HOW TO WRITE A LIFE: SOME THOUGHTS ON FIXATION AND THE COPYRIGHT/PRIVACY DIVIDE

LAURA A. HEYMANN*

TABLE OF CONTENTS

* Associate Professor, College of William & Mary—Marshall-Wythe School of Law. Many thanks to Kerry Abrams, Angela Banks, Corinna Lain, Noah Sachs, Jessica Silbey, and my colleagues at William & Mary for helpful comments at early stages of this project. Thanks as well to Brad Bartels, Paul Hellyer, and Michael Kourabas for research assistance and to the staff of the *Law Review* for their hard work.

INTRODUCTION

In the fall of 2001, a New York gallery mounted "Heads," a show of street photography by photographer Philip-Lorca diCorcia. DiCorcia, who had worked in this genre for many years, had set up his camera in Times Square and taken photographs of strangers, without their knowledge, as they passed by,[1] then cropped and framed the photographs to create portraits of each subject. Four years later, Erno Nussenzweig discovered that his photograph was among those in the exhibition. His image was included in the show's catalogue and was available for sale in ten limited edition prints. Nussenzweig, an Orthodox Jew who believed that the photograph offended his religious beliefs, brought suit under New York's right of publicity law,[2] alleging that the use of his image for commercial purposes was unauthorized and thus unlawful.[3] Although Nussenzweig's case ultimately failed on statute of limitations grounds, the trial court offered an alternative holding[4]: that diCorcia's transformation of Nussenzweig's image—unbeknownst to him—into "art" rendered the photograph constitutionally protected and thus outside the scope of New York privacy law.[5] DiCorcia's act

---

1. As the *New York Times* explained, diCorcia attached a strobe light to scaffolding and used a long lens, which allowed him to stand farther away than he had in previous shoots. A critic for the newspaper concluded, "The result: crisp and stark portraits picked out of murky blackness—just heads, no longer cityscapes, the surroundings now blocked by the scaffolding." Michael Kimmelman, *Art in Review: Philip-Lorca diCorcia—"Heads,"* N.Y. TIMES, Sept. 14, 2001, at E26; *see also* Detlev Fischer, *Philip-Lorca diCorcia: What Happened Between "Streetwork" and "Heads"?*, OTURN, Feb. 4, 2003, http://www.oturn.net/probe/heads.html (noting that, by largely eliminating the surroundings in each photograph, diCorcia "extract[ed] the genre of portrait from the genre of street photography").

2. N.Y. CIV. RIGHTS LAW §§ 50-51 (Consol. 2001); *see also* Hoepker v. Kruger, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002) (noting that the elements of a cause of action under sections 50 and 51 are "(1) [the] use of plaintiff's name, portrait, picture or voice (2) 'for advertising purposes or for the purposes of trade' (3) without consent ... (4) within the state of New York").

3. Nussenzweig alleged that the sale of the prints satisfied the commercial purpose element of the New York statute.

4. The appellate courts, relying on the doctrine of avoidance of constitutional questions, affirmed only on the statute of limitations ground. Nussenzweig v. DiCorcia, 832 N.Y.S.2d 510, 511 (N.Y. App. Div. 2007), *aff'd*, 878 N.E.2d 589 (N.Y. 2007).

5. The court determined that the photograph was "art" based on evidence of diCorcia's reputation in the "international artistic community," reviews of diCorcia's work, and the

of fixing Nussenzweig's face in a photograph—and the subsequent categorization of that act as "art"—transformed Nussenzweig's image from personal to property, giving control of it to the artist rather than to the subject.[6]

Six years later, Alison Chang, a teenager living in Texas, was surprised to learn that a photograph of her taken by a friend and posted to the photo-sharing site Flickr was used on a billboard in Australia as part of an advertising campaign for Virgin Mobile.[7] The print campaign featured numerous photos taken from Flickr on which Virgin had superimposed captions; the one on Chang's photo read "Dump Your Pen Friend." Chang, claiming that the campaign transformed her from a "normal high school student to the 'dump your pen friend girl,'" filed suit against Virgin Mobile in state court in Texas, alleging, among other things, that Virgin's activities constituted an invasion of privacy.[8] But whether Chang could have successfully asserted such a claim remains uncertain: Chang's friend had posted the photograph to Flickr under a Creative Commons Attribution License, which allows others to copy and use the photograph provided that attribution is given.[9] Thus, had the

---

nature of diCorcia's creative process. Nussenzweig v. DiCorcia, No. 108446/05, 2006 WL 304832, at *7 (N.Y. Sup. Ct. Feb. 8, 2006). For discussions of the case, see Ariella Goldstein, Note, *Privacy from Photography: Is There a Right Not To Be Photographed Under New York State Law?*, 26 CARDOZO ARTS & ENT. L.J. 233, 234-41 (2008); Philip Gefter, *The Theater of the Street, the Subject of the Photograph*, N.Y. TIMES, Mar. 19, 2006, at 29. For examples of other cases in which courts have attempted to reconcile copyright law and right of publicity/privacy law, see, for example, *Hoepker*, 200 F. Supp. 2d at 349 (noting that "New York courts have taken the position in the right of privacy context that art is speech, and, accordingly, that art is entitled to First Amendment protection vis-à-vis the right of privacy"); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 810 (Cal. 2001) ("Without denying that all portraiture involves the making of artistic choices, we find ... that when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity.").

6. Indeed, a critic reviewing diCorcia's "Heads" exhibit noted that previous series of diCorcia's street photography had "turned pedestrians into unsuspecting performers and the sidewalks ... into ad-hoc movie sets." Kimmelman, *supra* note 1.

7. As of this writing, the photo can be seen at http://www.flickr.com/photos/sesh00/515961023 (last visited Oct. 21, 2009), which is apparently where Chang discovered Virgin Mobile's use.

8. Plaintiffs' Original Petition at 5, Chang v. Virgin Mobile USA, LLC, No. 3:07-CV-1767-0, 2009 WL 111570 (N.D. Tex. Jan. 16, 2009), *available at* http://lessig. org/blog/complaint.pdf.

9. *See* Creative Commons, About: Licenses, http://creativecommons.org/about/licenses (last visited Oct. 21, 2009). Chang's friend, who was also a plaintiff in the suit, alleged that

case gone forward, Virgin Mobile might have argued that it had complied with the terms of the license and so satisfied all of its legal obligations toward the owner of the rights in the photograph.[10]

The experiences of Nussenzweig and Chang are commonplace. Many individuals have been surprised or troubled to find themselves the subject of biographies, plays, photographs, and Internet postings in which they did not actively participate, transformed from fairly anonymous individuals into widely known artistic subjects.[11] Although these experiences are not new, the development of recording and photographic technology and the ability to distribute such recordings over the Internet to a worldwide audience have redrawn the boundary between public and private. Events that formerly would have receded into the darkness of the past are now captured on mobile phones and uploaded to YouTube. Search engines and web archives make it ever harder to distance oneself from these once forgettable and now cemented episodes of life. Commentators have chronicled the misfortunes of individuals who believed their actions were viewed by only a few in the direct vicinity but who became unwilling Internet sensations virtually overnight.[12] Concerned by these developments, scholars have high-

---

Virgin Mobile failed to provide the required attribution and that Creative Commons failed to educate him adequately about the ramifications of selecting an Attribution License. Plaintiff's Original Petition, *supra* note 8, at 8.

10. The plaintiffs voluntarily dismissed their case against Virgin Mobile USA, LLC, and Creative Commons Corporation, and the district court dismissed the case against Virgin Australia for lack of personal jurisdiction. *Chang*, at *1 n.2, *7; *cf.* Oliveira v. Frito-Lay, Inc., 251 F.3d 56, 62-63 (2d Cir. 2001) ("If Congress were to consider whether to extend trademark protection to artists for their signature performances, reasons might be found both for and against such an expansion. But for a court now to 'recognize' the previously unknown existence of such a right would be profoundly disruptive to commerce.... Indeed, artists who had licensed users under their copyrights and had received fees for the copyright license could bring suits claiming additional compensation for infringement of trademark rights.").

11. *See, e.g.*, Mendonsa v. Time Inc., 678 F. Supp. 967, 968 (D.R.I. 1988) (declining to dismiss right of publicity suit brought by individual claiming to be "kissing sailor" in Alfred Eisenstadt's famous photograph of Times Square on V-J Day); Marcinkus v. NAL Publ'g Inc., 522 N.Y.S. 2d 1009, 1009 (N.Y. Sup. Ct. 1987) (denying plaintiff's motion for preliminary injunction and defendant's motion to dismiss in right of publicity case involving use of plaintiff's name, position, and background in work of fiction to "give a ... sense of historical accuracy").

12. *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 1-2 (2007) (discussing photos posted to a Korean blog of a young woman who refused to clean up after her dog on a subway train); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 216 (2008) (noting that "a world where bits can be recorded,

lighted the privacy interests at stake, calling for reforms that would provide greater protection against unwanted publicity, even for acts in public places, a space in which privacy law traditionally provides little force.[13]

As illuminating as these discussions are, they often do not take into account a potential competing interest: the copyright held by the writer or photographer who has captured the subject's life, an interest that arises at the moment of fixation[14]—the second that the story is committed to keyboard or the JPEG is stored in memory. Fixation—the act of preserving something, even if only temporarily—is necessary to obtain protection under U.S. copyright law, which requires that the copyrighted "work" be "fixed in a tangible medium of expression."[15] Because many works of creative expression are fixed in some form, the subject of fixation arises in relatively few cases—typically in connection with computer technology, when the question is whether fixation in computer memory meets the statutory requirement.[16] Fixation receives a bit more attention on the scholarly front, where commentators have highlighted how the requirement works to exclude artistic endeavors such as improvisational theater from the scope of copyright protection.[17] Fixation

---

manipulated, and transmitted" engenders a privacy "free-for-all" in which "the public is variously creator, beneficiary, and victim").

13. *See* SOLOVE, *supra* note 12 at 7-8; Jacqueline D. Lipton, *"We, the Paparazzi": Developing a Privacy Paradigm for Digital Video*, 95 IOWA L. REV. (forthcoming 2009).

14. 17 U.S.C. § 102 (2006).

15. *Id.* Other countries do not require fixation for copyright protection, and the Berne Convention does not mandate any such provision. Berne Convention for the Protection of Literary and Artistic Works art. 2(2), Jul. 24, 1971, 828 U.N.T.S. 221 ("It 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."); Carrie Ryan Gallia, Note, *To Fix or Not to Fix: Copyright's Fixation Requirement and the Rights of Theatrical Collaborators*, 92 MINN. L. REV. 231, 240 (2007); Yoav Mazeh, Modifying Fixation: Why Fixed Works Need To Be Archived To Justify the Fixation Requirement 7 n.14 (unpublished manuscript, on file with author). States are free to provide protection for unfixed works. *See, e.g.*, CAL. CIV. CODE § 980(a)(1) (West 2007) ("The author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression thereof as against all persons except one who originally and independently creates the same or similar work.").

16. *See, e.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).

17. *See, e.g.*, Gregory S. Donat, Note, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363 (1997); Gallia, *supra* note 15. Commentators have also explored the question of whether derivative works must be fixed to infringe. *See, e.g.*, Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is* Galoob *a*

may also find its way to a copyright exam or two, as law professors ask students to consider whether such ephemeral creations as skywriting, fireworks, and ice sculptures qualify for copyright protection under U.S. law. On the whole, then, it would seem as if fixation is a relatively uncontroversial topic.

Yet the stories of Nussenzweig and Chang illustrate the increasing importance of fixation in an information age. Under U.S. copyright law, fixation is what creates both an author and a commodifiable subject, neither of which exists as a legal entity in copyright law before the act of fixation occurs. It transforms the creative process (and its subject) from a contextual, dynamic entity into an acontextual, static one, rendering the subject archived, searchable, and subject to further appropriation.[18] Even in contexts in which there is no competing claim as to control, fixation still works to bound the fruits of creative effort, engendering distance between the author and audience. Fixation thus causes a kind of death in creativity even as it births new legal rights. Once an "author" has fixed a certain version of her work, she has propertized its subject, subordinating the work to the various laws and tropes that come with a property-based regime such as copyright law: ownership, transformation, borrowing, and theft. Fixation is what allows the subject to be commercialized and analyzed; it is what marks the transformation to subject in the first place.

This is not to say, however, that the way to resolve this tension is clear or even possible. So long as people have memories, gossip

---

Mirage*, or Does the* Form(Gen) *of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991 (2004); *see also*, *e.g.*, David J. Brennan & Andrew F. Christie, *Spoken Words and Copyright Subsistence in Anglo-American Law*, 4 INTELL. PROP. Q. 309 (2000) (criticizing fixation requirement in U.S. and U.K. law). In some industries in which unfixed creative works predominate, industry norms may substitute for legal protection. *See, e.g.*, Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be* Per Se *Copyrightable?*, 24 CARDOZO ARTS & ENTER. L.J. 1121, 1154 (2007) ("Norms against plagiarism and in favor of attribution seem to function vibrantly in the closely-knit culinary realm, where the esteem of one's peers and the opinions of diners work to both dissuade rampant copying and promote true innovation.").

