2013

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

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February 29, 2012

Introduction

In the United States, copyright protection subsists from the moment of a work’s “creation.” This is a cardinal rule for protection and yet, the underlying issues of how and when “creation” occurs are rarely, if ever, explored. The theoretical predicate of the current copyright statute is that as soon as an author creates a copyrightable work of authorship and fixes that work in a tangible medium of expression, the work is entitled to protection. That said, what is the scope of copyright protection for works that are designed to be continually developing? Moreover, can fluid works of authorship even be capable of copyright protection? Not much has been said or written about how copyright should address works of authorship that are, by their very essence, continually in progress or otherwise subject to change on an ongoing basis.

Perhaps we are so accustomed to this copyright trope that we fail to contemplate sufficiently the implications of this rule of law from both a theoretical and practical perspective. On a theoretical level, the notion that a work of authorship, once “created,” never undergoes change or modification goes against the norms of creativity theory. On a practical level, certain works do indeed evolve and change, necessitating judgments about whether they should be protected and if so, in what manner. This reality is especially important in the digital age. In 2011, the Seventh Circuit grappled with copyright and moral rights issues concerning a work subject to change. In Kelley v. Chicago Park District, the court held that a living garden of wildflowers composed of two enormous elliptical flowerbeds did not embody the type of authorship with fixation

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2 This dearth of discussion is particularly surprising given that law professors spend a majority of their time writing articles that are constantly in a state of flux. Even after publication, many of our colleagues would like to take a crack at revising prior works, and some actually do so in the form of sequels or books!
3 See infra notes 54-57 and accompanying text.
capable of supporting copyright protection. As a result of this ruling, the court also held that the garden was not protectable under the Visual Artists Rights Act (VARA), which requires that a VARA work qualify for copyright protection. The case is a difficult one to the extent it requires interpretation not only of copyright law, but also of the conceptually distinct area of moral rights as embodied in VARA, the largely flawed federal statute providing the sole source of protection for moral rights in this country.

This Article relies on Kelley as a springboard to discuss certain critical issues of copyright law and policy that, until this case, have largely been overlooked in the discourse. The type of work at issue in Kelley is an example of a growing subset of Conceptual art that is composed of plants and their soil rather than conventional mediums such as canvas and paint. In thinking about how copyright law ought to address these types of works of authorship, it is useful to contemplate creativity theories from other disciplines. In recent years, much has been written about creativity theory and its implications for copyright law. My particular focus in this Article is on Jewish Process Theology, an area that to my knowledge has not been explored in the legal literature in connection with human creativity. Jewish Process Theology is an application of Process Thought, which maintains that "reality is relational" and the cosmos is "constantly interacting, constantly social, always in process, and always dynamic." According to this conceptual framework, everything is constantly in flux. This Article draws from the Jewish tradition's version of Process Thought to inform our copyright policy concerning how we define eligible works of authorship and determine their appropriate scope of protection.

Part I of this Article lays the conceptual groundwork by discussing Jewish Process Theology. It demonstrates why this philosophy provides a particularly appropriate framework for contemplating human creativity. Part II explores the challenges to the copyright landscape presented by works of authorship that change over time. The types of works of authorship falling under this category extend beyond the living garden at issue in Kelley. The issue of "change" and authorship is more important now than ever before given how the digital age is revolutionizing the way we think about authorship. Part III discusses these issues in the related but distinct context of moral rights. Our prevailing limited view of authorship is particularly troublesome when the issue is not so much

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


economic protection, but rather protection for the integrity of the work as a whole.

The goal of this Article is not prescriptive. Rather, I seek to introduce a relevant interdisciplinary concept into the discourse and use this perspective to illustrate the basic point that copyright policy and law must address more directly how authorship is defined and applied. I suggest that we need to rethink some of the fundamental assumptions we have maintained historically concerning what types of works ought to be protected, and how the scope of protection ought to be calibrated.

I. The Implications of Jewish Process Theology for Creativity Theory

Process Thought is a methodology that seeks to integrate and reconcile diverse facets of human experience such as the ethical, religious, aesthetic and scientific realms into a “coherent explanatory scheme.” Grounded in the metaphysical system of Albert North Whitehead\(^9\) and others,\(^10\) Process Thought emphasizes the developmental essence of reality and the state of becoming rather than the stasis of our existence: “[t]he particular character of every event, and consequently the world, is the result of a selective process where the relevant past is creatively brought together to become that new event. Reality is conceived as a process of creative advance in which many past events are integrated in the events of the present, and in turn are taken up by future events.”\(^11\) In the scholarly arena, the most common applications of Process Thought are in philosophy\(^12\) and theology.\(^13\)

This Part concentrates on those aspects of Jewish Process Theology that can inform our understanding of human creativity. The essence of Process Thought is that all

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\(^9\) See Alfred North Whitehead, Process and Reality (1929).


\(^11\) The Center for Process Studies, supra note 8.


of creation is constantly in process—always dynamic, always in motion. Rabbi Professor Bradley Artson, who has written about the connection between Process Thought and Jewish theology, offers the following explanation of this perspective:

We and the rest of creation are not static substances. We—and everything that exists—are events. To grasp our nature scientifically, we must simultaneously embrace different levels of being, despite our propensity, when we think of ourselves, to focus on our conscious level. But our multi-layered reality complicates any simple self-identity. If we think about humans also as collections of atoms, those atoms do not know when they are part of a particular person and when they are part of the air around us, or when they are part of nearby objects. They float in and out of what we think of as “us” all the time. We are completely permeable; in fact, we do not exist on an atomic level, yet that level is no less real than the level of our conscious thought. On a molecular and even a biological level, we also interact with our environment; inhaling air, ingesting food, absorbing heat or cold, sweating, defecating, shedding hair and skin. On the atomic, molecular, biochemical, cellular, biosystemic, bodily, and even conscious levels, we are not stable substances at all. We are constantly engaging in a give-and-take with the rest of creation, all simultaneously. We are immediately connected to all that came before us, up until this very instant, and with all that exists at this very moment. Each of us immediately contains in ourselves everything that has led to each of us.  

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14 A detailed exploration of Jewish Process Theology outside of the topic of human creativity is beyond the scope of this Article but a few words about Artson’s overall thesis is useful. He describes Process Theology as “a constellation of ideas sharing the common assertion that the world and God are in continuous dynamic change, of related interaction and becoming.” 14 Artson, supra note 7, at 3. From a theological standpoint, those who embrace Process Thought within the Jewish religion believe it offers “the opportunity to sandblast the philosophical overlay of ancient Greece and medieval Europe off the rich, burnished grain” of Torah and Rabbinics “so that we can savor the actual patterns in the living word of religion...and appreciate Judaism for what it was intended to be and truly is.” 14 id. at 4. Artson argues that despite the Jewish tradition’s tendency to portray God as “immutable, impassible, omnipotent, and omniscient,” the vision of God in the Torah and the Talmud evidences “portrayals of an engaged, relating, interacting God.” 14 id. at 6-7. In his view, “Process Thinking offers a way to recover a biblically and rabbinically resonant, dynamic articulation of God” that meshes “with contemporary scientific knowledge of the cosmos and of life.” 14 id. at 8. Indeed, the Covenant, which represents the foundational relationship between Jews and God, exemplifies Process Thought in that, like the cosmos, it “is always interactive, always connecting, and always relational.” 14 id. at 8. He also discusses Revelation, “choseness,” evil, suffering and the afterlife from the standpoint of Jewish Process Theology. 15 id. at 8-9.
Significantly, Artson invokes Process Thought to emphasize that God’s very nature is fluid and dynamic and the details of His “creating—once we move from the abstract to the concrete—are always incomplete, in process, on the way.”16 According to Process Thought, God “is to be found in the fact that a universe that is established through fixed changeless laws still generates novelty all the time; new unprecedented things that did not previously exist.”17

