If It's Broke, Fix It: Fixing Fixation*

Megan M. Carpenter**

The fixation requirement, once an intended instrument for added flexibility in copyrightability, has become an unworkable standard under modern copyright law. The last twenty-five years have witnessed a dramatic expansion in creative media. Developments in both digital media and contemporary art have challenged what it means to be fixed, and cases dealing with these works reveal how inapposite current interpretations of fixation are for these forms of expression. Yet, getting fixation "right" is important, for it is often the juridical threshold over which idea becomes expression. Thus, we must enable fixation to help define the parameters of creative expression while not discriminating against dynamic and digital works.

In previous work, Steven Hetcher and I have identified problems with the fixation requirement as it applies to modern creative expression and have argued for changes that would amend the fixation requirement to better function in the modern era.[1] This Essay furthers that argument. As part of the Kernochan Center Symposium, "Copyright Outside the Box," I argued that the transitory duration exclusion for copyrightability should be stricken from the definition of fixation to better enable it to reflect the parameters of modern creative expression. Agnieszka Kurant's art serves as an example of this need for change. Removing the exclusion for transitory works, while maintaining the stability requirement, would retain the essence of the definition of fixation under the Copyright Act but enable application to modern forms of creative expression, including both contemporary art and digital works.

Human creativity is an essential part of being human. The United States Constitution reflects a commitment to fostering creativity by providing creators with exclusive rights over their creations for limited times.[2] This remains true

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** Professor of Law, founder and co-director of the Center for Law and Intellectual Property, Texas A&M University School of Law. I would like to thank Jane Ginsberg and the staff of the Kernochan Center for Law, Media, and the Arts for hosting a vibrant dialogue on issues impacting copyright and the arts. I also would like to thank the participants in the symposium, including my co-panelists Zahr Said, Robert Clarida, and Agnieszka Kurant, for a lively discussion that challenges the boundaries of copyright. I also thank Steven Hetcher, for his previous work with me on these issues, and Mary Garner, whose research assistance has been invaluable.

1. Megan M. Carpenter & Steven Hetcher, *Function Over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221 (2014).

2. U.S. CONST. art. 1, § 8, cl. 8. The Supreme Court states that the "philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" Mazer v. Stein, 347 U.S. 201, 219 (1954).

whether one adopts an incentive-based, utilitarian theory of intellectual property or a natural-rights theory of intellectual property. A utilitarian theory of intellectual property reflects a belief that the public welfare will benefit from incentivizing creators to produce creative works—that people will have greater creative output, in both quantity and quality, if they are given some measure of control over the product of their creation.[3] Utilitarian theory has been the dominant theory of intellectual property.[4] A natural rights theory of intellectual property recognizes that creative activity is an essential part of being human.[5] Creative works can be related to personhood, and an expression of individuality.[6] A natural rights theory may also consider the ownership that can come from mixing one's labor with the external world.[7]

Art is not only intrinsic to our humanity; it is socially beneficial.[8] Creative expression in all its varied forms in many ways defines who we are as a people. President Barack Obama has noted that we rely on the arts to remind us of the truths that connect us, and they play an important role in broadening our understanding of the world and telling our story.[9] As stated in the mission of the National Endowment for the Arts: "A great nation deserves great art."[10] And, while art is an accepted social good, it has constantly changing norms. The dynamic nature of art is not incidental, but intrinsic. Art does not stand still. It

3. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1750–51 (2012).

4. *See id.* (citing Harper & Row Pub., Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); 122 CONG. REC. 2834 (1976) (statement of Sen. John McClellan); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1571 (2009); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989); Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980); Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330–31 (1945); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597–99 (2003); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 697 (2001)).

5. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

6. *See* Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 93 (2006).

7. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: The Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993).

