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COPYRIGHT'S FIXATION REQUIREMENT: IS IT STILL NEEDED?

Attamongkol Tantratian

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements

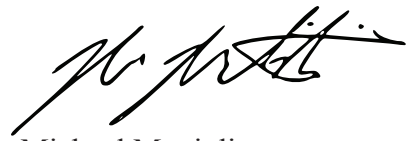
for the degree

Master of Laws – Thesis

December 2020

Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Master of Laws – Thesis.

Thesis Committee

A handwritten signature in black ink, appearing to read 'M. Mattioli', written in a cursive style.

Michael Mattioli
Chair

December 28, 2020

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I would like to express my sincere gratitude to everyone who is a part of my LL.M. journey for helping me make my dream come true.

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2020 is indeed a rough year. But very fortunately, all of you helped make it a memorable one. This incredible experience and wonderful memory will always be with me down the road.

Thank you so much.

ABSTRACT

While the United States requires fixation for an original work to be entitled to federal copyright protection, many other countries ignore such requirement. The difference could lead to partial copyright protection standards across jurisdictions over certain works that are not fixed. Examples of such works include extemporaneous speeches, lectures, improvisational performances, and contemporary arts that are transitory. Moreover, with today's rapid development of arts and technologies, creative works can be presented via new media without being fixed in a traditional way. The examples include live streams of lectures and music performances, which have become part of the "new normal." In order to tackle the issue of the necessity of fixation, this paper looks into a brief historical development of copyright law, followed by an overview of copyright legislations of civil law countries in which authors of unfixed works enjoy copyright protection. The research then examines American copyright law and its unsettled definition of fixation, which articulates how the fixation requirement could easily exclude a large quantity of creative work from copyright protection. Lastly, the paper studies the roles of registration and deposition as copyright formalities in the United States to see whether they serve the same functions as the fixation requirement does. As registration and deposition formalities can perform the fixation requirement's tasks, in light of promoting useful arts and rewarding authors for their creativity regardless of the form of expression, the paper suggests fixation as a federal copyright prerequisite could be entirely discarded.

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1. INTRODUCTION

Improvisational theater (“improv”) is a theatrical performance spontaneously and collectively created by the actors on stage employing creativity.¹ During a performance, dialogues may include stories and jokes created as a stage improvisation product. In the United States, improv has continuously gained popularity; there are at least one hundred and forty-six improv reported groups in America, making the country the second most popular improv destination in the world after Germany.² Even with the Coronavirus disease (COVID-19) pandemic, improv popularity remains, with venues being moved to online platforms,³ allowing borderless audiences to enjoy live streaming of improv shows. Nonetheless, under the current copyright regime, none of the dialogues and even choreographies that may occur during an improv session are protectable in the United States. Regardless of how much creativity the artists have put into their pieces, if the improvisational expressions have not been scripted prior, they would not enjoy copyright protection. That is because unscripted works do not pass a requirement called “fixation,” a copyright prerequisite under the United States jurisdiction.

Fixation, however, is not a copyright prerequisite in civil law countries. In China, for instance, a court has recognized an oral lecture as a copyright subject matter.⁴ Thus, the difference creates a partial copyright protection standard across jurisdictions over unfixed works. Using improv as an example, the dialogues improvised during a show may be copyrightable in the civil

¹ See R. Keith Sawyer, *Improvisation and the Creative Process: Dewey, Collingwood, and the Aesthetics of Spontaneity*, the Journal of Aesthetics and Art Criticism, Vol. 58, No. 2, Improvisation in the Arts, 149 (2000).

² See *List of Improv Groups Worldwide*, IMPROVWIKI (Dec. 24, 2020), https://improvwiki.com/en/list_of_improv_groups_worldwide.

³ See, e.g., IMPRO THEATRE, <https://improtheatre.com/livestreaming/> (last visited Dec. 24, 2020) (which live-streams more than 20 improv performances in December 2020).

⁴ See Chapter 3.3.

law countries, but not in the United States. Appropriation of jokes in an improv act live streamed from Germany, for instance, would be permissible in the United States, whereas in Germany, such act constitutes copyright infringement. As a result, the German improv artists may find a hard time seeking remedies against the misappropriation under the U.S. copyright law.⁵ Such problem does not only concern works of improv, but also any oral speeches, college lectures, improvisational music, User Generated Content (UGC)⁶, and contemporary arts that have inherently changeable mediums.

Justifications and Critiques of Fixation

As fixation can simply exclude certain types of creative arts from copyright protection, why is fixation worth having? First, it is suggested that fixation is designed to play an evidentiary role, avoiding difficult problems with respect to proof in copyright law.⁷ Fixation will help ensure that “a copyright claimant will be able to provide a court documentary evidence”⁸ so that the court can determine if an infringement has occurred.⁹ Second, fixation serves public interests, making creative works perceivable and easier to be circulated.¹⁰ Having copyright works fixed, the society is able to avoid copying previous works; thus, they can be fully enriched from creative works.¹¹

⁵ Even with the Berne’s National Treatment, the United States is not obliged to discard the fixation requirement to conform with German copyright law. *See* Chapter 2.2.

⁶ *See* Elizabeth White, *The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content*, 13 CHI. J. INT’L L. 685 (2013) (contending that certain UGC may not surpass the “more than transitory time” test of fixation).

⁷ *See* Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 687 (2003).; *See also* Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need to Be Archived to Justify the Fixation Requirement*, 8 LOY. L. & TECH. ANN. 109, 137 (2008).

⁸ Russ VerSteeg, *Copyright in the Twenty-First Century: Jurimetric Copyright: Future Shock for the Visual Arts*, 13 CARDOZO ARTS & ENT. L.J. 125, 132 (1994).

⁹ MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 55-56 (3d ed. 1999).

¹⁰ Lichtman, *supra* note 7, at 723.

¹¹ Mazeh, *supra* note 7, at 119.

Third, a fixation requirement helps distinguish authors who seek copyright protection from those who have copyright protection as an afterthought.¹² It is observed that fixation does not create unreasonable burden to copyright seekers as fixation is cheap, easy, and intuitive for the author's own interest.¹³ Therefore, fixation helps make sure that copyright law applies to "limited set of intellectual products" rather than "the ordinary stream of speech."¹⁴

Nonetheless, today's American fixation requirement is argued to be not practically effective in serving these justifications. As it does not require a work to survive to the time of litigation,¹⁵ there is no point of differentiation at all between a work that has never been fixed and a work which has its medium destroyed.¹⁶ Fixation, therefore, is not effectively capable of providing an evidence. Also, even if a work is fixed, without property keeping the fixed copy, neither the evidentiary nor the indication justifications are satisfied in case the copy is immediately disposed after being created.¹⁷ The third parties cannot identify the boundaries of the copyrighted content of the work that has lost its fixed copy, making them unable to enjoy the copyrighted work fully.¹⁸

Moreover, the statutory requirement of authorship-as-fixation¹⁹, in fact, creates significant troubles for performers of creative work seeking copyright protection. Unlike Britain's fixation requirement which does not limit the fixation authority solely to the author, the American version

¹² Lichtman, *supra* note 7, at 724.

¹³ *Id.*

¹⁴ *Id.* at 729.

¹⁵ *Id.* at 732. (noting that the reason is to avoid imposing unreasonable burden to authors).

¹⁶ *Id.* at 733.

¹⁷ Mazeh, *supra* note 7, at 138.

¹⁸ *Id.*

¹⁹ 17 U.S.C. § 101 (2018) (stating that a work is "fixed" in a tangible medium of expression... by or under the authority of the author).

limits the authority of fixation to the authors only.²⁰ This limitation only supports the author's subjective value justification that helps indicate the works worth protected; however, it does not necessarily support the evidentiary and public interest purposes which can be satisfied as long as the works are fixed regardless of authority.²¹ The strict application of the authorship-as-fixation requirement rejects the efforts of performers of creative works in seeking copyright protection and, thus, is constitutionally questionable.²² The requirement of author's authority for fixation may also lead to unwelcome ownership implications when a copyright issue is related to unconventional expressions of creativity. One example is the idea of setting up a camera for an animal to press the shutter, such as in *Naruto v. Slater*.²³ Another example is the use of new surveillance technologies, including drones, Google Glasses, and new voyeurism recording devices, which make video recording easy and constant.²⁴ Given that a minimal threshold of originality could somehow be proved by the person conducting the surveillance, granting him copyright protection might not be an ideal result for the creators of creative works that may have been recorded.²⁵ Thus, "a strict authorship-as-fixation rule betrays copyright law's role in recognizing and rewarding creativity and denies copyright interests to the very individuals who have provided significant, if not the most important, original contributions to works within copyright's traditional subject matter."²⁶

²⁰ Mazeh, *supra* note 7, at 137.

²¹ *Id.*

²² John Tehranian, *Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance*, 68 *Hastings L.J.* 1319, 1346 (2017) (the author finds that authorship-as-fixation is not explicitly expressed in the Constitution).

²³ *See* *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (a copyright case where an animal rights organization, on behalf of Naruto the monkey, claimed authorship over photographs that monkey took of itself).

²⁴ Tehranian, *supra* note 22, at 1355.

²⁵ *Id.*

²⁶ *Id.* at 1370.

This thesis will argue further to support the proposition that the American fixation requirement needs to be readdressed. Specifically, the thesis suggests that fixation could be entirely discarded. In forming arguments, a comparative study of American copyright law with foreign copyright laws will be presented through Chapters 2, 3 and 4. Chapter 5 will emphasize the importance of protecting unfixed works, and Chapter 6 will discuss the roles of registration and deposition formalities under the American copyright regime. These discussions lead to a conclusion that copyright fixation in the United States may no longer be necessary. The conclusion is based on the following reasons.

First, fixation is now having a hard time to fit in today's world full of rapidly developing technologies, resulting in different courts interpreting the requirement differently. As the unsettled definition of fixation creates uncertainty of copyright protection, authors of creative works may end up feeling reluctant to express their ideas in an unconventional or traditional but unfixed artform.

Second, the formalities of registration and deposition can replace the fixation requirement. All the said justifications of fixation discussed above can be satisfied by today's registration and deposition formalities. To illustrate, when an author registers or deposits a work, he must provide the Copyright Office with at least one copy of his work. And a copy, by its nature, requires some kind of fixation. Although the roles of formalities have been reduced to the point that they are no longer a prerequisite to copyright protection, American authors are still more than highly incentivized to register and/or deposit their works. Thus, having fixation as a prerequisite to copyright protection is redundant.

Third, by discarding the fixation requirement, authors will be given an opportunity to prove copyright ownership before a federal court once his unfixed work has been allegedly infringed.

Chances to prove copyright ownership over an unfixed work are common in civil law jurisdictions where fixation is not a copyright prerequisite. In light of promoting useful arts, authors of creative unfixed works, no matter where they live, deserve a chance to seek protection from copyright law.

