

How Much Should Being Accommodate Becoming? Copyright in Dynamic and Permeable Art

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Insofar as the senses display becoming, passing away, and change, they do not lie. . . . What we make of their testimony is what first introduces the lie, for example, the lie of unity, the lie of thinghood, of substance, of permanence. "Reason" is what causes us to falsify the testimony of the senses. . . . Heraclitus will always be in the right for saying that being is an empty fiction.

—Friedrich Nietzsche, *Twilight of the Idols*¹

INTRODUCTION

Much of the art in a variety of partially overlapping genres—participatory art, kinetic art, process art, performance art, body art, environmental art, land art, bioart, integrated art, site-specific art, installation art, conceptual art, found art, appropriation art, and Dada—is dynamic, or permeable, or both. By “dynamic art,” I mean art that is unstable or ephemeral, and that may invite unpredictable change though the influence of natural or human forces. By “permeable art,” I mean art that has and is meant to have weak, unclear boundaries—art that blurs text and context.

Dynamic and permeable art seek to present the world as a continuum in space and time, challenging our commitments to boundaries and objects. In this respect, dynamic and permeable art take philosophical sides with Heraclitus and Nietzsche. Those two philosophers, among others, assert that reality is to be found in becoming—in constant, fluid change.² Being—thinghood, substance, permanence, and unity, in Nietzsche’s words—is a fiction.³

By contrast, copyright law is firmly committed to being. Its central subject, the

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1. FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS, OR HOW TO PHILOSOPHIZE WITH THE HAMMER* 18–19 (Richard Polt trans., Hackett Publishing Co. 1997) (1889).

2. See generally NICHOLAS RESCHER, *PROCESS METAPHYSICS: AN INTRODUCTION TO PROCESS PHILOSOPHY* (1996).

3. NIETZSCHE, *supra* note 1, at 19.

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work of authorship, must be stable and discrete. Works of authorship can neither change over time, nor have unknown boundaries. A principal reason is that infringement analysis rests on an assessment of the similarity or dissimilarity of two works. That analysis cannot function if all we can say is that the plaintiff's work was somewhat similar to the defendant's at daybreak, and a little less so at noon, and may be more or less similar at dusk. Nor can it function if it is unclear whether the plaintiff's work is that sculpted object in the middle of the room, or just the paint covering the object, or also the paint on the walls and ceiling.⁴

The "being" of copyright will undoubtedly never do full justice to the "becoming" of dynamic and permeable art. Any stable, discrete work of authorship into which we pack dynamism and permeability will not include the full, ongoing experience of the open creation and its serendipitous transformations. Yet copyright, like human reasoning and imagination more generally, is nimble. It has developed a powerful set of tools to frame various kinds of becoming as being—that is, as stable, bounded objects that can qualify as works of authorship. This essay will address three of those tools: (1) considering ranges and correlations as copyrightable elements of works; (2) using non-notational, trans-category fixation in audio and video; and (3) considering site-specific and found art as involving compilation. It will consider how each of the tools accommodates dynamic and permeable art and will then consider the copyright policies that should be taken into account when setting limits for each tool's use.

Part I addresses the tool of ranges and correlations: the possibility that works of authorship can comprise not just determinate values, but ranges of values, bound by constraints, and within those constraints subject to observable correlations. That conceptual move allows protection of a wide variety of participatory art, from video games to immersive experiences, as well as of a wide variety of art in which processes of unpredictable, non-human origin play a role. Part II addresses the tool of trans-category, non-notational fixation: the 1976 Act's recognition that at least some types of creative activity—what we would recognize as music, dance, and talking, for example—can be fixed as works not in notation appropriate to that category, but in audio or video, which are also protected as sound recordings or audiovisual works. That tool enables dynamic, improvised activity to attain the status of a copyright-protected work. Part III addresses the tool of compilation: the treatment of creative selection and arrangement as resulting in works protected by copyright. The concept of creative compilation may allow the selection and arrangement of found objects, and the siting choices of site-specific art, to be included as part of a work of authorship.

4. Similarly, a stable, discrete work is needed to assess whether the originality requirement is met. See Laura A. Heymann, *How To Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 853 (2009) ("[A] court must be able to compare what the putative author has created to what came before to determine if the 'modicum of creativity' that the court has required exists."). Heymann connects this with the requirement of fixation, but I think it connects more directly with the concept of the work. Authors have means other than fixation of indicating that they are done with the creative process and have created a work. If a poet reads a poem he has composed, but never written down, to 100 other people, we have an object that can be compared with previous works to determine if it is minimally creative.

All three tools raise questions of whether the works they delineate are of sufficient complexity to be more than “ideas,” and whether those works fall into a copyrightable category of work of authorship. Some of the tools also raise distinct issues. For example, when works are composed of ranges and correlations, those ranges and correlations should be conspicuous enough to provide adequate notice, and foreseeable enough that they can be said to have been authored by the artist claiming to have created them.

I. DYNAMIC WORKS AS CONSTRAINED RANGES AND CORRELATIONS

How can copyright law create a stable work of authorship from art that unfolds and changes over time, and that may never appear exactly the same from minute to minute? One of the most powerful tools that copyright has developed to accommodate dynamic works is the framing of works as providing ranges and correlations rather than, or in addition to, furnishing images or sounds or shapes in all of their detail. I will further investigate in Part II how notated works of the performing arts, particularly music, can be said to have done this for centuries.⁵ However, as a matter of copyright theorizing, it was the 1982 case of *Stern Electronics, Inc. v. Kaufman* that, in the context of video games, began to build the tool of ranges and correlations.⁶ The defendants in that case argued that the video game they had copied was not fixed as an audiovisual work, because the video and audio output was never exactly the same. The *Stern* court responded:

No doubt the entire sequence of all the sights and sounds of the game are different each time the game is played Nevertheless, many aspects of the sights and sequence of their appearance remain constant during each play of the game. . . . The repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work.⁷

Zahr Said has generalized this insight and applied it to dynamic art, perhaps best expressed in her description of Olafur Eliasson’s *The Weather Project*, an installation art project that presented changing representations of the sun and sky at the Tate Modern. Said observed that “[t]he parameters of the work of art are set by the author, and both the viewer’s changes through participation and the light and atmospheric changes create some but predictable alterations with a predictable set of possible experiences.”⁸ Although Professor Said’s comment is embedded in a discussion of the fixation requirement, it is best understood as an assertion about the concept of the work of authorship. The issue of what can constitute a work of authorship is conceptually independent of and analytically prior to any discussion of fixation. Before we decide whether a work is fixed, we need to decide *what* qualifies as the

5. See *infra* text accompanying notes 55–56.

6. 669 F.2d 852 (2d Cir. 1982).

7. *Id.* at 856.

8. Zahr K. Said, *Copyright’s Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 347 (2016).

work and therefore needs to be fixed.

In many cases, determining what qualifies as the work will be the more consequential issue, because the fixation requirement for copyright protection in U.S. copyright law is quite modest. It requires only that stability necessary for perception, reproduction, or communication of the work for “more than a transitory duration.”⁹ The interpretation of “transitory duration” is decisively influenced by the second role of fixation—not that of setting a threshold for copyright protection, but that of distinguishing between the reproduction right and the public performance and display rights.¹⁰ In the context of distinguishing between exclusive rights, if an embodiment exists long enough to create practical and economic consequences that are significantly different than those of an evanescent performance or display, the duration will be more than transitory. The minimum duration to create such consequences will typically be measured in seconds or minutes, not in hours or days.¹¹ Because the same more-than-transitory duration is used as a threshold for copyright protection, mere minutes or hours of duration will render a work of authorship fixed.¹² If Pablo Picasso made one of his famous line drawings in one second and immediately threw it into a fire, it would likely not have been “fixed” under the Copyright Act, and thus fixation does limit protection for truly ephemeral creations.¹³ By contrast, an Andy Goldsworthy creation that is destroyed several hours later by the next incoming tide should be “fixed” and protected by copyright.¹⁴ For our purposes, the key idea is that a work of authorship can be composed of a set of constrained ranges, and of correlations between inputs and outputs, rather than of

9. 17 U.S.C. § 101 (2016) (defining “fixed”).

