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Volume 19 | Issue 2

Article 5

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March 2012

## The End of the Work As We Know It

Michael J. Madison

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## THE END OF THE WORK AS WE KNOW IT

*Michael J. Madison\**

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## I. INTRODUCTION

Intellectual property law is anchored in a handful of fundamental yet ill-defined concepts. Those concepts change over time, as virtually all concepts do, but worse, in some key cases they seem to have little to no meaning whatsoever. Can those concepts be rehabilitated, should they be rehabilitated, and if so, how?

Patent law builds on the idea of invention. “Invention” and “the invention” (related but distinct concepts) are reducible, at times in history and at times in the law, to subsidiary concepts: novelty, nonobviousness (in American law), an “inventive” step (in non-American patent systems), and utility. The meaning of “invention” and “the invention” in patent law are hardly free from ambiguity generally or in any particular instance, but relevant meanings are typically clustered together sufficiently so that the law and the inventive economy appear to get by, mostly, with an acceptable degree of difficulty.

Copyright law builds on the idea of the author, which has been critiqued at length, and also on the idea of the work, represented in American law as the “work of authorship.” The concept of the work appears to have little or no fixed meaning or meanings in the law, despite decades of inclusion of both term and concept in relevant statutes and treaties. It is, therefore, the subject of this Article.<sup>1</sup> The idea of the work is fundamental to all of contemporary copyright law and has been fundamental to most copyright law of the last century and a half. The emergence of digital technology over the last three decades reveals that the idea of the work may not be up to the task of adequately linking the text and structure of the law to the practices and expectations of the creators, consumers, technologists, and related industries and institutions that the law governs. But the problem here is not simply technological. What I call the de-materialization of the work, along with the consequences of de-materialization for the law as well as for creative practices, have their roots in the emergence of modern copyright law more than a century ago.

What seems to be a highly conceptual or theoretical problem—what is a work?—has significant practical implications. The existence of a work determines the existence and scope of a copyright owner’s initial rights.<sup>2</sup> In an infringement suit, identity between the plaintiff’s work and the work of the

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<sup>1</sup> My interest coincides with a modest amount of other recent scholarship on the same topic. See Paul Goldstein, *What is a Copyrighted Work? Why Does it Matter?*, 58 UCLA L. REV. 1175 (2011); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005); see also sources cited *infra* note 6.

<sup>2</sup> See 17 U.S.C. § 102(a) (2006) (providing the categories of works of authorship).

accused infringer is fundamental to determining liability,<sup>3</sup> and a contrast between the plaintiff's work and the defendant's work is fundamental to determining the scope of possible fair use or fair dealing defenses.<sup>4</sup> Given an initial work, does that work comprise subsidiary works (as a book might comprise separate chapters, each of which might be a work)? When does an initial work become a new, derivative work? American copyright law awards statutory damages on the basis of the number of works infringed,<sup>5</sup> giving copyright owners a substantial incentive to multiply the number of works they identify in their creations.

Those doctrinal implications represent the superstructure of my inquiry. The underlying foundational questions are the ones I wish to ask and answer here, at least in part. What analytical function has the concept of the work been performing in the law, why has it been performing that function, what flaws in the work have been exposed, and what, if anything, should law reformers do about them? I argue below that copyright scholars and lawyers have been insufficiently attentive to the several dimensions of the work—functional, expressive, and communicative—which, combined, should inform our understanding of what the work is, what it means, and what it does.

I organize the Article in the following brief steps. First, what is a work? I summarize the text and structure of the American Copyright Act, in light of relevant international copyright history as well as American copyright history. For reasons of space I focus on American copyright law, although, as I note below, the idea of the work as a foundational concept in copyright emerged elsewhere before it took firm hold in the United States, and the conceptual fragmentation that bedevils the idea of the work is not limited to American law.<sup>6</sup> My goal, in other words, is not primarily an exegesis of the American statute. My point is to investigate the extent to which the idea of the work can and should be isolated from the related ideas of authorship and of tangibility, or medium. Second, why is a work a “work,” or, what work does the “work” do? I review a series of relatively recent cases from the American experience that illustrate how and why courts struggle with the idea of the work. This is an

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<sup>3</sup> See *id.* § 106 (setting forth the exclusive rights of the copyright owner).

<sup>4</sup> See *id.* § 107 (describing the fair use doctrine).

<sup>5</sup> See *id.* § 504(c) (providing for remedies for infringement).

<sup>6</sup> Several scholars outside the U.S. have queried the work in recent years. See Justine Pila, *Copyright and its Categories of Original Works*, 30 OXFORD J. LEGAL STUD. 229 (2010) (England); Justine Pila, *An Intentional View of the Copyright Work*, 71 MOD. L. REV. 535 (2008) (England); Brad Sherman, *What is a Copyright Work?*, 12 THEORETICAL INQUIRIES L.F. 99 (2011) (Australia); Michal Shur-Ofry, *Baby Shoes and the Copyright Work: A Comment on Brad Sherman's What Is a Copyright Work?*, 12 THEORETICAL INQUIRIES L.F. 1 (2011) (Israel).

illustrative review, not a comprehensive or necessarily representative one. The illustrations point to a central organizing theme behind the idea of the work: A work both represents and is defined by boundaries and boundedness. But boundaries and boundedness have at least two meanings, and courts, scholars, and legislators have gone astray by overinvesting in efforts to define the boundaries of the work, as an abstract concept applicable generally to all forms of creation governed by copyright, without appreciating the role of the work in governing boundaries between other concepts, groups, communities, and other legal and extra-legal phenomena. Third, I conclude with some tentative and preliminary observations on what it might mean for copyright were this second idea of boundaries to be given greater emphasis, whether in the context of a more robust idea of the work or in the context of abandoning it.

## II. THE WORK IN AND OUT OF CONTEXT

What is a work? What I aim to show here is that this question lacks a good answer, at least initially, and that the lack of a good answer is attributable in large part to the de-materialization of the work during the latter part of the nineteenth century and the first part of the twentieth century. What I am referring to here is the “work” as a legal thing, which is related to, but conceptually and practically distinct from, the “work” or “the work of art” as an artistic or authorial object. Authors and audiences create artistic works; the legal system creates copyrightable (or copyright) works.<sup>7</sup> The phenomenon of de-materialization is often associated either with the rise of conceptual art during the twentieth century<sup>8</sup> or with the emergence of digitization of expressive content during the latter twentieth century.<sup>9</sup> My interest here is not primarily with the work of art as art, but instead with the work as a legal concept. Michel Foucault wrote, “A theory of the work does not exist, and the empirical task of those who naively undertake the editing of works often suffers in the absence of such a theory,”<sup>10</sup> and I am mindful of his point that the identity of the author and the identity of the work are co-creations, each, in its

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<sup>7</sup> Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381 (2005); Sherman, *supra* note 6.

<sup>8</sup> See LUCY LIPPARD, *SIX YEARS: THE DEMATERIALIZATION OF THE ART OBJECT* (1973) (documenting the emergence of conceptual art).

<sup>9</sup> See John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84–90, 126–29, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html> (arguing that de-materialization has made copyright, which was designed to protect the bottle and not the wine, irrelevant in the digital era).

<sup>10</sup> Michel Foucault, *What is an Author?*, in THE ESSENTIAL FOUCAULT 377, 379 (Paul Rabinow & Mark Rose eds., 2003).

own ways, defining the other. My quarry is related but distinct; I am after the meaning(s) of “the work” in the law, not in art. To explore the point, I start with the copyright statute, then move onward.

### III. CURRENT AMERICAN COPYRIGHT LAW

The word “work,” used as a noun, appears in almost every section of the Copyright Act. It permeates Section 101, listing definitions.<sup>11</sup> It defines copyrightable subject matter, identifies the subject of the copyright owner’s exclusive rights, limits the scope of fair use, and qualifies the entitlement of the successful infringement claimant to statutory damages. It is not an overstatement to argue that if one pulls too hard on the thread of the copyrighted work, the fabric of copyright law as a whole might unravel. As the law uses the term, what does it mean?

As any lawyer should, I start by trying to find a formal definition of the “work” and by trying to find it in the statute where the term appears. Section 101, the definitional section, does not include a definition of the work. Looking further, in the context of the statute as a whole, it quickly becomes clear that the Copyright Act has not accomplished and cannot accomplish the goal that it appears to set for itself: to identify and apply a consistent and straightforward meaning (if not definition) of the work.