2. FIXATION THEN AND NOW

Why do some countries require work to be fixed for copyright protection while some countries do not? Perhaps, part of the reasons lies in how copyright concepts originated and developed. This chapter briefly explores the two fundamental yet opposite concepts of early copyright laws. The presumption made in this Chapter is that a modern fixation requirement is a product of the embodiment emphasis of the early Anglo-American copyright that sought to protect copies of works. In contrast, the author's rights in their intellectual expression were regarded as critical during the French Revolution, when copyright statutes were born in France. The latter concept later became a model to "nearly all the copyright statutes except the Anglo-Saxon ones."²⁷ Consequently, without binding provisions on fixation requirements under international law, countries that may have followed the French copyright conception tend to discard fixation as a requirement for copyright protection.

2.1 Early Copyright Statutes

2.1.1 Statue of Anne (1710)

In the 15th Century, Gutenberg's printing press was "the new technology" that introduced a new commercial activity: sales of published copies of books. The innovation allowed reproductions of literature to be made on a large scale for the first time.²⁸ Considering literature as a "dangerous" art, the British Crown desired press control and, thus, assigned a monopolistic power to the Stationers' Company. The controversy led to the conclusion of the Statute of Anne in 1710, which eventually put an end to the censorship system in England by giving back the authors' copyrights.²⁹

²⁷ Rudolf Monta, *The Concept of Copyright versus the Droit D'Auteur*, 32 S. CAL. L. REV. 177 (1959).

²⁸ CRAIG JOYCE ET AL., *COPYRIGHT LAW* 16 (6th ed 2003).

²⁹ *Id.*

As used at the time of the Statute of Anne, the term “copyright” was highly descriptive. The term referred to the exclusive rights of owners over “copies” of books to print and publish.³⁰ The Statute titles itself “[a]n act for the encouragement of learning, by vesting the *copies* of printed books in the authors or purchasers of such *copies* during the time therein mentioned.”³¹ The Statute conferred a reproduction right on an author for fourteen years which is renewable for another fourteen until his death.³² Without consent, printing, reprinting or importing of the book amount to an infringement.³³

Copies of books could be considered the primary protectable subject matter in the copyright world. At least during that time, copies could not be made by other means than employing writing, printing, or reprinting. As the Statute only granted authors rights over the copies of their writings, the works that had not been written down and were incapable of getting reprinted would be unprotected by the Statute. Therefore, books or copies were the only recognized copyright mediums back then, and the act of fixing or writing on those mediums was the key to copyright protection under the Statute of Anne. The concept of fixation, therefore, came into existence at the very moment the world’s first copyright statute was born.

2.1.2 The Early American Copyright System

The English Statute of Anne as an “incentive to authors to create so that the public may have access to and be enriched by their works” largely influenced the development of the American copyright system.³⁴ Drafted in 1787, the United States Constitution resembled the underlying

³⁰ *Id.* at 3.

³¹ Statute of Anne, 1710, 8 Anne, Ch. 19, at Title (emphasis added).

³² *Id.* § 1.

³³ JOYCE ET AL., *supra* note 28, at 18.

³⁴ Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tul. L. Rev. 991, 998 (1990).

policy of the Statute of Anne with a clause stating that “Congress shall have power... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries”.³⁵ The intent of the Clause was later understood for the public benefits rather than primarily for the benefit of the author.³⁶ The “writings” are what Congress is authorized to protect³⁷, not directly the “authors.”³⁸

Following the constitutional clause, the first U.S. Copyright Act was enacted in 1790. Maps, charts, and books were the first three subject matters protected by the Act,³⁹ followed by musical compositions in 1831.⁴⁰ The scope of protectable subject matters greatly expanded in 1909 to cover periodicals, prepared speeches, dramatic compositions, drawings, prints, photographs, and works of arts.⁴¹ Congress did not attempt to make an exhaustive listing and focused attention on the qualities of works creation process; as a result, the concept of fixation came into play.⁴² To this point, it is noticeable that all the historical media protected in the early U.S. copyright acts require fixation by nature. Courts and Congress had long recognized the fixation requirement before formally introduced into federal law by the Copyright Act of 1976.⁴³

³⁵ U.S. Const. art. 8, § 8, cl. 8.

³⁶ Ginsburg, *supra* note 34, at 999.

³⁷ Lichtman, *supra* note 7, at 718.

³⁸ Paul Goldstein, *What is a Copyrighted Work – Why Does It Matter*, 58 UCLA L. REV. 1175 (2011).

³⁹ Copyright Act of 1790, 1 Stat. 124.

⁴⁰ Copyright Act of 1831, 4 Stat. 436 Chap. 16.

⁴¹ Copyright Act of 1909, 17 U.S.C. § 5.

⁴² See Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 Wash. J.L. Tech. & Arts 17, 21 (2014). See also Chapter 2.

⁴³ Lichtman, *supra* note 7, at 719.

2.1.3 French Revolutionary Copyright

French copyright law is the fruit of the French Revolution. In principle, it is “an exclusive right is conferred on authors because of their intellectual creation.”⁴⁴ Somewhat similar to what happened in England before the Statute of Anne, a monopoly in printings had existed prior to the French Revolution.⁴⁵ However, as opposed to Anglo-American copyright law as society-oriented, the French Revolution had developed a more author-oriented conception of copyright.⁴⁶ In other words, while the U.S. copyright law is utilitarian and materialistic with focuses on protecting the pecuniary and exploitative interests, the French copyright law has a broader scope of protection that covers the author’s intellectual and moral interests.⁴⁷

There are two important Revolutionary copyright statutes; one enacted in 1791, followed by the second in 1793. These two statutes “served as the essential legal test” for the present French copyright law, the copyright statute of 1957—amended in 1985.⁴⁸ The 1791 decree, however, did not center on the author’s right from the beginning. The decree’s underlying policy was to terminate a certain monopoly power that existed during the time by enlarging the public domain.⁴⁹ After the 1792 decree, which limited the authors’ rights with a burden to notify the public of their rights and shortening the protection term of many playwrights, there was a shift from the public domain principle toward a more author’s right approach in 1793.⁵⁰

⁴⁴ Ginsburg, *supra* note 34, at 991-92.

⁴⁵ Monta, *supra* note 27, 178.

⁴⁶ Ginsburg, *supra* note 34, at 993.

⁴⁷ Jean-Luc Piotraut, *An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 *Cardozo Arts & Ent. L.J.* 549, 551 (2006).

⁴⁸ Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 *J. Copyright Soc’y U.S.A.* 269, 270 (1989).

⁴⁹ Ginsburg, *supra* note 34, at 1006.

⁵⁰ *Id.* at 1009.

Although having the same goal of advancing public interests, the Anglo-Saxon copyright law differs considerably from the French copyright law. An overall comparison suggests that while the former encourages utility, the latter promotes beauty.⁵¹ The primary subject matters under the early U.S. copyright statutes, as previously discussed, were protected in a pragmatic view of achieving the constitutional objective; therefore, they were “highly useful” productions.⁵² The 1793 French copyright law, on the other hand, protected both “writings of all kinds” and “all productions of the beaux-arts.”⁵³ Consequently, theatrical plays were regarded as examples of historic copyright subject matters that the French Revolutionary law sought to protect.⁵⁴

2.2 The Berne Convention and Fixation Requirement

Despite the two opposing approaches to copyright protection as discussed above, most copyright laws worldwide have been greatly harmonized through many international treaties on intellectual property. Berne Convention for the Protection of Literary and Artistic Works, in particular, was concluded in 1886 in Berne, Switzerland, to provide a unified copyright standard to its member states.⁵⁵ The Berne standard contains provisions ensuring the “minimum protection,” based on the three principles: “National Treatment,” “Independent Protection,” and “Automatic Protection.”⁵⁶ Accordingly, formalities such as copyright notice and registration functioned as a

⁵¹ *Id.*

⁵² *Id.* at 1015.

⁵³ *Id.*

⁵⁴ *Id.* at 1016 (“the utility of dramatic works in disseminating the Enlightenment and the Revolution” is stressed)

⁵⁵ *WIPO-Administered Treaties*, WIPO LEX (Aug. 19, 2020), https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (currently, there are about one hundred and seventy-nine members).

⁵⁶ Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Sept 6, 2020).

tool of increasing evidentiary value to copyright works have to be partially removed pursuant to the latter principle.⁵⁷

However, with regard to the fixation requirement, Article 2(2) states that “[i]t shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”⁵⁸ The Article suggests a non-binding term, leaving the contracting parties to decide whether to impose a fixation requirement in their national laws for copyright protection of original works.⁵⁹ As a result, some countries require a work of authorship to be fixed to be entitled to protection, while many others do not have this requirement. Generally, jurisdictions with a civil law system do not incorporate fixation as a prerequisite for copyright protection, unlike the copyright regimes in common law countries.⁶⁰ This difference leads to partial protection of the same work across jurisdictions, meaning that an unfixed work that receives copyright protection in a country of origin may not enjoy the same protection in foreign jurisdictions that have a fixation requirement. Although the partial protection issue has been eased by Berne’s National Treatment principle, countries with a fixation requirement are still not required to discard the requirement to protect unfixed works of foreign nationals.⁶¹

⁵⁷ Berne Convention for the Protection of Literary and Artistic Works (1886), art. 5(2), 828 UN Treaty Ser 221 [hereinafter *Berne Convention*].

⁵⁸ *Id.* art. 2(2)

⁵⁹ White, *supra* note 6, at 687.

⁶⁰ Elizabeth Adeney, *Authorship and Fixation in Copyright Law: A Comparative Comment*, 35 Melb. U. L. Rev. 677, 689 (2011); *see also* JOYCE ET AL., *supra* note 28, at 71

⁶¹ White, *supra* note 6, at 690 (Berne’s Article 5(1) only requires countries of the Union other than the country of origin to grant the same rights they “grant to their nationals”).

3. JURISDICTIONS WITH NO FIXATION REQUIREMENT

In this Chapter, copyright legislations under five jurisdictions will be briefly discussed. The first national copyright law is that of France, a nation with the most creator-approached version of this law.⁶² Another iteration to be presented, the Germany Copyright Act, falls under the same EU Directive. Moreover, to give a broader overview, copyright legislations of civil law countries in Asia—China and Thailand—will also be examined.

Although all copyright statutes being discussed do not have fixation as a requirement for copyright protection, each country has different approaches in listing protectable subject matters. Importantly, their laws suggest that not all unfixed works are copyrightable. Some jurisdictions have statutory conditions of the medium of recordation on certain works. Some even have judicial interpretations that exclude certain unfixed works from copyright protection. Moreover, unlike the US jurisdiction, these four jurisdictions separate works protectable under related or neighboring rights from copyright subject matters. For the works that fall under the neighboring rights, fixation, most of the time, is a vital component. This requirement is found both in the EU under the Directive 2001/29/EC⁶³ and in the two Asian nations under discussion. Nonetheless, one will see that the copyright laws of these countries agree to suggest copyright protection over oral works, such as speeches and lectures, that have not been prepared in writing. As a result, there have been cases in which courts granted protection over non-transcribed works.

⁶² Piotraut, *supra* note 47, at 553.

⁶³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society O.J. (L167), 10-19 (art. 2 stating initial fixation is a prerequisite for production rights in performances, films, and broadcasting).