18. *Cf.* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 340 (1983) [hereinafter Zimmerman, *Requiem*] ("In reality, the most important distinction between press coverage and gossip seems to be in its visibility to the victim. Although we may suspect that our friends secretly talk about us, we know exactly what has been said when information about us appears in the press.") (footnote omitted).

or other information about others conveyed orally among a group can have the same effect on the subject. Moreover, the tendency of creators to fix their work yields indisputable benefits for both audiences and later creators. But fixation is a deceptively simple act with significant legal consequences. The act of fixation makes it necessary to consider whether "art" has been created, thus implicating the First Amendment. In other words, fixation does not simply have the potential to offend another's sensibilities; it also affirmatively creates rights (and an author) that did not previously exist and that often can be oppositional in nature. (As Diane Zimmerman has noted, "the ability to use speech goods is a necessary element of what the First Amendment protects," and so "it is very risky to allow individuals to 'own' or control use of their life stories."[19]) Fixation thus puts two sorts of authorship interests in tension: the interest of a creator in having control over the work she has fixed and the interest of the subject in resisting the transformation to a "work" in the first instance.[20]

This is not to say that U.S. copyright law's fixation requirement should be revised or eliminated. Indeed, to eliminate the requirement risks tipping the balance even more in favor of the author and away from the subject. But because fixation is typically uncontested, it is worth refocusing our attention on its effects, particularly on its locus at the boundary between copyright and privacy.

---

19. Diane Leenheer Zimmerman, *Is There a Right To Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 349 (2004) [hereinafter Zimmerman, *Something to Say*]; *cf.* Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299, 333 (1991) (noting that competing copyright claims from the subjects of biography over the use of such writings as unpublished letters encourages biographers to "avoid research in primary documents and deny reliance upon them in writing, or ... erect a façade of historical objectivity"). *But see* J. Thomas McCarthy, *Two Sets of Events that Changed Right of Publicity Law*, 19 COLUM.-VLA J.L. & ARTS 129, 143-44 (1995) ("In my opinion, a defendant's ownership of copyright or a license of copyright in a particular photograph, motion picture or phonorecord of plaintiff should not be a defense to assertion of infringement of plaintiff's right of publicity. A copyright, no more than any other property right, cannot be a license to trample on other people's rights.") (footnote omitted).

20. Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 783 (1997) (commenting that the idea that another might own one's persona "appears to be inconsistent with the ideal of personal freedom and autonomy").

I. THE COMPETING INTERESTS: COPYRIGHT LAW AND PRIVACY LAW

A. The Creator as Author: Copyright Law's Incentives

U.S. copyright law's[21] concept of the author is rooted in an economic theory of incentives. In the standard explanation, absent copyright law, authors will eventually lose their motivation to create new expressive works once they recognize the possibility of free riders who can copy those works and sell them at the marginal cost of copying. The author, who must also recoup the cost of production, cannot compete with the copyists and so decides not to create at all.[22] Thus, copyright law provides an author with the ability, in general, to control the use of her work[23] in order to incentivize the creation of the work in the first place. This notion that control of the work is an important incentive is nothing new, of course—the requirement in the mid-1500s that no book could be printed for sale unless registered by a member of the Stationer's Company, the precursor to the modern copyright regime, functioned as a form of government censorship and a monopoly to the registrant publisher.[24] So it is not merely the fact that copyright law provides an incentive that is said to justify its existence—it is that the incentive it provides (control) is one that is sufficient to motivate authors to create and publishers to publish, which works toward the benefit of the public in that it results in more creative expression for public consumption.[25]

---

21. This Essay focuses on U.S. copyright law except where otherwise indicated, and all references simply to "copyright law" should be understood by the reader to refer to U.S. copyright law.

22. This story does not always match reality, given that many authors create without thinking about whether to monetize those creations. But the explanation is probably more true of publishers and distributors, who will often have economic interests at heart and for whom the recoupment of selection and development costs is key. *Cf.* Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 939 (2007) (suggesting that copyright owners "suffer 'competitive harms'" as the result of unauthorized public distribution rather than reproduction).

23. *See* 17 U.S.C. § 106 (2006). The statutory fair use provision allows some use of the work by others without prior authorization by the author. *See id.* § 107.

24. *See, e.g.*, BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 3 (1967).

25. *See, e.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical

The Continental copyright scheme, by contrast, finds its roots in a theory of personality or moral rights. In a moral rights scheme, rights are granted in order to validate the personality in a work of creative expression, and an author's control extends not only to the economic interests in the work but also to uses of the work that offend its integrity or the author's connection to the work.[26] Although some commentators have argued for greater recognition of moral rights in U.S. copyright law, to date the only statutory recognition occurs in the Visual Artists Rights Act, which provides rights of attribution and integrity for a very limited category of "works of visual art."[27] This is not to say, however, that authors in the U.S. copyright system are insensitive to moral rights-type concerns, and until the Supreme Court's 2003 decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,[28] some artists had been successful in using the Lanham Act to address attributional concerns in connection with their work.[29] With the seeming rejection of this effort in *Dastar*, and the Court's emphasis that Congress intended only very limited moral rights-type protection in the Copyright Act,[30] the economic justification for copyright law in the U.S. has been reinforced.

Not all creators can take advantage of the incentives that federal copyright law provides, however. In order to qualify for copyright protection, the item at issue must be an "original work[ ] of authorship fixed in [a] tangible medium of expression."[31] This means that the work for which protection is sought must be original, in the sense that it has not been copied from another and involves a sufficient amount of creative effort to render it worthy of federal

---

expression for the good of the public.").

26. Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871, 882 (2007) ("Moral rights are aimed at preserving an author's artistic autonomy and dignity; copyrights afford economic protection and are steeped in a utilitarian framework.").

27. 17 U.S.C. § 101 (2006) (definition of "work of visual art"); *id.* § 106A (discussing the rights afforded to an author of a work of visual art).

28. 539 U.S. 23 (2003) (rejecting attempt to use Lanham Act to prevent the unaccredited copying of a work).

29. *See, e.g.*, King v. Innovation Books, 976 F.2d 824, 826 (2d Cir. 1992) (use of possessory credit on film version of story); Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976) (unauthorized editing of television show).

30. *Dastar*, 539 U.S. at 34-35 (noting that the "express right of attribution" contained in the Visual Artists Rights Act "is carefully limited and focused").

31. 17 U.S.C. § 102 (2006).

protection,[32] and fixed, meaning that it must be capable of perception, reproduction, or communication.[33] The originality requirement and the fixation requirement are not interdependent: A work can be an original work of authorship but not qualify for copyright protection because it is not fixed (such as an improvisational comedy performance); and a work can be fixed but not qualify for copyright protection because it is not an original work of authorship (such as a standard telephone directory).[34]

Neither the fixation requirement nor the originality requirement is particularly arduous. Fixation can be as simple as jotting one's thoughts on a notepad, hitting the "record" button on an electronic device, or pressing a camera's shutter button. Originality, as the Supreme Court noted in *Feist*, requires only a "minimal degree of creativity,"[35] which, as courts have recognized, admits of a wide range of qualifying individuals and work. In *Bleistein v. Donaldson Lithographing Co.*, for example, the Court held that the commercial nature of a circus advertisement did not preclude its embodying the requisite level of authorship;[36] and in *Burrow-Giles Lithographic Co. v. Sarony*, the Court rejected the argument that photography could not be a sufficiently creative activity, holding that the selection of the subject's pose, the lighting, and other effects sufficed.[37]

Copyright law's focus, then, is on product over process. So long as the work is a fixed "work of authorship," the method of creation is largely irrelevant.[38] Indeed, intention to create is not even required;

---

32. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

33. 17 U.S.C. § 101 (2006).

34. *See Feist*, 499 U.S. at 363-64.

35. *Id.* at 345.

36. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

37. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60 (1884); *see also, e.g.*, Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (noting that Zapruder film of the Kennedy assassination was sufficiently creative given that "Zapruder selected the kind of camera (movies, not snapshots), the kind of film (color), the kind of lens (telephoto), the area in which the pictures were to be taken, the time they were to be taken, and (after testing several sites) the spot on which the camera would be operated"). *But see* Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191, 196-97 (S.D.N.Y. 1999) (holding that "slavish copying" is not sufficiently original).

38. Laura A. Heymann, *A Tale of (At Least) Two Authors: Focusing Copyright Law on*

as the Second Circuit famously suggested in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,[39] even accidental authorship caused by a hand jolted by "a clap of thunder" suffices.[40] Intention becomes relevant when determining whether two or more individuals are joint authors, but that consideration goes toward their intent to share the benefits of copyright ownership, not their intent to create any particular kind of work.[41] In fact, the copyright owner need not have had any creative role at all in the development of the work. The Copyright Act explicitly provides for corporate ownership of works for hire,[42] and the fact that copyrights are alienable and descendible means that the owner of the economic rights in a work may be an intellectual stranger to the creative impulses that inspired the work.

In its fairly minimal requirements for copyrightability and its disjuncture between creation and control, U.S. copyright law further reinforces the economic nature of the rights it provides.[43] Apart from the Visual Artists Rights Act, which distinguishes between the inalienable rights personal to the author and the transferable rights belonging to the owner of the copyright,[44] the vast majority of the Copyright Act treats the work not as the culmination of a creative process but as a metaphysical object to which a bundle of legal

---

Process Over Product, 34 J. CORP. L. 1009, 1015 (2009).

39. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

40. *Id.* at 105 ("A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it.") (footnote omitted). *But see* SUSAN SONTAG, ON PHOTOGRAPHY 117 (1973) ("'A photograph is not an accident—it is a concept,' Ansel Adams insists.... To take a good photograph, runs the common claim, one must already see it.").

41. *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000).

42. 17 U.S.C. § 101 (2006) (defining "work made for hire"); *id.* § 201(b) (noting that "the employer or other person for whom the work [made for hire] was prepared is considered the author for purposes of this title").

43. *See generally* Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 3 (2002) (discussing the metaphors of "authorship as a form of paternity" and "a book as real estate," both of which conceive of creative expression as something that belongs to an author, rather than a personal engagement between author and reader).

44. 17 U.S.C. § 106A(b) (2006) ("Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner."); *id.* § 106A(e)(1) (noting that "[t]he rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author").

rights attaches. Others' use of that work is positioned defensively, as something that requires justification or explanation.[45] Thus, once creation yields a "work," copyright's hierarchy is constructed: work, author, reader, and, finally, subject.[46]

B. The Subject as Author: Privacy and Related Torts

Like copyright law, privacy law is concerned with the right to control, but privacy's focus is control not of one's creative output as an artist but rather over how one's persona or personality is engaged with by others. In other words, privacy law is about control *by* the subject rather than control *of* the subject.[47]

The right to privacy, as has often been noted, took on its most concrete form in two law review articles: Samuel Warren and Louis Brandeis's 1890 article in the *Harvard Law Review*,[48] and William Prosser's 1960 article in the *California Law Review*.[49] Warren and Brandeis's goal was to demonstrate the need for a tort to vindicate personal intrusions that caused only emotional and not economic harm. Until that point, many courts had responded to such claims by trying to make the facts of a particular case fit the elements of

---

45. *See* 17 U.S.C. § 107 (2006) (listing factors to be considered in determining whether use of a copyrighted work is fair).

46. Note, for example, that in *Burrow-Giles*, the Court gave little weight to the creative contribution that Oscar Wilde, the subject of the photograph, might have made to the photograph's artistic value. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (noting that the photographer created the photograph "entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera" and "arranging the subject so as to present graceful outlines"); *see also* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 433 (2004); *cf.* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1377 (2000) ("Our conceptions of property, choice, and information reinforce one another; under all of them, individuals are treated as the natural and appropriate objects of others' trades, others' choices, others' taxonomies, and others' speech.").

47. *See, e.g.*, J. Thomas McCarthy, *Public Personas and Private Property: The Commercialization of Human Identity*, 79 TRADEMARK REP. 681, 685 (1989) ("Perhaps nothing is so strongly intuited as the notion that my identity is mine—it is my property, to control as I see fit."); Zimmerman, *Something to Say*, *supra* note 19, at 348 ("The underlying justification given for the legal right to prevent disclosure of embarrassing personal information is essentially that individuals have something like a property right in the facts of their lives.").

48. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

49. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

another tort, such as breach of contract or trade secret law.[50] Warren and Brandeis instead advocated a cause of action that would directly respond to the harm at issue: a tort for invasion of privacy that would borrow from existing limitations in defamation and copyright law.[51]

Dean Prosser, canvassing the case law since the publication of the Warren and Brandeis article, concluded that what had been given the broad term of "privacy" by Warren and Brandeis actually comprised four different kinds of interests "which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff ... to be let alone": intrusion upon seclusion; public disclosure of private facts; false light; and appropriation of name or likeness.[52] These four categories of harm are now standard descriptions of what is broadly called the right to privacy.

The unifying character of interference with the plaintiff's autonomy is important, for it represents not simply the right "to be let alone" but a more active interference with the plaintiff's autonomy: the right to decide for oneself how one is represented to the public.[53] At the heart of this claim is the question of who is to exercise this control, and commentators contesting the validity of such claims criticize them on precisely this ground—that they deceitfully seek to hide information that might be relevant to others' decision making.[54] Unlike copyright law, however, the control at the heart of privacy law is motivated by individual and spiritual

50. Warren & Brandeis, *supra* note 48, at 207-13.

51. Warren and Brandeis concluded, accordingly, that the right would not apply to matters of public interest; to communications privileged under defamation law; to oral communications without proof of special damages; or to publication by consent. *Id.* at 214-18.

