

Section 101 of Title 17 of the United States Constitution explains that a work is considered fixed is when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” I believe that because of the vagueness of the language in this section, it should be reformed. This point is underscored in the Register of Copyrights, Maria Pallante’s, lecture, “The Next Great Copyright Act,” in which she explains that copyright law is difficult to read and understand.¹ Due to the confusion caused by this section of the law, artists are limited in their expression; their works might not be copyright eligible if they are not “fixed” in the eyes of a judge.

Works of art made from ice or other natural elements may not be protected by copyright law because they will not last long enough according to Title 17 Section 101. For example, after a highly contested dispute between artist Chapman Kelley and the Chicago Park District, Kelley’s multi-media installation was destroyed after the Seventh Circuit deemed the work ineligible for copyright as the wildflowers in the work lacked stable fixation.² Interestingly, one series housed by the Islip Arts Museum in New York by Olivia Kaufman-Rovira consists of giant grass chandeliers, displayed for six weeks in order for viewers to see the grass’ growth.³ Why would Kelley’s work not be protected, but another multimedia work that relies on a natural material, grass, be protected? This portion of the law is also problematic because it allows the

¹ Pallante, Maria A., 26. “The Next Great Copyright Act.” *Horace S. Manges Lecture, 4 March 2013*. New York: Columbia Journal of Law & the Arts, 2013.

² Isaacs, Deanna. “Chapman Kelley’s Mutilated Garden.” *Chicago Reader* 3 Dec 2009. *Reader*.

³ Ochi, Pauli. “Phoebe Washburn and Other Artists Who Use Dirt, Grass, Tress and Plants as Artistic Medium.” *Beautiful Decay* 15 Nov 2013: *Beautiful/Decay*.

courts, in some small way, to determine what constitutes art. With copyright protection, Kaufman-Rovira can feel comfortable displaying her work in a public space, while Kelley had to see his work destroyed. Typically, artists must feel safe in order to share their work, an original goal of copyright law. However, based on legal precedents like *Bleisten v. Donaldson Lithographing Co.*, it has been made clear that judges do not determine what constitutes art.⁴ This case in particular made it so advertisements were protected, because works need not be “fine art in order to be copyright eligible”.⁵ So how can courts determine whether one work is protected and another is not, when both works use the same medium?

I propose that Section 101 expand the terms “sufficiently permanent and stable” to include works that use materials found in nature as a medium, such as ice or plants. This explicit change to the law would help in a small, but noticeable way for all mixed-media works. A work requires a small degree of originality and must be considered fixed to be copyright eligible. Why aren’t ice sculptures considered fixed when we have legal precedents such as *MAI Systems Corp. v. Peak Computer, Inc.*? In this case, Peak Computer, Inc is a computer maintenance company that downloaded MAI software to help its clients.⁶ To prevent this, MAI Systems claimed infringement, and won the case even though the software is only stored on a computer’s RAM.⁷ A computer’s RAM is temporary memory that is wiped when the computer is shut off. This means that the software could potentially be “fixed” in a computer’s RAM for 48 hours, or 30 seconds. Why should storage on a computer’s Ram constitute as “sufficiently permanent” when even an ice sculpture in 90-degree weather will last longer than 30 seconds? An ice

⁴ *Bleistein v. Donaldson Lithographing Co.* 188 U.S. 239 (1903). 1903 |

⁵ *Ibid.*

⁶ *MAI Systems Corp. v. Peak Computers, Inc.* |. 991 F.2d 511 (9th Cir. 1993). 1993.

⁷ *Ibid.*

sculpture will last varying lengths depending on its environment, but so will other works that are already protected by copyright law. For example, analog media such as film has a much longer shelf life when kept in cold storage than in 60-degree conditions for long-term conservation. Either way, the film will not live forever and a copy will have to be made, but it is still eligible for copyright. The works created from objects found in nature also have an expiration date, it just happens to be sooner. What is important is that the works illustrate creativity and last long enough to “be perceived [or] reproduced” as the original intent of “fixity” is written in the law.

This provision to copyright law would mostly benefit artists, such as Kelley. However, art lovers, historians, and critics would probably all enjoy the benefits of this change. By explicitly adding works that use natural elements, more works will be protected, and so more works will be created and presented. This will spread new ideas and spark debate among people and scholars. However, the Copyright Office might not be thrilled with this change to the law because it will encompass many more works. It also might create a slippery slope. Can people now copyright nature? What if a museum’s garden accidentally looks like a floral arrangement of an artist’s? How do we discern between those that use materials from nature to make a specific piece of art from those who are simply enjoying nature?



Grass works by Olivia Kaufman-Rovira

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