3.1 France

Under the French jurisdiction, copyright work results from the creation of the mind and is, therefore, the most personal of all properties.⁶⁴ This notion is reflected in the very first article of its copyright legislation, which states that "[t]he author of a work of the mind shall enjoy in that work, by the mere fact of its creation, property right which shall be enforceable against all persons."⁶⁵ Reading together with the following provision, which stipulates that work creation occurs "by the mere fact of realization,"⁶⁶ another critical conclusion is formed—no other actions, except thinking, are required for a work to receive protection. And such protection shall be granted to "all works of the mind, whatever their kind, form of expression, merit or purpose."⁶⁷ The language of the law suggests that French copyright law is highly flexible in accommodating and adapting to new forms of expressions and technologies.⁶⁸ Accordingly, works that do not have mediums are also entitled to protection. Speeches, addresses, sermons, and pleadings are protectable and are listed as protectable subject matters.⁶⁹

However, although the list is non-exhaustive, not everything is copyrightable; there is creativity or independent creation that demonstrates the expression of authors' personality as a prerequisite for copyright protection.⁷⁰ Moreover, the statute itself even imposes conditions on particular works. Choreographic works, circus acts and feats, and dumb-show works, in particular,

⁶⁴ Monta, *supra* note 27, at 178.

⁶⁵ Intellectual Property Code [Civil Code] art. L111-1 (Fr.) [hereinafter *Fr. IP Code*]

⁶⁶ *Id.* art. L111-2.

⁶⁷ *Id.* art. L112-1.

⁶⁸ Ginsburg, *supra* note 48, at 273.

⁶⁹ *Fr. IP Code* art. L112-2(2).

⁷⁰ Ginsburg, *supra* note 48, at 274.

need to be written down to be considered work of the mind.⁷¹ In fact, not everything falls within Article L112-1; in 2008, a court ruled that the fragrance of perfume was not a form of expression that could enjoy copyright protection.⁷² Furthermore, there exists a fixation requirement for neighboring rights pursuant to the Directive. Unlike the US jurisdiction, in which sound recordings and motion pictures or audiovisual works are within the scope of copyright⁷³, in France, these works fall in the neighboring rights regime in which producers have a responsibility for the initial fixation.⁷⁴

Nevertheless, due to the lack of a general fixation requirement for most works, the Court of Appeals in *Marle c. Lacordaire*⁷⁵ granted copyright protection over sermons. A copyright infringement was found for the defendant publisher, who transcribed and edited the sermons of the plaintiff without consent. For two reasons, the court emphasized the importance of protecting oral discourse as a copyrighted work. First, the author had the right to profit from his individual work, and, second, based on the author's '*personnalité morale*', "the author should always preserve the rights to revise and correct his own work, to survey the fidelity of the reproduction and to choose the time and mode of publication."⁷⁶ The court also stated further that:

Because in effect the orator delivers his speech only, without giving up the power of disposal of his thought through printing; on the contrary it is essential for him to preserve the fruits of his labor, to remain the sole judge of the opportune moment for its publication and to keep guard against damaging alterations of his work.⁷⁷

⁷¹ *Fr. IP Code* art. L112-2(4).

⁷² Court of Cassation, Civil, Commercial Division Jul. 1, 2008, 07-13.952 (Nov. 26, 2020), <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000019127786&fastReqId=1714620208&fastPos=1>.

⁷³ 17 U.S.C. § 102 (2018).

⁷⁴ *Fr. IP Code* art. L211-4.

⁷⁵ Cou.* de Lyon, 17 Jul. 1845, D.1845.2.128.

⁷⁶ *Id.* at 129.

⁷⁷ *Id.*

3.2 Germany

Without a lengthy statutory language describing how a copyrighted work is created, the German Copyright Act protects “the author’s own intellectual creation,”⁷⁸ and the author is simply “the creator of the work.”⁷⁹ Similar to the French copyright jurisprudence, the scope of protection under the German copyright law extends to “intellectual and personal relationships to the work and in respect of the use of the work.”⁸⁰ Although there exists no provision stating that the German copyright law protects works regardless of their form of expression like France’s, the fact that “speeches” are on the list of protectable subject matters⁸¹ implies that the German copyright jurisprudence does not incorporate fixation as a requirement for its copyright protection.⁸² Apart from that, there is no statutory condition of writing down for choreography works to be entitled to copyright protection as existed in the French law.⁸³ In this instance, the language of the law alone suggests that the German law discards fixation to a greater extent than that of France. It is observed that the law requires a copyrighted work to exist in a perceptible form rather than a material form.⁸⁴ Still, a fixation requirement is a prerequisite for protecting particular works that fall within the related rights provisions in accordance with the Directive.

Nonetheless, the Hamburg District Court has surprisingly rejected copyright protection on the ground of a lack of fixation as it addressed whether artists could be considered as “art” within the meaning of the copyright act. While not directly stated in the language of the law, the court found

⁷⁸ Urheberrechtsgesetz [UrhG] [Civil Act] § 2(2) (Ger.).

⁷⁹ *Id.* § 1.

⁸⁰ *Id.* § 11.

⁸¹ *Id.* § 2(1).

⁸² *See also* White, *supra* note 6, at 696.

⁸³ UrhG § 2(1).

⁸⁴ Adeney, *supra* note 60, at 682.

“[n]o copyright protection because artists and work are identical. There is no fixation that can be separated from the person of the author. There is no property right in in the person.”⁸⁵ Thus, one might find that although the copyright act of Germany does not mention fixation, the courts may possibly find the need for fixation in some instances.

3.3 China

The copyright law in China is ambiguous whether fixation is needed for a work to be protected by the law.⁸⁶ While Article 3 of the Copyright Law of the People’s Republic of China expressly states that oral works are to be protected⁸⁷, Article 2 of the Implementing Regulations limits copyright protection to the works capable of being reproduced in a tangible form.⁸⁸ Defining oral works, Article 4(2) of the Implementing Regulations states, “oral works are works which are created in *spoken words and have not been fixed* on any material carrier, such as impromptu speeches, lectures and court debates.”⁸⁹ Thus, it is suggested that works that can be fixed but are not yet done, are eligible for copyright protection.⁹⁰ Supporting this suggestion, Beijing Haidian District Court, in 2006, granted copyright protection over English teacher’s lectures and found the defendant’s unauthorized recording and distributing the class instructions in the forms of MP3 files

⁸⁵ AG (Local Court) Hamburg, Aug. 18, 1998, 1998 ZUM 1047 (rejected copyright protection in the live static performance; thus, artists Eva & Adele as “living sculptures” are not artistic works).

⁸⁶ 1 International Copyright Law and Practice CHI § 2[1][a] (2019) [hereinafter *ICPL*] (Nov. 26, 2020), <https://plus.lexis.com/api/permalink/f2acf8d0-0ced-4566-b205-dd307c089cdc/?context=1530671>

⁸⁷ Copyright Law of the People’s Republic of China [Civil Code] art. 3(2) (China).

⁸⁸ Implementing Regulations of the Copyright Law of the People's Republic of China [Civil Code] art. 2 (China).

⁸⁹ *Id.* art. 4(3) (emphasis added).

⁹⁰ *ICPL* § 2[1][a].

a copyright infringement.⁹¹ With regard to computer programs, however, the Software Regulations specifically require fixation in a tangible medium for the works to be protected.⁹²

3.4 Thailand

Enacted in 1994, the Thai Copyright Act protects works of authorship “regardless of the method or form in which such works are expressed.”⁹³ Unlike jurisdictions discussed above, the list of subject matters under Thai copyright law is definitive.⁹⁴ As Section 4 of the Act expanding the exhaustive list with detailed definitions to each subject matter terminology, one can, accordingly, find protectable unfixed works in the language of the Act. Literary works within the meaning of the Act include lectures, sermons, addresses, and speeches.⁹⁵ Moreover, “choreography, dancing, gesturing, or a performance which is made up as a story, and shall include a mime performance” are included within the scope of copyright protectable dramatic works.⁹⁶ Thus, legal scholars have concluded that upon an expression of an idea or performance in a choreography work, even without labanotation, the work is immediately protected by the Thai Copyright Act.⁹⁷ Nonetheless, there is a fixation condition on audiovisual, cinematographic works, sound recordings, and photos.⁹⁸ These works fall in the copyright protection sphere and are not

⁹¹ Luo Yonghao v. Beijing Silicon Valley Power Electronic Commerce Co. Ltd., Beijing Haidian District Court (2006), Case No. 9749.

⁹² *ICPL* § [4][d].

⁹³ Copyright Act [Civil Act] § 6 (Thai.), [hereinafter *TCA*], http://web.krisdika.go.th/data/outsitedata/outside21/file/COPYRIGHT_ACT_1994.pdf.

⁹⁴ *Id.* (protectable works include literary works, dramatic works, artistic works, musical works, audiovisual works, cinematographic works, sound recordings, broadcasts, and any other work in the literary, scientific or artistic field)

⁹⁵ *Id.* § 4

⁹⁶ *Id.* § 4

⁹⁷ See Nick Soonthondai, *Choreography and Copyright: Taken for Granted* (ลิขสิทธิ์ในงานนาฏกรรม: ความสำคัญที่ถูกลืม) 93, 94 (2004) (Nov. 26, 2020), <http://journal.hcu.ac.th/pdf/file/soc71410.pdf>.

⁹⁸ *TCA* § 4

under the related right provisions.⁹⁹ As the stated works require fixation by their nature already, the law does not impose any additional burdens to authors.

In Supreme Court Decision no. 13159/2555, the Thai Supreme Court determined whether the plaintiff, an actor hired to entertain a meeting, was entitled to the performer's rights. To grant the stated right, the Court must first analyze the copyrightability of the work behind the plaintiff's performance. In doing so, it only took into consideration the content in such performance whether it falls into any subject matters listed under the Copyright Act. At the meeting, although the plaintiff engaged in singing and dancing, the plaintiff, for the most part, was responsible for interviewing guests and hosting activities. As a result, the Court found that such performance was for mere entertainment, and there was neither actual musical works nor works of choreography within the meaning of copyright law involved.¹⁰⁰ Although the Court rejected the plaintiff performer's rights as there was no copyrightability over the content performed, it is worth noting that in doing so, the Court did not take the fixation of the performance into its consideration at all.

⁹⁹ Related rights provisions are included from Chapter 2 of *TCA*, which govern the rights of performers only.

¹⁰⁰ Supreme Court Decision no. 13159/2555 (Thai.).