52. Prosser, *supra* note 49, at 389 (internal quotation marks omitted).

53. Zimmerman, *Requiem*, *supra* note 18, at 336 ("The private-facts tort merely relies on a vague consensus that we should not cause one another unnecessary pain, an agreement that we regularly temper by our tacit preference for the freedom to dissect one another's lives and characters."); *id.* at 339 ("Most people are embarrassed and hurt by the exposure of private facts because such revelations may alter the way that others see them—not necessarily in the sense that it will cause classic reputational injury, but in the sense that it will create a deviance between the image that they want to project of themselves and the one that others will actually form.").

54. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1089-94 (2000).

concerns rather than economic ones.[55] Accordingly, a violation of one's right to privacy is discussed not with metaphors of theft, piracy, and infringement but rather with metaphors of intrusion, invasion, and boundary-crossing.[56]

Like copyright law, however, privacy law has a public/private dimension. Under the 1909 Copyright Act, for example, in which publication, not fixation, was the touchstone for copyrightability, careless publication risked dedicating one's work to the public domain.[57] Once the work was released to the world at large through publication, its creator was given a choice: control its use through compliance with the requirements of copyright law or not at all. Similarly, one's right to privacy also becomes more tenuous the more one's identity-creating activities take place in the public sphere.[58] Case after case has held, for example, that a photograph taken of a subject in a public place—no matter how embarrassing or intrusive—gives rise to no privacy tort.[59] The way in which the

---

55. The Continental moral rights approach to copyright more closely resembles the spiritual rights approach.

56. The metaphors tend to blur in the case of the misappropriation and right of publicity torts, which combine elements of commercial use and personal intrusion. *See* McCarthy, *supra* note 47, at 687 (noting that "privacy is a personal and mental right" while "publicity is a commercial and business right"); Robert T. Thompson III, Note, *Image as Personal Property: How Privacy Law Has Influenced the Right of Publicity*, 16 UCLA ENT. L. REV. 155, 159 (2009) (contending that the right of publicity is a combination of property and privacy interests).

57. ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 75 (2003); Warren & Brandeis, *supra* note 48, at 200 ("The aim of those [copyright] statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all. The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.") (footnote omitted).

58. *See, e.g.*, Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 464 (1978) ("[I]t is quite clear that the ownership of one's own image [for commercial purposes] that underlies the tort of privacy is not so powerful that it gives each person exclusive control in all circumstances over the way in which others are permitted to view him."); Prosser, *supra* note 49, at 391 ("On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.") (footnotes omitted).

59. *See, e.g.*, Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 992-93 (1995) (citing cases); Prosser, *supra* note 49, at 391-92 (concluding that it is not an intrusion into seclusion to take

photograph is taken may well be subject to tort law if it constitutes, for example, harassment or trespass. But the act of fixation alone is not unlawful. This is why Nussenzweig articulated his claim against the photographer diCorcia as a right of publicity claim—as an objection to the later commercialization of his image rather than to the earlier fixation of that image that made such commercialization possible. Nevertheless, that fixation was not irrelevant to the harm that Nussenzweig experienced. Although Nussenzweig was in a public place and could be observed by any passerby, diCorcia's photograph decontextualized and reified him, making what was essentially, if not actually, a private activity (walking virtually unnoticed on a busy street) into an essentially, if not actually, public one. On the street, Nussenzweig *could* be observed by anyone; in the gallery, he existed for the *purpose* of being observed.

The right of publicity, a matter of state law, addresses the question of self-authorship by according an individual the right to control the use of her persona for commercial purposes. Originating as a variant of a general privacy tort, the right of publicity has been conceptualized as a form of misappropriation since the Second Circuit's decision in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[60] The core of a right of publicity claim is that the defendant has appropriated the plaintiff's persona[61] without

---

the plaintiff's photograph in a public place); *id.* at 394-95 (concluding that it does not constitute public disclosure of private facts to take and publish a photograph of the plaintiff in a public place); *id.* at 399-400 (concluding that it may constitute a false light claim to use the plaintiff's photograph to illustrate a book or article with which he has no connection); *id.* at 401 (citing cases in which the use of the plaintiff's likeness for the defendant's advantage constituted tort). Some commentators have taken issue with this presumption. *See, e.g.*, McClurg, *supra*, at 1026-27.

60. 202 F.2d 866 (2d Cir. 1953).

61. The particular aspects that "persona" comprises vary; the right "generally forbids the unauthorized use of the name or likeness of another individual for commercial purposes without that person's consent." SCHECHTER & THOMAS, *supra* note 57, at 264; *id.* at 268 (noting that "[t]he majority of courts, supported by the Restatement, hold that the right of publicity potentially extends to everyone," whether celebrity or noncelebrity); Philip Auslander, *Legally Live: Performance in/of the Law*, 41 DRAMA REV. 9, 15 (1997) ("An author does not have to be well-known, or even published, to enjoy copyright protection for her work, but a performer must be sufficiently famous so that someone else would seek to purchase her identity to enjoy protection of her performance under the right of publicity paradigm."). Courts have created a "newsworthiness" exception to carve out those uses consistent with First Amendment-promoting activities, even if such uses bolster the defendant's bottom line. For example, a magazine with a photograph of a celebrity on the cover might well result in more

authorization and for commercial gain, in connection with advertising or promotion.[62] The right is therefore a commercial property right as opposed to a moral or human right. Although some courts have suggested that the harm at the root of a right of publicity claim is the false suggestion of endorsement,[63] the right of publicity is distinct from, and does not require any proof of, a false implied endorsement, for which a plaintiff might seek redress under section 43(a) of the Lanham Act.[64] Rather, the harm is simply the unauthorized use of the plaintiff's persona for the defendant's commercial benefit, even if there is no confusion on the part of the consumer of any particular item as to the (nonexistent) relationship of the plaintiff to the goods at issue. Put differently, the tort attempts to address the harm to the plaintiff's autonomy that results from the defendant's unauthorized use of the plaintiff's identity for the defendant's own commercial ends.[65]

As with privacy law more generally, the right of publicity serves as a battleground for control. Here, however, rather than a battle over *whether* the subject will be propertized, the right of publicity represents a battle to determine to whom the benefits of property will accrue.[66] As Jane Gaines has noted, the right of publicity, rooted as it is in commercial exploitation, "is inherent at the same time

---

purchases than the same magazine without the photograph. Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 35, 55 (1998).

62. McCarthy, *supra* note 19, at 130 ("The right of publicity is simply the right of every person to control the commercial use of his or her identity.").

63. *See, e.g.*, Toney v. L'Oreal USA, Inc., 406 F.3d 905, 910 (7th Cir. 2005) ("The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse the product in question.").

64. 15 U.S.C. § 1125 (2006) (prohibiting acts that are "likely to cause confusion" as to, inter alia, origin or sponsorship).

65. *See, e.g.*, Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 168 n.207 (1993) ("Take the plaintiff in *Pavesich*, [50 S.E. 68 (Ga. 1905)], for example. Quite possibly he would have been every bit as upset if his picture had appeared on the front page of the local newspaper, illustrating a story, say, about spring fashions. Yet perhaps what upset him was not (or not only) the unwanted publicity but the commercialization of his personality. He may have felt it an affront to his dignity as an autonomous individual to be conscripted to serve another's purely commercial purposes.").

66. *See, e.g.*, Zimmerman, *supra* note 61, at 48 & n.39 (citing Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954)). *But see* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 285-93 (2005) (conceptualizing the right of publicity as concerned with the right to self-definition).

that it must be produced by exploitation."[67] In other words, the plaintiff asserting a right of publicity claim must accept the commercialization of her image before she can claim that the right to engage in such an activity belongs to her alone, not to the defendant.[68] The fixation that secures rights to the author in copyright law thus also affords the subject publicity rights (unwanted, perhaps) by concretizing and propertizing the subject's identity.[69] Indeed, the original fixation of the subject's image by a photographer for expressive purposes may give rise to later acts of appropriation by others for commercial purposes, thus giving the subject a right against attempts to commercialize her image that she did not have against the original photographer.[70]

Robert Post has cogently suggested that this tension was present even in Warren and Brandeis's article—the fact that the appropriation tort "has thus all along lurched precariously between formulations of privacy and of property."[71] Thus, as Post describes, copyright conceives of personality as a thing to be commodified and alienated, whereas Warren and Brandeis's view of privacy considers personality to be inextricably linked to the individual.[72] It is the act of fixation in both copyright law and privacy law that marks the transition between the two, changing the nature of the subject from limited, transitory, and private to expansive, permanent, and public.

---

67. JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 190 (1991) (italics omitted).

68. *See* Malkan, *supra* note 20, at 794-95 (contrasting a privacy claim based on an unauthorized photograph with a right of publicity claim).

69. *See, e.g.*, Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 675-79 (7th Cir. 1986) (stating that baseball players' right of publicity claims in their performances during games are preempted because those rights are equivalent to those under copyright). *But see* Toney v. L'Oreal USA, Inc., 406 F.3d 905, 910-11 (7th Cir. 2005) (stating that a plaintiff's persona is not fixed, even if a particular image might be, and so a right of publicity claim is not preempted by the Copyright Act).

70. Alison Chang is one such example. *See supra* notes 7-9 and accompanying text.

71. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 649 (1991).

72. *Id.* at 668.

II. FIXATION AND ITS EFFECTS

Given the importance of fixation to rights creation and deprivation, closer attention to fixation's history and function may prove to be illuminating. As noted, under U.S. copyright law, it is not enough to acquire protection for an author to produce an original work of authorship: the work must also be fixed in a tangible medium of expression. As the Copyright Act defines it, a work is fixed in a tangible medium of expression when

> its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.[73]

The statutory language suggests two different reasons for a fixation requirement, both tied to establishing value in the work. First, fixation relates to the use of the work by others. The explanation that a work is fixed only if it can be "perceived, reproduced, or otherwise communicated for a period of more than transitory duration"[74] suggests a concern not with enjoyment of a work by its audience (as would be true with an improvisational performance) but with some degree of permanence that allows future use of the work. Second, fixation relates to the concept of authority conveyed by the work's existence in tangible form. It is not enough for a work to have been fixed by anyone for rights to accrue; it must be fixed "by or under the authority of the author." According to this language, then, the fact that the work is fixed is insufficient for rights to attach—the author or her agent must actually perform the task of fixation. This requirement itself has the possibility of engendering conflict. Take, for example, *Burrow-Giles*, in which the question of who holds superior rights depends on what is determined to be the work: the photograph (for which the photographer is both the

73. 17 U.S.C. § 101 (2006).
74. *Id.*

author and the one who fixed the work) or the "performance" of the subject (for which the photographer is merely acting under Wilde's authorial direction).[75]

This second meaning is seen again in the definition of when a work is "created."[76] Under the statute, 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.[77]

Thus, for purposes of copyright law, a work only exists (that is, is "created") when it is fixed. No matter to what extent a work may have been conceived, communicated, or performed before fixation, it does not acquire any legal status until it is concretized in some form, if only temporarily. Under copyright law, "an undocumented performance is less than invisible: inasmuch as it has no copy, it was never created; it does not exist at all."[78] The Copyright Act itself embodies this tension in its definition of "copies," which includes "the material object ... in which the work is first fixed."[79] Thus, the first fixation is subordinate to the creative effort that results in a "work of authorship" (in that it is already a copy) and yet predominant over that effort in its legal significance.[80]

---

75. The same question might arise with respect to the common scenario in which a tourist asks a passerby to take her photograph in front of a landmark.

As Professor Ochoa notes, the phrase "by or under the authority of the author" is relevant only to the initial fixation that provides the basis for copyrightability; an infringing copy is by definition *not* "by or under the authority of the author." Ochoa, *supra* note 17, at 997 n.26.

76. 17 U.S.C. § 101 (2006).

77. *Id.*

78. Auslander, *supra* note 61, at 16.

79. 17 U.S.C. § 101 (2006).

80. *See* Auslander, *supra* note 61, at 9 ("With Title 17, we have entered the realm of Baudrillard's simulacrum: every copyrightable work is always already a reproduction of itself."); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 449 (2008).

A. History

The statutory requirement that a work be fixed in order to qualify for copyright protection was a development of the 1976 Copyright Act.[81] The 1909 Copyright Act provided that copyright applied to "all the writings of an author."[82] Copyright was secured by publication with the required notice of copyright affixed to the work or by depositing a copy of an unpublished work with the Copyright Office.[83] In this respect, fixation became a *de facto* requirement for copyrightability, as publishing a work with an affixed notice or submitting a deposit copy both required that the work be embodied in some sort of physical form.[84] The question of fixation in the 1909 Copyright Act thus intersected with the question of what constituted a "writing."[85] Congress indicated in the legislative history for the 1909 Act that it intended the word "writings" to have its historically broad meaning.[86] Indeed, proposed revisions to the 1909 Act would have amended the law to provide that fixation was not required in order to be eligible for copyright protection and that the intended subject of protection, rather, was the intellectual production of authors, even if not in concrete form.[87]

---

81. Pub. L. No. 94-553, 90 Stat. 2541 (1976).

82. Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076 (1909).