The canonical statement of copyrightable subject matter in American law appears in Section 102(a). Copyright “subsists,” according to the statute, in “original works of authorship fixed in any tangible medium of expression.”<sup>12</sup> Some quick parsing distinguishes the phrase “original work of authorship” from the phrase “fixed in a tangible medium of expression.” The related ideas of “tangible media of expression” and “fixation” are easy enough to appreciate, if not always easy to apply in practice, but logic yields the inference that “original works of authorship” might exist that are not “fixed in a tangible medium of expression.” The text of Section 301(b)(1), concerning preemption of inconsistent state law, confirms the existence of “works of authorship not fixed in any tangible medium of expression.”<sup>13</sup> On a first read, the idea of the work does not have to do with an author’s choice of medium.

But this is too quick. No copyright plaintiff is entitled to proceed with a claim unless the work is fixed in some tangible medium; the successive

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<sup>11</sup> See 17 U.S.C. § 101 (2006) (“anonymous work,” “architectural work,” “audiovisual works,” “best edition” of a work, “copies” are material objects in which a work is fixed, and so on).

<sup>12</sup> *Id.* § 102(a).

<sup>13</sup> *Id.* § 301(b)(1).

references to “the work” that is subject to the author’s exclusive rights in Section 106 must include, necessarily, the assumption that “the work” is embodied in some tangible object.

Continuing with the statute, we know the phrase “original works of authorship” refers to the intangible object of the law; that is, in some respect the phrase refers to the author’s intellectual creation or production. Some works of authorship are not original, both according to the logic of the statute (one might have a “work of authorship” not prefaced by the word “original”) and according to the Supreme Court in *Feist Publications v. Rural Telephone Service*.<sup>14</sup> The idea of the work does not have to do with originality.

Yet originality and authorship are intimately intertwined. Does the idea of the work have to do with authorship itself? A work often is defined as what an author creates,<sup>15</sup> or as what an author claims or alleges to be the author’s creation.<sup>16</sup> There is a lot of sense in that proposition, but an author-centered approach runs a number of substantial risks. One is unreliability: authors have little incentive not to claim in law more than they actually created, although secondary evidence (say, evidence that the work speaks for itself) sometimes would backstop the author’s position. A second is that an author-centric approach fails to interrogate the identity of the author. What of a person who contributes to a collective project that results in a single work? Is each contribution a work, because the contributor could fairly be characterized as an author? Or is the author the person (or entity) that is accountable for the end result? The premises underlying these and other “authorship” inquiries are well-known; authorship is a social and legal construct, even in cases where we plausibly identify a single person with a single artistic creation. The work creates the author, in other words, as much as the author creates the work.<sup>17</sup> A third risk is that equating the work with authorship overlooks the possibility that the work is performing an analytical function (or doing something else) that is distinct from the work that authorship is doing. A “work” might be something other than a “work of authorship.” The statute refers frequently to “the work” without qualifying it as a “work of authorship,” but it is often fair to

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<sup>14</sup> 499 U.S. 340, 345 (1991) (“To qualify for copyright protection, a work must be original to the author.”).

<sup>15</sup> See, e.g., Christopher M. Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 292 (2011) (“A work of authorship is a planned sensory experience, designed by its author to give rise to an expressive experience in the mind of one or more intended audiences.”).

<sup>16</sup> See Goldstein, *supra* note 1, at 1178 (“The vast majority of cases . . . confirm that a copyrighted work is what the author says it is.”).

<sup>17</sup> See generally Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author,”* 17 EIGHTEENTH-CENTURY STUD. 425 (1984) (discussing the evolution of society’s conception of the author and his relation to his work).

infer (despite statutory instruction) that Congress meant “work of authorship” each time that it used the term “work.”

For example, the definition of “derivative work” suggests that a “work” is nothing more (or less) than a “work of authorship”:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”<sup>18</sup>

A derivative work is copyrightable and therefore is an original work of authorship. It is a work that is based on another work. In this instance the statute seems specifically to equate a “work” with “an original work of authorship.”

For a contrasting example, consider the statutory version of copyright’s venerable distinction between uncopyrightable ideas and copyrightable expression. Section 102(b) states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”<sup>19</sup>

The text here is subject to multiple readings. One version holds that “an original work of authorship” might be uncopyrightable despite the presence of originality and authorship.<sup>20</sup> An alternative holds that copyright is barred under Section 102(b), at least in many cases—ideas, notably—because the work lacks originality or authorship. The logical inference is that it is a work, but only a work, or in some cases not even that. An uncopyrightable fact falls into the same analytical space. A fact cannot be copyrighted because it lacks originality and authorship. Is it a work? Are works necessarily antecedent to authorship, or are they necessarily bound up with it? *Feist* seemed to conclude that some

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<sup>18</sup> 17 U.S.C. § 101 (2006) (“derivative work”).

<sup>19</sup> *Id.* § 102(b).

<sup>20</sup> In other words, policy reasons might lead courts to deny the presence of an enforceable copyright even if the work otherwise met the formal requirements of the statute. *See, e.g.,* *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 978 (2d Cir. 1980) (“[W]here, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law.”).



works have authors, and some do not. The Copyright Act seems to suggest both, at different times, and as I argue below, so do the cases.

Finally, the statute at times suggests that an idea or a process might not be a work of authorship—or a work at all—for reasons to do with its definiteness, or lack thereof, rather than its authorship. The fixation requirement serves this definiteness function to a significant degree, but the statute also deals with it separately. A work has an independent thing-ness that copyright law is bound to respect, a claim that is underscored by the one statutory definition that bears on the question of the work:

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.<sup>21</sup>

That text speaks to fixation, but it speaks separately to versions and portions—to size, and to edges, or limits<sup>22</sup>—and it does not touch on authorship, or on originality.

At the end of the day, considered in formal terms, the fairest thing that may be said of the Copyright Act itself is that it points in multiple directions when asked “what is the work?” At times the work is what the author says it is, or what we understand the author to have intended; at times the work is what is original, or what is fixed in some tangible object; at times the work is only the sum total of the separate subject matter requirements of the statute. At times the work is the embodiment of a requisite thing-ness. And at times the work simply “is,” as an intangible thing, antecedent to considerations of authorship, tangibility, or definiteness.

Can the problem be cured, formally, by interposing some boundaries to what we call the work? The work can be defined in terms of other abstractions, all of which are, by virtue of their equivalent abstractness, unhelpful. If the goal were to identify the “metes and bounds” of the work, as a patent claim arguably defines the scope of a patented invention, then the answer is almost certainly that the goal is unrealizable. The work is simply not subject to an all-purpose formal definition. “Size matters (or should),” as Justin Hughes argues in proposing that copyright courts be empowered to deny enforcement to

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<sup>21</sup> 17 U.S.C. § 101 (2006) (“created”).

<sup>22</sup> See Hughes, *supra* note 1, at 578 (discussing lack of a clear “minimum size” principle in copyright law).

copyright claims where the work is simply too small.<sup>23</sup> But useful though that approach might be, the term and concept of the work captures too many things in a single word, and a single word is too inflexible to deal with all the purposes that we assign to the object of copyright and to all of the things that have been covered by copyright and might be covered by it in the future.

Before turning to some cases, I question some history, below. For the reasons summarized next, I believe that an inquiry into legislative history itself is not helpful conceptually. The key point is that relevant history goes back much farther than the most recent copyright statute. Congress was not writing on a blank slate. The Copyright Act of 1976 emerged against a backdrop of nearly 100 years of international copyright history, nearly 200 years of American copyright history, and nearly 300 years of English copyright history. The work and the idea that the term represents have been part of the law since the beginning. Whatever the work means today, that meaning has been shaped by copyright's full history and traditions.