4. THE UNITED STATES AND ITS FIXATION REQUIREMENT

Unfixed oral works such as sermons and lectures protectable by copyright law in the above civil jurisdictions may not enjoy the copyright law's protection in common law jurisdictions. In the United States, the current copyright regime is governed by the Copyright Act of 1976, codified in Title 17 of the United States Code as a federal law, which explicitly contains fixation as a copyright prerequisite.¹⁰¹ Therefore, works that are not fixed—though they may be eligible for “common law copyright,” which is state-created law—are not entitled to federal copyright protection.¹⁰²

4.1 Fixation as a prerequisite for Federal Copyright Protection

For a work to receive federal copyright protection, it needs to satisfy two requirements: originality and fixation.¹⁰³ The originality requirement is embodied in the statutory phrase *original works of authorship*.¹⁰⁴ Such works, however, do not need “novelty, ingenuity, or [a]esthetic merit and there is no intention to enlarge the standard of copyright protection to require them...”¹⁰⁵ The first prerequisite, in fact, is determined upon whether there exist an author’s independent creation and a modest quantum of creativity.¹⁰⁶ To pass this requirement, the work in question cannot be a mere “idea, procedure, process, system, method of operation, concept, principle, or discovery...”¹⁰⁷.

¹⁰¹ See 107 U.S.C. § 102(a) (2018).

¹⁰² JOYCE ET AL., *supra* note 28, at 14.

¹⁰³ Lichtman, *supra* note 7, at 716.

¹⁰⁴ 107 U.S.C. § 102(a) (2018).

¹⁰⁵ H.R. Rep. No. 94-1476 at 51-52.

¹⁰⁶ JOYCE ET AL., *supra* note 28, at 72.

¹⁰⁷ 107 U.S.C. § 102(b) (2018).

The second prerequisite, fixation, acts in a manner of a trigger for federal copyright protection for works that pass the authorship requirement.¹⁰⁸ Section 101 stipulates that “[a] work is ‘created’ when it is ‘fixed’ in a copy or phonorecord for the first time...”. Section 102(a) grants copyright protection to “works of authorship fixed in any tangible medium of expression.” In other words, there is no federal copyright protection for work unless the work is fixed in a tangible medium of expression.¹⁰⁹ However, during one’s daily life, the requirement is not so unfamiliar. “[C]opyright is created every time people set pen to paper or fingers to keyboard and affix their thoughts in a tangible medium...”, stated the Second Circuit.¹¹⁰

As previously discussed in Chapter 2, the concept of fixation had long been associated with the U.S. copyright regime. The Copyright Act of 1909, for instance, hid the requirement in Section 4 which states “[that] the works for which copyright may be secured under this Act shall include *all the writings* of an author.”¹¹¹ Nowadays, under the current Act of 1976, the fixation requirement is directly associated with the constitutional language of the Copyright Clause, which secures “for limited times to authors... the exclusive rights to their respective *writings*.”¹¹² The Constitution's latter-day writings are illustrated by the definition of "copies" and "fixed."¹¹³ As a result, given that a work is “embodied in a physical form capable of being copied,” such work is entitled to be

¹⁰⁸ Lichtman, *supra* note 7, at 717.

¹⁰⁹ JOYCE ET AL., *supra* note 28, at 54.

¹¹⁰ *In re World Auxiliary Power Co.*, 303 F.3d 1120 (9th Cir. 2002).

¹¹¹ Copyright Act of 1909, Pub. L. No. 60, 349, § 4, 35 Stat. 1075, 1076 (1909). (emphasis added).

¹¹² U.S. Const. Art. 8 § 8 Cl. 8 (emphasis added).

¹¹³ *Matthew Bender & Co., Inc. v. W. Pub. Co.*, 158 F.3d 693, 704 (2d Cir. 1998).

constitutional writing.¹¹⁴ In other words, *writing* under the constitutional extends “to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”¹¹⁵

As the current U.S. Copyright Act does not provide an exhaustive list of copyrightable subject matters, fixation correspondingly becomes a gatekeeper to federal copyright protection. Without a concrete definition of fixation, a complex issue arises as to whether work at hand satisfies the fixation requirement and is, therefore, protected by the copyright law. Authors would have difficulty claiming copyright protection for their works, especially when the mediums are not the traditional *writings*. Moreover, apart from the copyrightability side, fixation is a crucial factor in the infringement analysis. As a copyright owner’s exclusive right to reproduction under Section 106(1) prevents unauthorized copying,¹¹⁶ an alleged infringing work also needs to be fixed to constitute an unauthorized copy.

4.2 Unsettled Definition of Fixation

An on-going issue of implementing fixation as a copyright prerequisite is that as technologies keep developing, the definition of fixation must keep up with the technological change to serve its function properly. Failure to adapt to the new technology and artforms could potentially discourage authors from exploring new means of creative expression. In 1908, the US Supreme Court, in *White-Smith v. Apollo*,¹¹⁷ limited the medium on which a work can be fixed to only those perceivable by humans. In response to how new technology has changed the way people perceive arts, Congress overturned *White-Smith v. Apollo* with Section 102(a) of the Copyright

¹¹⁴ Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 664 (2d Cir. 1955) (Judge Hand dissented in part favoring copyright eligibility of sound recordings).

¹¹⁵ Goldstein v. California, 412 U.S. 546, 561 (1973).

¹¹⁶ 17 U.S.C. § 106(1) (2018) (stating that the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords).

¹¹⁷ White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908) [hereinafter *White-Smith*].

Act of 1976, which extends the requirement of fixation to be whatever perceivable *with the aids of a machine or device*. In 1982, both the Third Circuit, in *Williams Electronics, Inc. v. Artic Int'l, Inc.*,¹¹⁸ and the Seventh Circuit, in *Midway v. Artic*,¹¹⁹ agreed that intangible copies of inherently changing digital works in ROM, a computer memory component, constitute sufficient copyright fixation. Nonetheless, conflicts started when considering fixation with another computer memory device called RAM. While the Ninth Circuit, in *MAI Systems Corps. v. Peak Computer Inc.*,¹²⁰ ruled that data stored in RAM surpasses the “more than transitory duration” requirement under Section 101, the Second Circuit in *Cartoon Network v. CSC Holdings, Inc.*¹²¹ disagreed. The *Cartoon Network*'s strict “more than transitory duration” requirement poses difficulties in seeking copyright protection over non-conventional art forms, especially when the mediums are perishable. Respectively, the Seventh Circuit, in *Kelly v. Chicago Park District*,¹²² and the Central District Court of California, in *Kim Seng Co. v. J & A Importers*,¹²³ denied fixation of sculptural works in forms of gardens and a food bowl respectively.

4.2.1 Perceptibility

The first case brought into discussion is *White-Smith v. Apollo*.¹²⁴ Decided before the 1796 Copyright Act was enacted, it is an early example showing the judicial disinclination to deal with new technologies on information storage.¹²⁵ The issue presented before the court was whether a

¹¹⁸ *Williams Elecs., Inc. v. Artic Intern., Inc.*, 685 F.2d 870 (3d Cir. 1982) [hereinafter *Williams*].

¹¹⁹ *Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999 (N.D. Ill. 1982), aff'd, 704 F.2d 1009 (7th Cir. 1983) [hereinafter *Midway*].

¹²⁰ *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) [hereinafter *MAI*].

¹²¹ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) [hereinafter *Cartoon Network*].

¹²² *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011) [hereinafter *Kelly*].

¹²³ *Kim Seng Co. v. J & A Importers, Inc.*, 810 F. Supp. 2d 1046 (C.D. Cal. 2011) [hereinafter *Kimseng*].

¹²⁴ *White-Smith*, *supra* note 117.

¹²⁵ *JOYCE ET AL.*, *supra* note 28, at 54.

copy needed to be perceivable only by humans, as the lawsuit was brought by a composer of two certain musical compositions published in the form of sheet music, namely ‘Little Cotton Dolly’ and ‘Kentucky Babe’ against the company, Apollo Records. The defendant, Apollo, engaged in distributing a ‘players piano’ invention called the “Apollo” and perforated rolls of music embodying the two compositions used in connection therewith. These rolls in question were designed to be used specifically with the Apollo device, making them not capable of being read by skilled performers as ordinary pieces of music.

The appellant, the composers, argued that musical composition was “the thing which Congress intended to protect and that such protection covers all means of expression of the order of the notes which produce the air or melody which the composer has invented.”¹²⁶ The Supreme Court, however, narrowed the definition of copy of a musical composition to “a written or printed record of it in intelligible notation.”¹²⁷ For musical composition, the court gave this definition: “is not susceptible of being copied until it has been put in a form which others can see and read.”¹²⁸ Thus, although the perforated rolls can produce musical tones when used with the adapted mechanism, “...we cannot think they are copies within the meaning of the copyright act,” said Justice Day.¹²⁹

This decision, however, was later overturned by the language of the 1976 Copyright Act in which Section 102(a) stipulates that fixation occurs on “any tangible medium of expression” that is “*now known or later developed, from which they can be perceived, reproduced, or*

¹²⁶ *White-Smith, supra* note 117, at 11.

¹²⁷ *Id.* at 17.

¹²⁸ *Id.*

¹²⁹ *Id.* at 18.

otherwise communicated, either directly or with the aid of a machine or device.”¹³⁰ Congress specifically wrote this provision to avoid “artificial and largely justifiable distinctions” like the one from *White-Smith* that put copyrightability of a work upon the form or medium in which the work is fixed.¹³¹ This open-ended language’s intention was to accommodate new technologies and art forms; nonetheless, it still led to conflicts of court decisions later on.

In addition to Section 102(a), the Copyright Act of 1976 also brings Section 101 to help identify the occurrence of fixation. The provision states that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord... is sufficiently permanent or stable to permit it to be *perceived, reproduced, or otherwise communicated for a period of more than transitory duration*”.¹³² However, as technology and artistic ideas have expanded, the statutory language has been questioned from time to time. To what extent does the law require a medium to be *perceivable, reproducible, or communicable*? In particular, what it means by having a work fixed in a medium that can last for a “transitory duration” is still debatable. Different courts have interpreted the phrase differently.

4.2.2 Intangible copies

The two court decisions presented in this subsection attempted to answer whether an inherently changeable digital work could be fixed by virtue of Section 102(a), in particular when there is interactivity as an element. Firstly, in *Williams Electronics, Inc. v. Artic Int’l, Inc.*¹³³, the case was brought by the producer of an early arcade game “Defender” against Artic International

¹³⁰ 17 U.S.C. § 102(a) (2018) (emphasis added)

¹³¹ H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 52-53 (1976)

¹³² 17 U.S.C. § 101 (2018). (emphasis added)

¹³³ *Williams*, *supra* note 118.

on the ground of unauthorized replication of the video game. The plaintiff, Williams Electronics, manufactured video game machines operated by electronic circuit boards having tiny chips called ROMs (Read Only Memory) as part of the circuit.¹³⁴ According to Judge Newman, ROMs function in this fashion:

The (ROM) stores the instructions and data from a computer program in such a way that when electric current passes through the circuitry, the interaction of the program stored in the (ROM) with the other components of the game produces the sights and sounds of the audiovisual display that the player sees and hears. The memory devices determine not only the appearance and movement of the (game) images but also the variations in movement in response to the player's operation of the hand controls.¹³⁵

One of the subjects of the dispute was the copyrightability of audiovisual elements in the video game. The arcade had two modes: the “attract mode” and the “play mode.” The former gives examples of a fixed set of sounds and animations of what *Defender* would be like when the game was played. The latter, however, shows a series of sounds and animations interactively with the player inputs. Although the plaintiff had registered audiovisual works of the two modes with the Copyright Office, the defendant contended that there could be no copyright protection in either game modes since the works fail to meet the fixation requirement.¹³⁶ According to Artic, fixation could not occur since a “new” series of images and sounds generate each time when each mode is displayed.¹³⁷

¹³⁴ *Id.* at 873.