8. As First Lady Michelle Obama stated, "The arts are not just a nice thing to have or to do if one has free time or can afford it." Michelle Obama, *Remarks by the First Lady at the Ribbon Cutting Ceremony for the Metropolitan Museum of Art American Wing*, THE WHITE HOUSE (May 18, 2009, 3:21 PM), www.whitehouse.gov/the-press-office/remarks-first-lady-ribbon-cutting-ceremony-metropolitan-museum-art-american-wing [https://perma.cc/62TA-6S5U]. Our country's infrastructure recognizes the importance of supporting the arts, including providing federal funding since President Roosevelt created the Public Works Art Project and the Federal Art Project. The National Endowment for the Arts has, to date, given over four million dollars for various art projects. MARTIN R. KALFATOVIC, THE NEW DEAL FINE ARTS PROJECTS: A BIBLIOGRAPHY, 1933–1992 xxi–xxv (1994); *see* National Foundation on the Arts and the Humanities Act of 1965, Pub. L. No. 89-209, 79 Stat. 845, 846–47 (codified at 20 U.S.C. §§ 951–60 (2012)); *About the NEA*, NAT'L ENDOWMENT FOR THE ARTS, http://www.nea.gov/about/index.html [https://perma.cc/74F3-UZSP] (last visited Feb. 20, 2016).

9. Barack Obama, *Presidential Proclamation, National Arts and Humanities Month, 2014*, THE WHITE HOUSE (Sept. 30, 2014), https://www.whitehouse.gov/the-press-office/2014/09/30/presidential-proclamation-national-arts-and-humanities-month-2014 [https://perma.cc/HWJ4-L9JD].

10. *NEA at a Glance*, NATIONAL ENDOWMENT FOR THE ARTS, http://www.4uth.gov.ua/usa/english/politics/agencies/nea.htm [https://perma.cc/6ZER-4RN3] (last visited Feb. 2, 2016).

responds to the change and evolution in society over time. It is, by definition, creative.

Copyright law is also creative. It has historically, and importantly, evolved in response to cultural development.[11] While adaptation and evolution are necessary aspects of our legal system in general, they are imperative for copyright if it is to serve its essential function. Copyright has accommodated change over time through expansion and changes in subject matter and form.[12] The Supreme Court has stated that copyright law should not discriminate based on aesthetic judgment:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [particular creative expression] outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[13]

Therefore, to the extent that copyright law discriminates among certain forms of creative expression for the purposes of determining the boundaries of copyright protection, it must be done with great caution.

While artists are always going to push the envelope, copyright presently fails to promote modern creative expression in significant ways; it fails to adequately protect contemporary art that is not "fixed" according to current interpretations of the Copyright Act. While copyright law relies upon fixation as a signifier of creative expression, the Copyright Act defines fixation in a way that is significantly narrower. Fixation requires works to be able to be "perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[14] Many digital works, and contemporary works that incorporate elements of change over time, fall outside this definition because of the exclusion of works with transitory elements. The work of Agnieszka Kurant, discussed later in this paper, is an excellent example of work that is recognized by art experts around the world as

11. For example, legislative history indicates that Congress intended to create a flexible definition of "works of authorship" that would neither "freeze the scope of copyrightable . . . technology [nor] allow unlimited expansion into areas completely outside the present congressional intent." H.R. REP. NO. 94-176, at 51 (1976); *see also* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

12. *See, e.g.*, Act of March 3, 1865, 16 Stat. 198 (granting copyright protection to photographs); Act of August 24, 1912, Pub. L. No. 62-303, 37 Stat. 488 (providing express protection for motion pictures); Act of June 3, 1949, Pub. L. No. 81-84, 63 Stat. 153 (broadening compliance requirements with manufacturing clause in light of post-World War II conditions in Europe); Act of July 17, 1952, Pub. L. No. 82-575, 61 Stat. 653 (granting right of public performance to authors of nondramatic literary works); Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (granting protection to sound recordings).

13. Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 251 (1903).

14. Copyright Act of 1976, 17 U.S.C. § 101 (2012) [hereinafter 1976 Copyright Act]:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

being of great societal value, but yet is often not copyrightable per se because of the use of dynamic elements in the creative expression.[15]

Prior to the 1976 Copyright Act, fixation was a de facto, rather than de jure, requirement for copyrightability.[16] Copyrightable works under prior statutes were enumerated by medium rather than expressive category, and all were automatically fixed due to the specific medium involved. The 1790 Act applied to maps, charts, and books.[17] In 1831, the list expanded to include musical compositions.[18] Several other works were added in 1909, including periodicals, dramatic compositions, prepared speeches, photographs, prints, drawings, and works of art.[19] Formality requirements further ensured fixation; embodying a work in some kind of physical form was necessary for federal copyright protection.[20]