#### IV. TO HISTORY AND BEYOND

Consider the fact that the ordinary English word “work” is used and has been used in a number of different senses, all of which are relevant to copyright law—and all of which have been used at points in copyright history. “Work” can be a verb (a sculptor works a block of marble, or an engraver works a plate); any creator might work at his or her craft. “Work” is more commonly encountered as a noun. An artist might produce a painting, sometimes known as a “work of art” or as a “work of fine art,” in the sense that what the artist produced is fully co-extensive with the physical thing. An author might produce a book, also known as a work; in that usage the word “work” might refer solely to the physical thing but might also refer to the creative content that is bound up in the book, that is, the text. The author did not create the front matter or the index, perhaps; these may or may not be part of the author’s work. More than one work (in any of these nominal senses) might be combined into a single, plural work. An artist may be said to have produced a body of work, by which we understand the artist produced a number of pieces that are, in the aggregate, treated as a single product. Again, the term slips between intangible and tangible referents. Legal usage today extends both more narrowly and more broadly than any of these. The work subject to copyright is solely and purely an intangible thing.

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<sup>23</sup> *Id.*

As a description of creative or cultural production in the English language, the “work” goes back at least to the early seventeenth century, but the usage in that era was hardly customary. Ben Jonson’s writings were published in 1616 as *The Works of Benjamin Jonson*, but the title came in for criticism. Some ridiculed the title as presumptuous: “Pray tell me Ben, where doth the mystery lurke / what others call a play you call a work.” Another rose to the publisher’s, and Jonson’s, defense: “The author’s friend thus for the author says, / Ben’s plays are works, when other’s works are plays.”<sup>24</sup> Migration of the term into copyright took a while. In Anglo-American copyright law, “the work” did not come into common use until the latter nineteenth century as a standard referent for the subject or object of the rights of an author or copyright owner. Even then, use of “the work” or the “copyrighted work” had more in common with the medium-specific character of older copyright law than the medium-independent law that we rely on today.<sup>25</sup>

The first federal copyright statute in the U.S., of 1790, spoke of copyright in particular material forms: “maps, charts, and books.”<sup>26</sup> Material form created the work, in a manner of speaking, although “the work” was not, as such, part of the law. Today we speak of an author creating a work; in the late eighteenth century, lawyers spoke of an author writing a book. The work was the author’s labor or the artist’s craft or skill, represented in the material production. Works were tangible things. The statutory revision of 1831 extended that framework, opening the door to copyright in work (not necessarily works) of a sort. The 1831 act authorized copyright protection for “any book or books, map, chart, or musical composition, print, cut, or engraving.”<sup>27</sup> In a separate section on renewals, the statute referred to the renewal term vesting in the “author, inventor, designer, engraver” of “the work.”<sup>28</sup> In context, “the work” seems to refer to a relevant material form rather than to an intangible abstraction. The revision of 1870 added more references to “the work” as the object of

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<sup>24</sup> The exchange is recounted in IAN DONALDSON, *BEN JONSON: A LIFE* 326–27 (2012).

<sup>25</sup> The term “work” was known in publishing, centuries ago, as a referent for a manuscript or a book. Adrian Johns quotes Oldenburg, the seventeenth century publisher of the journal *Philosophical Transactions*, who objected to a translator’s name being printed on an edition of his book: “lest I should lose my good name, not being able to publish the work as I should like.” ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* 518 (1998). The abbreviated history in the text aligns with a history of the similar developments in Hughes, *supra* note 1, at 600–04, and with a longer account of the same period in Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 224–48 (2008).

<sup>26</sup> Act of May 31, 1790, ch. 15, 1 Stat. 124.

<sup>27</sup> Act of February 3, 1831, § 1, 4 Stat. 436.

<sup>28</sup> *Id.* § 2.

copyright, though still in the context of a broader recitation of copyrightable subject matter specified by particular forms rather than by a single abstraction. Copyrightable creativity was still largely defined by tangible context. Under the 1870 statute, copyright applied to

any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and [ ] models or designs intended to be perfected as works of the fine arts . . . . [A]uthors may reserve the right to dramatize or to translate their own works.<sup>29</sup>

The Copyright Act of 1909 inaugurated, or perhaps confirmed, a significant shift in emphasis. The new law spoke in terms of protection for “the copyrighted work,” completing a century-long transition from a wholesale statutory focus on particular material forms to a nearly-wholesale focus on a single, overarching intangible abstraction. In the words of the statute, “the works for which copyright may be secured under this title shall include all the writings of an author.”<sup>30</sup> The transition to abstraction was nearly but not entirely complete. For the 1976 Copyright Act, Congress invented the phrase “original works of authorship,” finally and fully distinguishing the intangible work from its fixed form, in a phrase applicable to all authorship, but the step from the 1909 abstraction to its current form was a very short one. The important conceptual shift, to the now-problematic and undefined term “work,” occurred roughly seventy-five years earlier.

A related transition in copyright decisionmaking occurred in the late nineteenth century. Copyright courts in the U.S. had long focused on work as a material product of an author’s or creator’s effort, but not necessarily on the work as an intangible abstraction. To speak of the author’s work was to speak of a particular material production.<sup>31</sup> For example, in *Lawrence v. Dana*,<sup>32</sup> a leading mid-century case, the court summarized the plaintiff’s position:

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<sup>29</sup> Act of July 8, 1870, § 86, 16 Stat. 198.

<sup>30</sup> Copyright Act of March 4, 1909, ch. 320, § 4, 35 Stat. 1075.

<sup>31</sup> Eaton Drone’s influential copyright treatise approached the subject this way, equating an author’s work with his “intellectual production.” See EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYWRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 1–8 (photo. reprint 1979) (Boston, Little, Brown & Co. 1879).

<sup>32</sup> 15 F. Cas. 26 (C.C. Mass. 1869).

Copyright is not the title of the author to his production. It is the statute monopoly [sic] to multiply copies of the book. . . . It attaches only to the book deposited. Mrs. Wheaton's copyright is the right to multiply copies of that complex work, consisting of the text, the notes of Wheaton, the notes of Lawrence, in their character of notes to Wheaton, with their connections and attachments thereto. Lawrence's work was attaching addenda and corrigenda to such portion of the text as he thought proper, so that they should perform the function of a note to that text, and nothing further.<sup>33</sup>

*Scribner v. Stoddart*,<sup>34</sup> not long afterward, equated the plaintiff's "copyrighted work" with "the material publication" produced overseas by the plaintiff, a version of which was in the public domain in the United States but had been reproduced without permission by the defendant. The plaintiff sued for infringement. Focus on the court's use of the term "work" in the following passage (the court denied the requested injunction):

To reproduce a foreign publication is not wrong. There may be differences of opinion about the morality of republishing here a work that is copyrighted abroad; but the public policy of this country, as respects the subject, is in favor of such republication. It is supposed to have an influence upon the advance of learning and intelligence. The defendants at the beginning could not know that before this work was completed and fully issued it would contain articles which were copyrighted. They had seen previous editions of this work published, one after another, without any such obstacles being cast in the way of a reprint.<sup>35</sup>

The term "work" here appears to bridge an older sense of work as "material product of particular labor" and "intangible original product." In the same spirit is *Bullinger v. Mackey*:<sup>36</sup>

I next notice the point made, that the plaintiff has not produced proper evidence to show himself the author or proprietor of his

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<sup>33</sup> *Id.* at 37.

<sup>34</sup> 21 F. Cas. 876 (C.C. Pa. 1879).

<sup>35</sup> *Id.* at 879.

<sup>36</sup> 4 F. Cas. 649 (C.C.N.Y. 1879).

works, within the meaning of the copyright laws. The argument here is, that no one but the plaintiff himself can legally establish the fact that the plan, arrangement and combination of his works originated in his brain. But, there is evidence showing that the plaintiff, by his own labor and that of persons employed by him, and working under his direction, gathered together from various original sources the material of his book; that the manuscript in which the matter was arranged was partly in his handwriting; and that from the manuscript the work was printed for him at his expense.<sup>37</sup>

By contrast, a case decided only a short time later, *Gilmore v. Anderson*,<sup>38</sup> borrowed the idea of the work, an intangible abstraction, as the object of the copyright owner's exclusive rights. The court wrote: "Section 4952 confers the 'sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending,' the work on complying with the provisions of that chapter."<sup>39</sup> The court modestly changed the text of the statute, which provided (at the time) that the relevant author, inventor, etc. had the "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same."<sup>40</sup> The antecedent of "the same," in the statute, was "any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and [ ] models or designs intended to be perfected as works of the fine arts."<sup>41</sup> For that text, the court substituted "the work."