¹³⁵ *Id.* at 872 (citing *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 854 (2d Cir. 1982)).

¹³⁶ *Id.* at 873.

¹³⁷ *Id.* at 874.

The Third Circuit, nonetheless, had little difficulty rejecting the defendant's contention.¹³⁸ The court agreed with the Second Circuit in *Stern Electronics*¹³⁹ in finding that the same pattern of images and sound newly appearing each time in the attract mode satisfies the statutory provision of "audiovisual works." Even in the play mode, the court found identifiable expression from the claimed audiovisual works. Although player interaction causes changes in presentation from one game to the next, "there is always a repetitive sequence of a substantial portion of the sights and sounds of the game, and many aspects of the display remain constant from game to game regardless of how the player operates the controls."¹⁴⁰ Importantly, the game's memory devices (ROMs) are capable of, for the audiovisual works in dispute, constituting a "copy" in which the work is "fixed."¹⁴¹ The defendant was, therefore, liable for copying the game.

Similarly, in the following year, the Seventh Circuit affirmed the district court's decision in *Midway v. Artic*,¹⁴² which ruled in favor of the plaintiff against Artic for copyright infringement of two video games: Galaxian and Pac-man. Artic, the same defendant from *Williams Electronics*, used a similar contention that neither the attract mode nor the play mode could produce copyrightable audiovisual works. The defendant specifically argued that the audiovisual aspects were not "fixed in any tangible medium of expression."¹⁴³ Artic noted that the ROMs in the games circuit board did not have enough memory to store all audiovisual information at an instant; therefore, the ROMs were basically generating a new set of pictures all the time.¹⁴⁴ The court found

¹³⁸ Brown, *supra* note 42, at 23.

¹³⁹ *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 885-56 (2d Cir. 1982) [hereinafter *Stern*].

¹⁴⁰ *Williams*, *supra* note 118, at 874 (citing *Stern*, *supra* note 162, at 885-86).

¹⁴¹ *Id.*

¹⁴² *Midway*, *supra* note 119.

¹⁴³ *Id.* at 1007

¹⁴⁴ *Id.*

the Artic’s argument fails to meet validity by recognizing the disputed works to be *capable of being reproduced with the aid of a machine or device* in line with Section 102(a).¹⁴⁵ Moreover, the ROM in question is a *later-developed* medium of expression, which the Congress has allowed fixation to occur through Section 102(a).¹⁴⁶

The two aforementioned cases opened that the gate for the fixation requirement to stand in the world of digital technology, where copies of copyright works might not exist in the physical sense. As a result, fixation no longer became an obstacle to digital works to get federal copyright protection.¹⁴⁷ However, what *Midway* left behind was a question of what exactly is the “transitory duration” that a digital copy needs to last.¹⁴⁸ After *Midway*, there have been many attempts to resolve such a question, which will be discussed below.

4.2.3 Temporary reproductions

The cases illustrated in this sub-section deals explicitly with a temporary storage technology called RAM. They tried to answer whether data stored in this storage could “be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” as required by Section 101. Unlike the two court decisions above that are in harmony, the following ruling resulted in controversy. In short, they are not in line whether the phrase “more than transitory duration” could be overcome by a “functional” test or should be interpreted strictly with a specification of time.

¹⁴⁵ *Id.* at 1008.

¹⁴⁶ *Id.*

¹⁴⁷ Brown, *supra* note 42, at 23.

¹⁴⁸ JOYCE ET AL., *supra* note 28, at 66.

*MAI Systems Corps. v. Peak Computer Inc.*¹⁴⁹ is one of the early cases in which courts tried to work with the statutory requirement of Section 101 for digital copies. MAI, the owner of copyrighted computer programs, brought legal action against Peak, who operated a computer maintenance business on the ground of unauthorized reproductions of MAI's works in the course of Peak's repair service. Specifically, the plaintiff contended that its computer programs were to be licensed for personal use, which included necessary internal processing such as loading the works into the computer's random access memory ("RAM").¹⁵⁰ Thus, the plaintiff claimed that "any copying" done by Peak was beyond the scope of the license, alleging Peak for making unauthorized copies.¹⁵¹

The significant dispute that followed the claim was whether loading the plaintiff's software into RAM involves fixation that would constitute copying under the Copyright Act. RAM functions by manipulating digital data store in a computer's permanent storage;¹⁵² however, the data loaded into it can be *perceived, reproduced, and otherwise communicated* only when the power is on.¹⁵³ When switched off, the data stored in RAM immediately disappears.¹⁵⁴ Considering that the stored data do not last for a *transitory duration*, the defendant disputed the district court decision, which holds that copying had occurred within the meaning of the Copyright Act.¹⁵⁵

¹⁴⁹ *MAI*, *supra* note 120.

¹⁵⁰ *Id.* 517.

¹⁵¹ *Id.*

¹⁵² *JOYCE ET AL.*, *supra* note 28, at 476

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *MAI*, *supra* note 120, at 517.

The Ninth Circuit, nevertheless, affirmed the district court’s decision in this regard— notwithstanding that RAM was designed to be a temporary storage medium.¹⁵⁶ According to the court, the reproductions did not need to be absolutely permanent for a copyright infringement analysis. Instead, “sufficient permanence” was considered with the fact that the reproductions in RAM were held long enough for the defendant to achieve the computer diagnose purpose.¹⁵⁷ Thus, the data stored there were adequately shown as being able to “perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁵⁸ The ruling of the Ninth Circuit was, therefore, said to be a “functional” standard as the court considers a reproduction “fixed” when it makes intended actions possible.¹⁵⁹

Many courts after *MAI* have agreed with the Nine Circuit.¹⁶⁰ Not long after *MAI*, the Eastern District of Virginia in *Advanced Computer Service of Michigan, Inc. v. MAI Systems Corp*¹⁶¹ was presented with the very same question—whether a reproduction in RAM constitutes copying. *MAI*’s “functional” standard was again adopted by the *Advanced* district court in concluding that the contents in RAM were “fixed.”¹⁶² Although the *Advanced* court found the occurrence of fixation, it agreed with the defendant, a computer maintenance service provider, that the data stored in RAM were “ephemeral” and “transitory.”¹⁶³ Moreover, in 1995, the district court

¹⁵⁶ See Joshua C. Liederman, *Changing the Channel: The Copyright Fixation Debate*, 36 Rutgers COMPUTER & TECH. L.J. 289, 290 (2010).

¹⁵⁷ *Id.*

¹⁵⁸ *MAI*, *supra* note 120, at 518.

¹⁵⁹ Liederman, *supra* note 156, at 299.

¹⁶⁰ JOYCE ET AL., *supra* note 28, at 478.

¹⁶¹ *Advanced Computer Servs. of Michigan, Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356 (E.D. Va. 1994).

¹⁶² Liederman, *supra* note 156, at 300.

¹⁶³ *Id.*

in *Religious Technology Center v. Netcom On-Line Communication Services, Inc*¹⁶⁴ extended the *MAI* doctrine beyond computer programs to the information posted on an electronic bulletin billboard service ("BBS"). In line with the Ninth Circuit's "functional" test in *MAI*, the district court held that, even though the contents remained in the system for eleven days at maximum, they were capable of being perceived and thus, were sufficiently fixed.¹⁶⁵

Nonetheless, *MAI* was significantly challenged in the Second Circuit's more recent decision in *Cartoon Network v. CSC Holdings, Inc.*¹⁶⁶ The disputed technology in *Cartoon Network* was an invention of the defendant, Cablevision, called "Remote Storage" Digital Video Recorder system ("RS-DVR.") The technology is known as "buffer" and is, again, considered a type of RAM.¹⁶⁷ Acting as working memory, a buffer temporarily holds data that are automatically being overwritten by new sets of data at all times.¹⁶⁸ The Second Circuit, with the attempt of imposing a strict "duration requirement" to the definition of "fixed," ruled that the information contained in the buffer was not fixed as "no bit of data remains on any buffer more than a fleeting 1.2 seconds."¹⁶⁹ The court rejected Cartoon Network's contention, which adhered to the *MAI* "functional" test that the data stored in the buffer were not transitory, as they lasted long enough for Cablevision to make unauthorized reproductions.¹⁷⁰

The *Cartoon Network*'s "1.2-second rule" has been widely criticized. If a "more than transitory duration" requires more than 1.2 seconds, the following question would be how long

¹⁶⁴ *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)

¹⁶⁵ *Id.* at 1368.

¹⁶⁶ *Cartoon Network*, *supra* note 121.

¹⁶⁷ JOYCE ET AL., *supra* note 28, at 477.

¹⁶⁸ *Id.*

¹⁶⁹ *Cartoon Network*, *supra* note 121, at 129-30.

¹⁷⁰ *Id.* at 30.

precisely the statute would need. In *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, the court mentioned that *Cartoon Network* suggested a RAM work to last for “at least several minutes ... or until the computer is shut off.”¹⁷¹ Criticism of the strict application of the rule is that it would not follow technology's rapid development. Slingbox, for instance, allows users to stream videos without saving them into the computer's permanent storage and gives users the ability to control the buffering process and the length of time the video remains in the buffers.¹⁷² Moreover, *Cartoon Network* is a direct conflict in connection with a 2001 DMCA Copyright Office report which states that in the context of determining fixation of digital copies, “attempting to draw a line based on duration may be impossible ... both in theory and as a matter of proof in litigation.”¹⁷³

In addition to the Copyright Office, other non-judicial entities have been trying to resolve digital reproductions' complex issues. The Commission on New Technological Uses of Copyrighted Works (“CONTU”), for instance, has issued its final report agreeing that data stored in RAM can be considered fixed; however, to keep up with how the technology operates, exceptions are to be granted herewith.¹⁷⁴ Consequently, Section 117 was replaced with Section 117(a) and (b) in 1980.¹⁷⁵ Section 117(a) essentially permits reproductions of computer programs by an owner of a licensed copy, given that they are essential to computer operations.¹⁷⁶ After that,

¹⁷¹ *SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 167 (S.D.N.Y.), modified on reconsideration, 642 F. Supp. 2d 206 (S.D.N.Y. 2009) at 189.

¹⁷² Liederman, *supra* note 156, at 318.

¹⁷³ U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT art. v (2001), at 113, <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

¹⁷⁴ National Commission on New Technological Uses of Copyrighted Works (CONTU), Final Report on the National Commission on New Technological Uses of Copyrighted Works, 3 Computer L.J. 53, 13 (1981), <https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1573&context=jitpl>.

¹⁷⁵ JOYCE ET AL., *supra* note 28, at 477.