10. See *id.* § 102(a) (extending copyright protection to original works of authorship “fixed in a tangible medium of expression”); *id.* § 106(1) (granting an exclusive right “to reproduce the copyrighted work in copies or phonorecords”); *id.* § 101 (defining “copies” as “material objects . . . in which a work is fixed . . .”).

11. Cf. *id.* § 112 (providing an exception to the reproduction right for “ephemeral recordings”); STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 44 (Comm. Print 1965) (noting that the ephemeral recording exception is “essential to educational broadcasting, since repetition of the same material by the same instructors is required when, for example, a class is scheduled to be repeated at *different hours throughout the school-day* or on different days” (emphasis added)). Compare *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129–30 (2d Cir. 2008) (finding that a buffer copy that exists for no longer than 1.2 seconds is not significantly different from a performance, and is not “fixed” within the meaning of the Copyright Act) with *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (assuming that recordings that may be made of broadcast television shows for a couple of hours are unauthorized “copies” that would violate the reproduction right but for the fair use of private “time-shifting”).

12. Thus, although it is helpful to have a work fixed for the entire duration of copyright in that work, so that a fixed copy is available to serve as evidence in case of dispute, the fixation requirement in § 102 does not require stability for anything like that duration.

13. See, e.g., *Pablo Picasso Drawings*, PABLOPICASSO.NET, <https://perma.cc/YX6V-CKS9> (last visited Feb. 7, 2020).

14. See Megan Carpenter & Steven Hetcher, *Function Over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221, 2228–29 (2014) (describing cairns created by Andy Goldsworthy that are changed or destroyed by the next incoming tide). More generally, I do not believe that “transitory duration” lasts quite as long as Carpenter and Hetcher seem to think it does. See *id.* at 2241–61 (arguing that copyright protection should require fixation, but not fixation for “more than a transitory duration”).

a set of static, determinate values. If that is the case, then only those ranges and correlations have to be tangibly embodied for “more than a transitory duration,” and most of the time, they will be.

It is precisely as a set of static, determinate values that most of us unconsciously think of a work of authorship. A literary work, for example, is paradigmatically an unchanging, sequenced set of characters, spaces, and punctuation. After the titles, the first fifty-one characters and spaces in Charles Dickens’s *A Tale of Two Cities* always have been, are, and always will be “It was the best of times, it was the worst of times.” True, not all works of authorship are experienced as sequences of discrete elements. Traditional works of two-dimensional visual art, for example, are more likely experienced as planes of continuous color. Yet those planes are also characteristically static and determinate. The colors of the sixteenth-century frescoes on the ceiling of the Sistine Chapel are, conceptually as a work, arranged just as Michelangelo created them: planes of hues, saturations, and luminosities distributed on plaster. The physical frescoes—the copies—will age and change. However, in the metaphysics of copyright, the work remains what it was. The practice of “restoring” works is consistent with that metaphysics, which makes determinative the appearance of the work at the moment the author decides it is finished.¹⁵ Even motion pictures and sound recordings, newer types of works that necessarily unfold over time, are also paradigmatically unchanging. The crop-dusting biplane will always appear over Cary Grant’s right shoulder exactly one hour and thirteen minutes into *North by Northwest*.¹⁶ Freddie Mercury and Roger Taylor will always start trading references to Galileo three minutes and sixteen seconds into “Bohemian Rhapsody.”¹⁷

By contrast, Eliasson’s *The Weather Report* is not composed of such a set of determinate, unchanging values. As a perceptual experience, it is by design open to the influence of unpredictable forces in the world, such as movements of air that shift and dissipate the generated mist. Moreover, it invites human participation that changes the way it looks. However, the variations in experience are bounded. The fog is generated by machines that will produce a certain quantity of fog per hour—not more, not less. The light is provided by yellow monofrequency lamps, which may make the mist take on shades of orange as well as yellow, but never purple or green. These define a range within which external influences operate.

15. The Sistine Chapel was famously restored in the late 1980s and early 1990s, and there was plenty of controversy surrounding the restoration. Most of the controversy about Michelangelo’s ceiling, however, was about whether the effort truly restored the frescoes to their original state, or whether, while removing various accretions, the restorers destroyed highlights, shadows, and other detail that Michelangelo had added after the frescoes had dried. See JAMES BECK & MICHAEL DALEY, *ART RESTORATION: THE CULTURE, THE BUSINESS, AND THE SCANDAL* (1993). Although notated musical works arguably create ranges for performers, see *infra* text accompanying notes 55–56, the influence of the ideal of determinate work is found in concepts of “authenticity” and “werktreue” in performance. See, e.g., Randall R. Dipert, *The Composer’s Intentions: An Examination of Their Relevance for Performance*, 66 *MUSICAL Q.* 205 (1980); Dorottya Fabian, *The Meaning of Authenticity and the Early Music Movement: A Historical Review*, 32 *INT’L REV. AESTHETICS & SOC. OF MUSIC* 153 (2001).

16. *NORTH BY NORTHWEST* (Metro-Goldwyn-Mayer 1959).

17. QUEEN, *Bohemian Rhapsody*, on *A NIGHT AT THE OPERA* (EMI Records 1975).

Many dynamic works also contain mechanisms that relate inputs to predictable outputs. Those mechanisms may be as simple as mirrors, or may be mechanical devices, or computer programs containing many thousands of lines of code. In *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, for example, both the District Court and the Ninth Circuit held that the dynamic elements of the video game *World of Warcraft*, as embodied in code on Blizzard's servers, were protected by copyright independently of the static audio and graphic files stored locally on the subscriber's own computer.¹⁸ It was the dynamic elements that set ranges and correlations governing the use and presentation of the static elements—ranges such as “how large or small to make an image or how soft or loud to make a noise,” and correlations such as determining “[a] monster's capabilities, [w]hat treasure will be recovered if the monster is defeated . . . , the amount of damage inflicted by a blow from a monster or another player, and when a character dies.”¹⁹ The general point is that if we think of a work as composed not just of creative choices about determinate values, but of creative choices about ranges of expression, and about correlations between inputs and outputs, then we can still conceive of a dynamic experience as being a work of authorship—as a conceptually stable set of choices made by someone we can think of as the work's author.

While both fully determinate works and ranges-and-correlations works may be either fixed or unfixed, it may be hardest to imagine how we could think of some creation as a work of authorship at all if it is dynamic and unfixed. How can we find being in all of that becoming? Yet it is possible. Suppose that I tell each of four actors how to respond to audience cues in an interactive theater piece. The instructions are reasonably complicated, but I never write them down. The instructions should qualify as a dynamic work of authorship. They comprise a set of ranges and correlations that will generate a set of theater experiences that is not nearly as broad as all possible theater experiences. However, because the instructions were conveyed orally and exist only in the memory of the actors, the dynamic work is not fixed in the copyright sense.

As interesting as the concept of work as ranges and correlations is, there are copyright policies that should provide limits at the edges. First, just as compilations must be of sufficient complexity, so should ranges and correlations. If they are not, then the traditional copyright law answer is that they amount only to an uncopyrightable idea. Take, for example, Frank Warren's *PostSecret* project.²⁰ It invites people to anonymously send a secret on a postcard to Warren, who then posts

18. *MDY Indus., Inc. v. Blizzard Entm't, Inc. (MDY I)*, 616 F. Supp. 2d 958 (D. Ariz. 2009), *aff'd*, 629 F.3d 928 (9th Cir. 2010). The issue of separating static and dynamic elements arose because Blizzard charged MDY with trafficking in a device that was designed to circumvent a technological measure controlling access to a work, in violation of § 1202(a)(2) of the Copyright Act. The courts held that only the dynamic elements stored on Blizzard's servers were protected by a technological measure controlling access, and the courts had to rule whether those elements were protected by copyright. See *MDY I*, 616 F. Supp. 2d at 966 (rejecting MDY's argument that “dynamic nonliteral elements of the WoW game cannot be copyrighted”); *MDY Indus., Inc. v. Blizzard Entm't, Inc. (MDY II)*, 629 F.3d at 953 (“WoW's dynamic non-literal elements constitute a copyrighted work.”).