These cases are suggestive and at most illustrative. But what they suggest is that courts in the latter part of the century were well on their way to characterizing the author's work as an intangible abstraction in addition to, if not in alternative to, the author's work as a particular material item—a development that mirrored the evolution of the copyright statute.

In both contexts, relevant legal actors in the late 1800s advanced a concept of the work that divorced content from form. In older copyright law, works were static things produced by the person or people that the law constituted authors. Scholarship on the contemporaneous emergence of the concept of "romantic authorship" demonstrates that reifying the intangible abstraction associated with the author's production was part and parcel of a political

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<sup>37</sup> *Id.* at 651.

<sup>38</sup> 38 F. 846 (C.C.N.Y. 1889).

<sup>39</sup> *Id.* at 848.

<sup>40</sup> Act of July 8, 1870, § 86, 16 Stat. 198.

<sup>41</sup> *Id.*

strategy during the latter nineteenth century intended to expand and make concrete the idea of authors' rights. Oren Bracha has made a compelling case for the underlying economic and political considerations driving this shift toward reification of "the work" alongside "the author": publishing interests that aimed to propertize an abstract version of an author's intellectual production and capture an ever-broader range of economic opportunities associated with what became "the work."<sup>42</sup> For all of that, though, the politics of the time focused at least initially on "the book" and other forms, with their echoes of materiality, as much as on the work.<sup>43</sup> The Supreme Court in *Burrow-Giles Lithographic Co. v. Sarony*,<sup>44</sup> a key step in this process, focused on "visible" forms of literary production rather than on *works*.

An author in that sense is 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.' Worcester. So, also, no one would now claim that the word 'writing' in this clause of the constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter. By writings in that clause is meant the literary productions of those authors, and congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression.<sup>45</sup>

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<sup>42</sup> See Bracha, *supra* note 25, at 224–48.

<sup>43</sup> Johann Gottlieb Fichte, whose 1793 *On the Illegality of Printing* is credited with supplying much of the philosophical justification for recognizing an author's intangible intellectual production, referred not to the work but to the book. Johann Gottlieb Fichte, *Beweis der Unrechtmäßigkeit des Buchernachdrucks. Ein R'asonnement und eine Parabel* [Proof of the Unlawfulness of Reprinting: A Rationale and a Parable], 21 *Berlinische Monaschrift* 443, 443–87 (1793) (Martha Woodmansee trans., 2008), translated in *PRIMARY SOURCES ON COPYRIGHT (1450–1900)* (L. Bently & M. Kretschmer eds.), available at [http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22d\\_1793%22](http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22d_1793%22). On Fichte's contribution to the development of nineteenth century copyright, see, e.g., Maurizio Borghi, *Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment*, in 5 *NEW DIRECTIONS IN COPYRIGHT LAW* 197 (Fiona Macmillan ed., 2007) (describing the contribution of natural law to understanding the work).

<sup>44</sup> 111 U.S. 53 (1884).

<sup>45</sup> *Id.* at 57–58. The citation to Worcester is not explained in the text of the opinion but likely refers to A Dictionary of the English Language, a leading dictionary first published in 1860 by Joseph Emerson Worcester. Dictionaries can tell us only so much about usage, particularly dictionaries from the nineteenth century, when lexicographic practices were still evolving. Worcester, however, is instructive, as relevant definitions changed over time. See JOSEPH E.

As the book gave way to the work, and in the process the work seemingly became more “property-like” (because, as Bracha argues, abstract property aligned with the needs of emerging industrial markets), the work became *less* bounded as an analytic matter. In the 1976 Act, copyright formally divorced form, represented by fixation, from creative content, represented as the work of authorship. The abstract version of the work emptied the legal system of one key resource, creativity bound to tangible things in context, that might have provided a more or less unambiguous, limiting definition of the work itself. Fixation in copyright has its own complexity, but fixation is not, alone, enough to define the work.

International copyright developments reflect the same themes. The work took on a leading role in the architecture of international copyright at precisely the same time that the concept of the work was being deprived by American courts and Congress of material or tangible constraints. The Berne Convention, signed in initial form in 1886, specified the subject matter of the Berne Union as “*la protection des droits des auteurs sur leurs oeuvres littéraires et artistiques*,” or “the protection of the rights of authors in their literary and artistic works.”<sup>46</sup> British copyright law since 1911 has applied to “every original literary, dramatic, musical, and artistic work.”<sup>47</sup> French copyright law governs the author’s *œuvre de l’esprit*, “all works of the mind.”<sup>48</sup>

The French *œuvre* for the noun “work,” an object or thing, can be compared with a word not chosen: *travail*, which also means the noun “work,” but which evokes the effort, skill, and labor associated with producing something. *Œuvre* is the thing produced; *travail* is the job undertaken to produce it. One might

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WORCESTER, A UNIVERSAL AND CRITICAL DICTIONARY OF THE ENGLISH LANGUAGE (1854) (defining “author” as “[a] writer of a literary or scientific work; a writer,” among other things, and “work” as “[t]he product of the labor of the hands or of the mind; a literary production; a performance; a piece of mechanism; any fabric; any thing made”). Worcester’s first dictionary was both more cryptic and less abstract. J.E. WORCESTER, A COMPREHENSIVE PRONOUNCING AND EXPLANATORY DICTIONARY OF THE ENGLISH LANGUAGE (1830) (defining “[a]uthor” as “[t]he writer or composer of a book,” and “work,” as a noun, as “toil; labor; a performance”).

<sup>46</sup> BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 828 U.N.T.S. 221, art. 1 (Sept. 9, 1886).

<sup>47</sup> See Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 1(1) (Eng.).

<sup>48</sup> See Code de la propriété intellectuelle, art. L111-1 (“L’auteur d’une oeuvre de l’esprit jouit sur cette oeuvre, du seul fait de sa création, d’un droit de propriété incorporelle exclusif et opposable à tous.”). French copyright statutes from the earlier part of the nineteenth century referred in translation to the works of an author, but the original French is *ouvrages*, which more likely points to a tangible product of an artist or artisan. See Loi 3869 du 28 Mars 1852 rapport et décret sur la contrefaçon d’ouvrages étrangers [Law 3869 of March 28, 1852 on the Report and Decree on the Counterfeiting of Foreign Works], BULLETIN DES LOIS DE LA RÉPUBLIQUE FRANÇAISE [BULLETIN OF LAWS OF THE FRENCH REPUBLIC], No. 510.



say, without much exaggeration, that the course of nineteenth century was the course of shifting law's focus from the latter to the former. American copyright law today looks back on more than 200 years of evolution of the concepts of work and the work, during which those concepts evolved in broad terms from the idea of a stable, material referent to an apparently unbounded, undefined abstraction. The French *œuvre* has migrated to English as *oeuvre*, commonly defined as the works of a writer, painter, or other creator, taken as a whole, or any one of those works. The "work" in copyright law has become one word, one abstract concept, applicable to all authors, authorship, and creative things.

## V. WORKS IN ACTION

If the question "what is a work?" proves too difficult to answer in a formal, boundary-based sense, then what sense remains in the question? I noted in the Introduction that analysis of the work should be more attentive to the multiple uses of the work in copyright, functional, expressive, and communicative, and to the role that the idea of the work plays as a kind of boundary itself, rather than being defined by boundaries. In this Section I illustrate that theme with examples from recent American judicial practice. I noted at the outset that digital technologies have made the challenges of the work more pronounced, but digital technology did not create them, and it is possible to expand several of the illustrations below with additional older cases.

### A. THE PLATONIC WORK AND THE BOUNDARY BETWEEN OLD AND NEW

There are, to be sure, cases that represent the baseline idea of the work as a static thing, defined by boundaries (even if those boundaries themselves are not necessarily specified). The idea of work is at times grounded in, or the boundaries of the work defined by, a sense of the Platonic ideal of a given work, or what Paul Goldstein has characterized as the "*ur-work*."<sup>49</sup> Copyright attaches to a "canonical" version of the work, and for purposes of infringement by substantial similarity, or for purposes of identifying a creatively distinct derivative work, the second work is compared with its "canonical" predecessor. Character copyrights are particularly subject to this problem and to the work-based solution, both where the copyright attaches to a fictional character as such as well as to a particular graphic representation of that character. A character representation case illustrates the point. In *Entertainment Research*

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<sup>49</sup> See Goldstein, *supra* note 1, at 1182–83 (discussing the idea in the context of *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990)).