Artson’s application of Process Thought in connection with the Creation is steeped in both current scientific thinking as well as Biblical and rabbinic perspectives. Like most Process thinkers, his view of Creation reflects a developmental perspective rather than being characterized by a moment in time when God began to create. Drawing from the second verse in the Book of Genesis stating “the earth being unformed and void, with darkness over the surface of the deep and a wind from God sweeping over the water,”18 Artson reads the Creation narrative contextually rather than literally. He sees Divine creation as “not necessarily one of instantiating ex nihilo from without, but rather a process of mobilizing continuous self-creativity from within.”19 He demonstrates that this “richer view of continuous creation” is also reflected in numerous other Jewish sources, beginning with the very first line in Genesis that has been translated as “When God began to create heaven and earth.”20 This imagery acknowledges that God’s spirit hovered over the preexisting chaos.21

Moreover, Artson argues that Creation is not a one-time event. On the contrary, the Talmud states that God “renews every day the work of creation.”22 Moreover, the cosmos is a partner in its own creation. This concept is a bit esoteric but it can best be understood as a belief that Creation contains an element of internal power in that the universe is “co-creating”.23 “It is not that God, once and for all, speaks everything that currently lives into existence from the outside.”24 Rather, “God coaxes, summons, and invites” each stage of creation to materialize.25 In other words, Artson understands Creation as an invitation from God “into the process of becoming.”26

Artson acknowledges that his articulated theory of Creation may be disconcerting for those who understand the Old Testament through “dominant theological lenses,” but he also demonstrates how the sources in the Jewish tradition can accommodate the

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16 *Id.* at 11.
17 *Id.* at 12.
19 Artson, *supra* note 7, at 17.
20 Jewish Publication Society Genesis 1:1.
21 See Artson, *supra* note 7, at 18.
22 Babylonian Talmud, Haggigah 12b.
23 Artson, *supra* note 7, at 19.
24 *Id.* at 18.
25 *Id.* at 18.
26 *Id.* at 19.
insights of Process Thought. For my purposes, it is important to understand that Artson’s theory of the Divine Essence and Creation has significant implications for how the Jewish tradition understands human creativity. According to Rabbi Joseph Soloveitchik, a leading modern authority on Jewish law, the Torah chose to relate to man “the tale of creation” so that man could derive the law that humans are obligated to create. Thus, the Jewish religion introduced to the world that the “most fundamental principle of all is that man must create himself.” The rabbinic literature provides that “Whatever was created by God during the six days of creation needs further improvement.” Moreover, it is man’s function to partner with God in creating an improved world and to renew the cosmos with his creative enterprise. This fundamental concept also is expressed in another early rabbinic narrative involving a dialogue between the great Talmudic Sage Akibah and the evil governor of the Judean province, Tinius Rufus. Rufus challenged Akibah by asking whether the work of God or man is more beautiful. Akibah replied that man’s work is better with respect to those things where his art is effective (as opposed to those matters such as the creation of heaven and earth which man cannot imitate). Pressing further, Rufus asked why male babies are not already born circumcised and Akibah replied they do not “come out already circumcised because God gave the commandments to Israel in order to refine them.”

According to this perspective, the world “is partially self-created and self-creating,” and therefore, “the cosmos is a partner with God in its own becoming” and humans “are partners with the cosmos and with God in our own becoming.” Thus, since Jewish Process Theology understands man as having the choice to do God’s will, or not, God is reaffirmed as “a dynamic, relating God who suffers, a God who becomes vulnerable in having created us.” We see an example of this perspective found in the imagery about Noah and the Great Flood: the text in Genesis recounts that God experienced “heartfelt sadness.” Rashi the celebrated eleventh-century French biblical commentator, explains this phrase as meaning that God, in preparing for the Flood, “mourned over the loss of His handiwork.” The sense of relation—“of a dynamic

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27 See id. at 20-22.
28 According to Soloveitchik, “the peak of religious ethical perfection to which Judaism aspires is man as creator.” JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 101 (1983).
29 Id. at 109.
31 SOLOVEITCHIK, supra note 28, at 81. According to Jewish law, man was not intended to be a passive recipient of the Torah, but rather “a partner with the Almighty in the act of creation.”
32 Tanhumah Tazria 5.
33 Artson, supra note 7, at 9.
34 Id. at 14.
connection between God, humanity, and all creation” lies at the heart of Jewish Process Theology in its definition of how God and man relate to one another.

The way in which humans partner with and relate to God according to Jewish Process Theology has important implications for human creative enterprise. A traditional Jewish approach to artistic creation emphasizes that the underlying motivations for physical creative action are rooted in the concept of mirroring the Divine. The Creation narrative in Genesis states that: “God created man in His image, in the image of God He created him.” God commanded man to “fill the earth and master it,” Through this language, the text illustrates that man’s capacity for artistic creation mirrors or imitates God’s creative capacity. Soloveitchik has argued that the term “image of God” as used in this narrative underscores “man’s striving and ability to become a creator.” Even historians who are not writing about the Bible from a theological perspective view this language as furnishing a path leading man to regard himself as a potential creator, thus underscoring an unprecedented parallel between God and humanity.

Jewish theology also teaches that man’s speech is reflective of his creative capacity in the same way that God’s speech reveals His creative capacity. In describing the Divine act of creation, the Torah does not say that God made a world, but that He spoke the world into existence by preceding every creative act by saying what He will do. For example, “God said, ‘Let there be light,’ and there was light.” These “speechings” are referred to as the “Ten Utterances” with which, according to the text, God created the world. Later in Genesis, the text states that God “blew into [Adam’s] nostrils the breath of life, and man became a living being.” The renowned Jewish commentator

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38 Etz Hayim, supra note 18, at 1394 (corresponds to Genesis 1:27).
39 Id. (corresponds to Genesis 1:28).
40 Cf. Mark Rose, Copyright and Its Metaphors, 50 UCLA L. REV. 1, 11 (2002) (noting that “some creative spark . . . if unpacked could be shown to carry a numinous aura evocative ultimately of the original divine act of creation itself.”). Id.
41 Soloveitchik, supra note 28, at 12.
43 Eliezer's Story, WEEK REV. (Vaad Hanochos Hatmimim, Brooklyn N.Y.), Nov. 22, 1997.
44 The Stone Edition, supra note 35, at 3 (corresponds to Genesis 1:3).
45 See Berel Wein, Pirkei Avos—Teaching For Our Times 184–85 (2003). See also Artson, supra note 7, at 18 (“By the end of the first chapter of Genesis, God has spoken creation into a symphony of diverse becoming.”). Id.
46 Rashi, supra note 36, at 23–24 (corresponds to Genesis 2:7); see also Rabbi Yaakov Culi, The Torah Anthology MeAm Lo'ez Book One 245 (Aryeh Kaplan trans., 1977); cf. Maurice Merleau-Ponty, Phenomenology of Perception 178–79 (1976) (likening authentic speech, that which is the creative, original descriptions of feelings, to the expression of artists); Russ VerSteeg, Defining "Author" for Purposes of
Nahmanides interprets this passage as meaning that God blew his own breath into Adam's nostrils. God's breath is understood to mean "the soul of life," thus establishing the way in which the creation of human beings differs from all other creations. Moreover, the purpose of this special soul was to enable man to speak and express himself. These vivid images of how man was created to mirror God by using his own creative capacities furnishes a striking parallel between God's connection to man and man's connection to his own works of creation. This parallel has been described as the "parental metaphor of authorship." Again, the sense of a dynamic and ever-changing "relationship" is what supports man's relationship to God, and man's relationship to the products of his own creativity.

