

Spring 2015

Living Gardens, Living Art, Living Tradition

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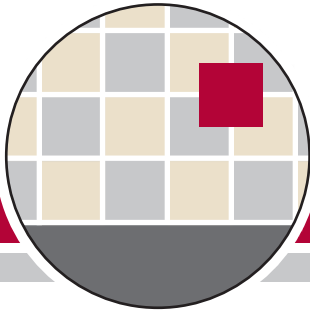
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Recommended Citation

Kwall, Roberta R. (2015) "Living Gardens, Living Art, Living Tradition," *IP Theory*: Vol. 5: Iss. 1, Article 5.
Available at: <http://www.repository.law.indiana.edu/ipt/vol5/iss1/5>

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Living Gardens, Living Art, Living Tradition

*Roberta Rosenthal Kwall**

INTRODUCTION

Copyright protection in the United States begins from the moment of a work's "creation."¹ Although this rule is codified in the statute, the underlying issues of how and when "creation" occurs are rarely, if ever, explored. Under the current law, 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. This formulation ignores the critical issues of whether fluid works of authorship that are constantly evolving can be subject to copyright protection and, if so, what is the scope of such protection. Not much has been said or written about how copyright should address such fluid works of authorship that are, by their very essence, continually in progress or otherwise subject to change on an ongoing basis. This dearth of discussion is particularly surprising given that law professors spend a majority of their time writing articles and books that are constantly in a state of flux. Even after publication, many would like to take a crack at revising prior works, and some actually do so in the form of sequel publications!

This Essay initially discusses the protection of fluid works from the standpoint of copyright law in the United States. By way of comparison, this Essay then examines the philosophy of human creativity deriving from the Jewish tradition. It argues that this ancient yet living tradition can inform our copyright policy concerning how we define eligible works of authorship and determine their appropriate scope of protection.

* © 2014 Roberta Rosenthal Kwall, Raymond P. Niro Professor of Intellectual Property Law, Founding Director, DePaul College of Law Center for Intellectual Property Law and Information Technology. Comments about this Essay are welcome: rkwall@depaul.edu. This Essay draws from one of my previous publications, *The Lessons of Living Gardens and Jewish Process Theology For Authorship and Moral Rights*, 14 VAND. J. ENT. & TECH. L. 889 (2012).

1. 17 U.S.C. § 302(a) (1978) (applying to works created on or after January 1, 1978).

I. LIVING GARDENS AND LIVING ART

Chapman Kelley creates representational paintings of landscapes and flowers.² In 1984, he installed “Wildflower Works” in Chicago’s Grant Park.³ 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.”⁴ The work was promoted as “living art” and was widely acclaimed on both a critical and popular level.⁵ Kelley, along with a group of volunteers, tended the garden, pruning and replacing it as needed.⁶ In 2004, however, the Chicago Park District drastically modified the garden, reducing it to less than half of its original size, changing some of the planting material, and reconfiguring the flower beds.⁷ Kelley sued the Park District for violating his moral right of integrity under the Visual Artists Rights Act (“VARA”).⁸

The district court did not grant Kelley his requested relief. The court held that his work could be considered both a painting and a sculpture under VARA and therefore met the statutory requirements of a work of visual art under VARA.⁹ Oddly, however, the court denied relief to Kelley on the ground that the work also lacked sufficient originality to be considered copyrightable under the copyright statute.¹⁰ 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 in 2011, 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.¹¹ 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 requirements

2. Kelley v. Chicago Park Dist., 635 F.3d 290, 291 (7th Cir. 2011).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 294.

7. *Id.* at 291.

8. *Id.*; 17 U.S.C. § 106A.

9. Kelley v. Chicago Park Dist., No. 04 C 07715, 2008 WL 4449886, at *4–5 (N.D. Ill. Sept. 29, 2008), *aff’d in part, rev’d in part, Kelly*, 635 F.3d 290.

10. *Id.* at *6. 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 Kelly*, 635 F.3d 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 that the Park District was entitled to prevail in this matter.

11. *Kelly*, 635 F.3d at 292.

rendering it not copyrightable.¹² The Supreme Court subsequently denied certiorari in the case, thus foreclosing the opportunity to revisit the significant implications of the decision.¹³

The Seventh Circuit's objections to protecting "Wildflower Works" under copyright appear to be grounded on two somewhat related rationales: 1) the work is "alive and inherently changeable, not fixed,"¹⁴ and 2) the work lacks human authorship because its appearance is dependent on the forces of nature¹⁵. The Seventh Circuit posited that "works owing their form to the forces of nature cannot be copyrighted."¹⁶ 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."¹⁷ In other words, the fact that the garden's "nature is one of dynamic change" means that copyright protection fails due to lack of fixation.¹⁸ In contrast, 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.

It can be argued the 1976 Act's concept of "fixation" is not necessarily coterminous with the Constitutional predicate of a "writing."¹⁹ 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"²⁰ arguably embodies a concern for proof in infringement situations. Moreover, this fixation requirement does not exist universally. 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.²¹

Significantly, fixation can occur at various stages of a work's development, and therefore, this

12. *Id.*

13. 132 S. Ct. 380 (2011), *denying cert. to Kelly*, 635 F.3d 290.