83. *Id.* § 10; *see also id.* § 19 (describing form of required notice). Copyright could be secured for works not reproduced in copies for sale by deposit of an identifying reproduction of the work with the Copyright Office. *Id.* § 12. As in the 1976 Act, deposit of copies of any work for which copyright was claimed was required prior to litigation to enforce the copyright. *Id.* § 13.

84. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDY NO. 28, at 96 (Comm. Print 1959) (Borge Varmer) [hereinafter COPYRIGHT STUDY NO. 28]; *id.* at 97 (noting that motion pictures could be used to accomplish the necessary fixation for a choreographic work).

85. *See, e.g.*, STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDY NO. 3, at 67-108 (Comm. Print 1960) [hereinafter COPYRIGHT STUDY NO. 3].

86. H.R. REP. NO. 60-2222, at 10 (1909) ("Section 4 is declaratory of existing law. It was suggested that the word 'works' should be substituted for the word 'writings,' in view of the broad construction given by the courts to the word 'writings,' but it was thought better to use the word 'writings,' which is the word found in the Constitution. It is not intended by the use of this word to change in any way the construction which the courts have given to it.").

87. *See, e.g.*, H.R. 6990, 71st Cong. § 1 (1930) (proposing to provide for copyright to be granted to authors in all writings "in any medium or form or by any method through which the thought of the author may be expressed"); *see also* COPYRIGHT STUDY NO. 3, *supra* note 85, at 77 ("Although the language of the bill would still seem to require embodiment in some concrete form, the words 'or by any method' would appear to abolish the necessity for concrete

The introduction of the fixation requirement appears to have been a reaction to efforts to include choreographic works, pantomimes, and sound recordings among the list of copyright-eligible works.[88] Some commentators resisted the notion that federal copyright protection might be extended to unfixed works. When Congress began considering whether to extend copyright protection to sound recordings in the 1930s, at least one proposed bill suggested extending protection to the efforts of performers.[89] Such proposals were met with opposition by, for example, the Committee on Copyrights of the American Bar Association based on its "attempt to protect performing rights of an intangible nature."[90] The Copyright Office, for its part, did not appear to advocate fixation as the trigger for the start of the copyright term, although it did believe that fixation was a requirement for copyrightability. Rather, the Office believed that the copyright term should begin when the work was first disseminated to the public, either through distribution of copies or sound recordings, by registration, or by public performance.[91] Some courts, however, had identified fixation as a require-

---

form altogether. For example, oral delivery would be a 'method' of expressing the thought of the author.... But even if the form is immaterial, it does not follow that the copyrighted conception need not be in some physical form; reasons of policy and convenience might demand concreteness of form without circumscribing the manner in which this form is cast.") (footnotes omitted); H.R. 10632, 74th Cong. (1936) (proposing to amend section 4 of the 1909 Act to provide for copyright protection for "all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or interpreter of any musical, literary, dramatic work, or other compositions, whatever the mode or form of such renditions, performances, or interpretations"); S. 3047, 74th Cong. (1935) (proposing to amend section 4 of the 1909 Act to provide for copyright for "all the writings of an author, whatever the mode or form of their expression").

88. *See* H.R. 1270, 80th Cong. (1947) (proposing to amend section 5(m) of the 1909 Act to provide protection for "recordings which embody and preserve any acoustic work in a fixed permanent form ... on any ... substance[]... by means of which it may be acoustically communicated or reproduced."); S. 3047, 74th Cong. (1935) (proposing to amend section 5 of the 1909 Act to add protection for "choreographic works and pantomimes, the scenic arrangement of acting form of which is fixed in writing or otherwise"); *see also* STAFF OF S. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION REPORT 16 (Comm. Print 1961) [hereinafter COPYRIGHT LAW REVISION]; COPYRIGHT STUDY NO. 28, *supra* note 84, at 93-94 (noting that absence of method for fixing choreography was a "practical obstacle[ ] to securing copyright protection for choreographic works").

89. S. 2240, 75th Cong. (1937)

90. AMERICAN BAR ASSOCIATION, SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW, COMMITTEE REPORTS 12 (1937); *see also* STAFF OF S.COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDY NO. 26, 31 (Comm. Print 1961) (Barbara A. Ringer).

91. COPYRIGHT LAW REVISION, *supra* note 88, at 9, 41.

ment for copyrightability under the Constitution, given the requirement of a "writing," and so the Copyright Office recommended that the 1909 Act be amended to explicitly reflect this.[92]

Thus, by 1964, three members of Congress had introduced a revision to the 1909 Act that included a concept of fixation.[93] The revision's section 1, which provided for copyright protection for "original works of authorship fixed in any tangible medium of expression," later became section 102(a) of the 1976 Act.[94] The 1964 revision bill also provided, in a section that later formed the basis of section 114(b) of the 1976 Act, that the exclusive right of reproduction of the copyright owner in a sound recording was limited to the right to duplicate the sound recording "in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording."[95] Section 15 of the 1964 revision bill introduced the concept that ownership of the copyright was distinct from ownership of the "material object in which the work is embodied" or "first fixed,"[96] a section that later became section 202 of the 1976 Act.[97] Finally, section 54 of the revision bill, the definitional section, provided both that "copies" were "material objects ... in which a work is fixed or reproduced by any method now known or later developed" and that a work is "created" when it is "fixed in a copy or phonorecord for the first time," as well as similar definitions for "phonorecords" and "sound recordings,"[98] all of which were carried over to section 101 of the 1976 Act. Later proposed bills maintained the same language as to fixation, with the definition of

92. *Id.* at 9-10; STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, pt. 6, 4 (Comm. Print 1965) [hereinafter 1965 REVISION BILL] (noting the recommendation that the "present implicit requirement of fixation ... be made explicit in the bill, and that it be stated broadly enough to cover any new forms or media of fixation that may be developed") (internal quotation marks and alteration deleted); *id.* ("Taken together, the definitions of 'copies' and 'phonorecords' in section 101 are intended to cover all of the material objects in which a copyrightable work of any sort can be fixed.").

93. *See* S. 3008, 88th Cong. (1964) (introduced by Sen. McClellan); H.R. 11947, 88th Cong. (1964) (introduced by Rep. Celler); H.R. 12354, 88th Cong. (1964) (introduced by Rep. St. Onge).

94. Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544 (1976).

95. *Id.* § 10(b).

96. *Id.* § 15.

97. Pub. L. No. 94-553, § 202, 90 Stat. 2541, 2544 (1976).

98. S. 3008, 88th Cong. § 54 (1964).

"copies" including the additional provision that the term "includes the material object, other than a phonorecord, in which the work is first fixed," and the definition of "phonorecords" including the additional provision that the term "includes the material object in which the sounds are first fixed."[99]

Fixation remained a requirement in the 1965 bill, with the Copyright Office noting that "[t]he manner or medium of fixation [was] irrelevant as long as it is tangible enough for the work to be perceived or made perceptible to the human senses, directly or with the aid of any machine or device 'now known or later developed.'"[100] As of 1965, however, the proposed revisions did not contain a definition of "fixation" itself. Broadcasters raised concerns that live broadcasts, particularly of sporting events, would not qualify for copyright protection because the transmission was not then fixed.[101] Other commenters raised concerns about whether computer software qualified for copyright protection.[102] As a result, the amendment that was reported out of the Judiciary Committee in 1966 added the 1976 Act's current definition of "fixed," including the provision that a transmission is considered "fixed" if "a fixation of the work is being made simultaneously with its transmission."[103]

---

99. H.R. 4347, 89th Cong. (1965) (Rep. Celler); H.R. 5680, 89th Cong. (1965) (Rep. St. Onge); H.R. 6831, 89th Cong. (1965) (Rep. Monagan), all at § 101; *see also id.* § 102 (scope of copyright protection); *id.* § 112 (scope of exclusive rights in sound recordings); *id.* § 202 (ownership of copyright distinct from ownership of material object).

100. 1965 REVISION BILL, *supra* note 92, at xvii; COPYRIGHT LAW REVISION, *supra* note 88, at 9-10.

101. *Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 89th Cong. 124 (1966) (statement of Ernest W. Jennes on behalf of the Association of Maximum Service Telecasters, Inc.).

102. *See, e.g.*, *Hearing on S. 597 and H.R. 2512 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 90th Cong. 196 (1967) (testimony of Arthur R. Miller); *Hearing on S. 597 and H.R. 2512 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, Part 2,* 90th Cong. 555-56 (1967) (testimony of W. Brown Morton, Jr.).

103. H.R. REP. NO. 89-2237, at 3 (1966); *see also id.* at 45 (1966) ("The committee was persuaded that, assuming they are copyrightable—as 'motion pictures' or 'sound recording,' for example—the content of a live transmission should be regarded as 'fixed' and should be accorded statutory protection if it is being recorded simultaneously with its transmission. The discussions on this point, as well as questions raised in connection with computer uses, further emphasized the need for a clear definition of 'fixation' that would exclude from the concept purely evanescent or transient reproductions."); *see also, e.g.*, Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668 (7th Cir. 1986) (holding that broadcasts of baseball games were fixed because recording was made simultaneously with

The accompanying report noted that the broad definition of fixation—both as to the form the fixation medium takes and the manner or nature of the fixation—was intended to "avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*,[104] under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed."[105] The report's language on fixation was carried over to the report accompanying the next revision of the bill in 1967,[106] the revision reported out of the Judiciary Committee in 1974,[107] the revision reported out of the Senate Judiciary Committee in 1975,[108] and the revision reported out of the House Judiciary Committee in 1976.[109]

The new definition of "fixed" thus reinforced the difference between the work entitled to copyright protection and the material object in which the work is fixed.[110] The former is to what legal

---

transmission); Trenton v. Infinity Broad. Corp., 865 F. Supp. 1416, 1424 (C.D. Cal. 1994) (holding that radio broadcasts were fixed because recording was made simultaneously with transmission). Jessica Litman has remarked that most of the statutory language of the 1976 Act "evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines." Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861 (1987); *id.* at 881 ("Congress's approach to enacting a modern copyright statute reflects an exceptional willingness to adopt particular language *because* industry representatives had agreed on it.").

104. 209 U.S. 1 (1908).

105. H.R. REP. NO. 89-2237, at 44 (1966); *see also id.* ("Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed.'"). The Court in *White-Smith* had held that player piano rolls did not qualify as a fixation because an individual could not perceive the music they contained by looking at them. *White-Smith*, 209 U.S. at 18.

106. *See* H.R. REP. NO. 90-83, at 3, 9-10, 15-16, 24, 96, 98 (1967).

107. S. REP. NO. 93-983, at 104-05 (1974) (on S. 1361); *see also Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the [H.] Comm. on the Judiciary*, 94th Cong., pt. 3, at 2052, 2079 (1975) (briefing papers of the Copyright Office).

108. S. REP. NO. 94-473, at 51-52 (1975) (on S. 22).

109. H.R. REP. NO. 94-1476, at 52-53 (1976) (on S. 22).

110. The definition, as the Committee report noted, divided the material objects into two types: "copies" and "phonorecords." H.R. REP. NO. 89-2237, at 45 (1966) ("Under the new definition, 'copies' and 'phonorecords' together will comprise all of the material objects in which copyrightable works are capable of being fixed."). This distinction was reinforced with the 1971 amendments to the Act that provided protection for sound recordings. Pub. L. 92-140, 85 Stat. 391 (1971) (S. 646); H.R. REP. NO. 92-487, at 5 (1971) ("The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, 'sound

rights attach but not unless and until it is embodied in the latter. This distinction is emphasized by the way in which the law treats live broadcasts. Although the live transmission is what is seen by the viewer, and is what contains whatever creative expression is sufficient for copyright protection, the act of simultaneous fixation (a purely ministerial act if there are no plan for rebroadcast) renders the work copyrightable.

The appearance of fixation as a relevant (and threshold) concept in the Copyright Act thus marked the transition from common law copyright to statutory copyright.[111] Under the 1976 Act, works that have not been "fixed in a tangible medium of expression," such as an extemporaneous speech or dance performance, do not qualify for federal copyright protection, although they may well qualify for state common law protection.[112] This dividing line cannot be explained by reference to the creative or artistic process—an improvisational dance is no different from a highly choreographed performance in this regard. Rather, it is a deliberate decision on the part of Congress to afford protection only to certain types of artistic endeavors—those that can be propertized and thus subject to the economic incentives at the heart of copyright law.

Since the enactment of the 1976 Act, fixation has rarely been a subject of great controversy. In many cases, the question is not what constitutes fixation in the abstract but rather whether the fixation

---

recordings' as copyrightable subject matter are distinguished from 'reproductions of sound recordings,' the latter being physical objects in which sounds are fixed.").

111. *See, e.g.*, H.R. REP. No. 89-2237, at 125 (1966) ("Under section 301 a work would obtain statutory protection as soon as it is 'created' or, as that term is defined in section 101, when it is 'fixed in a copy or phonorecord for the first time.' Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain."). Jessica Litman notes that this extension of federal copyright was "viewed by authors' representatives as a substantial gain." Litman, *supra* note 103, at 885.