Understanding human creativity through the lens of Jewish Process Theology illustrates that the characteristic ingredients of both Divine and human creativity are fluidity, partnership, and relationship. Both creativity theory and first-hand narratives of human creators support this description of human output. The process of human creativity is fluid and developmental. Individual creators attest to the "gestational period" underscoring creativity—that timeframe in which the creative juices flow.


47 Nahmanides, who lived in the thirteenth century, is also referred to as the Ramban.


49 Cull, supra note 46, at 245; Rashi, supra note 36, at 23.

50 According to classical Jewish belief, although man was created alive, his true form was not attained until God took this further step of infusing him with the soul. Cull, supra note 46, at 245, see also Ramban, supra note 48, at 66 (discussing the creation of man's soul).

51 Onkelos, the Roman convert to Judaism who wrote an Aramaic translation of the Five Books of Moses in the second century, translates the words "living being" found in the second Creation narrative as "a speaking spirit." The Stone Edition, supra note 35, at 11 (commentary on Genesis 2:7). Onkelos thus describes God's endowing man with the ability to speak as the purpose of this special soul. Rashi explains that the soul of man is more alive than the souls of animals because man's soul contains the powers of speech and reasoning. Rashi, supra note 36, at 23–24 (corresponds to Genesis 2:7); see also Cull, supra note 48, at 245; cf. Merleau-Ponty, supra note 46, at 178–79 (likening authentic speech, that which is the creative, original descriptions of feelings, to the expression of artists); Russ VerSteeg, supra note 46, at 1323, 1339, 1365 (1996) (affirming communication as the essential component of authorship).

52 Kwall, supra note 37, at 13-14.

53 In this regard, Artson has observed: "Our suffering pains God. God is diminished by our not rising to the best choice. The God of Israel is not merely an unchanging, external perfection (although there is an aspect of God that is unchanging and eternal); we encounter the Divine in the dynamism of brit, relationship ". Artson, supra note 7, at 15.
internally, almost imperceptibly. This inner labor—termed “the unconscious machine” by mathematician Henri Poincaré — is what creators underscore as the pivotal component of creativity.\textsuperscript{54} Moreover, testimonial accounts of creators also illustrate that creativity entails a partnership between the author and the work itself. Bertrand Russell emphasized “the fruitless effort he used to expend in trying to push his creative work to completion by sheer force of will before he discovered the necessity of waiting for it to find its own subconscious development.”\textsuperscript{55} Author Madeleine L’Engel wrote that in order for an artist to realize her goals, she must allow the work to take over so that the artist can “get out of the way” and not interfere.\textsuperscript{56}

These first-hand testimonials by creators from various disciplines are reinforced by current psychological theories that understand human creativity as featuring an element of artistic self-transcendence among its multifaceted components. Modern scholars of creativity believe self-transcendence is critical to the development of an artistic soul because it reaffirms that, to maximize creative output, an artist must get beyond herself and become a partner with her work. Thus, C.G. Jung once remarked: “The work in process becomes the poet’s fate and determines his psychic development. It is not Goethe who creates Faust, but Faust who creates Goethe.”\textsuperscript{57} The idea that an artist must get beyond her own ego and “listen” to her work embodies the very same partnership concept as Artson describes in discussing God’s creation of the Universe. Humans, who according to Jewish tradition are commanded to mirror God and create, must similarly partner with their works of authorship in order to maximize their creative potential. Even man’s need for self-transcendence in human creativity has a parallel in Divine creation. Recall that according to the account of Creation in Genesis, God spoke the world into existence.\textsuperscript{58} According to the Jewish tradition, for both God and man, speech is singularly reflective of the ability to transcend the self and relate to someone or something else.\textsuperscript{59}

The foregoing author narratives reveal that the partnership component of creativity that is emphasized in Process Thought has relevance for any creative work because “partnership” encompasses the idea of self-transcendence, which requires the creator to submerge her ego and pay attention to the voice of the work itself. Still, the idea of a work being a “partner” in its own creation is especially relevant for works involving random or accidental moments, or works resulting in part from the forces of nature. When I first began to write about non-economic motivations for human creativity, I had a difficult time reconciling the motivations that I saw as reflective of the author’s intrinsic creative process with these other forms of non-intentional expression.\textsuperscript{60} I now believe that Process Theology provides a valuable way to reconcile these two types of

\textsuperscript{54} For further development of this point, see KWALL, supra note 37, at 12.
\textsuperscript{55} Id. at 12 (quoting Bertrand Russell).
\textsuperscript{56} Id. at 17.
\textsuperscript{57} Id. at 16. See also id. at 15-17 for further examples.
\textsuperscript{58} See supra notes 22-26 and accompanying text.
\textsuperscript{59} See Eliezer’s Story. supra note 43 at 57-58.
\textsuperscript{60} KWALL, supra note 37, at 21.
human creativity. Indeed, if human creativity is seen as a “partnership” between the creator and the work, different works will fall on different places along the partnership spectrum. Perhaps it can be said that works of authorship that are not created with a strong degree of the author’s intentionality do not reflect as strong a sense of partnership as other types of works, but they nonetheless encompass a degree of mutuality in that the human author still is allowing these “chance” or partially natural works to emerge and develop.61

The text of Genesis also reveals that during the period God created the world, He evaluated his activity at the end of each day.62 Speaking from a Process Theology perspective, Robert Gnuse has remarked that “[t]he statement that God found the creative act of each specific day to be good is highly important, for it means that at each stage of the creative endeavor God stopped and took account of what was unfolding.”63 According to this perspective, God also functioned like an editor who viewed and reviewed daily. This imagery underscores both the relational and the fluid essence of Divine creativity in keeping with Process Theology. The parallel for human creativity is quite clear. Most human creators experience the same type of ongoing evaluative process, resulting in works that evolve and progress.

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

II. Applying Process Theology to Authorship and Fixation

Chapman Kelley creates representational paintings of landscapes and flowers. In 1984, he installed Wildflower Works in Chicago’s Grant Park. The work is described as “two enormous elliptical flower beds, each nearly as big as a football field, featuring a variety of native wildflowers and edged with borders of gravel and steel.”64 The work was promoted as “living art” and was widely acclaimed on both a critical and popular

61 This may be what Justin Hughes had in mind when he posited that personhood interests justifying protection of some type “can arise from simply being the human source of an intellectual property res.” See Kwail, supra note 37, at 21 (quoting Justin Hughes).

