

## Copyrightability of Conceptual Art: An Idea Whose Time Hasn't Come\*

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Hi, I'm Bob Clarida. Thanks very much. This is a dream come true for me too, because copyright law and conceptual art are two of my all-time favorite things to think about.

But my job here today is not to be enthusiastic. As Jane indicated, my job really is to kind of throw a wet blanket on the hopes for copyright protection for works of this nature. And that wet blanket has a name, which is 17 U.S.C. § 102(a), and Rob Kasunic, Professor Liu both spoke at some length about this, so I'm not going into it.<sup>1</sup> We've all read it a thousand times and we all know what it says. It says that works have to be fixed in a tangible medium. That's in paragraph (a), and then there is a list of types of works of authorship, which "include the following categories," and as Professor Liu pointed out, the word "include" has basically been read out of the statute. Courts and the Copyright Office basically take the position that if it's not on this list, it's not going to be subject to copyright protection. There really is no leeway, I think, in practice at least, for the courts to create new categories of works. So the job often becomes trying to shoe-horn an existing work that doesn't fit into one of these categories into one of these categories. And that's not always so easy to do.

In order of appearance in 102(a), let's start with fixation.<sup>2</sup> We've talked about fixation, this is the new *Compendium* that Rob Kasunic mentioned; it became effective in December 2014.<sup>3</sup> On fixation, in addition to the statutory language that we all know about, that the work must be sufficiently permanent and stable to permit it to be perceived for more than a transitory duration.<sup>4</sup> The *Compendium* says the Office "may communicate with the applicant or may refuse registration if the work or the medium of expression only exists for a transitory period of time, if the work or the medium is constantly changing, or if the medium does not allow the specific elements of the work to be perceived, reproduced, or otherwise communicated in a consistent and uniform manner."<sup>5</sup> Well, that reaches an awful

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1. 17 U.S.C. § 102.
2. *Id.*
3. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (THIRD) § 101 (3d ed. 2014).
4. *Id.*
5. *Id.*

lot of the work that's really interesting in the conceptual art area. Because, in very many of these cases, the medium, at least, is constantly changing. The medium often does not allow the specific elements of the work, that is the authorial elements that the human being put into it, to be perceived or communicated in a consistent and uniform manner.

Let's see how a court actually applies this fixation concept to deny copyright protection. Of course, the case that both Rob and Professor Liu discussed earlier, *Kelley v. Chicago Park District*, Seventh Circuit 2011.<sup>6</sup> Chapman Kelley was a painter. He did not come into this work out of a vacuum, he was a painter and mostly he painted wild flowers in ovals. At some point in the 1980s, he actually started doing installations of actual wildflowers in actual ovals in three dimensions, rather than just painting them. And he had a long relationship with the City of Chicago going back to the 1980s, which resulted ultimately in this work—the *Wildflower Works* in Grant Park in Chicago. The City of Chicago publicized this as “living art” before the lawsuit commenced.

But this living art that they were so proud of and felt such civic pride in (“We’ve got living art in Chicago, top that New York City!”), this is sort of a street-level view of it. They decided at a certain point, when they were building Millennium Park, they wanted to have some footpaths, some pedestrian paths, and they changed the work. And Chapman Kelley sued under the Visual Artists Rights Act (VARA) and the Seventh Circuit ultimately decided that VARA did not apply.<sup>7</sup> And perhaps not surprisingly, what this case, I think, illustrates, as much as anything else, is that the courts really hate VARA and they will go to great lengths to avoid enforcing VARA if it is going to inconvenience the property owner in any way.

So, Judge Sykes in the Seventh Circuit—Judge Posner, Judge Easterbrook were not involved in this case, so you can’t blame this on Posner-Easterbrook, there is no mention of antitrust law in this—but the first thing that the Seventh Circuit said was that it was not a painting or a sculpture; under VARA, it has to be a painting or a sculpture, not just a pictorial or sculptural work, which 102 allows, but a painting or a sculpture. And the court said this is an astonishing omission, that none of the parties brought this up.<sup>8</sup> Because, as far as the court was concerned, that could’ve ended the case right there. And the court says we’re not concerned about whether it is a painting or a sculpture “metaphorically or by analogy, but *really*”—and it italicizes *really*.<sup>9</sup> So, the court was just not willing to wrap its head around that this could be art, let alone a painting or sculpture.

The court also said that the work was original enough, it doesn’t lack for originality, but the real impediment to copyright is not that the work fails the test for originality, understood as not copied and possessing some creativity, but that a living garden lacks the kind of authorship and stable fixation normally required to

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

7. *Id.* at 308.

8. *Id.* at 300.