Broadening copyright protection to encompass new forms of creative expression has been a consistent and driving force behind the evolution of copyright law, and conversations about encouraging new forms of media began taking place in the legislative debate on amendments to the 1909 Act.[21] Concerns were raised that copyright requirements inhibited the protection and production of works that failed to be embodied in some permanent form.[22] Accordingly, the House of Representatives considered a proposal to allow copyright for works "in any medium or form or by any method through which the thought of the author may be expressed,"[23] and later for "all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/ or interpreter of any musical, literary, dramatic work, or other compositions,

15. For examples and discussion of Agnieszka Kurant's work, see *Agnieszka Kurant—Works*, TANYA BONAKDAR GALLERY, http://www.tanyabonakdargallery.com/artists/agnieszka-kurant/series-works_10 [https://perma.cc/5R6E-CNDD] (last visited Feb. 2, 2016); Sabine Russ, *Artists in Conversation: Agnieszka Kurant*, BOMB MAGAZINE 131 (Spring 2015), http://bombmagazine.org/article/171633/agnieszka-kurant [https://perma.cc/MX52-FU6T]; *Agnieszka Kurant*, GUGGENHEIM COLLECTION ONLINE, http://www.guggenheim.org/new-york/collections/collection-online/artists/bios/12212/Agnieszka%20Kurant [https://perma.cc/WZ4X-5HDQ] (last visited Feb. 2, 2016); Ken Johnson, *Agnieszka Kurant: Variables*, *Art in Review*, N.Y. TIMES (Oct. 9, 2014), http://www.nytimes.com/2014/10/10/arts/design/agnieszka-kurant-variables.html?_r=0 [https://perma.cc/JR67-9QAC].

16. *See* Copyright Act of 1909, c. 320, Pub. L. No. 60-349, 35 Stat. 1075 [hereinafter 1909 Copyright Act] (including no fixation language); Act of May 31, 1790, ch.15, 1 Stat. 124 (hereinafter 1790 Copyright Act) (also including no fixation language).

17. These works were all fixed automatically due to the nature of the media. *See* 1790 Copyright Act.

18. Before this amendment, musical compositions had been protected as books. Copyright Act of 1831, 4 Stat. 436.

19. 1909 Copyright Act § 5.

20. *Id.* Copyright could be secured for works not reproduced in copies for sale by deposit of an identifying reproduction of the work with the Copyright Office. *See* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDY NO. 28 COPYRIGHT IN CHOREOGRAPHIC WORKS 96 (Comm. Print 1961).

21. Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/ Privacy Divide*, 51 WM. & MARY L. REV. 825, 846 (2009–10) (citing S. 3008, 88th Cong. (1964) (introduced by Sen. John McClellan); H.R. 11947, 88th Cong. (1964) (introduced by Rep. Emanuel Celler); H.R. 12354, 88th Cong. (1964) (introduced by Rep. William St. Onge)).

22. Heymann, *supra* note 21, at 844.

23. H.R. 6990, 71st Cong. § 1 (1929).

whatever the mode or form of such renditions, performances, or interpretations."[24] In 1976, Congress acted on these concerns by making the fixation requirement explicit to eliminate "artificial and largely unjustifiable distinctions" among creative works, and cover any new forms or media "now known or later developed."[25]

Despite the fact that the fixation requirement was intended to eliminate these artificial distinctions, important segments of contemporary creative expression remain outside the ambit of copyrightability precisely because of the statutory language. It is perhaps no surprise that we again need to see an evolution in the legal framework of copyright law. Copyright law has historically adapted to significant cultural and technological changes in creative society, and it must do so now through a change in the meaning and application of the term "fixation" under the Copyright Act.