62 Genesis 1:4, 10, 12, 18, 21 and 25.


64 Kelley v. Chicago Park District, 635 F.3d 290, 291 (7th Cir. 2011).
level. Kelley, along with a group of volunteers, tended the garden, pruned and replanted it as needed. In 2004, however, the Chicago Park District drastically modified the garden, reduced it to less than half of its original size, changed some of the material and reconfigured the flower beds. Kelley sued the Park District for violating his moral right of integrity under VARA.

The district court did not grant Kelley his requested relief. The court held that his work could be considered as both a painting and a sculpture under VARA, and therefore met the statutory requirements of a work of visual art under VARA. Oddly, however, the court denied relief to Kelley on the ground that the work also lacked sufficiently originality to be considered copyrightable under the copyright statute. The district court’s ruling in this regard was completely flawed because works cannot be protected under VARA if they do not otherwise qualify for copyright protection.

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

The Seventh Circuit correctly held that in order to qualify for moral rights protection under VARA, a work must first satisfy basic copyright requirements. Almost everywhere, moral rights apply to works that are copyrightable, or in the context of civil

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65 Id.
66 Kelley v. Chicago Park District, No. 04 C 07715, 2008 WL 4449886, at *6 (N.D. Ill. Sept. 29, 2008). The VARA aspect of the decision also included an issue concerning site-specific art. The district court concluded that Kelley’s work was site-specific art and therefore, following the First Circuit’s opinion in Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, (1st Cir. 2006), it was also categorically excluded from protection under VARA. Given the Seventh Circuit’s disposition on the copyrightability of Wildflower Works, it did not need to address the issue of whether the work was site-specific art and the impact of this determination. The appellate court did, however, appear to accept the work’s classification as site-specific art, but questioned the district conclusion that as such, it is categorically excluded from protection under VARA. See Kelley, 635 F.3d 290, at 306-07. The case also involved a breach of contract claim on which the district court ruled in favor of Kelley but awarded nominal damages in the amount of $1.00. The Seventh Circuit reversed on the breach of contract claim, thus holding the Park District was entitled to prevail in this matter. This Article does not address either the site-specific art or the contract claim issues.
law systems, to works that are capable of giving rise to economic rights. Moral rights typically are contained in the copyright statutes of particular jurisdictions, as is the case in the United States. Thus, the district court’s conclusion that Wildflower Works qualifies as a work of visual art under VARA but lacks originality under copyright law simply made no sense. The Seventh Circuit correctly recognized this flaw in the lower court’s opinion. The Seventh Circuit did not evidence concern about whether Wildflower Works satisfied the relatively low standard for originality under copyright law. Instead, the court stated that “[t]he real impediment to copyright here is not that Wildflower Works fails the test for originality but that a living garden lacks the kind of authorship and stable fixation normally required to support copyright.”

Interestingly, the court acknowledged that “copyright’s prerequisites of authorship and fixation are broadly defined.” Still, the Seventh Circuit’s objections to the copyrightability of Wildflower Works appear to be grounded on two somewhat related rationales: 1) the work is “alive and inherently changeable, not fixed,” and 2) the work lacks human authorship because its appearance is dependent on the forces of nature. Moreover, the changeability quality appears to be attributable to the forces of nature that, according to the court, are primarily responsible for shaping the garden’s appearance. Since the Seventh Circuit understands authorship “as an entirely human endeavor,” it posits that “works owing their form to the forces of nature cannot be copyrighted.” Moreover, the court observed that “a garden is simply too changeable to satisfy the primary purpose of fixation; its appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement.” The court obviously was troubled with issues of proof and perceived practicality:

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

According to the court’s definition of authorship, that which is in a state of perpetual change is excluded from the scope of copyright protection, given the fixation requirement. The fact that the garden’s “nature is one of dynamic change” means that copyright protection fails.

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68 KWAILL, supra note 37, at 40. VARA is located in the U.S. Copyright statute, 17 U.S.C § 106A (1990).
69 Id. at 26 (noting that “VARA supplements general copyright protection.”).
70 Kelley, 635 F.3d at 303.
71 Id. at 304.
72 Id.
73 Id. at 304.
74 Id. at 304-05.
75 Id. at 305.
76 Id.
The court noted other examples of copyrighted works that are not entirely fixed or stable that it believed were somehow distinguishable from Wildflower Works. \(^77\) It therefore acknowledged that copyright does not attach "only to works that are static or fully permanent" and denied "that artists who incorporate natural or living elements in their work can never claim copyright." \(^78\) In acknowledging the possibility that some changeable works can qualify for protection, the court leaves the copyright window open at least a crack to include some types of works that are considered less traditionally stable.

In sum, the Seventh Circuit couched its first objection to the copyrightability of Wildflower Works on the dual grounds of lack of fixation and the work’s inherent fluidity; its second objection is based on the contribution of non-human elements to the work. In contrast, I believe the fixation and inherent fluidity components of the court’s first objection present two distinct issues that need to be addressed separately in the analysis. Once the parameters of both of these elements are more properly understood, the relevance of Process Theology as developed in Part I can be introduced. Process Theology can also facilitate a dialogue concerning the issue of non-human authorship upon which the court’s second objection hinges.

**Fixation and the Writing Requirement**

In *Kelley*, the Seventh Circuit observed that "fixation" is an explicit constitutional requirement in light of the use of the term "writings" in the Copyright Clause. \(^79\) Nevertheless, the original meaning of this term is not clear:

The constitutional grant of authority concerning copyrights does not require Congress to act with respect to all categories of materials that may meet the constitutional definitions. Instead, "whether any specific category of 'Writings' is to be brought within the purview of the federal statutory scheme is left to the discretion of Congress." In discussing the term *writings* in this context in 1879, the Supreme Court in the *Trademark Cases* stated that the

\(^77\) *Id.* at 305 (distinguishing Wildflower Works from the Crown Fountain, a sculpture whose surfaces "are embedded with LED screens that replay recorded video images of the faces of 1,000 Chicagoans", on the basis that "the Copyright Act specifically contemplates works that incorporate or consist of sounds or images that are broadcast or transmitted electronically, such as telecasts of sporting events or other live performances, video games, and the like."). *Id.* The Seventh Circuit also distinguished Wildflower Works from a puppy-shaped metal sculpture covered in blooming flowers, because "[Wildflower Works] is quintessentially a garden; 'Puppy' is not." *Id.* at 305-06.

\(^78\) *Id.* at 305.

\(^79\) *Id.* at 393 ("[un]like originality, authorship and fixation are explicit constitutional requirements; the Copyright Clause empowers Congress to secure for "authors" exclusive rights in their "writings" ") (citing the Copyright Clause of the Constitution, U.S. CONST. art I, § 8, cl. 8).
writings that are to be protected are the “fruits of intellectual labor.” Moreover, in *Goldstein v. California*, the Supreme Court emphasized that the “history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy.”

Based on this rationale, I have argued that the tremendous impact of commercial celebrity endorsements on our consumer culture provides additional support for recognizing celebrity personas as within the scope of “writings” within the meaning of the Copyright Clause. If the national importance of any given product is a factor to consider in whether a particular work is deemed a “writing” within the meaning of the Copyright Clause, the positive environmental impact of Wildflower Works might well be something to consider. Thus understood, the Constitutional requirement of a “writing” may be understood as encompassing a concern with appropriate copyrightable subject matter.