¹⁷⁶ See 17 U.S.C. § 117(a) (2018).

in 1998, the specific holding in MAI was overturned by the Digital Millennium Copyright Act.¹⁷⁷ Section 117(c) was added to exempt temporary productions for purposes of computer maintenance or repair.¹⁷⁸ Reading Section 117(c) could imply that Congress supports *MAI*'s proposition that ephemeral copies in RAM may constitute unauthorized reproductions under Section 106(1).¹⁷⁹

Still, to avoid Cartoon Network's strict duration standard by following the "functional" test as stipulated in MAI, one must face complex issues arising, especially nowadays when the internet is part of everyone's life. Suppose MAI is to become the prevailing standard. In that case, it may create unreasonable risks to every user in an email chain that contains infringing copyright materials as email users cannot avoid short-lived reproductions of the contents.¹⁸⁰ Moreover, the mere act of reading infringing works on a website may already impose the reader with unauthorized reproduction liabilities, as what appears on the web site is automatically stored in the user computer's RAM and even hard drive in certain cases.¹⁸¹

4.2.4 Non-static media

Difficulty in defining a 'fixed' work does not only reside in the digital world. Physical objects, in fact, can also pose complex fixation problems. Time and change bring not only new technologies to the world but also introduce new artforms. In *Kelly v. Chicago Park District*, the subject in dispute, presented before the Seventh Circuit, was a garden called "Wildflower Works," which Kelly, the plaintiff, promoted as a "living art."¹⁸² Defining this unconventional art form, Kelly, with his art history expert witness, contended that "Wildflower Works" is both a painting

¹⁷⁷ JOYCE ET AL., *supra* note 28, at 68.

¹⁷⁸ See 17 U.S.C. § 117(c) (2018).

¹⁷⁹ JOYCE ET AL., *supra* note 28, at 478.

¹⁸⁰ *Id.* at 480

¹⁸¹ *Id.*

¹⁸² *Kelly*, *supra* note 122, at 291.

and a sculpture within the purposes of the Visual Artists Rights Act (VARA).¹⁸³ Thus, by modifying the garden, the plaintiff alleged that the Park District violated his right to moral right or the right to “integrity” over the work protected under the Act.

Nonetheless, the Court of Appeals found that the work was not entitled to protection under VARA, as Wildflower Works did not satisfy the authorship and fixation copyright requirements.¹⁸⁴ Unlike a landscape design of a garden plan, which is put in writing, the garden itself is not a fixed copy of the gardener’s intellectual property.¹⁸⁵ The planting material is not “stable or permanent enough to be called ‘fixed.’” While rejecting “absolute” permanence, the court stated:

Seeds and plants in a garden are naturally in a state of perpetual change; they germinate, grow, bloom, become dormant, and eventually die. This life cycle moves gradually, over days, weeks, and season to season, 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.¹⁸⁶

Although the Seventh Circuit did not further rule that fixation was incompatible with all other inherently non-static media, there has been at least one court decision that extended *Kelly*’s reasoning beyond plants.¹⁸⁷ In *Kim Seng Co. v. J & A Importers*, an arrangement of food was brought to the U.S. District Court for the Central District of California to decide whether it would pass the copyrightability analysis. The plaintiff, a Chinese food supply company, brought a lawsuit against its competitor, J&A Importers. The plaintiff contended that the defendant infringed its copyright by using a photo of arranged Vietnamese rice sticks on the food products packaging.¹⁸⁸

¹⁸³ *Id.* at 300.

¹⁸⁴ *Id.* at 304

¹⁸⁵ *Id.* at 305

¹⁸⁶ *Id.* at 305

¹⁸⁷ Brown, *supra* note 42, at 29.

¹⁸⁸ *Kimseng*, *supra* note 123, at 1050.

The right over the photograph in dispute was said to be transferred from a third-party photographer. Additionally, the plaintiff claimed copyright ownership through its creative contribution to the picture, which is a product of a derivative work.¹⁸⁹ The underlying bowl-of-food “sculpture” was created by an employee of the plaintiff who arranged a bowl of Asian noodles from egg rolls, grilled meat, and other garnishes.¹⁹⁰

Regarding the derivative work claim, the court found no copyrightability over the underlying sculpture. However, the case did not pass the originality test; the court was not persuaded by the plaintiff’s contention that the employees “chose the foods out of thousands of possibilities, and directed their arrangement to be in a certain fashion out of infinite possibilities.”¹⁹¹ Furthermore, the court ruled that even if there had been originality, there would not have been enough evidence to support that the food bowl has passed the fixation requirement.¹⁹² The court cited *Kelly* as precedent and compared a bowl of food with a garden; it found that the nature of food was “inherently changeable” and would ultimately perish.¹⁹³ In conclusion, the court stated that “if the fact that the Wildflower Works garden reviving itself each year was not sufficient to establish its fixed nature, a bowl of food which, once it spoils is gone forever, cannot be considered “fixed” for the purposes.”¹⁹⁴

Nonetheless, it is worth noting that in *Kim Seng*, the food, though perishable, had already been depicted in a photograph, which enabled the work to be capable of being perceived and identified. Thus, the justifications behind fixation discussed in Chapter 1 have all been met—the

¹⁸⁹ *Id.* at 1055.

¹⁹⁰ *Id.* at 1050.

¹⁹¹ *Id.* at 1053.

¹⁹² *Id.* at 1054.

¹⁹³ *Id.* at 1055.

¹⁹⁴ *Id.*

author had expressed his desire to protect the work by hiring a third-party photographer, and photographs were capable of serving evidentiary and public interest purposes. Yet, the plaintiff lost its copyright over the sculptural work of food bowl. Notwithstanding the separate issue of copyright ownership over the photograph, it was fair to argue that the perishable bowl of food had already been fixed in the picture, making the food arrangement perceptible later. Moreover, it is questionable whether fixation is convenient and cheap, as observed.¹⁹⁵ If taking photos cannot suffice the fixation of sculptural works of food arrangement, would the authors need to create food models for fixation? If that was to be the case, fixation, indeed, imposes a significant burden upon certain authors.

4.2.5 Human body as medium

Apart from food, human bodies are unarguably perishable. The Copyright Act itself recognizes this very fact by using an author's life as a part of copyright protection terms.¹⁹⁶ Interestingly, in *Whitmill v. Warner Bros. Entertainment, Inc.*,¹⁹⁷ the plaintiff, who inked a registered tattoo called "*Tribal Tattoo*" for boxer Mike Tyson, sued Warner Bros, the defendant, for infringingly copied the tattoo. In the complaint, the plaintiff stated that he had never licensed anyone to use such a design, yet the movie "Hangover 2" depicted the said design's exact reproduction.¹⁹⁸ According to the plaintiff, the tattoo design had been registered at the Copyright Office and passed the originality and fixation requirements, therefore entitling him valid copyright over the work.¹⁹⁹ By copying the original tattoo from Tyson's face to an actor's face, the plaintiff

¹⁹⁵ Lichtman, supra note 7, at 724 (noting that fixation is cheap and easy)

¹⁹⁶ See, e.g., 17 U.S.C. § 302(a) which grants copyright protection to post-1978 works the life of the author plus seventy years after the death.

¹⁹⁷ Civ. No. 11-cv-752 (E.D. Mo., filed Apr.28, 2011).

¹⁹⁸ 23 No. 5 Westlaw Journal Entertainment Industry 5.

¹⁹⁹ S. Victor WHITMILL, Plaintiff, v. WARNER BROS. ENTERTAINMENT INC., Defendant., 2011 WL 2038149.

alleged that the defendant had constituted an initially unauthorized reproduction.²⁰⁰ Ultimately, however, the movie was allowed to be released, and the parties settled the case.²⁰¹

If the litigation had continued, it would have been interesting to see how the court would have touched upon the disputed work's copyrightability analysis. A critical question that could be raised is whether Tyson's face is a part of the plaintiff's tattoo elements. Note that in Chapter 3, the German Hamburg District Court found no fixation in which the art in question and the artist were inseparable. Similarly, the Seventh Circuit, in *Toney v. L'Oreal USA, Inc.*, found no copyrightability of a person's persona.²⁰² The court of appeals ruled that a person's likeness was not a work of authorship and was not fixed.²⁰³ A human body cannot be a medium within the purposes of the Copyright Act for a persona accordingly.

Given that tattoo is an art that can exist per se, a human body could be deemed a medium on which the work is expressed. If that is to be the case, the court may have to consider whether this perishable medium—human's facial skin—is adequate for fixation purposes under the Copyright Act. One may argue that human flesh, although perishable, is not *inherently changeable* in the way food does and is not *in a state of perpetual change*, as are seeds and plants. Nonetheless, what if a person, unfortunately, passes away the day after he got a tattoo? The corpse may be able to bear the tattoo in perfect shape only for a week or even a few days in some cases. Would this incident possibly be a tragedy for both the deceased and the tattoo artist?

From a more philosophical perspective, is there such an object that do not ultimately perish? Even books, the world first recognized copyright mediums, are perishable at some point. Whether

²⁰⁰ *Id.*

²⁰¹ JOYCE ET AL., *supra* note 28, at 68.

²⁰² *See Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005).

²⁰³ *Id.* at 910.

something is “inherently changeable” or “being in a state of perpetual change” or not is philosophically relative and, perhaps, using them as a legal test might not be the most ideal solution to the unsettled issue of fixation.

5. UNFIXED WORKS AND LIMITED PROTECTION

If the strict *Cartoon Network*'s “more than transitory duration test” discussed above is becoming a prevailing rule, it will exclude a great quantity of contemporary art from federal copyright protection. This is due to the fact that contemporary artists do not focus on the tangible products but define the process itself as the art's core.²⁰⁴ Examples of excluded creative works include sculptural works with natural media such as land art using natural objects²⁰⁵, performance arts in which an artist's body is a part of the art²⁰⁶, and sculptural works composed of living things or the so-called “bioart.”²⁰⁷ That is because these works would be deemed unfixed. The consequence is that the strict “more than transitory duration test” would leave many contemporary artists with neither economic nor moral rights—negating the constitutional copyright purpose of useful arts promotion.²⁰⁸ Apart from contemporary artists, authors of spontaneous works, including jazz musicians, stand-up comedians²⁰⁹, or even university lecturers²¹⁰ may also lose the remedies available under the federal copyright regime. Is it fair to exclude only this specific group of authors from receiving copyright protection to which other groups of artists are entitled? As justifications for protecting fixed works have already been presented prior, the following argument will explore the federal copyright protection of unfixed creation. Here, improvisational musical

²⁰⁴ Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 *FORDHAM L. REV.* 2221, 2228 (2014).

²⁰⁵ *See Id.*

²⁰⁶ *See Id.* at 2230.

²⁰⁷ *See Id.* at 2232.

²⁰⁸ *See Id.* at 2269.

²⁰⁹ Stand-up comedians, although has prepared jokes in writing before a show, most of the time feel the need to adapt the material to the audience and end up telling the jokes differently. *See* 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, 1801-02 (2008).

²¹⁰ Lecturers cannot have “off-the-cut” or mere oral delivery of lectures without prepared scripts under the protection of federal copyright law. *See* Ashley T. Barnett, *Profiting at My Expense: An Analysis of the Commercialization of Professors Lecture Notes*, 9 *J. INTELL. PROP. L.* 137 (2001).

works such as solos in jazz music will be used for the purpose of argument illustration.²¹¹ One will see that these works are the products of the authors' labor and can be misappropriated not less than fixed works are.

