.\textsuperscript{145}

\textsuperscript{145} See Amy Adler, \textit{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, \textit{Jeff Koons: King of Comic Relief}, THE INDEPENDENT, July 1, 2009 (“… in his studio in Chelsea, New York, Koons employs up to 100 studio 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
Given the consistently strong sales for the Appropriationist art works of Andy Warhol, Jeff Koons, and Damien Hirst, this significant intermediation by others in their creations does not undermine the value of these works as long as they are authoritatively ascribed to the putative well-known artist.\textsuperscript{146} Authenticity, James Gardner claims, is more valuable than quality for Postmodern art, and quality is determined by praise of a “… tepid, hedging, irresolute variety” by critics resolved “never again… to miss the boat.”\textsuperscript{147} Accordingly, the economic value of many Postmodern works is generated in large

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of politicians and entertainers who, having become famous, merely provide their name and ideas in order to sell a work ultimately created by others.

\textsuperscript{146} See Carol Vogel, \textit{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).

\textsuperscript{147} See Gardner, \textit{supra} note 15, at 19. See also Dolnick, \textit{supra} note 56 (discussing how prominent art experts in the 1930s and 40s 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”. \textit{Id.}, at 230.
measure by the artist’s “thaumaturgic touch,” and the individual or institutional owner’s sense of communion with, or at least proximity to, the personality of the artist himself.148

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

148 Gardner, supra note 15, 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 (“… said Thomas Devenish, an antiques dealer with a shop on Madison Avenue… ‘It [the collection of Jacqueline Kennedy Onassis’s personal effects] was a load of rubbish.’ 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)”); 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. I could replicate one of Jeff Koons’s balloon dogs and Jeff Koons himself would 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 appearing nowhere near the original. Accordingly, upon learning that his “Rembrandt” is a forgery, the crestfallen collector would likely feel

149 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. 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 Randy Kennedy, Scientist Presents Case Against Possible Pollocks, N.Y. TIMES, November 29, 2007.

Since time immemorial, there have 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.
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”.  

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 *Training Ground for Democracy*, there are no clear incentives to do so, economic or otherwise.  

The economic and cultural value of these works -- and of less sprawling Conceptual creations

150 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. 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 Dolnick, supra note 56. See also Gardner, supra note 15, 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.”).  

151 *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 Massachusetts Museum of Contemporary Art Foundation v. Christoph Büchel, No. 07-30089 (D. Mass., July 11, 2008). The installation was roughly the size of a football field. *Id.*
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, they will be rejected by “consumers” of art as pathetic derivations of works by artists who first successfully marketed such works. Unless I attempt to pass off – i.e., illegally -- these works as actually created by those artists who first developed the concept or conceit of using flowers, animals, or toys as a medium, my copies will likely have little negative economic effect on those I have copied. Unlike unauthorized copies of works of genuinely copyrightable expression, my copies of the Conceptual/living works may even boost the economic value of the “authentic” works by suggesting that the ideas behind these works are worth copying or imitating in the first place.

Conclusion
The preceding discussion has aired the difficulties in squaring the fixation and original expression requirements of copyright in the case of Conceptual/living works of art. The notion of extending copyright protection to these works often borders on the absurd. 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, obviously, allow these individuals to monopolize ideas and processes commonly used since time immemorial.

The awkward rapport between copyright and Conceptual/living works of art comes down to the fact that these works tend not to express the personality of a particular artist—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 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 protect the reputation and honor of artists by prohibiting conduct injurious to their unique characters as revealed in their work. As the previous discussion has argued, however, there is relatively little in most Conceptual/living works of art that is rightly perceived as the expression of an author’s personality, and thereby protected as such under moral rights. The deliberate destruction of a cultivated field of flowers in order to build a profitable strip mall might spark opprobrium like that generated by the rending of a painting by Picasso into small pieces.

\footnote{152 See supra note 35 and accompanying text.}
to realize the greatest profit from the sale of the work. Even without knowing the Picasso work – or even disliking it -- we instinctively find objectionable the intentional destruction of an expressive work by an important artist. In the case of the field of flowers, however, our distress can be attributed almost entirely to the destruction of something universally appealing produced more by natural rather than human forces. We 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 of -- or extensions of -- the artist/gardener’s unique personality.

Our discussion has also touched upon another underlying purpose of moral rights, as implemented by VARA in particular, namely the safeguarding for posterity of a record of artistic expression over time. As we have seen, however, Conceptual/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 purely intangible works using the infinitely malleable medium of digital information.

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Much of the commentary about moral rights, and VARA in particular, applauds the provision of these rights to artists in the U.S., regretting only that what VARA provides artists may be too little and too late. 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.” 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 those governed, 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.

To appreciate the potentially inhibiting effect of moral rights generally, upon the production of creative works, we need only to consider the fact that many mainstream works of art in various disciplines that we enjoy today might never have been created had

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156 See Amy Adler, Against Moral Rights 97 Cal. L. Rev. 263, 265 (2009) (“the 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”).
moral rights been in force at the time of their creation. Leopold Stokowski and Eugene Ormandy’s luscious elephantine orchestral arrangements of works by Bach, 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.\footnote{157} Significantly creative works can not only withstand, but are even enhanced by the ministrations of later artists, and even by attempts at mockery – e.g., Duchamp and Leonardo’s \textit{Mona Lisa}.\footnote{158} Conceptual/living works, like Chapman Kelley’s \textit{Wildflower Works} might 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.

\footnote{157} 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 \textit{Last Supper} for modesty’s sake by Daniele da Voltera.

\footnote{158} 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.’ \textsc{Edward Dolnick, The Forger’s Spell} (2008) 98 (quoting Hans Koningsberger, \textit{The World of Vermeer}, 1967).