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

15. *See id.*

16. *Id.*

17. *Id.* at 304–05.

18. *See id.* at 305.

19. The writing requirement derives from U.S. Const. art I, sec. 8, cl. 8. *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). For a similar argument: 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.

20. 17 U.S.C. § 102(a) (1978).

21. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221, 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.").

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.”²² As the copyright statute itself recognizes, works evolve over a period of time, and the fixation requirement is not intended to “freeze” a work at any given point in time in order to pass constitutional muster.²³

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. 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.

A standard of “substantial compliance” for fixation could be useful for works with more pronounced degrees of fluidity than more conventional works. For example, as applied in the context of performance art, 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 the fixation for the work generally under a substantial compliance standard. The application of this standard would entitle a particular performance to protection and would satisfy fixation for other performances to the extent it could be established that relatively minimal differences exist in those other performances. Of course, this approach entails issues for resolution but such is the nature of many copyright law determinations, such as originality and infringement. As David Lange remarked in the context of discussing the legality of piracy: “There is no escaping: we must decide,” and in his view, any decision

22. 17 U.S.C. § 101 (1978) (emphasis added).

23. *Cf.* Heymann, *supra* note 19, 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, *Circular 66: Copyright Registration for On-line Works*, May, 2009, <http://www.copyright.gov/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 particular website at a particular moment covers only that iteration of the website, it demonstrates that works in a constant state of change—even if change is known and expected at the moment of registration—are still undoubtedly fixed for purposes of the fixation requirement of the Copyright Act.” Brief of Blane De St. Croix et al., as Amici Curiae Supporting Petitioner, *Kelley v. Chicago Park Dist.*, 132 S. Ct. 380 (2011) (No. 11-101), 2011 WL 3821356.

“ought to be grounded in fact-finding affected by law.”²⁴

Thus, satisfaction of the fixation requirement, as a concept distinct from the fluidity of a given work, should not be an insurmountable obstacle for copyright protection for the majority of works of authorship. But this still leaves the question of how to address fluidity apart from the issue of fixation. A system of copyright protection that fails to consider the relevance of fluidity for works of authorship is out of step with how creation occurs in theory and practice. Perhaps because of the existence of the fixation requirement in the United States, the “lore” of copyright law tends to assume stability of eligible works. 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.

Certain works do indeed evolve and change, necessitating judgments about whether they should be protected and, if so, in what manner. 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.²⁵ In thinking about how copyright law ought to address these and other fluid 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.²⁶ The following section offers some insights derived from the Jewish tradition, one that has been in existence for at least five thousand years.

II. THE LIVING TRADITION

The opening sections of Genesis, the first of the Five Books of Moses, furnish the theological foundation for man’s existence: man is created in the image of God and his function on earth is to mirror and serve God through the exercise of human creativity. The first Creation narrative in Genesis recounts God’s creation of the world in six days.²⁷ In this narrative, the

24. David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 481 (2003).

25. See Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 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.

26. See, e.g., Gregory N. Mandel, *To Promote the Creative Progress: Intellectual Property Law and Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999 (2011); Gregory N. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283 (2010); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007).

27. See Genesis 1:1—1:31. A nuanced examination of the Creation texts in Genesis discloses two distinct Creation stories. For an in-depth discussion of these narratives and their implications for human creativity, see Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1951-58 (2006). See also ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A*

Torah²⁸ states: “God created man in His image, in the image of God He created him.”²⁹ Further, God commanded man to “fill the earth and master it.”³⁰ Through this language, the first Creation narrative establishes that man’s capacity for artistic creation mirrors or imitates God’s creative capacity.³¹

According to Rabbi Joseph Soloveitchik, a leading modern theologian, the Torah chose to relate the tale of creation so that man could derive the law that humans are obligated to create. Soloveitchik wrote that “[t]he peak of religious ethical perfection to which Judaism aspires is man as creator.”³² He has argued that the term “image of God” as used in this narrative from Genesis underscores “man’s striving and ability to become a creator.”³³ Thus, the Jewish religion introduced to the world that “[t]he most fundamental principle of all is that man must create himself.”³⁴

Understanding human creativity through the lens of the Jewish tradition illustrates that the characteristic ingredients of both Divine and human creativity are partnership, relationship, and fluidity. According to the Jewish tradition, it is man’s function to partner with God in creating an improved world and to renew the cosmos with his own creative enterprise.³⁵ The rabbinic literature provides that “[a]ll that was created during the six days of creation requires improvement.”³⁶ According to Jewish tradition, man was not intended to be a passive recipient of the Torah but rather “a partner with the Almighty in the act of creation.”³⁷ An early rabbinic narrative involving a dialogue between the great Talmudic Sage Akivah and the evil governor of the Judean province, Tinius Rufus, expresses this fundamental idea.³⁸ Rufus challenged Akivah by asking whether the work of God or man is more beautiful.³⁹ Akivah replied that man’s work is better with respect to those things where his art is effective (as opposed to those

MORAL RIGHTS LAW FOR THE UNITED STATES 11-22 (2010).