If fixation effectively defines the parameters of creative expression, then it should seek to reflect the reality of creative expression. The inclusion of fixation in the 1976 Act is an example of this—the dynamic nature of copyright seeking to adapt to contemporary understandings of creative expression.[26] The fixation requirement was added when the Copyright Act moved away from a laundry list of protected works and to a broader, more inclusive set of categories.[27] Within this broader construct, fixation was intended to delineate idea from expression, and not make copyrightability dependent on form.[28] The 1976 Act demonstrated a shift in focus to the function of expression, rather than the form.[29]

Courts are beginning to wrestle with this problem. Whether they recognize it explicitly, cases dealing both with contemporary art and digital works are struggling to define the parameters of copyrightability vis-à-vis the exclusion for works that incorporate transitory elements. The Seventh Circuit highlighted the tension between contemporary art and copyright law in *Kelley v. Chicago Park District* when it held that a sculpture made up of plant material was ineligible for copyright protection in part because it was not fixed: "The essence of a garden is its vitality, not its fixedness."[30] The court noted that the work was unfixed because of the inherently changeable nature of its constituent elements.[31] Because the work changed over time, it was "not a fixed copy of the gardener's intellectual property."[32] While the court stated that it was not "suggesting that copyright attaches *only* to works that are static or fully permanent . . . or that artists who

24. H.R. 10632, 74th Cong. § 4 (1936).

25. H.R. REP. NO. 94-1476, at 52 (1976).

26. *Id.* Replacing the publication requirement with a fixation requirement enabled federal copyright law to reach a new class of artistic works. A statutory fixation requirement enabled copyright law to do away with the "artificial and largely unjustifiable distinctions" that made copyright protection dependent upon the form of expression.

27. 1976 Copyright Act § 102(a).

28. H.R. REP. NO. 94-1476, at 52.

29. *Id.* at 51–52.

30. Kelley v. Chi. Park Dist., 635 F.3d 290, 305 (7th Cir. 2011).

31. *Id.* at 304–05.

32. *Id.* at 305–06.

incorporate natural or living elements in their work can *never* claim copyright," its holding unnecessarily limited the fixation language to media that are essentially static.[33]

At least one district court in a different jurisdiction has relied on the *Kelley* holding to deny copyright to not just living, but perishable works. In *Kim Seng Co. v. J & A Importers*, a district court extended the *Kelley* holding, supporting the idea that any physically impermanent form is insufficiently fixed for copyrightability, claiming that "[l]ike a garden, which is 'inherently changeable,' a bowl of perishable food will, by its terms, ultimately perish."[34] The court reasoned that the fixation requirement serves the purpose of preserving evidence of creation and infringement.[35] However, there are multiple reasons this reasoning is inapt: First, copyright protection does not degrade in conjunction with the degradation of its subject works.[36] Destruction of a work after it has been created does not affect the status of the underlying copyright. Second, works that are unfixed according to the Copyright Act can infringe; only the reproduction right requires unauthorized "copies or phonorecords."[37]

The exclusion for works that incorporate transitory elements creates problems for digital technologies as well. The difficult question of fixation as applied to RAM technologies illustrates this problem well, as addressed in both the Ninth and Second Circuit Courts. The Ninth Circuit first confronted this problem when it considered what constituted a "copy" in *MAI Systems v. Peak Computer, Inc*.[38] The court noted that the fixation requirement includes both an embodiment requirement and a duration requirement, and held that the copy of a work made in RAM was sufficient for fixation, despite the fact that it may exist for mere seconds and would "only be a temporary fixation."[39] The fact that the copy was impermanent and would be lost when the computer is turned off did not defeat fixation for purposes of creating a copy. More recently, in *Cartoon Network LP v. CSC Holdings, Inc*., the Second Circuit held that loading information into RAM does not necessarily create a fixed copy; in this case, the works were not fixed

33. *Id.* at 305.

34. Kim Seng Co. v. J & A Imps., Inc., 810 F. Supp. 2d 1046, 1054 (C.D. Cal. 2011). The court explained that a key purpose behind the fixation requirement is "to ease[] problems of proof of creation and infringement." *Id.* For a discussion of why this purpose is a red herring, see Carpenter & Hetcher, *supra* note 1, at 2239–40, 2246–49. *See also* Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 WASH. J.L. TECH. & ARTS 17, 30 (2014)

35. *Kim Seng*, 810 F. Supp. 2d at 1054 (citing William Patry, *Patry on Copyright* § 3:22).

36. Carpenter & Hetcher, *supra* note 1, at 2246.

37. 1976 Copyright Act § 106. For a detailed discussion on the purposes of the fixation requirement, see Carpenter & Hetcher, *supra* note 1, at 2236–51.

38. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

39. *Id.* at 518–19. The Ninth Circuit quoted the court in *Apple Computer, Inc. v. Formula International, Inc*.:

> RAM can be simply defined as a computer component in which data and computer programs can be temporarily recorded. Thus, the purchaser of [software] desiring to utilize in his computer all of the programs on the diskette could arrange to copy [it] into RAM. This would only be a temporary fixation. It is a property of RAM that when the computer is turned off, the copy of the programs recorded in RAM is lost.

Apple Computer v. Formula Int'l, Inc., 594 F. Supp. 617, 622 (C.D. Cal. 1984).

because they were in the buffers for no more than 1.2 seconds before being automatically overwritten.[40] Other cases involving digital fixation illuminate further problems with the duration requirement. Some courts have found fixation to exist from a mere description of the work. *Micro Star v. Formgen, Inc.* held that even a descriptive fixation may be sufficient in the context of an audiovisual display; fixation can result from a description that is "in sufficient detail to enable the work to be performed from that description."[41] The court in *Torah Soft Ltd. v. Drosnin* followed this reasoning, finding that fixation was satisfied by a repetitive and identical sequence.[42]

As technology continues to advance and a greater diversity of creative expression occurs online, courts will be faced with the increasingly difficult, if not arbitrary, task of drawing some line between fixed and unfixed pieces of information. The permanence traditionally associated with fixation simply does not apply to much of digital media. In any given analysis, the question quickly moves away from whether or not the work is of transitory duration and toward a consideration of how much transitory duration is acceptable within the parameters of copyright.

We would better reflect the principles of copyright law and the modern reality of creative expression by removing the transitory duration language from the fixation requirement. Important strains of contemporary art aren't protected by the Copyright Act because they incorporate natural or dynamic elements in their expression. Art that includes natural media will often be excluded from copyrightability under the definition of fixation. As an example, I will consider the art of Agnieszka Kurant, the artist featured in the Columbia Symposium, "Copyright Outside the Box."[43] Kurant's work is exemplary of this problem. Her art

> investigates the ways in which the immaterial and imaginary such as fictions, rumors, and phantoms influence political and economic systems of the contemporary world. Bridging the gap between fiction and reality, the invisible and tangible, past and present, her work analyzes hybrid and shifting status of objects as they relate to complex relationships between value, aura, authorship, distribution, production, distribution and ownership. Weaving together elements of history, geography, science, literature, and film and analyzing collective intelligence, immaterial labor, mutations of memes, manipulations of collective consciousness or the editing process as an aesthetic and political act Kurant probes the "unknown unknowns" of knowledge, or gaps in logic, in ways that both confuse and expand upon our understandings of the real and the imaginary.[44]

40. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d. Cir. 2008).

41. Micro Star v. Formgen Inc., 154 F.3d 1107, 1111–12 (9th Cir. 1998).

42. Torah Soft, Ltd. v. Drosnin, 136 F. Supp. 2d 276, 283 (S.D.N.Y. 2001).

43. This conference was hosted by the Kernochan Center for Law, Media, and the Arts on October 2, 2015. More information about the event, including an archive of presentations, can be found at *Kernochan Center Annual Symposium*, COLUMBIA LAW SCHOOL, http://web.law.columbia.edu/kernochan/copyright-outside-box [http://perma.cc/N9U7-ZRH4] (last visited Feb. 2, 2016).

44. *Agnieszka Kurant Biography*, TANYA BONAKDAR GALLERY, http://www.tanyabonakdargallery.com/artists/agnieszka-kurant/modal/bio [http://perma.cc/8L46-MK6F] (last

There are strong conceptual and dynamic elements to Kurant's work. It is often in constant transformation and shifts its status and meaning in different ways from the time of its creation.[45] It often shifts forms and formats depending on different quasi-fictional or unexpected factors.[46] For example, in her work, *The End of Signature*, displayed at the Guggenheim Museum in 2015, Kurant collected signatures from visitors to the museum and averaged them into one collective signature that evolved over time as more signatures were collected and scanned.[47] Museum visitors signed a piece of paper and fed it into a slot in the wall, where it was scanned and integrated by a computer into all other signatures, creating an average signature that an autopen machine repeatedly printed on new pieces of paper. The collective signature was projected prominently onto the exterior of the Guggenheim Museum so that it was visible from Fifth Avenue, and it evolved before the public eye.[48]