112. 17 U.S.C. § 301(b)(1) (2006) (noting that "nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State 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"); *see also* H.R. REP. NO. 89-2237, at 127 (1966) ("[U]nfixed works are not included in the specified 'subject matter of copyright.' They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statutes or common law until fixed in tangible form.").

requirement has been met given the facts of a particular case.[113] Because of the ease of fixing most creative expression, courts in copyright infringement cases can often simply note that the fixation requirement has been met and move on to other issues.[114] One exception to this general phenomenon is the spate of cases that considered the application of the fixation requirement to computer technology. The fixation of computer software accessed from read-only memory (ROM) on the computer's hard drive or from external media (such as a floppy disk) was not in question; courts were quite willing to recognize that the electronic bits and bytes that enabled the software to run had to be fixed in hardware or software, and the statute specifically acknowledges that fixation may require the use of equipment to make the fixed work perceptible.[115] More difficult cases arose, however, with fixations of a more temporary nature: software in a computer's random-access memory (RAM), which disappears when the computer is turned off, or video game displays that exist only during the duration of game play. Thus, in *MAI Systems Corp. v. Peak Computer, Inc.*, the Ninth Circuit held that a maintenance company's loading of the plaintiff's software into a computer's random-access memory in order to "view the system error log and diagnose the problem with the computer" satisfied the statutory definition of fixation because the version of the software in the computer's RAM was "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated

113. *See, e.g.*, Torah Soft Ltd. v. Drosnin, 136 F. Supp. 2d 276, 283 (S.D.N.Y. 2001) (rejecting the argument that use of printouts of database query results are not infringement because results are not fixed: "Although the matrixes do not appear either in the Software or the Database, they are 'fixed' insofar as the output is repeatable whenever the input is identical"); Metrano v. Fox Broad. Co., Inc., No. CV-00-02279 CAS JWJX, 2000 WL 979664, at *4 (C.D. Cal. Apr. 24, 2000) (rejecting plaintiff's assertion that his claim for breach of implied contract was not preempted by copyright law because plaintiff's proposal for television show was fixed in treatment, index cards, and tapes); Zen Music, Inc. v. CVS Corp., No. 98 Civ. 4246 DLC, 1999 WL 605462, at *6 (S.D.N.Y. Aug. 11, 1999) (rejecting defendant's argument that the plaintiff's commercial jingle was unprotected because it was rendered only in performance on the ground that a disputed issue of material fact existed as to the prior recording of a song).

114. *See, e.g.*, London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 171 (D. Mass. 2008).

115. *See* 17 U.S.C. § 101 (2000); *see also, e.g.*, Matthew Bender & Co. v. W. Publ'g Co., 158 F.3d 693, 703 (2d Cir. 1998) (noting that the definition of fixation "ensure[s] that reproductions of copyrighted works contained on media such as floppy disks, hard drives, and magnetic tapes would meet the Copyright Act's 'fixation' requirement").

for a period of more than transitory duration."[116] More recently, the Second Circuit has reaffirmed that the Copyright Act's definition of fixation

> plainly imposes two distinct but related requirements: the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration" (the "duration requirement").[117]

Thus, the court concluded, even though a defendant cable company copied the plaintiff's programming into a buffer for just over a second—long enough to subsequently transfer the programming to a hard disk for a particular subscriber—the buffer copy was not "fixed" pursuant to the statutory definition because the copyrighted works were "not 'embodied' in the buffers for a period of more than transitory duration,"[118] a conclusion that runs contrary to an explanation of the fixation requirement that turns on subsequent use.

Such cases are few, however. Although a matter of some legislative debate and marking a significant shift in the nature of a copyrighted work, the fixation requirement has not been much questioned in the courts. One might wonder, then, on what grounds such a shift could be justified. It is to this question that I now turn.

---

116. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993); *see also, e.g.*, Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 856 (2d Cir. 1982) (noting that a video game, constituting an audiovisual work, is fixed in the "memory devices" (ROM) of the game; the fact that a player's participation changes the sequence of the sights and sound does not mean the work is not fixed because "many aspects of the sights and the sequence of their appearance remain constant during each play of the game"); Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982) (same); Midway Mfg. Co. v. Dirkschneider, 543 F. Supp. 466, 480 (D. Neb. 1981) (noting that a video game is fixed in the game's printed circuit boards, which are "tangible objects from which the audiovisual works may be perceived for a period of time more than transitory").

117. Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).

118. *Id.* at 130. The court noted that the *MAI* court did not specifically discuss whether the RAM copy at issue in that case met the "transitory duration" requirement. *Id.* at 128. The copy saved to the hard disk for the subscriber met the fixation requirement, but the court concluded that the cable company was not liable for direct infringement based on this copy because that copy was made automatically in response to a subscriber's request and therefore did not constitute volitional conduct on the part of the cable company. The plaintiff content owners had not pursued claims of contributory infringement. *Id.* at 121.

B. Justifications

Once the concept of fixation had been proposed as an amendment to the 1909 Copyright Act, it seemed to have found widespread support. The legislative history yields few clues as to what justification Congress found most persuasive. Nevertheless, it is possible to imagine several reasons for requiring fixation as a condition of acquiring copyright.[119]

First, fixation may be seen as a constitutional imperative. The relevant clause in the Constitution authorizes Congress to "promote the Progress of Science ... by securing for limited Times to Authors ... the exclusive Right to their respective Writings."[120] If "writings" is interpreted as meaning, at the very least, something in tangible form, one might conclude that Congress could not constitutionally extend copyright protection to unfixed works, and some commentators during the Copyright Act revision process expressed this opinion.[121] Indeed, in commenting on an earlier draft of the 1976 Act, Melville Nimmer recommended an express statement, either in the legislative history or in the statute itself, that "works of authorship" extended to the full constitutional boundaries of the term "writings."[122] The idea of fixation as a qualification for protection may also be reflected in the fact that a work need not be fixed in order to infringe. It is only the reproduction right that requires the defendant's activity to consist of unauthorized "copies or phonorecords"; the derivative work right contains no such requirement. Thus, for example, an unfixed dramatic interpretation of a novel may infringe the derivative work right or the performance right without infringing the reproduction right.[123] An alternative, and

119. For an excellent discussion of some of these justifications, see Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 716-34 (2003).

120. U.S. CONST. art. I, § 8, cl. 8.

121. COPYRIGHT STUDY NO. 28, *supra* note 84, at 103 (suggesting that Congress could not protect unfixed dance performances under the Copyright and Patent Clause); STAFF OF S. COMM. ON THE JUDICIARY, 89TH CONG., 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS pt. 5, at 303-04 (Comm. Print 1965) [hereinafter 1964 REVISION BILL] (comments of Motion Picture Association of America, Inc.).

122. 1964 REVISION BILL, *supra* note 121, at 313-14.

123. H.R. REP. NO. 89-2237, at 53 (1966) ("[R]eproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form."); 1965 REVISION BILL, *supra* note 92, at 17 ("[I]t is possible for a 'derivative

more plausible, explanation, however, is that "writings" does not refer to the form a work takes but rather simply refers to an author's creative output, as distinguished from the Clause's reference to a scientific "invention."[124] As the Court noted in *Burrow-Giles*, in holding that photographs could constitutionally be protected under copyright law, the use of the word "writing" could not be interpreted to be limited to the "actual script of the author": "By writings in that clause is meant the literary productions of those authors, and [C]ongress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression."[125]

Second, fixation provides a tangible form from which to assess the requirement of originality—the key to authorship under the current Copyright Act. It is not enough for an author to describe his creative process, although that may help on the defense side;[126] rather, a court must be able to compare what the putative author has created to what came before to determine if the "modicum of creativity" that the Court has required exists. Thus, the fixed work is the repository for the author's efforts even if those efforts are not terribly significant.[127] But, as the court in *Time, Inc. v. Bernard Geis* tells us, in some instances the act of fixation—there, the capturing of the Kennedy assassination on film—is really all that the authorial "deposit" amounts to.[128] As Jane Gaines notes,

> [T]he question of who owned the Super 8 mm footage of the Kennedy assassination rested not only upon seeing the hand of *one* amateur filmmaker pushing the button ... but upon the

---

work,' based on a copyrighted work, to be prepared without being fixed in a copy or record .... It is true that a derivative work would not itself be protected by statutory copyright if it were not fixed .... Nevertheless, since there is no requirement under the definition in section 101 that a 'derivative work' be fixed in tangible form, clause (2) of section 106(a) would make the preparation of 'derivative works' an infringement whether or not any copies or phonorecords had been produced.").

124. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

125. *Id.*

126. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 255 (2d Cir. 2006) (crediting, in fair use analysis, artist's description of his creative process).

127. GAINES, *supra* note 67, at 51 ("[T]he investment of personality is the crucial authorial deposit that turns preexisting material and immaterial property into intellectual property.").

128. *See supra* note 37 and accompanying text.

> filmmaker's conferral of 'originality' on the mechanical work by virtue of his intervention in the creative act as a legal subject.[129]

Thus, in some instances, both the act of fixation (in supplying the necessary originality) and the result of fixation (in making the work concrete) provide the basis for copyrightability.

Third, and relatedly, fixation might be said to serve an evidentiary purpose in the infringement analysis. If the goal of the infringement inquiry is to identify whether the plaintiff's work and the defendant's use are "substantially similar," the inquiry becomes much easier if the trier of fact can have the two works before her (in visual or audio form) rather than relying on testimony describing the work.[130] But this justification is not entirely persuasive. First, recall that the definition of fixation requires only that the fixation be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[131] There is no requirement that the first fixation of the work (the "original") exist in any form at the time of the infringement or the litigation; indeed, the post-creation destruction of the original fixation does not affect the status of the copyright in the work at all.[132] Similarly, any medium in which a work is fixed is subject to degradation: paper fades, canvas tears, film melts, and computer memory boggles, with no accompanying degradation of the rights in the work formerly contained in those physical forms.

In addition, when the allegation is that the defendant has created a derivative work that does not reproduce the copyrighted work

---

129. GAINES, *supra* note 67, at 52.

130. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW pt. 4, at 454 (Comm. Print 1964) (comments of George Schiffer) (noting that the fixation requirement means that the work "not be transitory. By 'not transitory,' I mean that the form be not subject to substantial alteration during a reasonable period of time. (Everything ends with a jury question.)."); COPYRIGHT STUDY NO. 28, *supra* note 84, at 94 ("[I]n the absence of a record of the dance movements in some fixed form, it would often be extremely difficult, if not impossible, to determine whether a choreographer's creation was being reproduced in a dance performed by others."); *id.* at 103 (suggesting that the evidentiary rationale is possibly the reason that "most countries (including some that give copyright protection to unrecorded 'oral' works such as speeches) require that choreographic works, to obtain copyright protection, must be fixed in some tangible record").

131. 17 U.S.C. § 101 (2006).

132. Peter H. Karlen, *Worldmaking: Property Rights in Aesthetic Creations*, 45 J. AESTHETICS & ART CRITICISM 183, 186 (1986).

exactly but incorporates it to some extent—a film that uses the characters from a novel—little will be accomplished from the fact-finder's perspective in putting the plaintiff's work and the defendant's work side by side. Rather, the fact-finder as audience member must mediate between the two, extracting from the plaintiff's fixation the protected elements of the plaintiff's work and comparing them in her mind to the defendant's efforts.[133] Judge Hand's levels of abstraction in *Nichols* is an example of this;[134] so is, as Philip Auslander has noted,[135] *Horgan v. Macmillan*, in which the court determined that an unauthorized photograph of a ballet was an infringing derivative of copyrighted choreography.[136]

Fourth, fixation provides a definite starting time for the term of federal protection. Formerly, protection turned on the more amorphous concept of "publication," leading to complicated situations for researchers, who often needed to determine the manner and scope of the work's distribution in order to determine whether the work was subject to copyright.[137] Under current law, a work is protected from its moment of fixation, even if that work is never distributed to the public.[138] This has led to criticism that the ease of

---

133. *Cf.* Auslander, *supra* note 61, at 17 ("Even when a performance is fixed in tangible form, the tangible version has no absolute authority.... In order to enter into legal discourse, the performance must be retrieved from the technological memory-form in which it is preserved and subjected to the vagaries of human memory and interpretation.").

134. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

135. Auslander, *supra* note 61, at 17.

136. Horgan v. MacMillan, Inc., 789 F.2d 157, 162 (2d Cir. 1986).

137. H.R. REP. NO. 89-2237, at 126 (1966) ("Although at one time, when works were disseminated almost exclusively through printed copies, 'publication' could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-[century] communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given 'publication' a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would clear up this chaotic situation."); *see also, e.g.*, Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1213 (11th Cir. 1999).