9. *Id.*

support copyright.<sup>10</sup> So, what the court has done is say that this artwork is a garden and a garden is not copyrightable, so there is a sort of syllogism that goes on. And then the court says, “[a]t any given moment in time, a garden owes most of its form and appearance to natural forces, though the gardener who plants and tends it obviously assists. All this is true of Wildflower Works, even though it was designed and planted by an artist.”<sup>11</sup> So, what the court is doing here, I think, whether consciously or not, it’s making sort of a quantitative comparison. Most of the appearance of this work is not created by the human intervention of the author, it’s created by natural forces, as these plants grow and develop and are affected by the weather and so on.

Seeds and plants in a garden are naturally in a state of perpetual change—they germinate, groom, blow, becomes dormant, and eventually die; this life cycle moves gradually, over days, weeks, and seasons—but the real barrier to copyright here 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.<sup>12</sup>

Now, Professor Liu, I think rightly advised against essentialist arguments, but that is exactly what the court does here in italics, “the real barrier to copyright is not temporal, but *essential*,” and it italicizes “essential.”<sup>13</sup> It has made, I think, a category mistake here and completely misunderstood what the work is and said this work is a garden, so what do we know about gardens, can we copyright a garden? And I think that’s really not taking the work at face value. It’s not taking the work seriously as a work of art. It’s saying it’s a garden. So, even if it is a garden, well, really, what’s wrong with registering a garden? As we know, it’s not on the section 102 list and the *Compendium III* says about the list of categories in section 102: “Works that do not fall within the existing categories of copyright subject matter are not copyrightable and cannot be registered with the U.S. Copyright Office.”<sup>14</sup> And then the parenthetical below: “Congress did not delegate authority to the courts or the copyright office to create new categories of authorship. Congress reserves this option for itself.”<sup>15</sup>

So, as we saw in *Garcia v. Google*, courts are not willing to take on some new category of authorship, whether we call it performance or whether we call it something else.<sup>16</sup> If it’s not on the 102(a) list, it’s probably not going to be copyrightable. The Copyright Office is not going to register it, and the courts are not going to allow you to enforce it, even if you take the option of suing without a registration.

So, it’s up to Congress and they’ll get around to that essentially never, so I don’t think we can hold our breath for that. But, I think 102 also presents a bigger

10. *Id.* at 303.

11. *Id.* at 304.

12. *Id.* at 305.

13. *Id.*

14. COMPENDIUM, *supra* note 3, § 101.1(A).

15. *Id.*

16. *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015).

problem for works of this nature and that's in 102(b): ideas and concepts. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, [or] process," et cetera.<sup>17</sup> Ideas and concepts, this is the basis of the merger doctrine, obviously, where the idea of the work can only be expressed in one of a very few ways. But, I think, even beyond the merger doctrine—and I think the examples that I'm going to show you here very quickly are not really subject to the merger doctrine so much as they really are the idea. The idea is the work, and sort of by intention, the intention of the artist is to make this idea into the work, to dematerialize the artwork. And in particular, coming out of the 1960s, that had a lot of weight behind it.

I'm just going to show you some examples really quickly, and this is the conceptual art. When I refer to conceptual art, this is sort of the stuff that got me excited, you know, thirty, forty years ago. Annea Lockwood, *Piano Burning*, 1968.<sup>18</sup> Anybody know this piece? And because of my background as a composer, all of these are sound related. This is *Piano Burning*; in 1968 there were a lot of things burning all over the place. And in the summer of 1967, Jimi Hendrix had made some real headlines by burning his guitar, so this is an idea that was in the air.<sup>19</sup> I think it's interesting that the piano in this case is not some elegant concert Steinway, it's an upright piano from somebody's grandma's parlor. And also this is a sound piece, by the way. It was essentially created as a sound piece and not just a theatrical demonstration because as the piano burns, the strings start popping like crazy. It's just really a kind of terrifying sound that it makes. But my question is: how would I infringe this piece? If the piece is piano burning and I go out and burn a piano someplace, what possible action—so perhaps, Annea Lockwood brings an infringement action against me, I go to court on 12(b)(6), I say this is an idea; what's not an idea here? You set a piano on fire and listen to it pop. I think I win that argument. I think this is an idea and I think no matter how I dress it up, even if I use a concert Steinway and I do other things with it, I think all I've got here is an idea. So, it's almost impossible to infringe in a way.