Thus, I would argue that the 1976 Act’s concept of “fixation” is not necessarily coterminous with the Constitutional predicate of a “writing.” As discussed, the Constitution’s “writing” requirement may stem from a concern with subject matter whereas the statutory requirement that a copyrightable work be “fixed within a tangible medium of expression” arguably embodies a concern for proof in infringement situations. Specifically, the fixation requirement provides notice to the public of exactly what falls within the scope of the copyright, and in this way, functions to “mark off” the protected work. The Seventh Circuit clearly recognized this when it articulated concern.

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80 Kwall, supra note 37, at 111-112 (case citations omitted from quote).
81 Id. at 112.
82 According to the Seventh Circuit, “[i]n promoting Wildflower Works, Kelley variously described the project as a ‘living wildflower painting,’” a “study on wildflower landscape and management,” and “a new vegetative management system that beautifies [the] landscape economically with low-maintenance wildflowers.” Kelley, 635 F.3d at 309.
83 For a similar argument on this point, see Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 844-46, 853 (2009). Heymann’s thesis is that the fixation requirement represents not a Constitutional mandate but rather “a deliberate decision on the part of Congress to afford protection only to certain types of artistic endeavors—those that can be propertized and thus subject to the economic incentives at the heart of copyright law.” Id. at 849.
84 It is also significant that the Berne Convention for the Protection of Literary and Artistic Works, which the United States joined in 1988, gives participating countries the option of whether to include a fixation requirement in their copyright laws. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, art 2(2) (“It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”).
with when a fluid work is deemed "fixed" for purposes of demonstrating infringement.\textsuperscript{85}\nIn discussing the statutory language of the 1976 Act, the House Report stated that "[i]t makes no difference what the form, manner or medium of fixation may be..."\textsuperscript{86} Clearly Wildflower Works is capable of being "fixed" in any number of ways to satisfy the statute's tangibility requirement.\textsuperscript{87}

Fixation can occur at various stages of a work's development and therefore, this issue should not be conflated with the fluid nature of a given work. Indeed, the definitional section of the Copyright Act provides that "a work is 'created' when it is fixed in a copy or phonorecord for the first time; "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work."\textsuperscript{88} As the copyright statute itself recognizes, works evolve over a period of time, and the fixation requirement is not intended to require that a work be "frozen" at any given point in time in order to pass constitutional muster.\textsuperscript{89}

\textsuperscript{85} See supra note 74.
\textsuperscript{87} For a work to be 'fixed', the Copyright Act requires that it be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1978) (emphasis added). The scope of this durational requirement has been the subject of much litigation, especially in the age of digital copyright infringement. See Mai Systems Corp. v. Peak Computer, 991 F.2d 511 (9th Cir. 1993) (holding that loading a computer program into RAM constituted fixation because it was capable of being perceived by computer technicians for diagnostic purposes.); CoStar Group v. LoopNet, 373 F.3d 544, 551 (4th Cir. 2004) (holding that an Internet Service Provider could not be held liable for direct copyright infringement when its servers were used to upload infringing photographs, partly because its servers were mere conduits for transmission and "[w]hile temporary electronic copies may be made in this transmission process, they would appear not to be "fixed" in the sense that they are 'of more than transitory duration'."). Cartoon Network v. CSC Holdings, 536 F.3d 121 (2d Cir. 2008), cert. denied. Cable News Network, Inc. v. CSC Holdings, 129 S. Ct. 2890 (2009) (holding that data stored for 1.2 seconds in a cable company's Broadband Media Router was not sufficiently fixed so as to constitute a 'copy'). For an in-depth discussion of this issue, see Aaron Perzanowski, Fixing RAM Copies, 104 Northwestern Univ. L. Rev. 1067 (2010).
\textsuperscript{89} Cf. Heymann, supra note 83, at 858-59 (critiquing the fixation requirement on the ground that "when creators seek to avail themselves of copyright protection, they must choose a particular performance of creative output that becomes the fixed work."). With respect to copyrighted Internet websites, the Copyright Office has taken the position that "copyrightable revisions to online works that are published on separate days must each be registered individually." See U.S. Copyright Office, Circular66: Copyright Registration for Online Works, May, 2009, http://www.copyright.gov/circs/cir66.pdf. According to the Amicus Brief filed by the Volunteer Lawyers for the Arts and the Arts & Business Council of Greater Boston, although "this statement suggests that the registration of a
There may be some types of fluid works for which fixation can be problematic. Performance art, which interacts directly with the viewer and the exhibition space, comes to mind because its very essence depends upon constant and significant degrees of fluidity from one performance to another. That said, however, some types of performance art may represent one end of the spectrum of fluid works; as discussed below, not all works that are characterized by a sense of fluidity present the same challenges for fixation.

The Seventh Circuit believed that Wildflower Works was so fluid that it should be barred from copyright protection on this ground. Clearly the degree of fluidity of a given work should be taken into account in determining its copyrightability, but it should not be the case that a degree of fluidity should, in and of itself, be a bar to copyright protection based on the work’s inability to satisfy the fixation requirement. Process theology emphasizes that everything changes over time. This reality introduces the possibility of incorporating a standard of “substantial compliance” for fixation, which could be useful for works with more pronounced degrees of fluidity than more conventional works. For example, if a given performance artist typically introduces minimal variations into her work from day to day, an argument probably could be made that the fixation of one performance could satisfy fixation of the work generally under a substantial compliance standard for fixation. Such a fixation standard would entitle a particular performance to protection and would satisfy fixation for other performances to the extent it could be established that only minimal differences exist in other performances. Moreover, the “film” of any given performance would satisfy the Constitution’s requirement of a writing under this approach. The copyright statute already evidences this approach to fixation by extending its protection to choreography, which is specifically protected under the statute. Choreography satisfies the fixation requirement through video tape or film, or through labanotation, a method of recording dance movements on paper that is similar to the way music is recorded on a staff. Yet, any given performance of a dance will vary from time to time. In much the same way, works such as Wildflower Works could be fixed by a written document with a detailed plan for what the garden would entail—very similar to architectural plans that are also protected under copyright law. The fact that the precise contents of the garden may change from time to time does not make the garden outside the bounds of copyright law any more than choreography that

91 See generally Anne Weinhardt, Copyright Infringement of Choreography: The Legal Aspects of Fixation, 13 J. CORP. L. 839, 850 (1988).
also can change in any given performance.93 Under this approach, the real issue would come down to the question of the extent to which the fluidity of a given work excludes protection on subject matter grounds, not on grounds of lack of fixation.