138. 1965 REVISION BILL, *supra* note 92, at xxii ("Instead of the present dual system of protection of works under the common law before they are published and under the Federal statute after publication, the bill would under section 301 establish a single system of statutory protection for all works whether published or unpublished. The common law would continue to protect works (such as choreography and improvisations) up to the time they are fixed in tangible form, but thereafter they would be subject to exclusive Federal protection under the statute even though they are never published or registered.").

obtaining copyright in a work creates rights that are never desired and so go unenforced: shopping lists and hastily dashed off e-mails are protected just as much as a toiled-over novel,[139] and putative "authors" can benefit from economic rights that motivate neither the creation of the work at issue nor the later attempt at enforcement.[140] In addition, while fixation is, for the most part, an unambiguous event, it merely indicates whether a work will be subject to the federal copyright scheme, not the duration of its copyright term, a much more complicated inquiry.[141]

None of these justifications—which essentially reduce to constitutional dictate and ease of administrability—seem wholly reconcilable with the legislative history or limited in scope. If the goal of the Copyright and Patent Clause is to encourage the production of creative works for the public's benefit, there is no defensible reason to restrict that protection to fixed works; the free rider problem applies to improvisational dance as much as to Broadway musicals (particularly given the omnipresence of video cameras). And if fixation is designed merely to make copyright law easy to manage, then it seems to be ill-suited to the task, particularly given the contemporaneous abandonment of copyright formalities such as registration and notice.

Thus, it seems as if the fixation requirement is, however opaquely, communicating something about what kinds of works are worth protecting: works that can be engaged with as things and commodities rather than as experiences, by a reader, listener, or

---

139. Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURAL CRITICISM 141, 143-44 (Josué V. Harari ed., 1979) (questioning whether every writing of an author should be considered "part of his work"); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 974 (1990) ("Copyright vests automatically in your shopping lists, your vacation snapshots, your home movies, and your telephone message slips."); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation To Shape Copyright Protection*, 69 LA. L. REV. 1, 6-11 (2008) (discussing works that would likely still be created in the absence of copyright).

140. *See, e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 525 (2004) (describing use of copyright law to inhibit discussion of matter of public concern). Publication is still relevant to the length of the term for some works. 17 U.S.C. § 302(c) (2006) ("In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.").

141. *See* 17 U.S.C. §§ 302-305 (2006).

viewer who is removed from the act of creation—in short, who is more consumer than audience.

III. FIXATION AT THE BOUNDARY OF AUTHOR AND SUBJECT

This commodification of the creative process, by simultaneously engendering the "work" that is protected under copyright law and the "author" of that work, functions as both property and authority. First, much like the claims of a patent, fixation defines the "metes and bounds" of the copyrighted work.[142] This is not to say that the scope of rights is certain—far from it, given the vague notions of substantial similarity and fair use. But it does function as a frame encapsulating what it is that constitutes the protected work, providing (again as in patent law) both a way for creators to "teach" their work to others as well as an opportunity for second-generation authors to "write around" the "prior art."

Second, the creation of a fixed work defines its subject within that frame.[143] Thus, in *Burrow-Giles*, once the Court held that the photograph of Oscar Wilde qualified for copyright protection, that particular image of Oscar Wilde became property: something that could be controlled by someone who was not Wilde, sold to others,

---

142. *See* Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory,* 41 STAN. L. REV. 1343, 1380 (1989) (describing how the fixation requirement substitutes for physical boundaries). *Compare, e.g.*, Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 349 (1968) ("Assuming, without deciding, that in a proper case a common-law copyright in certain limited kinds of spoken dialogue might be recognized, it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication. In the conventional common-law copyright situation, this indication is afforded by the creation of the manuscript itself."), *with* Post, *supra* note 71, at 668 ("[B]ecause the law must accurately ascertain the boundaries of the thing exchanged among persons, commodified personality must itself be legally apprehended in terms capable of objective measurement. So, for example, common law copyright locates commodified personality in the physical 'order of words.'") (footnote omitted).

143. *Cf.* COPYRIGHT STUDY NO. 28, *supra* note 84, at 93-94 (noting that prior to invention of method for notating choreography, "the knowledge of the dance creations of a choreographer was largely a matter of memory, and the preservation of a particular dance depended upon one person teaching it to another by word of mouth and demonstration"); KAPLAN, *supra* note 24, at 24 ("In placing a high value on originality, the new literary criticism, I suggest, tended to justify strong protection of intellectual structures in some respect 'new,' to encourage a more suspicious search for appropriations even of the less obvious types, and to condemn these more roundly when found.").

and used for others' expressive purposes without Wilde's specific consent.[144] With works meant to be performed, fixation can be used as a way of attempting (albeit not always successfully) to control later performances or interpretations. Composers and playwrights can convey intended tempos and stage directions in a way more difficult to achieve through performance alone.[145] Fixation is thus the first (and critical) step in making something public at the same time that it is owned. It creates the work as an object of cultural discourse with fixed boundaries, establishing an *ur*-text that confers authority on the validity of what is fixed, even if the other factor in copyrightability—the author's original and creative contribution—may affect how reliable that authority is.[146] Later versions, both authorized and infringing derivative works, are compared to the original work, which retains its position at the origin, as compared to, for example, an oral tradition of storytelling or jazz performances, in which the official "text" becomes whatever accretes

144. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884). Of course, Wilde consented to having his photograph taken and so presumably expected the further exploitation of his image. Moreoever, the act of fixation makes commodification possible even without copyright protection, the difference being that the party fixing the work has no legal rights under copyright to enforce and so must rely on alternative measures, such as contract.

145. José A. Bowen, *The History of Remembered Innovation: Tradition and Its Role in the Relationship Between Musical Works and Their Performances*, 11 J. MUSICOLOGY 139, 140 (1993) ("For the last three hundred years, composers have increasingly tried to exercise more control over the variability of performances by being more specific in everything from pitch content and instrumentation to dynamics and even the physical experience of playing."); *id.* (noting that Beethoven "lived at a time when composers were first learning to protect themselves from performers who freely changed the score" and that "[e]mphasizing the 'text' was an antidote to the virtuoso excesses of the bel canto era"). Of course, the knowledge obtained through fixation may also make infringement more likely. *See* Kenneth B. Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932, 947-48 (1939) ("Classicism assumed that literary excellence had some relation to scholarship—that inborn genius could not result in literature except in conjunction with learning and culture.... Romanticism went to the opposite extreme. Scholarship, it maintained could never result in the production of great literature. The test of genius was originality and only the complete ignoramus could be completely original.").

146. Carl Becker, *Everyman His Own Historian*, 37 AM. HIST. REV. 221, 231-32 (1932) ("[I]n every age history is taken to be a story of actual events from which a significant meaning may be derived; and in every age the illusion is that the present version is valid because the related facts are true, whereas former versions are invalid because based upon inaccurate or inadequate facts."); Buccafusco, *supra* note 17, at 1145 (noting that "[w]ith the dispersion of printed cookbooks and the increasing quantitative precision of recipe writers, recipes became more prescriptive and authoritative").

over time.[147] Accordingly, when creators seek to avail themselves of copyright protection, they must choose a particular performance or creative output that becomes the fixed work. The fact that George Harrison once testified that he regarded a song as "that which he sings at the particular moment he is singing it and not something that is written on a piece of paper"[148] is irrelevant for purposes of copyright law: "[T]hat one moment of performance, frozen in textual form, became the song 'My Sweet Lord' in the eyes of the law."[149] Thus, in a strange sense, copyright grants legal rights as it takes away artistic freedom; it requires the author to say, "*This* is the work."[150]

Certain forms of creative expression resist this claim staking even as they necessarily incorporate it.[151] As José Bowen has noted, in the field of jazz improvisation, two performances of the same work may each bear enough resemblance to the "original" to be identifiable as that work but bear little resemblance to each other.[152]

---

147. Bowen, *supra* note 145, at 151 ("The point of all performance used to be to 'make the tune one's own' or to 'say something new'"; it would never have occurred to either Bach or Miles Davis that the goal of performance was to 're-produce' a work. It was only recently (with the help of Stravinsky and the Early Music Movement) that the performer was demoted from interpreter to technician, and the composer was given legal power over later incarnations of his work.") (footnote omitted).

148. Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180 n.9 (S.D.N.Y. 1976).

149. Auslander, *supra* note 61, at 10.

150. *See* Heymann, *supra* note 38, at 1015 ("Given the exceedingly low threshold of originality required for copyrightability, the focus of the law seems to be not on the decision or effort to create in the first place but on the later decision to assert that the work created is attributable to oneself."); *see also* Jeanne C. Fromer, *Claiming Intellectual Property,* 76 U. CHI. L. REV. 719, 743-52 (2009) (describing copyright law's claiming requirements).

Of course, some artists who work in an improvisational style seek the potential for immortality that fixation promises. *See, e.g.*, EMINEM, SING FOR THE MOMENT (Shady/Aftermath/Interscope 2002) ("That's why we seize the moment, try to freeze it and own it/Squeeze it and hold it, 'cause we consider these minutes golden/And maybe they'll admit it when we're gone/Just let our spirits live on, through our lyrics that you hear in our songs.").

151. Bowen, *supra* note 145, at 141 ("Scores are not musical works. Through the means of notation (and recording) we have learned to translate music into something else (figures, dots, magnetic fields and numbers) which can be reconstituted into music, but these are merely spatial representations; they are not the temporal musical work."); Karlen, *supra* note 132, at 188 ("With literary works the *materia universi* is not regulated by controlling its shaping in the form of notation, e.g., inked letters, because the literary work's aesthetic content does not lie primarily in its sounds or lettering. At most the sounds and letters denote an imaginary shaping of the world by the author.") (footnote omitted).

152. Bowen, *supra* note 145, at 145 (showing two versions of "'Round Midnight" and noting

The "original," in fact, is nothing more than the "first variation, and holds no exceptional authority."[153] As various performers perform the work over time, the work emerges as the consensus of the various performers—what is essential to the work and what is not—in any particular genre. Jazz music is intended to be altered by performers; Beethoven, we have decided, is not.[154] Thus, fixation in music not only creates the "work" to be protected but also helps to define—perhaps primarily to those outside the field—who the "true" author is.[155] Thus, for some types of musical creation, "[r]ecording began as a reproduction of the live act" but now "has all but displaced the live event as primary."[156] Whereas musical performance once focused on the relationship between performer and audience, the focus on fixation from a technological perspective renders the fixed form the "original," or the "authentic,"[157] with the live performance compared to the recorded original as a measure of its authenticity.[158]

The transformation of art to commodity thus makes creative works individually more accessible but detracts from the communal and personal nature of a performance, causing both the birth and

---

that "[b]oth are recognizably *'Round Midnight* to an audience familiar with the work, but they share no common elements").

153. *Id.* at 151.

154. *See id.* at 140.

155. Chris Cutler, *Plunderphonia, in* AUDIO CULTURE: READINGS IN MODERN MUSIC 138, 140 (Christoph Cox & Daniel Warner eds., 2005) ("[T]he whole edifice of western art music can be said, after a fashion, to be constructed upon and through notation, which, amongst other things, *creates* 'the composer' who is thus constitutionally bound to it.") (footnote omitted).

156. *Introduction*, *in* AUDIO CULTURE: READINGS IN MODERN MUSIC 113, 114 (Christoph Cox & Daniel Warner eds., 2005).

157. *See, e.g.*, *id.* at 113 ("For [pianist Glenn] Gould, the perfect performance could only be created in the studio, pieced together from multiple takes. Hence, for Gould, 'the authentic' was a technological product.").

158. *Cf., e.g.,* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* MEDIA AND CULTURAL STUDIES: KEY WORKS 48, 51 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2001) (discussing how mechanical reproduction jeopardizes the authenticity of the original).

the death of the author.[159] In a 1966 essay, the pianist Glenn Gould wrote of the effect on the audience:

> Within the last few decades the performance of music has ceased to be an occasion, requiring an excuse and a tuxedo, and accorded, when encountered, an almost religious devotion; music has become a pervasive influence in our lives, and as our dependence upon it has increased, our reverence for it has, in a certain sense, declined.[160]

From the performer's perspective, Gould continued, fixation changes things as well, encouraging the performer to fix the perfect version of a particular piece—to frame the "authoritative" performance—then move on to the next.[161] Thus, both author and audience engage not with each other but on either side of the fixed work. As musician and producer Brian Eno has written, performance in this way becomes an analytical experience, allowing the listener "to become familiar with details [she] most certainly had missed the first time through, and to become very fond of details that weren't intended by the composer or the musicians,"[162] and encouraging the composer to "think in terms of supplying material that would actually be too subtle for a first listening,"[163] rendering what was formerly an

---

159. *See* ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 249 (1998) (noting similar potential for digital technology); Jane P. Tompkins, *The Reader in History: The Changing Shape of Literary Response*, *in* READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM 201, 214 (Jane P. Tompkins ed., 1980) (noting that once "literature assumes the fixed condition of print," the relationship between author and reader changes: "Instead of taking place within the context of a social relationship, the production and consumption of literature go on independent of any social contact between author and reader. Literature becomes simultaneously both impersonal and privatized. Instead of writing a dedicatory poem on the King's new cellar, the poet writes an 'Ode to Joy.'"); *see also* Roland Barthes, *The Death of the Author, in* IMAGE, MUSIC, TEXT 145 (Stephen Heath trans., 1977).

160. Glenn Gould, *The Prospects of Recording, in* AUDIO CULTURE, *supra* note 155, at 115, 116.

161. *Id.* ("[T]his archival responsibility enables the performer to establish a contact with a work which is very much like that of the composer's own relation to it. It permits him to encounter a particular piece of music and to analyze and dissect it in a most thorough way, to make it a vital part of his life for a relatively brief period, and then to pass on to some other challenge and to the satisfaction of some other curiosity.").