Similar example, Paul Kos, *Sound of Ice Melting*.<sup>20</sup> Another sound piece, two blocks of ice, each twenty-five pounds surrounded by eight microphones on boom stands. As they melt, the sound is amplified. And believe or not, it makes quite a sound. It's popping and cracking and doing all sorts of amazing things. And it's a way of focusing the perception on these things that would seem to be static, and actually they're changing all the time. It's pointing a spotlight on impermanence. But again, if I put some blocks of ice with microphones around, Paul Kos sues me for that—I say this is an idea. I think I win that argument, under 102(b).

17. 17 U.S.C. § 102(b) (2012).

18. See Annea Lockwood, *Piano Transplants* (last visited Mar. 9, 2016), <http://www.annealockwood.com/compositions/pianotransplants.htm> [<https://perma.cc/TS5C-JWFU>].

19. See Bryan Wawzenek, *48 Years Ago: Jimi Hendrix Sets His Guitar on Fire for the First Time*, ULTIMATE CLASSIC ROCK (Mar. 31, 2015), <http://ultimateclassicrock.com/jimi-hendrix-guitar-fire/> [<https://perma.cc/48HP-AYDZ>].

20. See, e.g., Mark Stevens, *Zen and Now*, NEW YORK MAGAZINE, [http://nymag.com/nymetro/art/reviews/n\\_9214/](http://nymag.com/nymetro/art/reviews/n_9214/) [<https://perma.cc/7QX8-V6HU>].

Another Paul Kos piece from 1970—Paul Kos is in San Francisco, active in performance art, conceptual work—*Sand Piece*, 1970.<sup>21</sup> This is not just a lovely sculptural cone of sand; he turns an entire two-story gallery into an hour-glass, puts a tiny hole in the floor and puts a ton of sand on the second floor and it all trickles down very slowly onto the first floor and it makes a lovely cone. Again, I can do that, that's an idea. I don't think there is anything but the idea here, no matter what kind of execution I may give it. It's a wonderful piece, but I don't think copyright could or should be able to protect it.

Steve Reich, *Pendulum Music*, from 1968.<sup>22</sup> You hang some microphones from the ceiling on very long cords and put them over loud speakers and set them in motion swinging as pendulums and as they cross the loud speakers they make a sound and you have four or five or six or ten of these going at once and they go in and out of phase with each other and they make a lovely sound. Again, I don't know if that's anything but an idea. This set of instructions [on the slide] certainly is protectable as a piece of text. I'm not going to play the performance video of *Pendulum Music*, but it's lovely. It just goes “whoop, whoop, whoop,” like that.

But all these pieces are really ideas. They are, I think, ideas in the same way that the set up for a reality television show is an idea. You put a bunch of airhead kids in a beach house, turn the cameras on, and see what happens. I think I can make a show like that and not infringe anything. Just as I think I can put microphones on blocks of ice. So, we can't really fix these works. That's, I think, the real ultimate problem—that we can't really fix these works. We can fix a photograph of a work, a video of a work, a printed description of a work, but those things are not the work. And they're a really poor substitute for what the work is and this creates, what I call, the “Magritte effect.” Magritte has a painting from 1929; it shows an image of a pipe, and the text on the bottom in French says, “This is not a pipe.”<sup>23</sup> The piece is called *The Treachery of Images*. And that is exactly what we're dealing with here, I think. We're dealing with works that are not reducible to some representation of the work in a photograph or a video or a printed description. The work is not the copy. The work is not the representation of the work. This painting of a pipe is not a pipe. So, until Congress amends—and also just let me point out, this is not some crazy, discriminatory policy towards artists. Architects had this problem until 1990. A work of architecture was only protectable as a blueprint. Pre-1990, anyone can make the three-dimensional structure, just by walking by and looking at a building they liked and copying it. So, Congress actually had to step in in 1990 and create architectural works protection to give architects real protection over something other than just blue-

21. See, e.g., *Ice Makes Fire: Paul Kos with Jarrett Earnest*, BROOKLYN RAIL (Apr. 2, 2012) <http://www.brooklynrail.org/2012/04/art/ice-makes-firepaul-kos-with-jarrett-earnest> [https://perma.cc/Y3ME-Y3HS].

22. See *Pendulum Music Steve Reich 1968*, YOUTUBE (May 8, 2014) <https://www.youtube.com/watch?v=fU6qDeJPT-w> [https://perma.cc/HWV9-SS8K].

23. See, e.g., Rene Magritte, *The Treachery of Images*, RENEMAGRITTE.ORG, <http://www.renemagritte.org/the-treachery-of-images.jsp> [https://perma.cc/A6CR-3F3T].

prints.<sup>24</sup> So, until Congress amends section 102, as it did for architects in 1990, I think hopes for copyrightability of conceptual arts are, sadly, just a pipe dream.

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24. 17 U.S.C. § 102(a)(8).