Another example is Kurant's invited piece in the Frieze Projects in London, her dynamic exhibition involving live parrots.[49] She presented a trio of trained parrots that had been isolated soon after birth and trained by the head of the Society of Talking Bird Owners, Marek Żyłkowski, to speak an alternate language—in this case, dog-barking.[50] During the art fair, the birds heard human voices and civilization; people began talking to the birds and in front of the birds, and there was ambient sound of (dis)organized society and urban life.[51] The language the birds had spoken dissolved and fell into individual parts as they began to assimilate the sounds they were hearing.[52] In three days, the birds' barking language had broken down and they had developed other ways of communicating.

Kurant's work does not sit at the fringes of contemporary art. Her work has garnered worldwide acclaim, including exhibitions at the Guggenheim and the Museum of Modern Art in New York, the Palais de Tokyo in Paris, and the Tate Modern in London.[53] She represented Poland at the Venice Biennale 12th International Architecture Exhibition (2010) and participated in the Performa Biennial in New York (2013 and 2009), Moscow Biennale (2007), Bucharest Biennale (2008), and 2nd Ural Biennial (2012).[54]

Insofar as Agnieszka Kurant's work incorporates elements of process in its

visited Feb. 2, 2016).

45. *See id.*; *see also* Guggenheim, *Storylines: Agnieszka Kurant*, YOUTUBE (June 5, 2015), https://www.youtube.com/watch?v=pa7Jdf91dWU [http://perma.cc/WF9L-X4GW]; Russ, *supra* note 15; Johnson, *supra* note 15.

46. *Agnieszka Kurant: Life and Work*, CULTURE.PL (Oct. 14, 2015), http://culture.pl/en/artist/agnieszka-kurant [http://perma.cc/A2PZ-XL8D].

47. Guggenheim, *Storylines*, *supra* note 45.

48. *Id.*

49. *See Frieze Projects 2008, Agnieszka Kurant*, FRIEZE PROJECTS, http://www.friezeprojects.org/commissions/detail/agnieszka_kurant/ [http://perma.cc/5DEZ-JEVL] (last visited Feb. 2, 2016).

50. *Agnieszka Kurant: Life and Work*, *supra* note 46.

51. *Id.*

52. *Id.*

53. *Agnieszka Kurant Biography*, TANYA BONAKDAR GALLERY, *supra* note 44.

54. *Id.*

product, it sits alongside renowned contemporary artists like Andy Goldsworthy,[55] Marina Abramovich,[56] James Turrell,[57] Damien Hirst,[58] and Chapman Kelley.[59] A significant segment of contemporary art *essentially* incorporates change over time and is thus uncopyrightable under the current construction of the fixation requirement. Because of the transitory duration exclusion, these works aren't copyrightable per se. Yet, these works are "fixed" exactly as they're supposed to be fixed. They are in a form that is stable, and able to be perceived and reproduced. While artists will always push the boundaries of creative expression (and, certainly, copyright law), excluding from copyrightability forms of creative expression that include process as well as product discriminates against a significant movement in creative expression.

Copyright law should stop ignoring the "fluidity of creativity" that is "inherent in any work under modern copyright law."[60] The sky will not fall, nor the entire universe become copyrightable, if the transitory duration exclusion is removed from the definition of copyright. Works[61] will still need to be fixed, to be

55. *See* ANDY GOLDSWORTHY DIGITAL CATALOGUE, http://www.goldsworthy.cc.gla.ac.uk [http://perma.cc/LR6X-VMHS] (last visited Feb. 2, 2016); Arthur Lubow, *35 Who Made a Difference: Andy Goldsworthy*, SMITHSONIAN MAG (Nov. 2005), http://www.smithsonianmag.com/arts-culture/35-who-made-a-difference-andy-goldsworthy-114067437/?no-ist [http://perma.cc/H588-VDAW]; *Fresh Air: Sculptor Turns Rain, Ice, and Trees into "Ephemeral Works of Art,"* NPR (Oct. 8, 2015) (transcript, "Interview Highlights"), http://www.npr.org/2015/10/08/446731282/sculptor-turns-rain-ice-and-trees-into-ephemeral-works [https://perma.cc/WPB2-CQTH].