5.1 Rhetorics of Copyright

5.1.1 The Rhetoric of Natural Rights

John Locke, a 17th Century English philosopher, introduced the concept of “natural rights,” which conveys a proposition that an individual is entitled to reap the fruits of his or her creation or labor.²¹² Based on physical property, Locke's labor theory contends that by combining “common” things with one's labor, one owns as his private property what was once in common.²¹³ Although many scholars are reluctant to connect this conception to intellectual property theory²¹⁴, Locke's labor model played a role in creating the Statute of Anne in 1710.²¹⁵ Therefore, as introduced in Chapter 2 that the Statute was the model for the American copyright law, this “natural law” conception exists as an alternative to the “utilitarian” concept in the American copyright regime.

To be able to improvise, musicians must go through years of extensive practice hours. John Coltrane, an American jazz artist and one of the most influential saxophonists in music history, practiced tirelessly all day long and even during concert transmissions.²¹⁶ Every singly note he

²¹¹ Solos in jazz music in this regard refer to the improvisation of jazz musicians which usually takes place after the theme has been played and before the theme is revisited again for an ending.

²¹² JOYCE ET AL., *supra* note 28, at 46.

²¹³ Camille Edwards, From Locke to Louboutin: *Justifying Fashion Legal Protection with Philosophical Property Theories*, 4 PENN UNDERGRADUATE L.J. 12, 28 (2017) (citing John Locke, Second Treatise of Government (Harlan Davidson 1982, p. 111-112)).

²¹⁴ *Id.* at 29.

²¹⁵ JOYCE ET AL., *supra* note 28, at 47.

²¹⁶ See LEWIS PORTER, JOHN COLTRANE: HIS LIFE AND MUSIC, University of Michigan Press; Illustrated edition 254-55 (January 11, 2000).

played was unarguably the fruit of his hard work. Thus, applying the Lockean reasoning, one could see that Coltrane owned the improvisational works he created. This anecdote does not apply only to Coltrane but also to any artists who express their creative ideas in a non-fixed form of expression with perseverance demonstrated accordingly.

5.1.2 The Rhetoric of Misappropriation

Based on the natural law argument, this rhetorical mode claims that it is “unfair” for a free-rider to profit from someone else’s work of the mind or to “reap where he or she has not sown.”²¹⁷ The fact that someone else has tried to appropriate the creator’s product of the mind indicates that such work is worthy of legal protection.²¹⁸ An empirical study shows that oftentimes excerpts from improvisational solos in jazz music are transcribed and published; however, not many jazz artists get remuneration from these publications.²¹⁹ Applying the argument under the misappropriation rhetoric, those other than the original creators have appropriated improvised musical phrases that signify that the works are worth protecting. Thus, it is “unfair” for jazz artists to have no available remedies under copyright law when their works of minds are embezzled.

Nonetheless, the two rhetorics do have limitations. When it comes to the consideration of copyrightability, Lockean reasoning was denied by the Supreme Court of the United States in 1991. The Court rejected the "sweat of the brow" or "industrious collection" theory developed by lower courts, which justifies the protection of factual compilations as a reward for an author's hard work. It reasoned that "sweat of the brow" was not the touchstone of copyright protection; therefore,

²¹⁷ JOYCE ET AL., *supra* note 28, at 49.

²¹⁸ *Id.*

²¹⁹ See Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 Colum. L. Rev. 1363, 1365-66 (1997). (conducting the empirical study through telephone interviews with jazz musicians, music directors, and entertainment attorneys)

mere fact-based works without original components were not copyrightable.²²⁰ Regarding the “fairness” argument in the misappropriation rhetoric, there also needs to have a limit. That is because it is not ideal to have an intellectual property regime that would protect every intellectual product for an unlimited term,²²¹ which would be against the rhetoric of the public domain.²²² However, it is worth noting that the limitations of the two rhetoric do not only apply to unfixed works but also fixed works to the same extent. Thus, the rebuttals to these two rhetorics would not justify excluding unfixed works from federal copyright protection.

5.2 Limited Protection of Unfixed Works in US Jurisdiction

The U.S. jurisdiction, in fact, does not entirely ignore unfixed works; several state courts have protected the works that have no tangible mediums. Moreover, there are both federal and state laws that may provide remedies to owners of unfixed materials. Nonetheless, these remedies available for the authors of unfixed works are extremely limited.

5.2.1 Anti-Bootlegging Provisions

At the federal level, Congress has enacted Section 1101²²³ *outside* of the Copyright Act to prevent unauthorized audio and video recordings of live musical performances pursuant to the Agreement on Trade-Related Aspects of Intellectual Property (“TRIPs”). This enactment was considered a constitutional departure which extends copyright protection to unfixed materials—musical performances.²²⁴ Section 1101(a)(1) prohibits fixation of the sounds and images of a live

²²⁰ *Id.* at 1359-60.

²²¹ JOYCE ET AL., *supra* note 28, at 50.

²²² The core notion goes that “[t]he existence of a robust, constantly enriched public domain of material not subject to copyright (or other intellectual property protection) is a good in its own right, which our laws should promote at the same time as they provide incentives or reward creativity”. See Lange, *Recognizing the Public Domain*, 44 Law & Comp. Probs. 147 (1981).

²²³ 17 U.S.C. § 1101 (2018)

²²⁴ Susan M. Deas, *Jazzing up the Copyright Act - Resolving the Uncertainties of the United States Anti-Bootlegging Law*, 20 Hastings COMM. & ENT. L.J. 567, 570 (1997).

musical performance without performers' consent, followed by Section 1101(a)(2) and Section 1101(a)(3), which make illegal the transmission and distribution of unauthorizedly fixed performances, respectively.

However, this current federal copyright law only helps stage artists prevent unauthorized fixation and distribution of their works in very limited circumstances. For jazz musicians, the Anti-Bootlegging provisions do not prohibit a member in the audience to remember improvisational phrases and transcribe them on paper for publication or incorporate them in new works.²²⁵ Moreover, the provisions only apply to cover musical performances, leaving theatrical works, live comedies, and any other non-musical works involving improvisational elements unprotected. Therefore, for non-musical works shown on stage for the first time without prepared scripts, misappropriation through videotaping by an audience member is not prohibited by the law. Not to mention that nowadays, video recording can be conveniently done by every audience member, even on the cheapest smartphone.

5.2.2 Common Law Copyright

The fact that unfixed works enjoy no federal copyright protection does not mean that they go into the public domain right away. Instead, they are considered for protection under the common law copyright regime. Observed by the New York Court of Appeals, the recognition of unfixed work under state law resulted from the labor theory's influence of Locke.²²⁶ In *Williams v. Weisser*, a professor sued a note service business for selling lecture notes from his classes without

²²⁵ Donat, *supra* note 219, at 1367.

²²⁶ *Hemingway's Estate v. Random House, Inc.*, 244 N.E.2d 250, 254 (1968) [hereinafter *Hemingway*] (citing NIMMER COPYRIGHT, § 11.1, at 40 which states that “the underlying rationale for common law copyright (i.e., the recognition that a property status should attach to the fruits of intellectual labor) is applicable regardless of whether such labor assumes tangible form”).

authorization.²²⁷ The court held that the professor owned the common law copyright of the lectures and “oral delivery of lectures did not divest the plaintiff of his common law copyright to his lectures.”²²⁸

The Copyright Act of 1976, Section 301(b)(1) explicitly declines to preempt state law with respect to “subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression.”²²⁹ As a result, the Ninth Circuit, for instance, has applied a two-pronged test in considering preemption of federal copyright law: (1) the work at issue comes within the subject matter of copyright, and (2) the state law rights are “equivalent to any of the exclusive rights within the general scope of copyright.”²³⁰ Nonetheless, not every work that passes the two-prong test would be protected under common law copyright; there needs to be applicable law, which varies from state to state. In California, for example, there exists state legislation that protects unfixed works. For oral lectures, there is a specific bill that bars the commercialization of lecture notes without consent.²³¹ Such protection was the success of professors in lobbying for legislation and is, nonetheless, not available in some other states.²³² Besides, for improvisational materials, California’s statute has a provision that protects improvisational performers and grants them

²²⁷ Williams v. Weisser, 273 Cal. App. 2d 726 (Ct. App. 1969).

²²⁸ Id. at 741.

²²⁹ 17 U.S.C. § 301(b)(1) (2018).

²³⁰ See Grosso v. Miramax Film Corp., 383 F.3d 965, 968 (9th Cir. 2004); See also Montz v. Pilgrim Films & Television, Inc., 649 F.3d 975, 980 (9th Cir. 2011).

²³¹ Cal. Educ. Code § 66450.

²³² Ashley T. Barnett, *Profiting at My Expense: An Analysis of the Commercialization of Professors Lecture Notes*, 9 J. INTELL. PROP. L. 137, 140 (2001).

“exclusive ownership in the presentation thereof.”²³³ However, this protection is one of its kind and is not available in other states.²³⁴

Court precedents, moreover, show that unfixed works are not easily granted with common law copyright. In *Estate of Hemingway v. Random House*, the issue presented before the court was whether “anecdotes, reminiscences, literary opinions and revealing comments” of Ernest Hemingway that were uttered during an interview could be “literary property” protectable under New York law.²³⁵ The court rejected state law copyright protection over the subject matters, reasoning that the author did not “mark off the utterance in question from the ordinary stream of speech.”²³⁶ Similarly, in *Falwell v. Penthouse International*, one of the claims brought by the publication of the plaintiff’s statements made during interviewed constituted Virginia common-law copyright infringement.²³⁷ The court, nevertheless, dismissed the claim on the ground that “[t]here is no defined segregation, either by design or by implication of any of plaintiff’s expressions of his thoughts and opinions on the subjects discussed which would aid in identifying plaintiff’s purported copyrighted material.”²³⁸

Nonetheless, such ground is not likely to be applicable for cases in which contemporary artists or improvisational authors try to protect their unfixed works. That is because it is often conspicuous to the audience that the author’s creative expression is a result of the act of authorship. For jazz musicians, solos played on stage are intended for artistic purposes rather than mere noodling. For stand-up comedians, the jokes they improvise are known as parts of their profession

²³³ Cal. Civ. Code § 980(a)(1) (West Supp. 1997).

²³⁴ Donat, *supra* note 219, at 1367.

²³⁵ *Hemingway*, *supra* note, at 226.

²³⁶ *Id.* at 256.

²³⁷ *Falwell v. Penthouse Int’l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981).

²³⁸ *Id.* at 1208.

and are not created to be primarily used in an ordinary course of daily conversation. However, as there appears to be no case law on improvisational performances and common law copyright, one possible conclusion is that the common law copyright regime fails to address the performers' specific problems.²³⁹

²³⁹ Searches for improvisational common law copyright case on Westlaw and LexisNexis (Dec. 7, 2020) failed to find relevant case law; *See also* Donat, *supra* note 219, at 1377.