*Group, Inc. v. Genesis Creative Group, Inc.*,<sup>50</sup> the defendant was accused of infringing the plaintiff's copyrights in three-dimensional costume versions of famous advertising cartoon characters, such as the Pillsbury Doughboy, Geoffrey the Giraffe, and Cap'n Crunch. The copyrights were valid, if at all, if the costumes constituted derivative works, that is, original adaptations of the underlying, two-dimensional copyrighted characters. The court decided that the costumes were not derivative works. Any variation between the two-dimensional and three-dimensional versions of the characters were dictated wholly by functional considerations, rather than creative judgments. Each character copyright related to a single canonical creative work, which was then represented in any number of forms and media—including both two-dimensional and three-dimensional versions. The court noted:

[N]o reasonable trier of fact would see anything but the underlying copyrighted character when looking at ERG's costumes. . . . [B]ecause ERG's costumes are "instantly identifiable as embodiments" of the underlying copyrighted characters in "yet another form," no reasonable juror could conclude that there are any "non-trivial" artistic differences between the underlying cartoon characters and the immediately recognizable costumes that ERG has designed and manufactured.<sup>51</sup>

This kind of clean division between work and copy, or content and form, is the purest version of the work in legal action. Note, however, that the point of the bounded, defined work here is not to define the work in the abstract. The boundary is not solely inward-looking (what is the content of the work?); it is outward-looking (what is the distinction between this work and the accused work?). The idea of the work here serves a broader goal of copyright: to identify a boundary between sameness or identity, on the one hand, and the changed and the new, on the other hand. On one side of the line (identity) lies copyright infringement. On the other side lies a noninfringing new work.

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<sup>50</sup> 122 F.3d 1211 (9th Cir. 1997).

<sup>51</sup> *Id.* at 1223 (quoting *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 908–09 (2d Cir. 1980)). In very much the same spirit is *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990), discussed in Goldstein, *supra* note 1, at 1182–83.

## B. INCOMPLETE WORKS AND WHEN A WORK COMES INTO BEING

The idea of the work can tell us when a work is a “work” worthy of copyright contemplation, or is instead a draft, sketch, or mere idea. In this sense, the work defines the trigger of copyright, or the outer boundary of relevant law. Before something becomes a work, copyright law does not apply. Justin Hughes pursues this reasoning, in part, when he argues that copyright law should not protect “microworks” because they are not works.<sup>52</sup> One might simply invoke the maxim *de minimis non curat lex*: The law does not concern itself with trifles. In a related sense, a creative thing may emerge as a work from early or preliminary effort, and in doing so it crosses a kind of copyright boundary. In *Massachusetts Museum Of Contemporary Art Foundation, Inc. v. Büchel*,<sup>53</sup> the plaintiff Christophe Büchel was a conceptual artist who commissioned the defendant, the Massachusetts Museum of Contemporary Art (MassMoCA), to install a large, complex, and expensive conceptual sculpture. MassMoCA was to bear the expense of the installation. During installation, Büchel made substantial changes to the scope of the project. Fearing that it would never recoup its installation expense via admission charges or otherwise, MassMoCA eventually suspended additional work and opened the incomplete installation to public viewing. MassMoCA included signage making it clear to patrons that the sculpture on display was not the completed work of the artist. Büchel sued under the relevant provisions of the Visual Artists Rights Act (VARA), Section 106A of the Copyright Act,<sup>54</sup> for violations of his rights to integrity and attribution, and under the public display portion of Section 106 of the Copyright Act. With respect to both claims, the defendant raised the defense that Büchel had not proved the existence of a work that triggered any obligations under copyright law. As Büchel himself argued, from the artist’s point of view, the work of art here consisted of a specific kind of visual and physical experience of the creation.<sup>55</sup> A work itself would be a kind of jurisdictional boundary; until an author is done creating, copyright law is irrelevant.<sup>56</sup> On this reasoning, an unfinished sculpture was not a work. The district court agreed, but the court of appeals did not. Holding that Büchel’s

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<sup>52</sup> See Hughes, *supra* note 1 (discussing and rejecting the modern trend toward protection of “microworks”).

<sup>53</sup> 593 F.3d 38 (1st Cir. 2010).

<sup>54</sup> 17 U.S.C. § 106A (2006).

<sup>55</sup> See *MassMoCA’s Lawsuit*, THE ART LAW BLOG, <http://theartlawblog.blogspot.com/2007/05/mass-mocas-lawsuit.html> (May 27, 2007) (blog post written by Büchel’s counsel).

<sup>56</sup> Before the 1976 Copyright Act took effect, this was indeed the case. With few exceptions, copyright applied only to published works.

work fell within the scope of VARA as a “work of visual art,” the court relied on the copyright statute’s definition of “created” that applies, it held, to unfinished works:

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.<sup>57</sup>

The court’s interpretation of the statute is almost certainly incorrect if the idea of the work is to be independent of fixation and if there is any jurisdictional boundary between creativity to which copyright attaches and creativity that lies outside of it.<sup>58</sup> Of course, that may not be the case. Cases on protection of “small” works, some of which started (and remained) small and some of which were small slices of larger creations, are divided. The salient examples come from the arena of digital technology. In *Tin Pan Apple Inc. v. Miller Brewing Co.*,<sup>59</sup> the court declined to hold, as a matter of law, that the defendant’s digital sampling of the words “Hugga-Hugga” and “Brr” from the plaintiff’s copyrighted recording constituted copying of noncopyrightable material). In *Newton v. Diamond*,<sup>60</sup> the court concluded that unauthorized copying of a six-second, three-note sequence of the plaintiff’s musical composition appropriated a part of the plaintiff’s work that was simply too small to matter. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,<sup>61</sup> the supplier of digital video recording services was held not to have infringed the plaintiff’s copyrighted audio-visual works, where the copies were stored for 1.2 seconds apiece. These were whole copies, but brief copies. None of these turned on the idea of the work itself, but the idea of the work as a boundary seems very closely related to what the courts did in each one.

Without yielding on the question of boundaries, the fact that Büchel sued under VARA, the limited version of moral rights protection available under American copyright law, suggests that more was going on in the case, and more was at stake with the work, than the functional delineation of the author’s

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<sup>57</sup> 17 U.S.C. § 101 (2006) (“created”).

<sup>58</sup> The statute clearly applies to things that are completed in pieces, such as movements of a symphony or chapters of a novel. It is less clear that the statute applies, or should apply, to every successful stroke of a pen or brush.

<sup>59</sup> 88 Civ. 4085 (CSH), 1994 U.S. Dist. LEXIS 2178 (S.D.N.Y. Feb. 23, 1994).

<sup>60</sup> 388 F.3d 1189, 1195 (9th Cir. 2004).

<sup>61</sup> 536 F.3d 121, 127 (2d Cir. 2008).

economic rights according to the presence or absence of a work. From a moral rights standpoint, a work bears the imprint of the author himself or herself,<sup>62</sup> and it might be said, metaphorically, that the boundary defined by the work represents the boundary between the author as a whole person or personality, on the one hand, and a non-person, or the undifferentiated world of readers, viewers, and listeners, on the other. To recognize a work in Büchel's sculpture was to recognize the whole of Büchel himself. This kind of boundary is present in other non-VARA moral rights cases in the U.S., notably *Gilliam v. American Broadcasting Companies*,<sup>63</sup> in which the integrity of the work *qua* work stands in for the integrity of the authors themselves.

### C. WORKS, NOT THINGS

Some created or creative things, even when complete, are simply not the sorts of things that copyright is meant to deal with. For some courts, the idea of the work has served as boundary between copyrighted or copyrightable things and "ordinary" things, subject to tangible property law and commercial law. In *Ets-Hokin v. Skyy Spirits, Inc.*,<sup>64</sup> a commercial photographer who had prepared photographs of a distinctive vodka bottle for advertisements sued his client, alleging that the client had rejected the photographs and procured and used virtually identical, infringing photographs from a different photographer. The defendant argued, among other things, that the plaintiff's copyrights were invalid, because they constituted derivative works and as such were not original when judged in comparison with the source object—the bottle itself. In this case, the court used the copyright statute's definition of derivative works to interpose the concept of the work as a boundary between creative objects and everyday objects. The bottle, the court ruled, was an ordinary (if attractive) utilitarian object, possessing no originality or creativity aside from its use as a bottle. It was therefore not a "work" at all within the meaning of the law, and because it was not a work, photographs of the bottle could not be derivative works. The photographs were to be judged copyrightable under the usual standard applicable to any claimed work of authorship.