19. *MDY I*, 616 F. Supp. 2d at 965.

20. See *POSTSECRET*, <https://perma.cc/B4UL-P999> (last visited Jan. 31, 2020).

an image of the postcard online. That invitation provides ranges and constraints. Contributors can do anything that fits on a postcard, but it has to fit on a postcard. The postcard can't contain the name of the contributor, and the postcard is supposed to reveal something about the sender that the sender hasn't told others. However, there is a strong argument that those constrained ranges are no more than an idea. That is to say, there is a strong argument that protecting Frank Warren's project against all other projects that have those characteristics is too broad, and not something we want copyright to do.²¹

Second, there should probably be some doctrine regarding the conspicuousness, or the lack of conspicuousness, of ranges and correlations in a dynamic work. The courts in *Stern Electronics* and in *Williams v. Artic International* cited the repetitiveness of certain features in video games as grounds for deeming them to meet the fixation requirement.²² Zahr Said similarly concludes that "repetitively changing art" more easily qualifies for copyright protection than "evolving art."²³ Though it is not clear to me that repetition is a sine qua non of copyrightability of dynamic art, a principal value of repetition is that it provides notice: It makes it easier, and may in some cases be necessary, to comprehend that a dynamic work is operating within certain ranges and correlations. The allowed behavior of a video game character might be so varied and unrepeatable that it is not evident that that behavior is limited in some way. Similarly, the color and patterns of light in a participatory installation may vary widely with a visitor's actions, and it may not be evident that a particular shade or pattern is excluded. Conspicuousness could figure into copyright analysis in a number of ways. For example, there might be a presumption that ranges and correlations that would not be noticed by an ordinary observer were not copied by a defendant. In those cases, mere access to such works should not be sufficient to prove copying of those features, lest plaintiffs hassle defendants with legal action regarding ranges and correlations that are not easily noticed.

Third, copyright in ranges and correlations should be limited to those that are traceable to an author. Old Faithful, the geyser in Yellowstone National Park, has for the last twenty years erupted every 44 to 120 minutes, and the eruptions last for between one-and-a-half and five minutes.²⁴ Those are both ranges. It is also the case that the longer a given eruption of Old Faithful lasts, the longer the interval will be until the next eruption.²⁵ That's a correlation. However, no one can claim authorship of Old Faithful's ranges and correlations.²⁶ As Zahr Said has argued, the features of

21. Warren may select some submissions to post and reject others, and that selection may result in compilation copyright. However, the compilation copyright would cover only the particular collection of submissions that are posted online, not the idea of posting anonymous secrets sent on postcards.

22. See *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982); *Williams v. Artic Int'l*, 685 F.2d 870, 874 (3d Cir. 1982).

23. See Said, *supra* note 8, at 346.

24. See *Old Faithful*, WIKIPEDIA, <https://perma.cc/PF7M-G7RY> (last visited Feb. 7, 2020).

25. See *id.*

26. On the other hand, an author could conceivably select Old Faithful's eruption cycle to trigger some output in his or her work. I will consider below in Part III the extent to which an author can select elements found in nature and make them component parts of a work of authorship.

a claimed work must be the foreseeable results of actions that a person or persons took.²⁷ More generally, as Shyamkrishna Balganesb has argued, an author must be the cause of the features of the work claimed, which means both the but-for cause and the proximate cause, and the latter may include a foreseeability criterion.²⁸

Lastly, we have to consider the relationship of any dynamic or permeable work to the eight categories of copyrightable subject matter enumerated in § 102. These categories play a complicated role in limiting what creations qualify for copyright protection. The Copyright Office has taken the position that the eight enumerated categories are a closed set, and that any original work that does not fit into one of those eight categories is not subject to copyright protection.²⁹ Thus, for example, according to the Copyright Office, a fish that has been genetically modified to glow is not copyrightable subject matter because it does not fit into one of the eight categories (as well as because it is not the product of human authorship).³⁰ As a matter of statutory interpretation, the closed-set position is very difficult to support. Section 102 states that works of authorship “include” those falling into the eight categories,³¹ and § 101 defines “including” as “illustrative and not limitative.”³² The legislative history makes clear that “not limitative” means exactly what it sounds like it means: The closed-set option was thoroughly considered and rejected.³³

27. See Said, *supra* note 8, at 350–51.

28. See Shyamkrishna Balganesb, *Causing Copyright*, 117 COLUM. L. REV. 1, 61–63 (2017).

29. See Registration of Claims to Copyright, 77 Fed. Reg. 37605, 37607 (June 22, 2012). For an argument that Congress should enact a copyright law with a closed set of categories, see R. Anthony Reese, *Copyrightable Subject Matter in the Next Great Copyright Act*, 29 BERKELEY TECH. L.J. 1489, 1499 (2014).

30. Letter from William J. Roberts, Jr., Copyright Office Review Bd., to Tamsen Barrett, Fulbright & Jaworski LLP (Sept. 5, 2013), <https://perma.cc/8ML5-EB5Y>.

31. 17 U.S.C. § 102(a) (2017).

32. *Id.* § 101 (defining “including”).

33. A 1963 draft of the Copyright Act provided that works of authorship “shall include” certain categories. See STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT (Comm. Print 1964). Discussants of that draft recognized that that language did not resolve the issue of whether the enumerated categories were exclusive. They debated that issue, and most of them took the position that the categories should not be exclusive. See *id.* at 50–56. The next draft of the Act, the 1964 Revision Bill, expressed that view, providing that “[w]orks of authorship include, but are not limited to, the following categories.” STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 2 (Comm. Print 1965) (emphasis added). The General Counsel of the Copyright Office explained that the additional language was inserted to “mak[e] clear that the enumeration of categories following is not an exclusive enumeration but is an enumeration by way of illustration.” *Id.* at 38 (comments of Abe Goldman). In the 1964 Revision Bill, there were a number of provisions that used the word “including” as illustrative and not limitative. See, e.g., *id.* at 12 (providing, in § 19, that the Act would not preempt state law with regard to “activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 5, including breach of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices” (emphasis added)). The third draft then created a general definition of “including” as “illustrative and not limitative,” thus economically making clear that “including” was to be read nonexclusively in all cases, and it removed the specific wording “but not limited to” from the sentence listing the categories of copyrightable subject matter. See H.R. 4347, 89th Cong. § 101 (1965) (defining “including” as “illustrative and not limitative”); *id.* § 102 (introducing the list of categories of copyrightable subject matter with “include”). That wording in §§ 101 and 102 remained unchanged in the Copyright Act of 1976 as enacted.