6. FORMALITIES AND FIXATION

Formalities of registration and deposition have had a significant role in American copyright history. Before the Copyright Act of 1976 took effect, the law had required authors to register the work before publication and deposit a copy of the work with relevant offices.²⁴⁰ The requirement had been taken seriously as a prerequisite for copyright protection, and non-compliance would inject the work into the public domain.²⁴¹ Nowadays, however, formalities are no longer a copyright prerequisite; there was a shift towards Automatic Protection pursuant to the Berne Convention Article 5(2), which stipulates that “[t]he enjoyment and the exercise of these rights shall not subject to any formality...” Nonetheless, the importance of formalities remains, as authors of creative works are still highly incentivized to comply with such.

Copyright registration was designed to make a public record of the basic facts in a copyright claim,²⁴² entitling the public access to useful information about the owner of the underlying work. Although registration is not a copyright prerequisite under the Copyright Act of 1976, copyright owners have several inducements to register their works. First, Section 411(a) clarifies that registration is a requirement for bringing a copyright suit before a federal court.²⁴³ Second, registration establishes prima facie evidence of validity in the work copyright if such action is made within five years from the date of publication according to Section 410(c).²⁴⁴ Moreover, registration made within three months from the date of publication of the work permits

²⁴⁰ JOYCE ET AL., *supra* note 28, at 393.

²⁴¹ *See Wheaton v. Peters*, 33 U.S. 591 (1834).

²⁴² JOYCE ET AL., *supra* note 28, at 427.

²⁴³ 17 U.S.C. § 411(a) (2018) (stating “... no civil action for infringement of the copyright in any United States works shall be instituted until preregistration or registration of copyright claim has been made in accordance with this title.”).

²⁴⁴ *See* 17 U.S.C. § 410(c) (2018).

statutory damages and attorney fees under Section 412.²⁴⁵ Even though there has been a relatively small number of registrants due to the reduced role of registration formality²⁴⁶, the inducements for copyright registration in the United States are higher than those in other jurisdictions.²⁴⁷ Moreover, the importance of registration is so significant that it could exclude unregistered works from federal suits. Therefore, copyright holders who have rights that cannot be enforced are indistinguishable from authors of unfixed works who receive no copyright protection at all.

Deposition formality is a requirement that copyright holders must deposit at least one copy of the underlying copyright work that has been published. This deposition is required as a part of the registration process at the Copyright Office;²⁴⁸ additionally, it can also be demanded in writing by the registrar at the Library of Congress.²⁴⁹ As a part of the registration process, Section 408(b) requires “in the case of unpublished work, one complete copy or phonorecord.” For published work, the law requires “two complete copies or phonorecords of the best edition.” Alternatively, deposition of published works can be made at the Library of Congress, which Section 407(a) generally requires two complete copies of the best editions. Non-compliance with the timely deposition demand made by the Register of Copyrights will result in monetary fines.²⁵⁰

These formalities help serve at least two purposes; firstly, they provide the public with information about the work and the owner of such work; and secondly, they help indicate works

²⁴⁵ See 17 U.S.C. § 412 (2018).

²⁴⁶ Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1186 (2010).

²⁴⁷ For instance, at least the above foreign jurisdictions including France, Germany, China, and Thailand do not have copyright registration as a prerequisite to initiating suits.

²⁴⁸ 17 U.S.C. § 408(a) (2018) (stating “... the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section...”).

²⁴⁹ 17 U.S.C. § 407(a) (2018) (stating “...the owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication...”).

²⁵⁰ See 17 U.S.C. § 407(d).

that the authors care and desire to protect.²⁵¹ Deposit requirements, in particular, “are consistent with the preservation of cultural heritage and with copyright's constitutional copyright purpose to ‘promote the progress of science,’ by which the Founders meant knowledge.”²⁵²

Importantly, the two formalities require submitting one or two copies in certain cases of the underlying copyright work. By producing a copy, there needs to be some iteration of fixation. Therefore, the author of an unfixed work who cares to exercise his rights would eventually find a need to fix the work and submit a copy in the copyright registration process. In other words, even without fixation as a copyright prerequisite, fixation of creative expression will, nevertheless, must be made to satisfy the registration formality. Therefore, fixation as a copyright prerequisite in the copyright regime where formalities are demanded is not necessary.

If a work will need to be fixed anyway to enjoy full remedies available under copyright law, what is the difference between having or not having fixation as a copyright prerequisite? First, the authors of creative works, regardless of the nature of mediums of expression, will be adequately entitled to copyright protection. The authors who pursue contemporary arts with transitory mediums of expression and the artists who perform improvisations will receive copyright ownership, as do other artists, resulting in a non-discriminatory copyright standard. Secondly, an unfixed work will begin receiving copyright protection from the date of expression of idea rather than the date of fixation. Thus, if an author of an unfixed work later fixes the work, the work will be protected by copyright law during the interval when the work has not been fixed. Accordingly, a misappropriation happening during the interval would constitute a copyright infringement claim, giving the author a chance to seek remedies under copyright law.

²⁵¹ Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 Stan. L. REV. 485 (2004).

²⁵² Samuelson et al., *supra* note 246, at 1187.

Hypothesis Scenario

To clarify the above arguments, consider the following hypothetical scenario, which involves musical improvisation, the use of new technologies, and how fixation will create an adverse result upon the author.

A jazz music professor, teaching a virtual class, improvised a beautiful jazz phrase to his students. One student, wanting to study every note the professor plays, activates a music transcription software²⁵³ on his computer, which transcribes the improvisational excerpt into music notation without the professor's knowledge. After studying the phrase at the student's own time, the student finds that the work is a perfect example of an improvisational method he has been developing. As a result, he includes the professor's material into his jazz improvisation tutorial book to be published for sales. To make sample recordings for each particular work included in the book, he plays his works and the professor's work on his instrument and records them in MP3 files, which he bundles with the books put them all for sales. These materials receive a lot of attention, generating income for the student. Later, the professor finds out that his work has been stolen and used in the student's book. The professor, thus, claims the ownership of his musical phrase, asking the student for a share of the profits.

Under the current federal copyright law that has the fixation requirement, it would be unfortunate for the professor as he will not be able to claim copyright ownership and exercise any rights over the improvisational phrase. That is because the musical work has never been fixed under his authority.²⁵⁴ Apart from that, the copyright over the phrase could even belong to the

²⁵³ A software that can detect musical notes from a soundwave and notate them on a sheet music. *See, e.g.*, AnthemScore (<https://www.lunaverus.com/>).

²⁵⁴ Transmission of audio in the live streaming process during the virtual class is not likely to constitute fixation, especially under the "more than transitory duration" test. *See* H.R. REP. NO. 94-1476, 53 (1976). Moreover, the authorship-as-fixation requirement excludes the professor from obtaining copyright ownership because the work is notated by the student's transcription software or fixed by the student in other words.

student, as the fact that the student employs the music transcription software instead of using an audio recording or video recording program would make the Anti-Bootlegging provisions irrelevant and may give copyright to the student as he has fixed the work.²⁵⁵ In addition, as the student plays the phrase on his instrument and records it, he would also be the copyright owner of the sound recording. Not fixing the work, the professor will have no available remedies under the copyright law. Thus, he could not use a copy of the notation made by the student's transcription program for depository purposes²⁵⁶ that would give him the standing to sue in a federal court.²⁵⁷ Moreover, provided that the professor starts constructing his copyright claim by writing down the phrase in the music sheet after learning about the misappropriation, copyright over the work would commence at the time of the writing. In other words, there will be no copyright during the interval in which the work has not been fixed, giving the professor a hard time alleging copyright infringement over the student's activities.²⁵⁸

However, given there is no fixation requirement imposed, the professor would have owned copyright over the musical improvisation from the date he first plays it. As discussed in earlier chapters, idea/expression dichotomy and creativity can already suffice the requirements of copyright in several civil law jurisdictions. Without fixation, the copyright prerequisites in the United States would resemble those in civil law nations. As a result, with the work passing the two

²⁵⁵ This anticipation is based on the potential copyright ownership of a person who makes an audio recording on mobile phone. The act of pressing the transcription button and pressing the recording button could be of no difference. Nonetheless, theoretically it could be argued that activating the music transcription program, although fixation occurs, does not require creativity.

²⁵⁶ *See* *Alicia v. Machete Music*, 744 F.3d 773 (1st Cir. 2014) (noting that the deposit requirement was not met when the plaintiffs used the allegedly infringing recordings as deposit material).

²⁵⁷ As previously discussed, registration is a prerequisite to bringing an infringement suit in courts.

²⁵⁸ *See, e.g.,* *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 139 (2d Cir. 1992) (stating that “in order to establish a claim for copyright infringement, a plaintiff must show ownership...”).

prerequisites²⁵⁹, the professor will have a second chance to prove the ownership of his work, which will be a matter of evidence in court. He may, for instance, use a student's transcription program's activity history to show that the program was activated during the class he taught.

²⁵⁹ When the professor played the jazz phrase on his instrument, his musical idea was expressed. And improvisation is a core aspect of musical creativity. See Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 Notre Dame L. Rev. 1829, 1840 (2011).

CONCLUSION

As the Berne Convention leaves the state members open to decide whether to have a fixation requirement in their copyright legislations, the civil law countries that may have followed the French copyright tradition generally do not require copyright works to be fixed. For instance, in France, Germany, China, and Thailand, their provisions on fixation requirements only apply to limited subject matters. As a result, sermons and lectures, for example, have been recognized as copyright subject matters by courts in France and China, respectively. The United States, on the other hand, incorporates British copyright tradition in its copyright system. American copyright law prioritizes the protection of “writings” rather than primarily protecting authors’ intellectual and moral interests. Accordingly, previous copyright legislations listed copyright subject matters that have tangible mediums, and the Copyright Act of 1976 explicitly contains provisions on the requirement of fixation. A series of precedents, however, suggest that the fixation has been having a hard time adapting to new technologies. Up to this point, it is still uncertain if one should consider how long exactly a medium of work needs to last to satisfy the statutory language of “a period of more than transitory duration.”

Consequently, contemporary arts expressed on inherently changing mediums may not enjoy copyright protection as other art forms do. Such arts, as well as improvisational works and other works that do not require a medium of expression, are unarguable the products of artists’ labor. Because these works are capable of being misappropriated, especially when everyone with a mobile phone can conveniently make an audio or video recording, the unfixed works should be entitled to copyright protection. Nonetheless, the unfixed works are subject to much lesser protection. Anti-bootlegging law, for instance, only applies for audio or video recording of live musical performances, while common-law copyright does not effectively do the job.

Regarding the registration and deposit formalities' role, the research finds that they can serve the same function as the fixation requirement. For an author interested in protecting their work in court, they must register the work and deposit at least one copy anyway. And by discarding fixation as a copyright prerequisite, the author will have a chance in courts upon creating a document and comply with the registration process, leaving copyright ownership as the matter of proof. Authors of unfixed works will be incentivized to fix the works accordingly. In light of promoting useful arts, copyright law should welcome new artforms and accommodate new technologies. With the registration and deposition formalities, the thesis contends that fixation, which makes copyright law inflexible, should be discarded.

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