Fluidity and Process Theology

The foregoing discussion argues that satisfaction of the fixation requirement, as a concept distinct from the fluidity of a given work, should not be an insurmountable obstacle for most works of authorship. This raises the question of how to address the question of fluidity, apart from the issue of fixation. In approaching this issue, it is useful to consider the law concerning copyright protection for other types of works that may evolve over time. Fictional characters represent an interesting example of this genre. The copyright statute does not contain express protection for fictional characters and commentators have differed in their views of whether such protection is appropriate.94 By addressing the question of literary characters specifically, the Ninth Circuit devised a rigorous test95 requiring that such characters could not be granted protection unless they "constituted the story being told."96 What this means, however, is not entirely clear according to either the court or subsequent interpretations,97 but a reasonable

93 Cf. Heymann, supra note 83, at 854 (noting that "[t]here is no requirement that the first fixation of the work (the 'original') exist in any form at the time of the infringement or the litigation; indeed, the post-creation destruction of the original fixation does not affect the status of the copyright in the work at all.");
94 See David Feldman, Finding a Home for Fictional Characters: A Proposal for Change in Copyright Protection, 78 Cal. L. Rev. 687 (1990) (arguing that fictional characters should be expressly protected by the Copyright Act because courts often confuse the 'copyrightability' inquiry with the infringement inquiry when characters are at issue); compare Leslie A. Kurtz, The Independent Legal Lives of Fictional Characters, 1986 Wis. L. Rev. 489 (1986) (acknowledging that fictional characters should be copyrightable, but arguing that courts should analyze character infringement cases in terms of the similarities between the infringed and allegedly infringing characters rather than the copyrightability of the protected character.) Id.
96 Warner Bros. Pictures v. Columbia Broadcasting System, Inc., 216 F.2d 945, 950 (9th Cir. 1954) (also known as the Sam Spade case).
97 The only guidance provided by the Warner Brothers court with respect to the application of "the story being told" test is that "if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright." Warner Bros. Pictures v. Columbia Broadcasting System, Inc., 216 F.2d 945, 950 (1954), cert. denied, 348 U.S. 971 (1955). See also Anderson, 11 U.S.P.Q.2d at 1168 ("Air Pirates can be interpreted as either attempting to harmonize granting copyright protection to graphic characters with the 'story being told' test enunciated in the Sam Spade case or narrowing the 'story being told' test to characters in literary works.")
interpretation is that literary characters only receive protection to the extent they embody the story itself to such a degree that the copyrightable story and the character itself become one. The law does seem to reflect a requirement that characters be sufficiently delineated in order to receive copyright protection.\(^{98}\) Still, this legal position ignores the reality that, no matter how delineated a given character may be—either physically or through a word portrait—characters change and develop over time and often take shape over the course of several works. The fact that a character may be delineated one way at one point in time does not mean that it becomes “fixed” forever in this format; looks can change and so can personalities. The necessity of taking character fluidity into account in infringement situations is underscored by the fact that some courts have demonstrated a willingness to protect the personality traits of fictional and graphic characters that are sufficiently distinctive to merit protection.\(^{99}\)

Thus, as both Process Thought and the copyright law concerning characters illustrate, change is a fact of life. Indeed, “all works of art succumb to the forces of nature and change over time.”\(^{100}\) A system of copyright protection that fails to consider the relevance of fluidity of works of authorship is out of step with how creation occurs in theory and practice. Perhaps because of the fixation requirement in the United States, the “lore” of copyright law tends to assume stability of eligible works. I would suggest that this narrative of copyright law is far less reflective of reality than we might otherwise think, especially in a digital era when change is so easily accomplished. Margaret Chon has studied the Chain Art project, one interesting example of fluidity in the digital era. This work was a collaborationist category of visual digital art housed on a Web site whose design and execution “depended on the deliberate change by its many authors of a

\(^{98}\) Anderson, 11 U.S.P.Q.2d at 1166 (“This Court has no difficulty ruling as a matter of law that the Rocky characters are delineated so extensively that they are protected from bodily appropriation when taken as a group and transposed into a sequel by another author.”).

\(^{99}\) See, e.g., Warner Bros. v. American Broadcasting Companies, 720 F.2d 231, 243 (2d Cir. 1983) (examining both physical and personality traits of fictional Superhero characters at issue); Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir.), cert. denied, 459 U.S. 880 (1982) (holding that the video game K.C. Munchkin infringed upon PACMAN’s copyright based not only on graphic similarities but also on similarities in the characters’ portrayal); Halicki Films, LLC v. Sanderson Sales and Marketing, 547 F.3d 1213 (9th Cir. 2008) (recognizing protection for the physical and conceptual qualities of the character Eleanor the automobile); Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004) (noting that an otherwise stock comic book character’s “speech” and other “expressive content” ultimately contributed to its being copyrightable.)

\(^{100}\) Brief of Blane De St. Croix, supra note 89, at 7. An interesting—and perhaps extreme—illustration of this point is furnished by Christo’s “Running Fence,” which consists of an 18-foot tall “fence” composed of white nylon fabric, “stretched over 24.5 miles of undulating hillside terrain, where the appearance of the fence was affected by wind and light.” DAVID LANGE, ET. AL., INTELLECTUAL PROPERTY CASES AND MATERIALS 863 (3d ed. 2007).
single author’s original image.”\textsuperscript{101} Moreover, the case law involving video games presents another genre of copyrightable works whose content is subject to variability.\textsuperscript{102}

The issues of eligibility for copyright protection should be seen as distinct from how to prove infringement of fluid works in the context of an actual case. In \textit{Anderson v. Stallone},\textsuperscript{103} a case involving copyright protection for the \textit{Rocky} movie characters, the court quoted the Nimmer treatise for the proposition that the question whether characters are copyrightable is “more properly framed [in terms of] ...the degree of substantial similarity required to constitute infringement rather than in terms of copyrightability per se.”\textsuperscript{104} In my view, this quote probably means that since characters are not explicitly protected by copyright law, the extent to which they can be protected probably can only be determined in the context of an overall infringement inquiry with respect to the work in which the character appears.\textsuperscript{105}

Significantly, an approach that embraces fluidity as a characteristic of copyrightable subject matter is more consistent with the practice of artistic creativity and the belief that change is inevitable. This belief is illuminated by the underlying theories of Process Thought and Theology. Once it is accepted that fluidity does not necessarily preclude copyright protection, the subject matter issue should depend on whether a given work constitutes an “original work of authorship” as required by the copyright law.\textsuperscript{106} Moreover, if fluid works are accorded protection under copyright law, the extent to which they will be protected in practice will depend on how similar an allegedly infringing work appears to the work being infringed. Copyright law contains precedent for this approach with respect to less conventionally expressive subject matter. For example, in \textit{Kregos v. Associated Press},\textsuperscript{107} the Second Circuit concluded that the plaintiff’s selection of baseball

\textsuperscript{101} Margaret Chon, \textit{New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship}, 75 Or. L. Rev. 257, 266 (1996). Chon also observed that “the notion of fluidity...is crucial to a networked environment.”). \textit{Id.} at 270.

\textsuperscript{102} See, e.g., Stern Electronics, Inc. v. Kaufman, 669 F.2d 852 (2nd Cir. 1982) (court affirmed copyrightability of video game despite variability of images on the screen depending on actions of a given player); M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 433 (4th Cir. 1986) (noting that, “[e]ven though “audiovisual works” are proper subjects for copyright, the actual copyrighting of such audiovisual works and their qualifying for copyright protection depends on whether the works meet the tests for originality and fixation ... .”); Williams Electronics v. Artic Intern., 685 F.2d 870, 873-74 (3rd Cir. 1982) (rejecting the argument that video game graphics are ‘transient’ and therefore not fixed for purposes of copyright protection.); Midway Mfg. Co. v. Dirkschneider, 543 F. Supp 466, 480 (D. Neb. 1981) (holding that Plaintiff’s coin-operated video games, an “audiovisual work”, were fixed in printed circuit boards—“tangible objects from which the audiovisual works may be perceived for a period of time more than transitory.”).