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<sup>62</sup> See Borghi, *supra* note 43.

<sup>63</sup> 538 F.2d 14 (2d Cir. 1976).

<sup>64</sup> 225 F.3d 1068 (9th Cir. 2000). The opinion discussed in the text is sometimes referred to as "Skyy I." Following remand, the district court awarded summary judgment to the defendant, and the parties returned to the Ninth Circuit, which affirmed. The resulting opinion is reported at *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763 (9th Cir. 2003), sometimes known as "Skyy II."

## D. THINGS THAT ARE WORKS

Whether or not one judges a bottle for a specialty spirit to be creative and therefore worthy of copyright protection, in *Skey Spirits* the idea of the work kept some things in the copyright system and some things in other systems of law. In *Skey Spirits* the result was properly exclusionary. In other cases it is inclusive. Things may fall on the copyright side of the boundary defined by the work. Software licensing provides the clearest example of this boundary principle in action. Software producers have learned to draft their license agreements in ways that permit them to capture copies of their works as things under copyright, though the statute and copyright practice originally contemplated that works would be licensed, not copies.<sup>65</sup> In *Vernor v. Autodesk, Inc.*,<sup>66</sup> the plaintiff bought several packages of high-priced copyrighted software produced by Autodesk. He bought them not from Autodesk but from third parties, customers of Autodesk, and in this declaratory judgment action he sought confirmation of his right to re-sell the packages free of the resale restrictions that Autodesk imposes on its direct customers as part of the license agreement that accompanies each copy of Autodesk's products. That is, the plaintiff argued that he was an owner of his copies of Autodesk's software and was privileged to re-sell them under the doctrine of first sale,<sup>67</sup> despite Autodesk's exclusive right to distribute copies of the work under Section 106(3) of the Copyright Act.<sup>68</sup> The district court agreed with the plaintiff, but the court of appeals reversed. Vernor, the plaintiff, did not own his copies because the Autodesk customers who sold their copies to him were not, themselves, owners. They were licensees, not entitled to the benefit of the first sale doctrine.

The crux of the case was Autodesk's (and the court's) blending of the idea of the work and the idea of the copy in the license agreement that Autodesk included with each package. As the court of appeals described the agreement between Autodesk and its customers, the agreement

recites that Autodesk retains title to all copies. Second, it states that the customer has a nonexclusive and nontransferable license to use Release 14. Third, it imposes transfer restrictions, prohibiting customers from renting, leasing, or transferring the software without Autodesk's prior consent and from

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<sup>65</sup> See Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275 (2003).

<sup>66</sup> 621 F.3d 1102 (9th Cir. 2010).

<sup>67</sup> 17 U.S.C. § 109(a) (2006).

<sup>68</sup> *Id.* § 106(3).

electronically or physically transferring the software out of the Western Hemisphere. Fourth, it imposes significant use restrictions . . . .<sup>69</sup>

The text of the agreement, as quoted elsewhere in the opinion, makes clear that the agreement pertains to the Autodesk computer program (“Release 14”), sometimes referred to as “the Software” (the particular version or release of a particular Autodesk program).<sup>70</sup> If one applies the classic copyright distinction between the work and one or more copies that embody the work, to which does the license pertain? Is Autodesk licensing the work? The history of software licensing teaches that this was originally the goal of software developers: to control the use of the work by customers who would otherwise be able to exploit the work by reproducing it in unexpected ways and settings.<sup>71</sup> But Autodesk’s license, like many modern software agreements, is not so narrowly or carefully drawn, and the court simply failed to ask whether “the Software” referred to the work or to the copy. If the agreement were construed as referring to the work, then Vernor, the plaintiff, would have been on relatively safe ground; Autodesk’s customers would have been “owners” of their copies and therefore entitled to re-sell those copies to Vernor, who could re-sell them again. The court assumed, instead, that the agreement referred to both the work and the copy. The idea of the work was not given an opportunity to perform the limiting function that it might have done. Instead, the idea of the work expanded the rights of the copyright owner. Autodesk and other software companies were given the power to control resale markets for copies of their works in ways that few other manufacturers can, and in ways that are strikingly inconsistent with the operation of resale markets for copies of virtually all non-digital copyrighted works.<sup>72</sup>

To be fair to Autodesk and the software industry, drawing a classic distinction between the work and the copy in the context of digital products is all but impossible.<sup>73</sup> What a boundary between work and copy would mean in the digital context is a hugely problematic question. The work is by definition an abstract thing, and a digital product (whether a computer program or a digital version of some other creative work) is an intangible thing. For an

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<sup>69</sup> *Vernor*, 621 F.3d at 1104.

<sup>70</sup> *See id.*

<sup>71</sup> *See* Madison, *supra* note 65, at 310–16; *see also* Michael J. Madison, *Notes on a Geography of Knowledge*, 77 *FORDHAM L. REV.* 2039 (2009).

<sup>72</sup> *See, e.g.*, *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011) (addressing re-sale rights regarding promotional copies of compact discs).

<sup>73</sup> *See* Borghi, *supra* note 43.

analog copy of a work, the distinction between the work and the copy is the distinction between thoughts and atoms. Physics determines the identity of the copy, for a person can touch the copy. For a digital “copy,” the distinction between the work and the copy is the distinction between thoughts and bits. That is elusive at best and arbitrary at worst, because for all practical purposes, the copy cannot be touched. In a particular case, such as *Vernor*, the boundary created by the work may be a matter of the author’s unilateral designation, the purchaser’s or owner’s appropriation, or public policy.<sup>74</sup>

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<sup>74</sup> See Madison, *supra* note 7. In the so-called digital “space,” the boundary between work and thing has an important additional dimension in the context of the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA). Section 1201(a) of the DMCA provides: “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” 17 U.S.C. § 1201(a)(1)(A) (2006). Section 1201(b)(1) provides:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that— (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

17 U.S.C. § 1201(b)(1) (2006). The term “work” is used twice, in both parts of the statute, but refers to different things in each place. In Section 1201(a), “work” appears to refer to a particular material copy of a work. In Section 1201(b)(1)(A), “work” appears to refer to the intangible work of authorship to which the copyright owner’s rights attach. For extensive discussion and confusion on this point, see *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 944–48 (9th Cir. 2010), *opinion amended and superseded on denial of rehearing by MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 2011 WL 538748 (9th Cir. Feb. 17, 2011). The Federal Circuit’s construction of these sections tries to harmonize them, in a way that is not motivated by a single reading of the term “work” but that offers the advantage of that term’s being used consistently in both Section 1201(a) and Section 1201(b). See *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004) (requiring that the plaintiff in a case alleging violation of Section 1201(a)(2), trafficking in technology used to obtain unauthorized access to a protected work, prove that use of the technology had some nexus to infringement of a copyright). Tony Reese worried that the nature of digital versions of copyrighted works, for which “access” to the work necessarily implies reproducing, displaying, and/or performing the work, would lead to the collapse of the distinction (one might say, boundary) between Sections 1201(a)(1), regarding access controls, and 1201(b)(1), regarding so-called copy controls. That would give the DMCA significant weight beyond the copyright context in which it is situated, and as *MDY Industries* suggests, it appears to be supported by a plain reading of the statute. *MDY Industries* did not, however, attempt to reconcile the different ways that the statute uses the term work, and if a court were to seek a single meaning for that term across the different sections of the DMCA, then it might well reach the result in *Chamberlain Group*. *Chamberlain Group* implicitly relies on the work to soften the boundary between DMCA claims and the Copyright Act; *MDY Industries* implicitly relies on the work to harden that boundary.