162. Brian Eno, *The Studio as Compositional Tool*, *in* AUDIO CULTURE, *supra* note 155, at 127, 127.

163. *Id.*

"arbitrary collision of events" something that became "very meaningful on relistening."[164]

Thus, fixation gives the work not only legal significance but historical significance—it enables copyrighted works to become "themselves 'facts' or events of history."[165] The random encounter on the street formerly disappeared out of memory, but its fixation on a cell phone camera transforms it into a moment of history, into something deserving of value and study because of its permanence.[166] As Linda Scott has written:

> Historical records and anthropological studies show that the first, most basic outcome of the institution of writing is the exteriorization of knowledge. While the collective wisdom of oral cultures is limited to what can be remembered and recounted, a literate culture can store its knowledge by putting it on scrolls and in books. Once knowledge is reliably stored outside the mind, it can be accessed at will. Thus, the emphasis of learning is no longer on memory, as in oral cultures, but on *study*. As soon as knowledge can be accessed for the purpose of study, facts and thoughts can be categorized, juxtaposed, and otherwise arranged, producing a manner of analytical and critical thinking that is both peculiar to literacy and radically different from oral cultures.[167]

---

164. *Id.* at 128; *cf.* McClurg, *supra* note 59, at 1042 ("[B]ecause of this permanent record [of photography], information may be revealed that would not be noticed by transitory observation with the naked eye."); *id.* at 1043 (noting that a photograph "permits dissemination of an image not just to a larger audience, but to *different* audiences than the subject intended").

165. KAPLAN, *supra* note 24, at 68 (giving as an example "the quotation in stories or essays of old copyrighted song-lyrics as means of recalling the spirit of the times").

166. As Louis Menand, discussing the arbitrary nature of recording life's events, wrote:

> Dickens's story, first told to his biographer John Forster, about his experience in the blacking factory—once these 'pivotal moments' or primal episodes get established in the literature, they acquire an unstoppable explanatory force. But what if ... Dickens later had a *really good* experience in a bluing factory, and never told anyone about it?

Louis Menand, *Lives of Others*, NEW YORKER, Aug. 6, 2007, at 64, 66.

167. Linda M. Scott, *Spectacular Vernacular: Literacy and Commercial Culture in the Postmodern Age*, 10 INT'L J. RES. MARKETING 251, 254 (1993). *But see* SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 34 (2005) (noting possible "positive dividends" from emphasis on oral over written word, including "immediacy of transmission, the creation of living memory, the opportunity for fluidity and cultural evolution, and freedom from the permanent distortion that may occur through fixation").

Similarly, in an 1859 article in the *Atlantic Monthly*, Oliver Wendell Holmes, the physician, writer, and father of the Supreme Court justice, wrote, "Theoretically, a perfect photograph is absolutely inexhaustible. In a picture you can find nothing which the artist has not seen before you; but in a perfect photograph there will be as many beauties lurking, unobserved, as there are flowers that blush unseen in forests and meadows."[168] This possibility for extended scrutiny, Holmes wrote, was coupled with the propertization and commercialization of the image:

> *Form is henceforth divorced from matter.* In fact, matter as a visible object is of no great use any longer, except as the mould on which form is shaped. Give us a few negatives of a thing worth seeing, taken from different points of view, and that is all we want of it. Pull it down or burn it up, if you please.[169]

Upon fixation, then, a subject becomes not only an object of commodification but also static. Whatever later variations or interpretations might arise are seen in contradistinction to the authority of the original, an authority it obtains through the value, however slight, conferred by fixation.[170]

Two examples of biography further illustrate this potential. The first involves novelist Charlotte Brontë. After Brontë's death, Victorian writer Elizabeth Gaskell was recommended by Brontë's friend, Ellen Nussey, as the appropriate person to write Brontë's biography.[171] Nussey had been perturbed by an article she had read

---

168. Oliver Wendell Holmes, *The Stereoscope and the Stereograph*, ATLANTIC MONTHLY, June 1859, at 738, 744 [hereinafter Holmes, *The Stereoscope and the Stereograph*]. Holmes continued this theme in a subsequent article. *See* Oliver Wendell Holmes, *Doings of the Sunbeam*, ATLANTIC MONTHLY, July 1863, at 1.

169. Holmes, *The Stereoscope and the Stereograph, supra* note 168, at 747.

170. *Cf., e.g.*, COOMBE, *supra* note 159, at 256 (noting that "[c]opyright law was critical in normalizing and elevating particular forms of writing"); CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 237 (2008) ("An interesting effect of digital archiving is that much casual conversation is now captured and stored for posterity, so it is possible to look back in time and find simple messages whose importance becomes obvious only with the passage of time."); Roslyn Sulcas, *All the Right Moves*, N.Y. TIMES, Aug. 30, 2007, at E1 (noting that Rudolf van Laban, a developer of a system of choreography notation, aimed to "'give dance a written form so that it can be reproduced'" without which "'dance would never be a respected art form'" (quoting Nancy Allison of the Dance Notation Bureau)).

171. CLEMENT SHORTER, THE BRONTËS AND THEIR CIRCLE 16 (1914).

about Brontë and hoped that Gaskell might set the record straight while also burnishing Gaskell's own literary reputation.[172] In this sense, she viewed Gaskell much as a "family retainer, whose job it was to ensure that nothing went wrong with the literary funeral arrangements."[173] Gaskell took on the task with deliberateness. She moved quickly to gather source material and establish relationships with those in a position to help her, writing to Brontë's publisher, George Smith, two months after Brontë's death to propose that she be named Brontë's biographer.[174] Intent on redeeming Brontë as a subject and establishing her as a Victorian paragon of virtue, Gaskell minimized or ignored biographical details that detracted from Gaskell's vision of her subject.[175] (Brontë's affair with her teacher, Constantin Heger, during her stay in Brussels is one such example.) As an accomplished novelist, Gaskell could approach the biography as she did her other endeavors: treating her subject as a character, selecting which details to include and which to omit, and shaping the biographer's characters to her own ends.[176]

---

172. Ellen Nussey wrote to Brontë's widower, Arthur Nicholls:

> I wish Mrs. Gaskell, who is every way capable, would undertake a reply, and would give a sound castigation to the writer.... She valued dear Charlotte, and such an act of friendship, performed with her ability and power, could only add to the laurels she has already won.

Id. at 10-11.

173. Robert Skidelsky, *Only Connect: Biography and Truth, in* THE TROUBLED FACE OF BIOGRAPHY 6 (1988).

174. June Foley, *"The Life of Charlotte Brontë" and Some Letters of Elizabeth Gaskell*, 27 MODERN LANGUAGE STUD. 37, 40-42 (1997).

175. *See, e.g.*, Alan Shelston, *Introduction to* ELIZABETH GASKELL, THE LIFE OF CHARLOTTE BRONTË 35 (Alan Shelston ed., Penguin Books 1975) ("Certainly the external influences for suppression were strong, but again one senses that Mrs. Gaskell used them almost as a means for excluding material which was inconsistent with her view of her heroine."); *Charlotte Brontë's Tragedy*, THE TIMES (London), July 29, 1913, at 9 (noting that Brontë's letters to Heger had "for the biographer's particular purpose been garbled in a manner rare in a frankly and candidly conceived narrative"). Gaskell noted in a letter to George Smith, Brontë's publisher, that she would tell only "what was right & fitting" in the biography; the letter indicates that she had previously indicated that she would tell "all" but crossed this word out. THE LETTERS OF MRS. GASKELL 348 (J.A.V. Chapple & Arthur Pollard eds., Univ. of Manchester Press 1966); *cf.* John Halperin, Letter, NEW YORKER, Apr. 21, 2008, at 8 ("[I]n any sort of history-writing (including autobiography), there will be some holding back, some obfuscation of facts that don't fit the writer's ideas about his subject. He can refer to what supports his view and leave out the rest.").

176. Patrick Brontë, Charlotte's father, remarked on the similarity between Gaskell's biography and a Gaskell novel in a letter to Gaskell about his portrayal in the biography: "I am, in some respects, a kindred likeness to the father of Margaret in *North and South*." Letter

The propertization of Brontë as subject also enabled her to become an object of control to others besides her biographer. It was Patrick Brontë, Charlotte's father, who requested that Gaskell take on the task of "writing his daughter's life,"[177] and it was Arthur Nicholls, Charlotte's widower, who worried about the possibility of letters "passing ... into hands and under eyes for which they were never written," as Brontë wrote to her friend Nussey, noting that Nicholls wished Nussey to burn all letters that she had ever received from Brontë.[178] (Here, too, the fixed form represents authority; Nicholls apparently felt that if the letters were destroyed, it would be as if they never existed at all.) As a result, Gaskell felt the need to modify her portrait of Brontë to accommodate the concerns of the men who sought to control her image (and, by association, their own).[179]

A more modern example was recently chronicled by Malcolm Gladwell.[180] In early 2004, Dorothy Lewis learned of a Broadway play called *Frozen*, written by Bryony Lavery.[181] Lewis, a psychiatrist specializing in the study of serial killers, had been told by friends that the play would be of interest to her given one aspect of its subject matter: a psychiatrist who engages with a patient who

---

from Patrick Brontë to Elizabeth Gaskell (Nov. 3, 1856), 8 BRONTË SOCIETY TRANSACTIONS, 99-100, *reprinted in* THE LIFE OF CHARLOTTE BRONTË, *supra* note 175, at 26. Gaskell used similar language in talking about Brontë. THE LETTERS OF MRS. GASKELL, *supra* note 175, at 347-48 ("[A]nd the time may come when her wild sad life, and the beautiful character that grew out of it may be made public.").

177. Letter from Elizabeth Gaskell to John Greenwood, *in* THE LETTERS OF MRS. GASKELL, *supra* note 175, at 362.

178. CLEMENT KING SHORTER, 2 THE BRONTËS: LIFE AND LETTERS 379 (1908) (letter from Brontë to Ellen Nussey). Brontë continued, "As to my own notes, I never thought of attaching importance to them or considering their fate, till Arthur seemed to reflect on both so seriously." *Id.* at 380.

179. As Gaskell wrote to publisher George Smith:

> I shall have now to omit a good deal of detail as to her home, and the circumstances which must have had so much to do in forming her character. All these can be merely indicated during the lifetime of her father, and to a certain degree in the lifetime of her husband.

ARTHUR POLLARD, MRS. GASKELL: NOVELIST AND BIOGRAPHER 144 (1965). Gaskell's implication, evidently, was that the deaths of the two men would allow her a greater degree of control over their lives as subjects.

180. Malcolm Gladwell, *Something Borrowed*, NEW YORKER, Nov. 22, 2004, at 40.

181. Bryony Lavery, *Frozen*, *in* THE SUSAN SMITH BLACKBURN PRIZE: SIX IMPORTANT NEW PLAYS BY WOMEN FROM THE 25TH ANNIVERSARY YEAR 149 (Emilie de Mun Smith Kilgore ed., 2004). The play was nominated for a Tony Award in 2004.

has killed a young girl.[182] After she was asked by a theater mounting a production of the play to participate in a post-show discussion, Lewis requested a copy of the script.[183] The more she read of the script, the more she recognized elements of her own life: events that had taken place, jobs she had held, studies she had conducted.[184] As Gladwell quotes Lewis, her reaction to this adaptation of her life was very personal, much like an invasion of privacy, but described in property-like terms: "'I felt robbed and violated in some peculiar way. It was as if someone had stolen—I don't believe in the soul, but, if there was such a thing, it was as if someone had stolen my essence.'"[185] And yet, as one commentator noted, the character of Agnetha Gottmundsdottir was not Dorothy Lewis or, rather, she was at most the character of "Dorothy Lewis"—a creation of Lavery's artistic endeavors living out scenes that Lewis did not.[186]

Despite feeling as if she had been unwillingly transformed into a subject, Lewis responded by attempting to make herself her own author. After hiring a lawyer, she compiled a list of the similarities between *Frozen* and her own book, *Guilty by Reason of Insanity*,[187] as well as a list of nearly identical passages from *Frozen* and a profile that Gladwell had written about Lewis in the *New Yorker* seven years earlier.[188] She then asked Gladwell if he would assign her the copyright in his article in order to strengthen her legal case.

---

182. *Id.* at 184; Gladwell, *supra* note 180, at 40.

183. Gladwell, *supra* note 180, at 40.

184. *Id.*

185. *Id.*

186. Deborah Friedell, *Cold Hard Fact*, THE NEW REPUBLIC (ONLINE), Oct. 5, 2004, http://209.212.93.14/doc.mhtml?i=online&s=friedell100504 ("Agnetha may speak Lewis's thoughts about the criminal mind, but she exists as a character on the stage only because the playwright has put her into scenes of her own imagining.").

187. DOROTHY OTNOW LEWIS, GUILTY BY REASON OF INSANITY: A PSYCHIATRIST EXPLORES THE MINDS OF KILLERS (1998).

188. Malcolm Gladwell, *Damaged*, NEW YORKER, Feb. 24, 1997, at 132. *Compare, e.g.*, *id.* at 134 ("'I just don't believe people are born evil,' she said. 'To my mind, that is mindless. Forensic psychiatrists tend to buy into the notion of evil. I felt that that's no explanation. The deed itself is bizarre, grotesque. But it's not evil. To my mind, evil bespeaks conscious control over something. Serial murderers are not in that category. They are driven by forces beyond their control.'") (quoting Lewis), *with* LAVERY, *supra* note 181, at 218 ("I just don't believe people are born evil/To my mind, that is mindless./Forensic psychiatrists tend to buy into the notion/of evil./But I feel that's no explanation./The deed itself is bizarre, grotesque./But it's not evil./To my mind, evil bespeaks conscious control/over something./Serial murderers are not in that category./They are driven by forces beyond their control.").