56. *See* MARINA ABRAMOVIC: THE ARTIST IS PRESENT (2010). The Museum of Modern Art in New York held a retrospective of Marina Abramovic's performance art in the spring of 2010, in which forty pieces were performed simultaneously. This exhibition was popular in person—with over half a million visitors—and on the website, including more than 600,000 photos downloaded from the Flickr stream. Holland Cotter, *700-Hour Silent Opera Reaches Finale at MoMa*, N.Y. TIMES (May 30, 2010), http://www.nytimes.com/2010/05/31/arts/design/31diva.html [https://perma.cc/YK6E-N7GT]. Information about this retrospective, *The Artist Is Present*, can be found online. *Exhibitions*, MOMA, http://www.moma.org/calendar/exhibitions/964?locale=en [http://perma.cc/V4M7-7NXV] (last visited Feb. 2, 2016).

57. *See James Turrell*, GUGGENHEIM (video interview transcript), http://www.guggenheim.org/new-york/exhibitions/past/exhibit/4819 [http://perma.cc/8A67-YRFM] (last visited Feb. 2, 2016); *James Turrell*, ART21, http://www.art21.org/artists/james-turrell [http://perma.cc/WRM2-725W] (last visited Feb. 2, 2016). James Turrell has been a MacArthur and Guggenheim Fellow, and has won the Turner Prize.

58. *See Hands up for Hirst*, THE ECONOMIST (Sept. 9, 2010), http://www.economist.com/node/16990811 [http://perma.cc/JD35-623R]; Peter Schjeldahl, *Spot On: Damien Hirst's Global Show*, THE NEW YORKER (Jan. 23, 2012), http://www.newyorker.com/magazine/2012/01/23/spot-on [http://perma.cc/9A8Y-3AJK].

59. *See* CHAPMAN KELLEY, www.chapmankelley.com [http://perma.cc/8BD7-8UU3] (last visited Feb. 2, 2016); *see also* discussion of *Kelley v. Chicago Park District*, *supra* note 30.

60. Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC'Y U.S.A. 209, 211, 213 (2013).

61. The definition of a work is unclear under copyright law, and neither legislative history nor case law provides much clarity. Professor Christopher Newman proposes the following definition for a work of authorship:

> [A] planned sensory experience, designed by its author to give rise to an expressive experience in the mind of one or more intended audiences. The sensory experience consists of a specific selection and arrangement (spatial and/or temporal) of sensory inputs that is perceived by the person 'consuming' the work. The expressive experience consists of a specific set (and for some

embodied in a form that "is sufficiently permanent or stable to permit [them] to be perceived, reproduced, or otherwise communicated."[62] There are incredibly important aspects of modern creative expression, digital and otherwise, that incorporate elements of change. Removing the transitory duration exclusion will enable fixation to serve the valuable function of delineating the boundaries of a work—distinguishing idea from expression—while beginning to acknowledge the frequently dynamic nature of those works. Art need not be static—art can be dynamic while still being fixable in that form. The fixation requirement currently mischaracterizes art by focusing on the *form* of expression rather than its essential *function*—precisely what the requirement was created to avoid.

works, a specific sequence) of intellectual responses that the sensory experience is designed to arouse in the mind of the audience. An intended audience consists of people equipped with the minimum sensory and conceptual apparatus (e.g., language) needed to translate the sensory experience into the expressive experience designed by the author. The purpose of the expressive experience, in turn, is to give rise to various *expressive effects* on the audience.

Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 292–93 (2011) (emphasis added). For an enlightening discussion about the work, and why there is no clear understanding of what constitutes a work, see Michael J. Madison, *The End of the Work as We Know It*, 19 J. INTELL. PROP. L. 325, 328 (2012) (discussing "the 'work' as a legal thing, which is related to, but conceptually and practically distinct from, the 'work' or 'the work of art' as an artistic or authorial object"). Roberta Kwall discusses the relationships between the physical origin of a work and the "emotional or intellectual" origin of the work in Roberta R. Kwall, *The Lessons of Living Gardens and Jewish Process Theology for Authorship and Moral Rights,* 14 VAND. J. ENT. & TECH. L. 889, 911 (2012).

62. 17 U.S.C. § 101.