In *MDY Industries* itself, the court of appeals found the defendant liable under Section 1201(a)(2) for trafficking in technology designed to facilitate circumventing access to a copyrighted work. The court concluded that the relevant technology facilitated access to parts of the plaintiff’s online videogame that consisted of its “dynamic non-literal elements,” characterized



## E. CHOOSING ONE WORK OR MANY WORKS

The idea of the work at times expresses what might be called a finality interest, or a boundary between a continuing process on the one hand, in which the author or others wait until after the fact of creation to determine what is and what is not a work, and a finished, even independent, product, on the other hand. That is not to say that courts consistently apply a principle that bars changes to the identity of a work after the act of creation is complete, or that forces a copyright owner consistently to choose one characterization or another. The boundary here is partly between the unit and the whole. It is also between the author and the audience. Giving full rein to authorial interests in the work suggests that the author should have unlimited or nearly unlimited discretion over the characterization of his product, at almost any point in the life of the product, whether for infringement purposes or damages purposes or both. Authorial discretion might be resisted and the work might be characterized from some more objective or third-party perspective, in order to advance countervailing public interests generally, to advance public interests in any particular work, or to preserve any other form of balance in copyright law. Courts apply the boundary in different ways. The idea of the work exists to identify it as such. A television series may be characterized as a single copyrighted work, because its plots, settings, and themes carry over from episode to episode, and if so the work remains the same even if new episodes are produced. That same series may also be characterized as a sequence of episodes, each of which constitutes a separate work. A record album is both a work and a compilation of underlying individual songs, each of which is a work.

Courts have used the work as this sort of boundary both in statutory damages calculations and in infringement contexts. The statute's statutory damages provisions require that damages for infringement be computed according to the number of works infringed, rather than the number of infringements or the number of copies produced by the infringer.<sup>75</sup> Cases having to do with works comprised of other works, that is, compilations or collective works, cause problems. In *Bryant v. Media Right Productions, Inc.*,<sup>76</sup> the

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by the lower court as the "real-time experience of traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players." *MDY Industries*, 629 F.3d at 943. The tension in that definition between the idea of the intangible work of authorship and the tangible form in which the work is embodied, even characterizing the latter as an "experience," is palpable, and it evokes the same tension—call it a boundary—in the *MassMoCA* litigation. See *supra* note 55 and accompanying text.

<sup>75</sup> 17 U.S.C. § 504(c) (2006).

<sup>76</sup> 603 F.3d 135 (2d Cir. 2010).

court computed statutory damages in a case involving infringement of a copyrighted record album by treating the entire album—a compilation—as a single work, rather than as a collection of separate (compensable) works. The statute itself says that a compilation work is to be treated as a single work for purposes of assessing statutory damages.<sup>77</sup> Should the album have been treated as a compilation work? A significant factor in the court’s decision was the fact that the copyright owner had registered the album with the Copyright Office as a compilation, had sold the compilation as an album, and had registered copyrights in some but apparently not all of the individual songs.<sup>78</sup> Because the owner had made that choice in the first place, the court in effect barred the owner from having a second bite at the characterization apple when infringement and damages, rather than registration and marketing, were at issue. Of course, focusing on the album as such tends to reduce the amount of damages recoverable by a successful plaintiff and, in an era such as the current one when recorded music is often sold on a song-by-song basis rather than on an album basis, tends to discount the actual economic injury caused by the infringement. A record album that contains eight songs is a work in the same statutory sense as a record album that contains ten or twelve songs, even though the economic value of the two works might be different. The plain reading of the statute in *Bryant* strikes some as indifferent to the logic of copyright markets and unfair to authors.<sup>79</sup> Other courts have looked to an “independent economic value” standard—a third-party perspective—for determining whether something is a work. In *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*,<sup>80</sup> the defendant had infringed copyrighted episodes of a television series. For statutory damages purposes, the court determined that each episode should be treated as a separate work, because each episode could be treated as an independent economic unit—although the episodes were generally packaged by the copyright owner as a series for purposes of broadcast television deals. The rule of *Bryant* runs the risk of under-compensating copyright owners. The rule of *Columbia Pictures Television* runs the risk of over-compensating them.

The rule that a “whole TV series is a single work,” rejected in *Columbia Pictures Television*, was accepted in the infringement context in *Castle Rock*

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<sup>77</sup> 17 U.S.C. § 504(c)(1) (2006).

<sup>78</sup> *Bryant*, 603 F.3d at 141. The court assumed that copyrights in all of the songs had been properly registered. See *id.* at 140 n.4.

<sup>79</sup> See Goldstein, *supra* note 1, at 1184–85 (discussing the disparate treatment given to compilations).

<sup>80</sup> 106 F.3d 284 (9th Cir. 1997).

*Entertainment, Inc. v. Carol Publishing Group, Inc.*<sup>81</sup> Characterizing the *Seinfeld* television series in the context of infringement by substantial similarity, the court determined, with little discussion, that the entire series should be treated as a single work when compared with the defendant's *Seinfeld* trivia book.<sup>82</sup> That case is justly criticized for using an unduly elastic concept of the work in order to capture a work published by the defendant that many believe should have been characterized as noninfringing, either because of a lack of similarity in the first place, or because the defendant was engaged in fair use, or both.<sup>83</sup> But the critique is largely beside the point for my purposes. The notable thing about the case is the broad discretion that the court gave to the plaintiff in choosing how to characterize the work. The court distinguished *Twin Peaks Productions, Inc. v. Publications Intern., Ltd.*,<sup>84</sup> which held that infringement of eight episodes of a television series should be treated as infringement of eight independent works, or eight independent marketable things, when assessing statutory damages.

#### F. DYNAMIC WORKS

Works may be characterized in different ways, but the idea of the work is, fundamentally, something that we assume should remain the same. This is true both in the general sense that the idea of the work is meant to be the same across artistic disciplines, media, and eras and in the specific sense that once a work has been created, it cannot change. The work itself is static, even if the law permits authors, courts, and others to re-characterize what it is. But, of course, things change. Art changes. Do works change? Courts wrestle with the idea of the work as a boundary between static and stable works and dynamic and changing works. In *Kelley v. Chicago Park District*,<sup>85</sup> the plaintiff had designed an elaborate public flower garden. After a long period of maintenance and then disputes between the designer and the owner of the garden space, the owner, the Chicago Park District, made substantial modifications to the garden, over the objection of the designer. The designer sued for violations of the right to integrity of the work under the Visual Artists Rights Act. Among the questions

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<sup>81</sup> 150 F.3d 132 (2d Cir. 1998).

<sup>82</sup> *Id.* at 140 (distinguishing *Twin Peaks Prod., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993)).

<sup>83</sup> See, e.g., Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 544–45 (2004) (arguing that the court undervalued the defendant's transformative expression).

<sup>84</sup> 996 F.2d 1366 (2d Cir. 1993).

<sup>85</sup> 635 F.3d 290 (7th Cir. 2011).

faced by the court was whether the designed public garden was a “work of visual art,” or a work of any kind, covered by the statute. The court did not decide whether or not it was; in dicta the court expressed skepticism that the plaintiff’s landscape design should be treated as a painting or a sculpture, the categories of copyrightable expression that it most resembled.<sup>86</sup> The court worried that copyright here was recognizing a work that was “infinitely malleable.”<sup>87</sup> Instead, the court concluded (in a questionable bit of reasoning) that the garden did not rise to the level of originality or stable fixation required by the law, because the living garden was subject to inevitable changes over time, and the changes were not the product of the plaintiff’s authorship.<sup>88</sup>

A couple of notable things are going on in the court’s opinion. One is that the court gives no weight to the idea of the work itself aside from the statute’s other subject matter requirements: originality and fixation. There is a boundary principle in play, based on the idea of the static work, but the boundary is defined by subject matter tests, not by the idea of the work as an independent, autonomous thing.

More interesting is an argument that was not well-developed by the parties, according to the court, and that the court dismissed almost out of hand. “The Park District suggests that Wildflower Works is an uncopyrightable ‘method’ or ‘system,’” wrote the court.<sup>89</sup> And the court replied: “Although Wildflower Works was designed to be largely self-sustaining (at least initially), it’s not really a ‘method’ or ‘system’ at all. It’s a garden.”<sup>90</sup>

Here is a kind of boundary provided by the work, between static works and dynamic things, between static things and dynamic “processes” or “systems,” and between the static created and the dynamic natural, where traditional copyright law and its focus on the independent, intangible creative thing contrasts with deeper, organic processes that are revealed by nature. The court’s answer—“[i]t’s a garden”—is clearly inadequate, because it simply restates the issue. Why is a garden not a work? A work *qua* work is communicative, not simply functional; a work communicates the fact that humans produced it.<sup>91</sup> Anything else—plants, flowers, animals—communicates

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<sup>86</sup> *Id.* at 292.