That, however, is hardly the end of the matter. Aside from the list of enumerated categories, § 102 is extremely terse and abstract. It packs all of what is supposed to identify copyrightable subject matter into just a few words—“works of authorship,” “original,” “fixed,” “ideas,” “processes,” and a few other near-synonyms. It is likely that the characteristics that should be relevant to determining whether some creation counts as a copyright-protected work of authorship cannot and have not all been stated at that level of abstraction. The enumerated categories, though not exclusive, may be a source of those otherwise unarticulated limits, as courts consider what other characteristics those categories share. That amounts to taking an *ejusdem generis* approach to the interpretation of § 102. Under that approach, although the eight enumerated categories are not a closed set, they are not a completely open set either, because they are an “exemplary set,” providing some implicit limits to what can count as an unenumerated work of authorship.³⁴

From the exemplary set of enumerated categories, courts may draw a wide variety of common characteristics, ranging in generality and in analytical framework. Here are some possibilities:

- All works properly falling into one of the enumerated categories may “produce some mental effect in an audience,” and creations not intended to produce such an effect should not be subject to copyright protection.³⁵
- Most or all enumerated category works are typically disseminated in networks that are insufficiently regulated by informal norms, and those unenumerated creations that are sufficiently norm-regulated should not be copyright-protected.³⁶
- Works in enumerated categories are mostly those that have a low cost of copying relative to their cost of design, and unenumerated works that have high copying costs should likely not be protected.³⁷
- Works in enumerated categories mostly do not appeal to desires for

34. That means, among other things, that if § 102 had fewer enumerated categories, limitations implicit in those categories might be found to exclude works in a category that is now enumerated. Architectural works, for example, are markedly different than works in any of the other categories. See *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 898–99 (5th Cir. 1972) (refusing to protect architectural works, which were not enumerated in 1972); Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 701, 104 Stat. 5089 (1990) (adding architectural works as an enumerated category of works of authorship).

35. See Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1232 (2016).

36. For explorations of how various types of creative endeavors gain protection through community-enforced informal norms rather than copyright or other intellectual property, see, for example, Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013); David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123 (Christine A. Corcos ed., 2010); Dotan Oliar & Christopher Sprigman, *There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1787, 1790 (2008); Mark Schultz, *Fear and Norms and Rock and Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006).

37. See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 224–25 (describing how “state-of-the-art” limitations on copying can render legal prohibitions less necessary).

authenticity and branding, which leaves them underprotected by trademark and false advertising law.³⁸

- Works that are highly functional, such as typefaces, should not be protected, unless Congress specifically decides to protect them, as it did with architectural works.³⁹

In *National Basketball Association v. Motorola*, the Second Circuit treated the § 102 enumerated categories as an exemplary set as it reasoned its way to holding that sports events are not protected by copyright. “Although the list [of eight categories in § 102] is concededly non-exclusive,” the court wrote, “[sports] events are neither similar nor analogous to any of the listed categories.”⁴⁰ Comparing sports events to the enumerated categories, the court articulated reasons why they are not analogous. It noted that sports events are composed of improvised competition, which is not typical of any enumerated work; that sports spectators are interested in seeing whether one athlete can physically match the feats of another, a type of competition that would be hindered by recognizing exclusive rights to some of those feats; and that team sports events would encounter many joint authorship problems.⁴¹

Some dynamic works that otherwise qualify for copyright protection as original, sufficiently complex ranges and correlations may, in part or in whole, not fit into any of the eight enumerated § 102 categories. If not, their copyrightability may depend on whether they are relevantly analogous to works in those categories.⁴² Consider, for example, the garden at issue in *Kelley v. Chicago Park District*, entitled *Wildflower Works*, which consisted of two large oval-shaped plots filled with wildflowers. The oval shapes themselves are too simple to be considered original.⁴³ However, the selection and arrangement of flowers within the plots seems to have

38. See Charles Cronin, *Dead on the Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 247–51 (2010) (arguing that copyright is less important for works of conceptual and living art, for which “monetary value tends to attach mainly to original artifacts rather than copies”); Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 330–41 (2018) (arguing that copyright is not needed in the market for single-copy and limited-edition art, because buyers value authenticity and there is rarely a market for derivative works).

39. See *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978) (holding that the Register of Copyright is justified in refusing to register typefaces, because the “sole intrinsic function of [a typeface] is its utility [in legibly conveying text]”); see also *supra* note 34 (discussing architectural works).

40. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997).

41. See *id.*

42. In some cases, arguments about whether a particular unusual or atypical creation is a copyrightable “work of authorship” may not be all that different under a “closed set” than under an “exemplary set” approach. That is because some of the eight categories are themselves abstract enough that determining whether a work falls inside of one of them will require contextual reasoning. Is a fish or a garden a sculptural work—one of the enumerated categories—or, alternatively, a qualifying unenumerated work? Well, fish and gardens are “three-dimensional,” and, if formed through human intervention, are arguably “applied art.” See 17 U.S.C. § 101 (2016) (defining “pictorial, graphic, and sculptural works” to include “three-dimensional works of . . . applied art”). We then have to figure out what “applied art” means, and that may include consideration of characteristics typical of all of the enumerated categories.

43. *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 303 (7th Cir. 2011) (citing U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 503.02(a)–(b) (1984)).

exhibited a “modicum of creativity” that would support copyright protection.⁴⁴ According to the Seventh Circuit, of all possible species of wildflowers, Kelley selected between forty-eight and sixty; he “designed the initial placement of the wildflowers so they would blossom sequentially, changing colors throughout the growing season and increasing in brightness towards the center of each ellipse.”⁴⁵ Undoubtedly Kelley would be able to provide additional detail about the decisions he made. Although those decisions did not determine the exact placement of colors and shapes within the garden, because unpredictable natural forces filled in some of the details, they likely created sufficiently complex ranges to constitute a range-and-correlation work.⁴⁶

On that reading of the facts and the law, the Seventh Circuit was wrong to hold that *Wildflower Works* was not a copyrightable work for lack of fixation and authorship.⁴⁷ Rather, from the point of view of fixation and authorship, *Wildflower Works* was no different than animated desktop wallpaper software that we can hypothetically construct. Consider wallpaper software that would produce an image that slowly changes with the seasons. It incorporates external inputs, such as cameras, weather data, and random number generators, which determine the placement, quantity, and timing of patches of color as they appear and disappear throughout the year. The patches of color are keyed to the hues of selected wildflower blossoms. While the detailed appearance of the wallpaper could not be predicted in advance, the wallpaper program would be setting ranges and correlations that reflected a modicum of creativity, and hence would be protected as an audiovisual work, independently of the computer code that was used to generate it. From the point of view of fixation and authorship, *Wildflower Works* is no different.

In at least one other respect, however, the software and the garden are quite different. The cost of copying a garden relative to its cost of design is much, much higher than the relative copying-versus-design cost of the desktop wallpaper program. A copy of the program could be made and distributed for pennies. A single copy of the garden, at least in the case of *Wildflower Works*, would cost well over \$100,000, and much more if the cost of acquiring land with the same climate and sun exposure was included.⁴⁸ Thus, it is much less likely that a garden will be copied by another garden in any way that will undermine the value of the original.⁴⁹ As a result, as Zahr Said and Christopher Buccafusco have suggested, the best answer is likely

44. See *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (establishing the “modicum of creativity” standard).

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

46. See Buccafusco, *supra* note 35, at 1280, 1280 n.281.

47. See *Kelley*, 635 F.3d at 303–06.

48. Even with donated volunteer labor and free public land, Kelley paid between \$80,000 and \$152,000 for the wildflower plugs that were planted to make the garden. See *id.* at 293.

49. It is possible that a garden could embody an original graphic design that had value separately from its presentation in a garden. Consider, for example, the bold designs carried out in Marco Polo Flower World, a park in Yangzhou, China. See Xinhua, *Aerial View of Marco Polo Flower World in E China*, PEOPLE'S DAILY ONLINE ENG. EDITION (Apr. 11, 2016), <https://perma.cc/ET7W-8G95>. In such cases, it is possible that a garden could beget a derivative work that fell into an enumerated category—pictorial, graphic, or sculptural work—and that was easy to copy. In that event, however, the garden designer could protect herself by fixing the original design as a drawing or other graphic work.

that although the garden embodies original, fixed authorial choices about the selection and arrangement of flowers, it does not fit into any of the § 102 enumerated categories, and is, in significant respects, different from them.⁵⁰ Thus, although many dynamic creations should properly be treated as range-and-correlation works of authorship that are in relevant part fixed, some may still fall outside of § 102's coverage.