\textsuperscript{103} Anderson, 11 U.S.P.Q.2d 1161.

\textsuperscript{104} \textit{Id.} at 7 (quoting J. M. Nimmer, \textit{The Law of Copyright}, § 2.12, p. 2-171.).

\textsuperscript{105} See generally Feldman, supra note 94.


statistics in a pitching form embodied sufficient originality and creativity as a matter of law to withstand denying summary judgment to the defendant in the plaintiff's copyright infringement action.108 Still, the court warned that the plaintiff, if he prevails at trial regarding the originality and creativity requirements for copyright protection, will only be able to obtain copyright protection commensurate with the type of work at issue.109 Ultimately, the defendant’s competing compilation escaped liability because the court determined that its selection of statistics was sufficiently different from that of the plaintiff's.110 The Kregos litigation provides an example of how the approach articulated by Nimmer in the context of characters has been used in determining infringement with respect to other types of copyrighted works whose subject matter may be less clear-cut than works perceived as more conventional copyrighted works. Simply put, whether a work is copyrightable in the first place should be understood as a distinct issue from how to prove infringement in any given situation.

Non-Human Elements of Authorship

Works such as Wildflower Works raise the ultimate issue of what it means to “author” a work. In the Amicus Brief to the United States Supreme Court submitted by the Volunteer Lawyers for the Arts and the Arts & Business Council of Greater Boston, the attorneys for Amici Curiae wrote: “On authorship, the Seventh Circuit drew a bright line in the sand, stating that ‘works owing their form to the forces of nature cannot be copyrighted.’ irrespective of what an artist may do to control the visual perception of his subject.”111

Although “authorship” lies at the heart of copyright law, the governing law appears to be easily stated but difficult to apply. In Burrow-Giles Lithographic Co. v. Sarony,112 the Supreme Court defined an “author” with the often-quoted language: “he to

108 Id. at 704 (“it cannot be said as a matter of law that in selecting the nine items for his pitching form out of the universe of available data, Kregos has failed to display enough selectivity to satisfy the requirement of originality.”).
109 Id. at 709 (“If Kregos prevails at trial on the factual issues of originality and creativity, he will be entitled to protection only against infringement of the protectable features of his form.”). Specifically, the plaintiff will only be able to enjoin infringements of his selection of statistics, but not his arrangement.
110 On remand, the district held that the three-year statute of limitations contained in §507 barred a cause of action based on one of the defendant’s forms. With respect to the more recent form, the court held, as a matter of law, that the defendant’s form was not substantially similar to the plaintiff’s form, and therefore granted the defendant’s motion for summary judgment on the copyright claims. See Kregos v. Associated Press, 795 F. Supp. 1325 (S.D.N.Y. 1992), aff’d, 3 F.3d 656 (2d Cir. 1993), cert. denied, 510 U.S. 1112 (1994).
111 Brief for Blane De St. Croix, supra note 89, at 5 (quoting Kelley, 635 F.3d 290, at 304).
112 111 U.S. 53 (1884).
whom anything owes its origin; originator; maker." The problem, however, is that “he to whom anything owes its origin” can mean different things in different contexts. Significantly, is “origin” to be understood as “physical origin” or the “origin” that results when an individual embraces the work intellectually, emotionally, or both? It is possible to understand the difference between “physical origin” as product centered, and the “emotional or intellectual” origin as process centered.

Although physical origin is more commonly discussed, both the case law and legal commentary contain support for the process view of “origin” that entails the author’s intellectual or emotional validation of the work. One famous example of this perspective appears in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*\(^{114}\) “A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the ‘author’ may adopt it as his and copyright it.”\(^{115}\) Laura Heymann explicitly discusses this process perspective in her work on authorship. Her focus seems to be on the creator’s “decision to assert that the work created is attributable to oneself.”\(^{116}\)

[T]he Copyright Act’s “author” is the individual (or entity) who names herself as owner of the intellectual content of the work—who looks at the paint inadvertently splattered on the canvas or reviews the draft prepared by an assistant and declares, “That is mine.”\(^{117}\)

Heymann boldly concludes that “[c]opyright law might...better accomplish its goals if it took better account of the activities and interests of authors rather than focusing on the products of their creativity.”\(^{118}\)

The authorship determination should consider both the tangible, physical actions of the creator, as well as the emotional and intellectual components of the creative enterprise. The physical components of authorship are easier to conceptualize, although the Seventh Circuit’s opinion reveals that this determination still can be problematic. Landscape art such as Wildflower Works exemplifies a dynamic rather than static medium: “its primary medium is organic; it is always in process and is never perfected.”\(^{119}\) Yet, fluidity and growth do not defeat the presence of human authorship because landscape art requires “constant curatorial concern if the work is to be

\(^{113}\) *Id.* at 58.

\(^{114}\) 191 F.2d 99 (2d Cir. 1951).

\(^{115}\) *Id.* at 105.


\(^{117}\) *Id.* at 1016 (also noting that the Copyright Act is not “particularly clear on this point.”).

\(^{118}\) *Id.* at 1012.

appreciated as envisaged. The Seventh Circuit did not understand that Wildflower Works "was entirely and intentionally conceived, modeled, designed, organized, and physically executed—and thus authored—by Mr. Kelley." Although the court recognized "that Mr. Kelley specifically chose each plant bulb according to his concept, brought the bulbs into a foreign environment, deliberately planted and framed the bulbs with steel partitions and gravel, and simultaneously arranged them in a unique sculptural format," it rendered a decision concerning lack of authorship that "is at odds with these undisputed facts." The existence of "physical authorship" in this case can profitably be compared to that which exists when a photograph is taken by a surveillance camera. In the latter case, meaningful physical human authorship would appear to be lacking; such is not the situation with Wildflower Works.

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

This carefully nurtured sense of fluidity, combined with the artist's embracing the organic, natural development of the art, is what lies at the core of creativity from the perspective of Jewish Process Theology. Steeped in a developmental perspective that reflects an emphasis on Divine creativity as "a process of mobilizing continuous self-creativity from within," Jewish Process Theology embraces the internal evolution of life. This perspective emphasizes Divine encouragement of "each stage of creation to materialize," thus culminating in Creation being understood as the result of God's invitation "into the process of becoming." Thus, Creation can be understood as a partnership between the Divine and that which is created. This parallel is exemplified in the type of art created by artists such as Chapman Kelley and Daniel Urban Kiley. Their

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120 Id.
121 Brief for Blane De St. Croix, supra note 89, at 6.
122 Kelley, 635 F.3d at 293.
123 Brief for Blane De St. Croix, supra note 89, at 6, n. 3.
124 Nivala, supra note 119, at 276 (quoting DAN KILEY & JANE AMIDON, DAN KILEY: THE COMPLETE WORKS OF AMERICA'S MASTER LANDSCAPE ARTIST 109 (1999)).
125 Nivala, supra note 119, at 276 (quoting Anne Whiston Spirn, Seeing and Making the Landscape Whole, PROGRESSIVE ARCHITECTURE at 92 (Aug. 1991). For a contrary, and I would suggest too simplistic, perspective, see Cronin, supra note 5, at 245 ("The work of an artist who uses living materials for his creations is more akin to that of a conductor or director than to that of a composer or dramatist."). Id.
126 See supra note 19.
127 See supra note 25.
128 See supra note 26.
art is a testament to the internal power possessed by their landscape creations. As discussed in Part I, creativity theory evidences numerous testimonial accounts of a partnership between authors and their artistic creations. In other words, artistic works become a “partner” in their own creation. The existence of this partnership should not preclude a work’s copyrightability.