<sup>87</sup> *Id.* at 301.

<sup>88</sup> *Id.* at 303–04.

<sup>89</sup> *Id.* at 303.

<sup>90</sup> *Id.*

<sup>91</sup> See Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* (Annabelle Lever ed., forthcoming 2012), available at <http://ssrn.com/abstract=1954858> (arguing that a work subject to copyright is a communicative act).

the fact that organic processes are driving what we see and experience. The boundary established by the work and identified by Kelley in this quick, dismissive statement is the boundary between the “creative,” or made, and nature.

## VI. CONCLUSION

The goal of this brief Article has been primarily descriptive. The idea of the work in copyright law has been incompletely understood and therefore ineffective because courts, scholars, litigants, and others have spent too much time trying to define the boundaries of the work and not enough time trying to understand the work as boundary. Over the course of the nineteenth century, copyright law evolved the idea of the work as a thing abstracted from material form. That development pressed courts and legislatures to understand the relationship between the work and its boundaries. Modern statutory text is formally unhelpful on that point. Courts have fared little better. The cases described above show that they have used the idea of the work as a boundary, but in inconsistent and sometimes ineffective ways. In this conclusion, I note a handful of possibly prescriptive implications.

First, I start with *Kelley* itself and with the idea of gardens—and processes. *Kelley*’s dicta suggests that gardens cannot be copyrighted.<sup>92</sup> But why not? Think of “garden” and “gardening” as metaphors as well as literal things and practices. Treat a creator as a gardener and a creation as a garden, or as something that has a dynamic existence for a time after its initial production, in the hands of the creator as well as in the hands of third-parties—readers, viewers, interpreters, and archivists. The contours of that follow-on life of the work, both static and dynamic in different parts, are clearly creative in their own right, or at least are of significant interest to the copyright system because of their critical roles in preserving knowledge and creativity for access and use by later generations. I have referred to these processes in their collective sense as “curation.”<sup>93</sup> A gardener, too, is a kind of curator. In the contemporary sense, copyright interests in curation are only likely to grow, because no knowledge or creativity curates itself, and digital forms of knowledge require at least as much curation, and perhaps more, than forms that originated on more robust, tangible media. Moreover, when it comes to intersections between the natural and the made, the court in *Kelley* is clearly unaware of copyright history. The

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<sup>92</sup> *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 303–04 (7th Cir. 2011).

<sup>93</sup> See Michael J. Madison, *Knowledge Curation*, 86 NOTRE DAME L. REV. 1957, 1958 (2011) (calling the “problem of cultural heritage” the “challenge of knowledge curation”).

political movement of the eighteenth and nineteenth centuries that supported recognition of the independent author as a legal character and the intangible work as a legal thing were grounded in a specific conception of the work as an independent, autonomous, and *natural* product.<sup>94</sup> I do not advocate a repeal of copyright's prohibition on legal protection for processes or systems. There is no need to recognize a process copyright akin to a process or method patent—though the idea, and the abandonment of the idea of the work, tempts. But the idea of the work should not be used to police a firm boundary between creation and curation. That boundary is much more porous than the court in *Kelley* is prepared to acknowledge.

Second, by implication I have critiqued the law's shift from a more contextual approach to what authors create, linking content and particular forms, to a more abstract, universalized approach that foregrounds content alone. One remedy might be to work the law back toward context, either by recommending that courts interpret the idea of the work with greater sensitivity to the particulars of artistic practice in a given community or by making the definitional characteristics of the work in a particular case, its so-called metes and bounds, more robust. Or both. These strategies have their respective costs and benefits. They risk repeating the error that I identify above—exaggerating the fixity of the work as an abstract thing and under-appreciating the value of the changeable work. Instead, I suggest that further work in this area should pursue the meanings of boundaries themselves. It would be a mistake to invest the idea of boundaries, even as I have referred to them above, with an overarching sense of rigidity or solidity. It is not only the boundary between the made and the natural that is or should be porous. *All of the boundaries that I describe above, all the communicative, functional, and expressive uses to which the work is put in copyright practice, are and should be porous. Their porosity is the point. The work both can and should be flexible.*<sup>95</sup> Of particular interest here is the scholarship of Leigh Star, with different co-authors, identifying the concept of the boundary object:

This is an analytic concept of those scientific objects which both inhabit several intersecting social worlds (see the list of examples in the previous section) and satisfy the informational requirements of each of them. Boundary objects are objects

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<sup>94</sup> See Mario Biagioli, *Nature and the Commons: The Vegetable Roots of Intellectual Property*, in LIVING PROPERTIES: MAKING KNOWLEDGE AND CONTROLLING OWNERSHIP IN THE HISTORY OF BIOLOGY 241 (Max Planck Institute for the History of Science Preprint 382) (Jean-Paul Gaudillière, Daniel J. Kevles & Hans-Jörg Rheinberger eds. 2009) (drawing attention to the use of naturalizing metaphors in the writing of Edward Young).

<sup>95</sup> See Madison, *supra* note 65, at 386–87.

which are both plastic enough to adapt to local needs and the constraints of the several parties employing them, yet robust enough to maintain a common identity across sites. They are weakly structured in common use, and become strongly structured in individual-site use. These objects may be abstract or concrete. They have different meanings in different social worlds but their structure is common enough to more than one world to make them recognizable, a means of translation. The creation and management of boundary objects is a key process in developing and maintaining coherence across intersecting social worlds.<sup>96</sup>

It is possible, likely even, that the idea of the work in copyright practice is a boundary object within the above definition: things that bridge communities weakly in abstract terms, that permit adjacent communities to collaborate or cooperate, and whose flexibility allows a degree of coordinated but independent action within each community. Courts' treatment of the work in different factual and legal settings suggests strongly that the work has a weak abstract character that permits it to translate relationships between nearby communities or practices. I leave further investigation of the performance of works as boundary objects for later research. If that approach is fruitful, then the boundary object analysis may be applied to the patentable invention and to the mark or the sign in trademark law, and beyond that, to the idea of objects and subjects of the law more broadly.

Third, and finally, if that proposed re-casting of the work bears fruit, then we may see, as my title proposes, the end of the work as we know it. That is, the end of the work as an independent, autonomous, static thing and its rebirth as a fluid, dynamic thing embedded in multiple communities and practices.

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<sup>96</sup> See Susan Leigh Star & James R. Griesemer, *Institutional Ecology, 'Translations' and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907–1939*, 19 SOC. STUD. SCI. 387, 393 (1989) (footnotes omitted). On the meaning and roles of boundary objects, see GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 296–98 (1999). A good example of the application of the boundary object concept to a particular form of intellectual production is CORYNNE MCSHERRY, *WHO OWNS ACADEMIC WORK?: BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY* (2001). Boundary objects have politics, which must be accounted for in any application of the concept to law. See Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL'Y & L. 183 (2007). See also Madison, *supra* note 71, at 2045–46 (noting the relevance of the “borderlands” metaphor developed by Saskia Sassen to questions of knowledge regulation).

Copyright in action is largely a question of institutional design and operation,<sup>97</sup> and understanding the work as a boundary object offers one potentially powerful tool for managing both relationships between institutions and relationships between institutions and individuals. Here is an example: I am in many ways a critic of interpretations of copyright law that foreground a romanticized version of the author, but I agree with criticism of the current statutory damages provision that bases damages on the number of works infringed. Courts that apply an “independent economic value” standard to the definition of a work in that context are trying to restore some sense to the logic of markets for copyrighted works—key institutions of copyright law—and not, as some might suggest, trying to protect the author’s perspective on distribution of their works. A preferred solution might be to delete the concept of the work from that part of the statute, and perhaps from others. But for practical reasons the work cannot be deleted entirely. That being the case, in this specific context and in copyright law more broadly, the idea of the work deserves a new beginning.

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<sup>97</sup> Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 165.