II. FIXATION OF CREATIVE ACTIVITY IN AUDIO AND VIDEO

Suppose that you engage in some activity that we would recognize as creative—you make music, or dance, or talk, or act, or mime, or you engage in “performance art,” which I here use to mean an event that includes live human activity, and which might involve some combination of those other activities.⁵¹ What does it take for those activities to be recognized as having created a work of authorship? Before the Copyright Act of 1976, the general answer was that you needed to write down directions for engaging in that activity, in some notated or graphic form. Thus, for example, in the 1908 case of *White-Smith Publishing Co. v. Apollo Co.*, the Supreme Court held that only visible notation legible to musicians could count as a “copy” of a musical work.⁵² The Copyright Office, following the *White-Smith* holding, required appropriate visible notation for registration.⁵³ The archetypal model for copyright is the literary work, and part of that model is having a dedicated system of notation, in that case a phonographic or ideographic writing system.⁵⁴ Other types of activities might ideally have their own specialized notation systems. Thus, the Copyright Office referenced “conventional” staff notation for music and specialized dance notation such as Labanotation or Benesh Movement Notation for dance.⁵⁵ However, any form of notation that provided sufficient directions would do, and thus the Copyright Office recognized that music, dance, and pantomime could be

50. See Said, *supra* note 8, at 343–44; Buccafusco, *supra* note 35, at 1280. Cf. *Kelley*, 635 F.3d at 300–02 (casting doubt on the District Court's conclusion that the garden at issue was both a painting and a sculpture, but not reversing it because it was not challenged on appeal).

51. As Wikipedia notes, “performance art” is “an essentially contested concept.” *Performance Art*, WIKIPEDIA, <https://perma.cc/CHJ9-C265> (last visited Feb. 7, 2020).

52. 209 U.S. 1, 17–18 (1908).

53. See U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 405.01(a) (2d ed. 1984) [hereinafter “COMPENDIUM II”] (“Copies required before 1978. Until 1978, a copy was the only form in which a musical work could be accepted for registration.”).

54. Indeed, because writers and musicians use symbolic languages, and painters do not, painters were once considered to be mere tradesmen, and painting was not considered to be authorship on the same level as writing or musical composition. See Cronin, *supra* note 38, at 240–43.

55. See, e.g., U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 2.6.1.I (1st ed. 1973) (“To constitute a musical composition for purposes of copyright registration in Class E, a work must generally contain notations representing a succession of musical sounds, usually in some definite melodic and rhythmic pattern.”); *id.* § 2.6.2.I (“As long as it is intelligible and capable of being read and visually perceived, a work may be accepted for registration in Class E, even if it does not employ the conventional form of music notation.”). See also U.S. COPYRIGHT OFFICE, CIRCULAR 52: COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 2 (“Acceptable formats of fixation for choreographic works and pantomimes include . . . [d]ance notation such as Labanotation and Benesh Dance Notation . . .”).

sufficiently described in text.⁵⁶

In this context, notation has come to be seen not merely as a means of fixing a copyrightable activity, but as constitutive of the work itself. A musical work becomes whatever can be expressed in musical notation. With respect to actual musical activity, for example, notation provides only ranges. It does not indicate exact tempo, note values and pitches, dynamics, or timbre. Tempo and dynamics are typically suggested by imprecise words, such as “allegro” and “forte”; note values and pitches are only relative; and timbre is suggested only by choice of instrument and various marks concerning articulation and ornamentation. The intangible musical work has only those features that the notation allows it to have, and those features persist in the intangible work even if the only copy is destroyed. The half note is still held, not for any precise number of milliseconds, but for twice as long as the quarter note. Whether or not the middle A is tuned to 440 cycles per second, and whether or not the tuning is well-tempered, the interval between the note of C and the next higher note of G is still a fifth. The work that is to be rendered “allegro” is still supposed to proceed at a somewhat undefined brisk tempo.

Against the background of a notated musical work, musical activity is framed as interpretive rendering. This is one of the major connotations of the term “performance.” If we describe creative activity as a “performance,” in many contexts we are likely thinking of it as an interpretive rendering of an underlying work.⁵⁷ In this understanding, works of the “performing arts” are notated directions; their realizations are merely “performances” that are not in themselves copyrightable works of authorship.

The 1976 Act introduced a potentially major change to the relationship between creative activities such as talking, making music, dancing, miming, and acting, and copyright-protected works of authorship. Section 102 of that Act provides that works of authorship can be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁵⁸ Under a narrow interpretation, that provision might preserve the notation requirements described in the paragraphs above, and simply allow that notation to be stored on magnetic tape or a silicon chip or any physical medium from which a device could make it visible. Yet it is clear that § 102 and its associated definitions were meant to do something much broader. They were intended to discard the notation requirements, and to allow audio and video recordings—which will themselves

56. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.4(A) (3d ed. 2017) [hereinafter “COMPENDIUM”] (“A . . . textual description of pitch, rhythm, or both may suffice [to fix a musical work] as long as the notation is sufficiently precise.”); *id.* § 805.3(D)(3) (“A choreographic work may be fixed with a textual description . . . provided that the description is specific enough to identify the precise movements of the dancers and provided that the description is sufficiently detailed to serve as directions for its performance.”).

57. The other major connotation of “performance” is that it is an activity undertaken before an audience, with the audience and the performers playing different roles that are defined by the relationship between them. A performer is doing something for an audience to listen to or watch, and an audience is listening to or watching a performer.

58. 17 U.S.C. § 102(a) (2019).

almost always be copyrightable as sound recordings or motion pictures—to do double duty by also serving as the means of fixation of various types of other works, including literary, musical, dramatic, choreographic, and pantomimic works.⁵⁹

Confirmation of the broad reading is found in the language of other provisions of the Copyright Act. For example, the definition of “literary work” in § 101 provides that literary works can be fixed in phonorecords, and the definition of “phonorecords” provides that they are material objects in which sounds—and only sounds—are fixed.⁶⁰ A literary work that is fixed in sound alone cannot be a notated work. Similarly, § 303(b) provides that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of any musical work, dramatic work, or literary work embodied therein.”⁶¹ That rule assumes that musical, dramatic, and literary works can all be embodied in sound alone, without notation of any kind, even as it assigns different legal consequences to the past distribution of the work in un-notated form. Confirmation is also found in legislative history,⁶² as well as in the subsequent practice of the Copyright Office, which has explicitly contemplated such means of fixation in numerous passages of its *Compendium of Copyright Office Practices*.⁶³ Now not only can Norah Jones register a musical work that is fixed only in sound, but Garrison Keillor can register a literary work that is fixed only in sound, and George Balanchine could register choreography that is fixed only in video.⁶⁴

59. See Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1384–85 (1997) (recognizing that under the 1976 Act, audio and video recording can simultaneously fix “underlying works” such as musical, dramatic, or choreographic works, and “secondary works” such as sound recordings and motion pictures). Copyright registration applicants can now also use video as “identifying material” for works such as kinetic sculptures, which are fixed but difficult to deposit. See, e.g., U.S. Copyright Registration No. VAu000457070 (June 5, 1998) (for a “kinetic light sculpture” with a deposit of a videocassette); U.S. Copyright Registration No. VAu000438784 (Apr. 1, 1998) (for “Chicken the man remote control dummy,” with a deposit of a videocassette).

60. 17 U.S.C. § 101 (2016) (defining “literary work” and “phonorecord”).

61. *Id.* § 303(b).

62. See Copyright Law Revision, H.R. REP. NO. 94-1476, at 52 (1976) (indicating that the 1976 Act provisions respecting copyrightable subject matter are intended to overrule the *White-Smith* case, and to allow for protection no matter “what the form, matter or medium of fixation may be”).