28. The term “Torah” designates the Five Books of Moses, the first five books of the Hebrew Bible.

29. ETZ HAYIM: TORAH AND COMMENTARY 10 (David L. Lieber et al. eds., 2001) [hereinafter Etz Hayim] (corresponding to *Genesis* 1:27).

30. *Id.* (corresponding to *Genesis* 1:28).

31. *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”).

32. JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 101 (Lawrence Kaplan trans., 1983).

33. JOSEPH B. SOLOVEITCHIK, THE LONELY MAN OF FAITH 12 (1965).

34. SOLOVEITCHIK, *supra* note 32, 109.

35. *See id.* at 81.

36. *Genesis Rabbah* 11:6.

37. SOLOVEITCHIK, *supra* note 32, at 81.

38. *See* Midrash Tanhuma, Tazria 5.

39. *Id.*

matters such as the creation of heaven and earth which man cannot imitate).⁴⁰ Significantly, it is this sense of partnership with the Divine that underlies the argument that human creativity can be an expression of the Jewish concept of *tikkun olam*—understood in broad, general terms as repairing the world.⁴¹

The concept of partnership between man and God is connected generally to the idea of relationship. Specifically, a dynamic synergy between God, humanity, and all creation lies at the heart of the Jewish tradition’s view of how God and man relate to one another and how humans understand their own creativity. According to this perspective, the world “is partially self-created and self-creating.”⁴² 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.”⁴³

Significantly, the text of Genesis also reveals fluidity as a core concern for Divine creativity. During the period when God created the world, He evaluated his activity at the end of each day.⁴⁴ 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.”⁴⁵ According to this perspective, God also functioned like an editor who viewed and reviewed daily. The parallel for human creativity in this regard is quite clear given that according to the Jewish tradition, man is obligated to mirror the Divine and to partner with God through his own creativity. Human creators should engage in an ongoing evaluative process of their works, resulting in products that evolve and progress.

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 internally, almost imperceptibly. This inner labor—termed “the unconscious machine” by mathematician Henri Poincaré — is what creators underscore as the pivotal component of creativity.⁴⁶ Moreover, testimonial accounts of creators also illustrate that creativity entails a partnership between the author and the work itself. Author Madeleine

40. *Id.*

41. See Roberta Rosenthal Kwall, *TIKKUN OLAM: JUDAISM, HUMANISM, TRANSCENDENCE* (Martin S. Cohen & David Birnbaum, eds. 2015).

42. Bradley Shavit Artson, *Ba-derekh: On the Way—A Presentation of Process Theology*, *CONSERVATIVE JUDAISM*, Fall-Winter 2010, at 9.

43. *Id.*

44. *Genesis* 1:4, 10, 12, 18, 21, 25.

45. ROBERT GNUSE, *THE OLD TESTAMENT AND PROCESS THEOLOGY* 102 (2000).

46. Henri Poincaré, *Mathematical Creation*, in *THE CREATIVE PROCESS: REFLECTIONS ON THE INVENTION IN THE ARTS AND SCIENCES* 33 (Brewster Ghiselin, ed. 1952).

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.⁴⁷ Engel’s words encompass the idea of self-transcendence, which requires the creator to submerge her ego and pay attention to the voice of the work itself.

These narratives by authors and others interested in creativity theory support the Jewish tradition’s focus on partnership, relationship, and fluidity as they relate to the process of creativity. 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, such as “Wildflower Works”. Indeed, if human creativity is seen as a “partnership” between the creator and her 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. Nonetheless, they encompass a degree of mutuality in that the human author still is allowing these “chance” or partially natural works to emerge and develop, and the author embraces the results with intentionality. Moreover, an appreciation for the fluidity inherent in the creative process is consistent not only with the practice of human artistic creativity but also the reality that change itself is inevitable.

CONCLUSION

This foray into the Jewish tradition’s view of Divine and human creativity causes one to question whether any work of human creativity is ever really complete any more than human beings, while alive, are considered “finished.”⁴⁸ This query poses an interesting dilemma for copyright law in the United States, particularly with respect to decisions such as *Kelley*. 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.”⁴⁹ The court’s view reflects the conventional copyright trope in the United States. This Essay suggests that a more nuanced view of what types of works of authorship deserve copyright protection might be facilitated by considering the insights of the Jewish tradition’s view of Divine and human creativity.

47. MADELEINE L'ENGLE, *WALKING ON WATER: REFLECTIONS ON FAITH AND ART* 24 (1980).

48. Recently, a renowned Jewish law authority sent the author a congratulatory email on the submission of a final manuscript to the publisher. He said that even after a book is published, it is “*tam ve-lo nishlam* (done but not completed) since no work is ever complete.” This statement underscores the point in the text.

49. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 305 (7th Cir. 2011).