III. VARA, Moral Rights, and Fluid Nature-Dependent Works of Authorship

The Seventh Circuit’s opinion noted that Kelley v. Chicago Park District “raises serious questions about the meaning and application of VARA’s definition of qualifying works of visual art—questions with potentially decisive consequences for this and other moral rights claims.” The Seventh Circuit correctly identified that the VARA issue presented in the case involved the right of integrity delineated in 106A, which precludes any “intentional distortion, mutilation, or other modification” of a covered work that “would be prejudicial to” the “honor or reputation” of the author. VARA provides a definition for qualifying works of visual art as “a painting, drawing, print, or sculpture, existing in a single copy....” This same definition also provides a number of exclusions, including the catch-all limitation that VARA does not apply to “any work not subject to copyright protection under this title.”

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

VARA’s definition of “work of visual art” operates to narrow and focus the statute’s coverage; only a “painting, drawing, print, or sculpture,” or an exhibition photograph will qualify. These terms are not further defined, but the overall structure of the statutory scheme clearly illuminates the limiting effect of this definition. Copyright’s broad general coverage extends to “original works of authorship,” and this includes “pictorial, graphic, and sculptural works.” The use of the adjectives “pictorial” and “sculptural” suggests flexibility and breadth in application. In contrast VARA uses the

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129 See supra notes 53-59 and accompanying text.
130 See supra text following note 60.
131 Kelley, 635 F.3d at 302.
136 Kelley, 635 F.3d at 300.
specific nouns “painting” and “sculpture.” To qualify for moral-rights protection under VARA, Wildflower Works cannot just be “pictorial” or “sculptural” in some aspect or effect, it must actually be a “painting” or a “sculpture.” Not metaphorically or by analogy, but really.137

The history of VARA’s enactment reveals that insufficient thought or attention was given to the content of the statute, resulting in numerous problematic areas.138 One point that is clear, however, is that the statute’s intent was to provide very circumscribed federal statutory protection for only certain types of visual art. In enumerating those works of visual art covered by VARA, the statute establishes some basic parameters with respect to the requisite originality, creativity and aesthetics of the eligible works. Moreover, the case law supports an interpretation of VARA that reinforces the statute’s narrowly crafted scope of coverage.139 In light of this statutory posture, the Seventh Circuit was absolutely correct in its ruling that Wildflower Works should not be considered either a painting or a sculpture under VARA. As the court observed, “VARA plainly uses the terms ‘painting’ and ‘sculpture’ as words of limitation.”140

Although the Seventh Circuit properly applied VARA as written, the statute itself is flawed and fails to address critical issues concerning the scope of moral rights protection in the United States. I have argued elsewhere that VARA’s limitations are entirely too confining and that moral rights protection should apply to works of authorship other than just visual art. Nevertheless, I have also urged that only works satisfying a heightened standard of originality, as manifested by substantial rather than “a modicum” of creativity, should qualify for moral rights protection.141 Kelley v. Chicago Park District requires a consideration of how the model I proposed with respect to moral rights generally would incorporate issues specifically presented by fluid works with non-human elements of authorship.

Part II argued that Jewish Process Theology supports a copyright model that would include protection for such works. The issue regarding moral rights protection is whether and how the presence of fluidity and non-human elements of authorship mesh with a standard requiring a heightened degree of originality with substantial creativity. In my view, the answer to this inquiry is that these considerations should not preclude moral rights protection if the work in question otherwise manifests an adequate degree of “heightened” original and creative human input despite the existence of some forces of nature that contribute to the work’s ultimate form and appearance, and render the work more seemingly fluid than some works of authorship.

As discussed in Part I, the key ingredients of both Divine and human creativity according to a Jewish Process Theology perspective are fluidity, partnership, and

137 Id. at 300 (statutory cites omitted).
138 K W A L L, supra note 37, at 27-30, 74-75.
139 For a more complete discussion of these issues, see K W A L L, supra note 37, at 75.
140 Kelley, 635 F.3d at 301.
141 K W A L L, supra note 37, at 72.
relationship. 142 Throughout the Seventh Circuit’s opinion, these characteristics drive the court’s description of Wildflower Works. According to the facts recounted in the Seventh Circuit’s opinion, Kelley selected the plant material for aesthetic and other reasons and designed the initial placement of the flowers. 143 He supervised numerous volunteers who planted the seedlings and continually nurtured the garden. 144 A Temporary Permit subsequently issued to Kelley provided that Kelley would “have responsibility and control over matters relating to the aesthetic design and content” of Wildflower Works. 145 The Seventh Circuit also observed, however, that “the forces of nature—the varying bloom periods of the plants; their spread habits, compatibility, and life cycles; and the weather—produced constant change.” 146 Kelley was a “partner” with the work and with nature in the creation of Wildflower Works. His work manifested not only fluidity due to nature, but also the necessary collaborative relationship in its creation and cultivation. This perspective is a markedly different one from that which was expressed by the court:

Simply put, gardens are planted and cultivated, not authored. A garden’s constituent elements are alive and inherently changeable, not fixed. Most of what we see and experience in a garden—the colors, shapes, textures, and scents of the plants—originates in nature, not in the mind of the gardener. At any given moment in time, a garden owes most of its form and appearance to natural forces, though the gardener who plants and tends it obviously assists. All this is true of Wildflower Works, even though it was designed and planted by an artist. 147

The perspective of Jewish Process Theology developed in Part I of this Article reveals an alternate—and preferable—way of understanding the creation of works of authorship and the consequent scope of copyright and moral rights protection. Although the court made the foregoing observation in the context of denying the copyrightability of Wildflower Works, the point here is that under my proposed standard for moral rights protection Wildflower Works should qualify not only for copyright but also moral rights protection. This standard, which would require a heightened standard of originality, would protect a work that manifests the requisite degree of human creativity despite the presence of apparent fluidity and non-human elements of authorship. 148 The theoretical predicate for this view derives from the fluidity that exists in all of Creation and reality and the emphasis on the author’s relationship to the work’s internal creative force.

142 See supra text following note 53.
143 Kelley, 635 F.3d at 293.
144 Id.
145 Id. at 294.
146 Id.
147 Id. at 304.
148 For a contrary perspective reflecting the more conventional understanding of copyright and moral rights protection in connection with living works of art, see Cronin, supra note 5, at 239, 252-53.
Conclusion

In denying copyright protection for Wildflower Works, the Seventh Circuit stated that "the real barrier to copyright" is "not temporal but essential": "The essence of a garden is its vitality, not its fixedness. It may endure from season to season, but its nature is one of dynamic change."\textsuperscript{149} This perspective reflects one that is conventionally invoked in copyright law. In contrast, I suggest that the theory of copyright law might be better informed by an alternative perspective focusing on Process Thought and Theology as it has been developed in the Jewish tradition to facilitate a more nuanced view of what types of works of authorship deserve both copyright and moral rights protection.

\textsuperscript{149} Kelley, 635 F.3d at 305.