63. See COMPENDIUM II, *supra* note 53, § 405.03 (“On January 1, 1978, phonorecords, including tapes, disks, sound sheets, soundwheels, and piano rolls, became acceptable deposits for registering claims to copyright in music recorded on them. Moreover, music embodied only in phonorecords before 1978 is now acceptable for registration in that form.”); COMPENDIUM, *supra* note 56, § 802.4 (“Improvised [musical] works are not registrable unless they are fixed in tangible form, such as in . . . an audiovisual recording.”); *id.* § 808.10(1) (“When a live performance is recorded on film, video, or other audiovisual medium, one work is captured and another work is created by the recording. For a musical performance, the work captured is the music and lyrics, if any. For a dramatic performance, the work captured is the dramatic work. In both instances, the work created by the recording is considered a motion picture, rather than a musical work or a dramatic work.”); *id.* § 1509.2(d)(2) (“Choreographic works and pantomimes generally are fixed in visually perceptible copies, because these types of works are based on the physical movements of a person’s body. The forms of fixation for choreography and pantomime typically include . . . motion pictures”); *id.* § 1509.2(c) (“Dramatic works may be fixed in . . . a motion picture or other audiovisual work.”).

64. See U.S. Copyright Registration No. PA0001084684 (July 15, 2002) (Norah Jones, “Come

The use of video and audio to fix works raises some interesting questions about the qualities of the musical, literary, and choreographic works thus fixed. As discussed above, a notated musical work is a work of ranges and relative values, which becomes determinate only in the activity of interpretive rendering that we call “performance.” A musical work fixed in audio has most of the details filled in—tempo and pitch are absolute, the relative loudness is absolute, and timbre is provided. The same is true of a choreographic work fixed in video. Whatever a dancer might have added to a notated choreographic work, if there had been such a previous notation, is embodied in the video. Whether and how we can and should separate out what would have been the notated work from the recorded activity are not easy questions. I have written about them elsewhere in the context of music.⁶⁵ For present purposes, it is important to note that video and audio recording have a somewhat alchemical effect. They transform a creative activity that is itself only “becoming” in a stream of time into a work of authorship that has a “being” with a beginning, a middle, and an end.

The remaining question, however, is which types of creative activity will be eligible for this alchemical transformation into works of authorship separate from the sound recordings or motion pictures that the audio and video recordings also embody. Activity that counts as music, talking, dance, and mime should all qualify for being transformed into musical, literary, choreographic, and pantomimic works respectively. Thus, for example, when fixed in audio-accompanied video, the violin improvisations that form part of Laurie Anderson’s performances of *Duets on Ice* should count as a musical work, separate from the motion picture that has also been fixed.⁶⁶

“Dramatic works” is another § 102 enumerated category into which some activities might be transformed if fixed. However, exactly which activities would end up as dramatic works is more complicated. That is because the category has historically been defined quite loosely, in a way that overlaps with a number of the other enumerated categories while also possibly extending beyond them. A dramatic work is a work, in the words of one court, that “tell[s a] story, portray[s a] character, [or] depict[s an] emotion.”⁶⁷ Nondramatic works can tell stories too, but in dramatic works, “the narrative is not related, but is represented by dialogue and action.”⁶⁸ Importantly, the stories need not be told in words. One of the earliest cases concerning dramatic works, the 1868 case of *Daly v. Palmer*, involved stage directions rather than dialogue.⁶⁹ As a result, even though choreography and pantomime were not among the enumerated categories of protected works in the

away with me”); U.S. Copyright Registration No. PA0000469819 (May 5, 1990) (Garrison Keillor, “Lake Wobegon loyalty days”); U.S. Copyright Registration No. PAu000363024 (Dec. 7, 1981) (George Balanchine, “Hungarian gypsy airs”).

65. See Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology*, 17 TULANE J. TECH. & INTELL. PROP. 1 (2014).

66. See, e.g., Jesse Reynolds, *Laurie Anderson - Duets on Ice - Beginning - Adelaide 2013*, YOUTUBE (Mar. 1, 2013), <https://perma.cc/5EDB-8U8P>.

67. Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892).

68. Daly v. Palmer, 6 F. Cas. 1132, 1136 (C.C.S.D.N.Y. 1868) (No. 3,552).

69. *Id.*

Copyright Act of 1909, choreography and pantomime that told stories were protected as dramatic works.⁷⁰ That raises the possibility that some performance art activities, if fixed in video or audio recordings, might be protected as dramatic works even if they did not contain music or text or choreography or pantomime.

Those possibilities, however, run straight into the positions that the Ninth Circuit and the Copyright Office took in *Garcia v. Google, Inc.*⁷¹ In that case, Cindy Lee Garcia argued that her acting performance in a short, controversial motion picture was a work of authorship separate from the motion picture itself. The Ninth Circuit ruled that it was not. The court was particularly worried about “splintering a movie into many different ‘works,’ even in the absence of an independent fixation,” which could result in fragmented ownership and bargaining difficulties.⁷² Thus, it adopted the same position as the Copyright Office, which had rejected Garcia’s application to register her acting performance. The Copyright Office’s rejection letter explained that its “longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.”⁷³ It concluded that “[f]or copyright registration purposes, a motion picture is a single integrated work.”⁷⁴ The one exception that the Office acknowledged was when a separate portion of a motion picture, such as a special effects scene, was commissioned. That exception, however, was “premised on the creation of a stand-alone work that is independently authored, fixed, and sufficiently creative to be considered a separate claim within one or more of the statutory categories of authorship in section 102(a).”⁷⁵

The Copyright Office’s stated requirement of independent fixation sweeps too broadly, and conflicts with other positions the Office has taken. As I have noted above, the Copyright Act contemplates fixation of works of other types in video and audio, and the Copyright Office has issued registrations for musical, choreographic and dramatic works that were fixed in video (and for musical, dramatic, and literary works fixed in audio).⁷⁶ Moreover, the Office’s *Compendium of Copyright Office Practices* explicitly contemplates such means of fixation.⁷⁷ Yet two legal doctrines

70. *Fuller*, 50 F. at 929. By analogy, one can imagine that even though olfactory, gustatory, and haptic works are not enumerated categories in § 102, sequences of smells, tastes, and touch that tell stories could be protected as dramatic works if appropriately fixed.

71. 786 F.3d 733 (9th Cir. 2015) (en banc).

72. *Id.* at 742.

73. Letter of Robert J. Kasunic, Assoc. Register of Copyrights & Dir. of Registration Policy and Practices, U.S. Copyright Office, to M. Cris Armenta (Mar. 6, 2014), <https://perma.cc/QSA2-5GK3>.

74. *Id.*

75. *Id.*

76. See *supra* notes 58–64 and accompanying text.

77. COMPENDIUM, *supra* note 56, § 802.4 (“Improvised [musical] works are not registrable unless they are fixed in tangible form, such as in . . . an audiovisual recording.”); *id.* § 808.10(l) (“When a live performance is recorded on film, video, or other audiovisual medium, one work is captured and another work is created by the recording. For a musical performance, the work captured is the music and lyrics, if any. For a dramatic performance, the work captured is the dramatic work. In both instances, the work created by the recording is considered a motion picture, rather than a musical work or a dramatic work.”); *id.* § 1509.2(D) (“Choreographic works and pantomimes generally are fixed in visually perceptible copies,

that could justify the result in *Garcia* likely remain. The first is a rebuttable presumption that the elements of the motion picture which could be considered simultaneously fixed, separate works were intended to be “merged into inseparable or interdependent parts of a unitary whole.”⁷⁸ The second is the position that, while activities that involve music and dance and pantomime can become copyright-protected works of authorship when fixed in a motion picture, acting performances cannot.

Such a categorical exclusion of acting performances from copyright merits a brief inquiry into what an acting performance is. It is, in part, akin to choreography and pantomime: An actor controls the positions and movements of his or her body.⁷⁹ To the extent that those positions and movements are controlled in the service of telling a story, acting is also in part akin to the choreography and pantomime that was protected under the category of “dramatic work” even before choreography and pantomime became separately enumerated categories of works. Indeed, if the acting were wordless, there would be little or nothing to distinguish it from pantomime.⁸⁰ However, even wordless acting in a motion picture is usually being directed by someone other than the actor, which raises a question as to authorship of the movements in question. Moreover, the paradigmatic acting performance also involves the recitation of language—frequently language that was written by someone else and is already protected by copyright. Thus, recognition of copyright in an “acting work” would sandwich yet another layer of copyright in between copyright in a script and copyright in the motion picture as audiovisual work. For the Ninth Circuit and the Copyright Office, that is one layer too many, particularly when the actor can in theory bargain for joint ownership of the motion picture copyright, or at least for compensation that is based in part on profits from exploitation of the motion picture.