(Gladwell initially agreed, then declined, as he chronicled in a second *New Yorker* article.[189])

Thus, despite feeling what would typically be described as an invasion of privacy, Lewis (or her lawyer) believed that her stronger legal case rested on copyright infringement—not that Lavery had "stolen [Lewis's] essence," but that she had stolen Gladwell's words about Lewis's essence.[190] By writing a profile of Lewis in the *New Yorker*—by fixing a particular version of Lewis's life—Gladwell gained a property interest in that version, an interest that, at least in one respect, was superior to Lewis's.[191]

That property interest, like Gaskell's interest in Brontë's life, diCorcia's interest in Nussenzweig's image, and Chang's friend's interest in her photograph, all born of fixation, embodies the principle that using an author's art without permission is a greater fault than using a subject's life without permission.[192] This is not necessarily inappropriate—indeed, it is necessary if many works of nonfiction are to exist at all—but it represents an important focal point that has implications beyond biographical works. Fixation makes a subject a "work," which must have an "author." It conveys a certain amount of authority on the work because of its fixed nature, creating, in some instances, a superior version of history.[193] We believe a work, whether written, photographed, or composed, to have some degree of value because it is fixed—its default mode is authoritative. Our awareness of technology such as Photoshop and Auto-Tune notwithstanding, we must still remind ourselves that fixation causes creativity to become "suspended between the

189. Gladwell, *supra* note 180, at 42.

190. *Id.* at 41.

191. As Gladwell noted, "Lewis had told me that she 'wanted her life back.' Yet in order to get her life back, it appeared, she first had to acquire it from me. That seemed a little strange." *Id.*

192. The qualification of "art" is important, as this is often the dividing line between protected activity and unlawful appropriation of identity. *See supra* note 5. Fixation may also play a role in making something "art." *See* SONTAG, *supra* note 40, at 21 ("Aesthetic distance seems built into the very experience of looking at photographs, if not right away, then certainly with the passage of time. Time eventually positions most photographs, even the most amateurish, at the level of art.").

193. *See* Gladwell, *supra* note 180, at 47-48 ("Dorothy Lewis says that one of the things that hurt her most about 'Frozen' was that Agnetha turns out to have had an affair with her collaborator, David Nabkus. Lewis feared that people would think she had had an affair with her collaborator, Jonathan Pincus.").

discourses of science and art, providing a dual collision with both empirical and aesthetic truth."[194] Thus, as fixation births the required author (who is defined by the "work of authorship" she creates),[195] it makes certain aspects of "reality" more invisible, including the nature of the creative process and its effect on its subjects.[196]

All of this is subordinated to fixation's chief function: to enable the work to be commoditized, transferred, and alienated.[197] Until a work becomes a thing,[198] it is difficult for it to become an article of

194. George Baker, *Photography Between Narrativity and Stasis: August Sander, Degeneration, and the Decay of the Portrait*, 76 OCTOBER 72, 83 (1996); *see also* Allan Sekula, *The Traffic in Photographs*, 41 ART J. 15, 15 (1981) ("[F]rom 1839 onward, affirmative commentaries on photography have engaged in a comic, shuffling dance between technological determinism and auterism, between faith in the objective powers of the machine and a belief in the subjective, imaginative capabilities of the artist."); Alex Williams, *I Was There. Just Ask Photoshop*, N.Y. TIMES, Sunday Styles, Aug. 17, 2008, at 1, 12 (noting that, in India, "it is a tradition to cut-and-paste head shots of absent family members into wedding photographs as a gesture of respect and inclusion.... 'It's a Western sense of reality that what is in front of the lens has to be true.'" (quoting Mary Warner Marien, an art history professor at Syracuse University)).

195. 17 U.S.C. § 102(a) (2006) (noting that copyright subsists in "original works of authorship").

196. K.J. Greene reminds us to pay particular attention to these issues with respect to race. K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1201 (2008); *see also, e.g.*, SCAFIDI, *supra* note 167, at 82 (describing debate over whether "images of female sexuality commodified as pornography ... [are] acceptable expression or whether [the practice] degrades and endangers all women"); *id.* at 103, 107-08 (describing Pueblos' opposition to unauthorized photography of ceremonial dance as an "interruption, defilement, and commodification of a religious ritual"). Some commentators are sanguine about this development. Gould, *supra* note 160, at 125 ("The most hopeful thing about this process—about the inevitable disregard for the identity factor in the creative situation—is that it will permit a climate in which biographical data and chronological assumption can no longer be the cornerstone for judgments about art as it relates to environment. In fact, this whole question of individuality in the creative situation—the process through which the creative act results from, absorbs, and re-forms individual opinion—will be subjected to a radical reconsideration.").

197. Indeed, as Jessica Litman notes, "[t]he chief justification for so thoroughly commodifying rights in creative output is that it facilitates their transfer and exploitation." Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1297 (2000).

198. *See* Post, *supra* note 71, at 667-68 ("At the most general level, the property created by common law copyright and the right to publicity transforms personality into a *thing* or an object whose value is to be determined by reference to the institution of the market. Hence personality is commodified and becomes 'something in the outside world, separate from oneself.'" (quoting Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982)) (footnote omitted)); *see also* Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381 (2005).

commerce.[199] Once a work is propertized, the formerly intimate relationships between author and subject, and between author and audience, become depersonalized.[200] Indeed, the importance of fixation to commodification can be seen starkly in the nature of the remedy the law provides. Copyright, in its utilitarian mode, aims to replace the income stream lost to the plaintiff by infringement. Privacy, by contrast, aims to monetize the harm felt by the plaintiff, to translate the invasion into damages.[201] This disaggregation of the individual into persona and person is the same disaggregation that provides the basis for a right of publicity. This is why Dorothy Lewis's action in seeking to acquire Malcolm Gladwell's copyright feels initially incongruous: she was seeking to replace the personal harm she felt with a commercial one and thus was required to accept herself as a subject that could be owned.[202]

---

199. *See, e.g.*, STAFF OF S. COMM. ON THE JUDICIARY 86TH CONG., STUDY ON THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS 60 (Comm. Print 1961) ("If the creator should drop dead immediately thereafter, the product of his intellectual and artistic labor in either case is there for inspection, examination, identification, preservation, transfer, identical duplication, physically in duplicate recordings as well as by identical performances. It is genuinely an article of commerce."). Of course, fixation does not mandate commercialization, given that there is no requirement that an author distribute the work that he has fixed. Accordingly, an author who writes a biography and locks it in his desk drawer receives just as much copyright protection as the blogger whose writing is seen by thousands. The manuscript in the desk drawer is unlikely to be infringed, but that is a separate matter.

200. GAINES, *supra* note 67, at 82 ("The photographic image may be owned by a second, succeeding party by virtue of the property-producing individuality of the first.") (discussing *Gross v. Seligman*).

201. *Cf.* Keene v. Wheatley, 14 F. Cas. 180, 200 (E.D. Pa. 1861) ("In the case of a limited publication, the purpose of the redress is to maintain the privacy which the restrictive condition was intended to secure."); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-60 (1982) ("[A]n object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.... The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value.").

202. Whether Lewis could have succeeded is open to question. *Cf., e.g.,* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring) ("It has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity.").

CONCLUSION

Under U.S. copyright law, fixation creates both the author—the one who fixes or authorizes fixing—and the work—the thing that is created upon fixation. Prior to the act of fixation, a creator might be a performer, a visionary, or an artist, but she is not an author under U.S. copyright law.[203] An intellectual product may be a conception, a performance, or a speech, but it is not a work until it is fixed. In an ever more technological world, the importance of fixation to the boundary between personality and commodity, between public and private, cannot be overstated.[204] What was ephemeral, the Internet makes at once more permanent and more unstable.[205] As Brian Eno points out, with the move from records to audiotape, "the performance isn't the finished item[;] the work can be added to in the control room, or in the studio itself."[206] Even technological neophytes have ready tools at hand for altering reality[207] and websites eagerly waiting to distribute their work to the world.[208] Facebook, with its feature enabling users to "tag" subjects in posted photos (and enabling those subjects to remove those tags), is a well-trod battleground for disputes about control of image.

Indeed, the explosion of reality television is a natural outgrowth of this dichotomy. Once a term reserved for the practice of recording real-life events as they happened and then replaying them for

---

203. At least, she is not one with any legal rights.

204. Of course, an artist can incorporate another's life in an unfixed performance, such as an improvised stand-up comedy routine. But fixation, by giving the creator legal rights in the work, immediately positions the subject as oppositional. Indeed, it is possible that the subject's ability to respond or recontextualize the now-copyrighted work will itself be limited, depending on the scope of the fair use doctrine.

205. *Cf.* J.D. Lasica, *The Net Never Forgets,* SALON, Nov. 25, 1998, http://archive.salon.com/21st/feature/1998/11/25feature.html ("Once, words were spoken and vanished like vapor in the air; newsprint faded and turned to dust. Today, our pasts are becoming etched like a tattoo into our digital skins.").

206. Eno, *supra* note 162, at 128-29.

207. *See* Williams, *supra* note 194, at 1, 12 ("In an age of digital manipulation, many people believe that snapshots and family photos need no longer stand as a definitive record of what was, but instead, of what they wish it was."); *id.* ("The motivation to craft an idealized image of oneself or one's family is even greater in an era when the family photo album is migrating from the closet to the Internet.").

208. *See, e.g.*, Emily Nussbaum, *Say Everything*, NEW YORK, Feb. 12, 2007, *available at* http://nymag. com/news/features/27341/.

television audiences (such as arrests and emergency situations), the term now primarily refers to programs in which the participants are not professional actors but appear on the show willingly—the entire point of participating is to appear on the show. Reality television transforms the actions of "real" people into the form of dramatic narrative (sometimes with some scripted assistance), shifting control to the producers of the program. Where we once had actors playing characters, we now have "real" people playing a reified and fictionalized version of themselves.[209]

It is perhaps apt that one of the most prevalent metaphors for photography is that it allows the photographer to "capture" an image.[210] The fixation of an individual as the subject of the photograph ossifies a particular moment in time, transforming that individual into a static subject. Unlike film, which also "captures" its subject, a photograph has greater potential for acontextuality in that it may not tell its viewer the location or circumstances of its creation. "[T]he photographic lexis," notes one commentator, "has no fixed duration[;] ... it depends, rather, on the spectator, who is the master of the look, whereas the timing of the cinematic lexis is determined in advance by the filmmaker."[211]

It is this very ability to play with creation—both invented and reinvented—that thrills many on the copyright side of the line just as it concerns those on the privacy side of the divide.[212] The more our lives become fixed, the less we cease to be the sole authors of our own lives and the more we become the authors of the lives of others. Glenn Gould recognized this in 1966:

---

209. JOHN W. OLLER, JR. & J. ROLAND GIARDETTI, IMAGES THAT WORK: CREATING SUCCESSFUL MESSAGES IN MARKETING AND HIGH STAKES COMMUNICATION 76-77 n.15 (1999) ("[E]ven if President Clinton plays himself in a fictional role in a movie, his actually being the President does not render the fiction any more true than it would be if some other actor played the President.... When Forrest Gump is shown shaking hands with famous persons, carrying a friend out of a Vietnamese jungle, etc., the events may appear real enough, but the fictional portrayal can no more change the actual events of the past than calling a piece of glass a diamond can turn it into one. The relations between fiction and fact are exactly as real as the fiction itself and no more. They are fictional.").

210. Christian Metz, *Photography and Fetish*, 34 OCTOBER 81, 82 (1985) ("It is easy to observe ... that photography very often primarily means souvenir, keepsake.").

211. *Id.* at 81.

212. *See, e.g.*, SOLOVE, *supra* note 12, at 4 (expressing concern about the permanence of information on the Internet and its effect on personal autonomy).

> [T]he ability to obtain in theory an audience of unprecedented numbers obtains in fact a limitless number of private auditions. Because of the circumstances this paradox defines, the listener is able to indulge preferences and, through the electronic modifications with which he endows the listening experience, impose his own personality upon the work. As he does so, he transforms that work, and his relation to it, from an artistic to an environmental experience.[213]

Fixation thus ultimately works the curious effect of transferring true authorship from the creator to the audience. For an unfixed work, the "work" is created by the artist at the moment of performance. Although the audience may subsequently react, the work exists at the moment of reception. A fixed work, however, is simply a "blueprint."[214] It awaits realization from a reader, a musician, or a performer to make the artistic communication complete. In a strange irony, then, the moment at which a work is "fixed" is both its first and last moment of stability.

213. Gould, *supra* note 160, at 122.

214. Cutler, *supra* note 155, at 141 ("A score was an individual's signature on a work. It also made unequivocal the author's claim to the legal ownership of a sound blueprint. 'Blueprint' because a score is mute and others have to give it body, sound, and meaning.").