In many cases, activities that fall under the rubric of “performance art” will not

because these types of works are based on the physical movements of a person’s body. The forms of fixation for choreography and pantomime typically include . . . motion pictures”); *id.* § 1509.2(C) (“Dramatic works may be fixed in . . . a motion picture or other audiovisual work.”).

78. 17 U.S.C. § 101 (2016) (defining “joint work”).

79. *Cf. Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 196 (S.D.N.Y. 2006) (denying a motion to dismiss a stage director’s claim for copyright infringement and refusing to rule early in litigation that stage directions are nonprotectable “stage business” rather than protectable “choreography”).

80. One might think that the category of pantomime included only highly stylized motions performed by someone in heavy makeup, after the model of Marcel Marceau. However, early discussions of copyright protection for pantomime occurred in the context of the screening of silent films that showed actors performing without speaking. *See, e.g., Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). An inspection of the movie at issue in *Kalem*, a 1907 version of *Ben Hur*, reveals that the acting, while exaggerated, was in no way Marceau-style mime. *See, e.g.,* The Video Cellar, *BEN HUR (Silent 1907)*, YOUTUBE (Nov. 4, 2011), <https://perma.cc/RWB6-ZNEU>. The Copyright Office takes the position that “[n]on-expressive physical movements, such [as] ‘ordinary motor activities’ or ‘functional physical activities’—in and of themselves—do not represent the type of authorship that Congress intended to protect as choreography or pantomime.” COMPENDIUM, *supra* note 56, § 806.5(B). While that is understandable, when such movements are performed in a movie or play, they are in fact expressive of a character or plot, and presumably that expression would be infringed not by someone who copies such movements in order to accomplish an ordinary task in life, but only by someone who copies to accomplish the same expressive purpose.

involve a script written by someone other than the performer, nor direction by someone other than the performer. That less complicated context could possibly convince a court (or the Copyright Office) that the performance art, when fixed in video or audio, could qualify as a dramatic work, or perhaps an unenumerated work (though as noted above, the latter would be more difficult given judicial and administrative reluctance to recognize unenumerated works).⁸¹ Of course, to the extent that the performance art includes improvised speaking, music, or dance, those elements should be protected as literary, musical, or choreographic works respectively.

III. PERMEABLE WORKS AS COMPILATIONS

The treatment of the creative selection and arrangement of preexisting elements as creating copyright-protected compilations is the most traditional of the three tools discussed in this Article. For our purposes, it is relevant because it can be used to turn permeable art into copyrightable works of authorship. Consider, first, the issue of art that makes reference to and incorporates its surroundings. That includes much art in the traditions of “installation art,” “site-specific art,” “environmental art,” and “land art.” Compilation is the tool that enables copyright to handle the incorporation of surroundings that have not been created by the author.⁸²

Suppose that I am Robert Irwin and I create an installation of fluorescent tubes and scrim on a set of escalators in the Indianapolis Museum of Art, or that I am Agnes Denes and I wrap chain between trees in a particular forest, or that I am Andy Goldsworthy and I create a snow sculpture on a particular hill. It is easily within copyright’s toolbox to deem me to have selected not only the fluorescent bulbs and the pattern of their installation, but the escalator stack as the installation site; not only the chains, but the trees to wrap and the surrounding forest; or not only the snow and the shapes in which to mold it, but the hill. The Copyright Act states that “preexisting materials” can be “selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁸³ All that is required is that the author exercise a “modicum of creativity” in that selection or arrangement.⁸⁴

In many cases, artists should easily be able to demonstrate that they exercised creativity in selecting a site and arranging their art within it. In seeming recognition of that possibility, the Copyright Office has registered a number of claims of copyright in art that is pointedly described as “site-specific.”⁸⁵ Presumably, that

81. See *supra* text accompanying notes 29–41.

82. See 17 U.S.C. § 103(a) (2019) (“The subject matter of copyright as specified by section 102 includes compilations and derivative works . . .”).

83. *Id.* § 101 (defining “compilation”). If any of the components of the site are themselves protected by copyright, such as buildings protected as architectural works, and if the art in question modifies those components, then site-specific art could also be treated as a derivative work. See *id.* (defining “derivative work”).

84. See *Feist Publ’ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 340 (1991).

85. See, e.g., U.S. Copyright Registration No. VAu000195815 (Nov. 11, 1990) (for a work entitled “Legallook,” consisting of “10 individual elements comprising one site-specific installation”); U.S.

includes the selection of the site and the arrangement of artist-created and selected elements within the site. Of course, if the client rather than the artist selected the site, then absent some co-authorship arrangement, site selection cannot form part of the authorship claim.

Courts have also recognized the possibility of including siting choices within the definition of a work. In *Phillips v. Pembroke Real Estate, Inc.*, for example, the First Circuit noted that “for site-specific art, the location of the work is an integral element of the work. Because the location of the work contributes to its meaning, site-specific art is destroyed if it is moved from its original site.”⁸⁶ While the *Phillips* court ultimately held that the Visual Artists Rights Act does not protect against that destruction, the court had no problem recognizing that selection of a site, and arrangement within that site, can define a work of authorship.

There are, however, four caveats to claiming the site of an installation as part of the work. The first will be familiar from previous discussion in this Article. It is likely that a compilation is copyrightable only to the extent that its elements are copyrightable subject matter. Consistent with its position that only works falling into one of the § 102 enumerated categories are copyrightable, the Copyright Office has concluded that a compilation is copyrightable only if it also falls into one of the enumerated categories.⁸⁷ Thus, for example, the Office would refuse registration of “a claim in a compilation of exercises or the selection and arrangement of yoga poses” because “[e]xercise is not a category of authorship in section 102[.]”⁸⁸ Whether one takes a “closed set” view of the enumerated categories, or an “exemplary set” view, there may be elements of a site, such as a garden or arboretum, that could be found to be uncopyrightable subject matter. If one takes the position that to be considered as part of a copyrightable compilation, an element must itself be copyrightable subject matter, then those elements that are categorically excluded from copyright will also be excluded from the claim of copyright in a site-specific work.⁸⁹ That might prevent Agnes Denes or Andy Goldsworthy from claiming

Copyright Registration No. VAu000211203 (Aug. 13, 1991) (for a work titled “Cannery Row catch on Cannery Row,” described as “Site specific sculpture”); U.S. Copyright Registration No. VA0001871276 (July 12, 2013) (for a work entitled “Early Warning Repeat Series,” described as “2-D artwork, Site-specific installation”).

86. 459 F.3d 128, 134 (1st Cir. 2006).

87. See Registration of Claims to Copyright, *supra* note 29, at 37606 (“[T]he Copyright Office concludes that the statute and relevant legislative history require that to be registrable, a compilation must fall within one or more of the categories of authorship listed in section 102.”). In litigation about the copyrightability of yoga poses, the Central District of California adopted the Copyright Office’s line of reasoning. See *Bikram’s Yoga College of India, L.P. v. Evolution Yoga, L.L.C.*, No. 2:11-cv-5506-ODW, 2012 WL 6548505, at *4 (C.D. Cal. Dec. 14, 2012). However, the Ninth Circuit affirmed on the alternative ground that the yoga poses, separately and as a sequence, were an uncopyrightable idea. See *Bikram’s Yoga College of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1038–42 (9th Cir. 2015).

88. Registration of Claims to Copyright, *supra* note 29, at 37607.

89. It is black-letter copyright law that elements that are for at least some reasons uncopyrightable can nonetheless be incorporated into copyrightable compilations. Facts, uncopyrightable because they are not original, can be creatively compiled. In that case, however, the facts are typically represented in literary form, such as words or numerals. When creatively compiled, they become a copyrightable literary work. By contrast, selection and arrangement of a forest as part of a work of environmental art does not

copyright in a compilation that includes as elements the natural surroundings of a forest or hill.

On the other hand, the siting elements of many site-specific installations might fall into the categories of graphic, sculptural, or architectural works. Thus, for example, Robert Irwin's site-specific installation of fluorescent lights on an escalator stack could be characterized as a compilation that is partly sculptural and partly architectural. Although we usually think of works as falling within only one of the enumerated categories of authorship, it is perfectly possible for a work to span categories.⁹⁰ Therefore, many creators of site-specific installations would be able to claim copyright in a compilation that includes elements of the installation's surroundings.

The second caveat is that at some point before an infringement action is decided, the artist must either assert that her work includes placement in a site, or claim the objects that she created apart from any location. It seems unlikely that the Copyright Office would register a claim in which the artist states that it is indeterminate whether the site plays any role in the work. Nor does it seem possible to litigate and decide an infringement action while leaving the role of the site open. Thus, copyright's "being" does not allow ambiguity about the boundaries of the work to remain.

Third, an expansive definition of a work that encompasses a site will most often limit copyright protection, rather than expanding it. If a work includes its site, then recreating parts of that work in another location is less likely to be infringing, and more likely to be fair use. If I create a snow sculpture similar to Andy Goldsworthy's Cumbria sculpture, but I do so on the steps of the U.S. Capitol, then the more Goldsworthy's work is defined to include the whole setting, the less my work is similar to his, and the less the market for my work overlaps with his.⁹¹

Lastly, at some point, increasing the weight given to site selection will start to generate tension with copyright's traditional approach to attributing independent creation. Suppose that after Goldsworthy has created his snow sculpture on the hill in Cumbria, someone else creates another sculpture on the same hill. Could Goldsworthy claim that no matter how different the second sculpture, the work as a whole, defined to include the site, infringes his work?⁹² That is a normative question

make the forest fall into an enumerated category of work of authorship. Under a "closed set" interpretation of § 102, that makes the forest incapable of being an element of a copyrightable compilation. Under an "exemplary set" interpretation, we have to decide whether forests or gardens are sufficiently like the enumerated categories to merit protection by copyright. If not, then once again, they cannot be elements of a copyright-protected compilation. *Cf. id.* (concluding that compilations should be protected only when they form a work that falls into one of the enumerated categories); Reese, *supra* note 29, at 1529–32 (arguing that compilations and derivative works should be subtypes of enumerated categories).

90. See, e.g., COMPENDIUM, *supra* note 56, § 807.8(A) ("Many works that contain audiovisual material also contain literary and visual arts authorship, and sometimes it is difficult to determine which type of work should be specified in the application. . . . As a general rule, [on the application form,] the applicant should select the type of work that is appropriate for the predominant form of authorship in the works.").

91. See Robert Brauneis, *Goldsworthy at the Capitol*, ROBERTBRAUNEIS.NET, <https://perma.cc/J7Y5-7BUN> (last visited Jan. 22, 2020).

92. See Robert Brauneis, *Augustus on Goldsworthy Hill*, ROBERTBRAUNEIS.NET, <https://perma.cc/3PWP-3F8P> (last visited Jan. 22, 2020).

within copyright, and it involves balancing the recognition of selection authorship with the recognition of the public domain of uncreated objects and settings. Thus, that is part of the question of how far copyright should go in accommodating, in this case, site-specific or environmental art.

There is a similar issue with works that consist of previously existing objects—works that are sometimes categorized as “found art” or as “appropriation art.” If I am Tracey Emin and I take a bed and muss the sheets and arrange ordinary objects around it and call it *My Bed*, it doesn’t matter that I haven’t shaped stone with a chisel, because I have created a sculptural compilation.⁹³ Since Emin has selected and arranged dozens of objects, we should have no problem recognizing a compilation copyright.⁹⁴ However, the choices made in found art can also arguably lack sufficient complexity to be recognized as compilation authorship. Consider two of Marcel Duchamp’s “Readymades.” The first is *Bicycle Wheel*, consisting of a bicycle wheel and fork mounted upside down on a stool.⁹⁵ Duchamp selected a particular bicycle wheel and fork, and a particular stool, and arranged them in a particular way. That may be getting very close to the minimum of compilation authorship, but it arguably still reaches that minimum. Selecting two objects, of all of the objects in the world, to be conjoined, and then conjoining them in one out of many possible orientations, might be considered both sufficiently creative to merit copyright protection, and also (just) sufficiently complex that it does not limit other authors in a way that we do not want them to be limited.

But then consider *Bottle Rack*, which consists of a bottle rack, designed and made by someone else, and merely selected by Duchamp.⁹⁶ We may be able to explain in great detail why the bottle rack is a particularly interesting object, among all objects, to reframe as a work of art. That act of selection and reframing may lead viewers both to see this object anew, and to question what art is and what the context of the museum does. However, selection of a single item as a basis for compilation copyright creates some obvious policy concerns. Among other things, it would seem to grant copyright in a work to the first person to claim it after any previous copyright

93. See *My Bed*, WIKIPEDIA, <https://perma.cc/RT9C-NLWV> (last visited Jan. 22, 2020). Cf. Joan Infarinato, *Copyright Protection for Short-Lived Works of Art*, 51 *FORDHAM L. REV.* 90, 92–94 (1982) (arguing that an arrangement of objects in a decorated house or shop window should be protected by copyright).

94. What if each object, by itself, is not copyrightable as a sculptural work, either because it does not display a modicum of creativity, or because it is a useful object that has no “pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article?” 17 U.S.C. § 101 (2016) (defining “pictorial, graphic, and sculptural works”). The lack of creativity in the design of an object should pose no problem for finding creativity in the spatial arrangement of many such objects. Functionality is a little trickier, because an assemblage of functional elements can in itself be functional, like a clock assembled from many gears. Yet in the case of Tracey Emin’s *Bed*, none of the functional elements can be used without destroying the sculptural assemblage, and hence that assemblage is not functional.

95. See *Bicycle Wheel*, WIKIPEDIA, <https://perma.cc/KM6M-APN6> (last visited Jan. 22, 2020).

96. See *Bottle Rack*, WIKIPEDIA, <https://perma.cc/RG64-VTK8> (last visited Jan. 22, 2020). Of course, the bottle rack may be uncopyrightable for another reason: It may be a useful article the design of which does not “incorporate[e] pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” 17 U.S.C. § 101 (2016) (defining “pictorial, graphic, and sculptural works”).

has expired, and to grant copyright in natural features and processes, like the shape of Yosemite Valley's Half Dome or the ranges and correlations of Old Faithful. However creative we think Duchamp's particular act of selection was, and however enlightening we think *Bottle Rack* is, it is difficult to see the net benefits of any rule that would generally protect such single-item acts of selection.

IV. CONCLUSION

Dynamic and permeable art is the art of "becoming," of art that challenges our perception that the world is made of stable, discrete objects. Although copyright law demands stable, discrete objects—works of authorship—as its subject matter, it has developed powerful tools that can accommodate some dynamic and permeable art, in part by locating or creating stable features or boundaries in the dynamism and permeability. This article has explored three of those tools: the framing of works as ranges and correlations; the recording of creative activity in audio or video; and the treatment of creative selection and arrangement as creating copyrightable compilations. However, there are copyright doctrines that should and do limit the use of those tools, including the requirement of minimum complexity (sometimes known as the "idea-expression" doctrine), and the exclusion of some types of fixed, original creations as uncopyrightable subject matter. Thus, sometimes becoming will remain becoming, unassimilable into the "being" of copyright.