Are Gardens, Synthetic DNA, Yoga Sequences, and Fashions Copyrightable?

by

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Copyright is said to "subsist" under U.S. law in "original works of authorship that have been fixed in a tangible medium of expression…." The statute enumerates eight categories of works that qualify for protection: literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, sculptural and graphic works, motion pictures and other audiovisual works, sound recordings, and architectural works. Because the meta-category, "works of authorship," is said to "include" these eight, the enumerated categories would seem to be illustrative, not exhaustive. This implies that other types of intellectual creations might be eligible for protection as long as they meet copyright's originality and fixation requirements. But how far beyond the enumerated categories do U.S. copyrights extend?

Some enterprising individuals have sought copyright protection in unenumerated subject matters. Consider the following examples:

Chapman Kelley claimed copyright in a garden he designed for Chicago's Grant Park known as "Wildflower Works." After the Chicago Park Department decided to reconfigure and downsize the garden ten years after the initial planting, Kelley filed a lawsuit to challenge the modified garden as a mutilation of his work in violation of the Visual Arts Rights Act (VARA). An appellate court rejected Kelley's claim, concluding that the garden was not a work of authorship eligible for U.S. copyright protection. In the court's view, VARA extends its protection only to works of visual art that are themselves eligible for copyright protection, so Kelley lost his lawsuit.

Drew Endy is a pioneering researcher in the field of synthetic biology. He and his fellow bioengineers have developed techniques for constructing novel strands of DNA that cause living organisms to behave differently than they would in their natural state. These engineers can also transform the DNA strands from a form in which the DNA can be processed with the aid of a computer and can transform machine-processible forms of DNA into living biological materials. Endy analogizes synthetic biology artifacts to computer programs and believes that they should be as eligible for copyright protection as software is. Copyright may seem desirable to synthetic biologists because it is easy to obtain, for it attaches automatically by operation of law, and because it would enable synthetic biologists to make their creations available under Creative Commons licenses. One company has tried to register a synthetic biology artifact with the Copyright Office. The Office refused this request and the firm has reportedly appealed.

Bikram Choudhury devised a sequence of 26 yoga positions and 2 breathing exercises some years ago. He wrote some books and prepared videos to explain and illustrate the sequence. After some yoga instructors made unauthorized uses of these sequences in their classes, Choudhury sought and obtained a copyright registration certificate that he claimed covered the sequence of positions. He has insisted that other instructors could only lawfully perform the

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protected sequence if they obtained a license from him. To challenge Choudhury's claim, Open Source Yoga Unity (OSYU) asked a court to declare that sequences of yoga positions are ineligible for copyright protection and moved for summary judgment, but the court denied it.

Anna Sui is one of the prominent fashion designers who have been enraged at retail outlets such as Forever 21 that copy her fashion designs. Fashionable clothing, shoes, purses, and eyeglasses do not enjoy copyright protection in the United States. Past efforts to extend copyright protection to dress designs through common law interpretation of existing law have been unavailing. Several times in recent years, certain fashion industry leaders have urged the U.S. Congress to extend copyright (or at least copyright-like) protection to fashion because offshore manufacturers have been "pirating" the designs of these fashion leaders. Congress has held hearings on whether to adopt legislation of this sort. The bills have yet to pass.

Among the other unenumerated subject matters that some have argued either might or should be eligible for copyright protection are these: food, perfume, tattoos, jokes, magic tricks, computer programming languages, XML schemas, and semiconductor chip designs.

The literature discussing the "works of authorship" concept has thus far focused on particular types of creations (e.g., gardens or synthetic DNA). There has been no systematic effort to analyze "works of authorship" as a meta-category or to articulate what criteria should be used to determine whether unenumerated creations fall within it. This article seeks to fill that gap.

Part I traces the historical evolution of copyright subject matter rules, mainly concentrating on U.S. law, but with some consideration of copyright subject matter rules elsewhere. Part II reviews some mid-19th to mid-20th century cases that refined the concept of copyright subject matter. Part III discusses how the U.S. conception of copyright subject matter was transformed in the course of the copyright revision process that ultimately led to adoption of the Copyright Act of 1976 ("1976 Act"). Part IV offers five criteria that courts should employ in judging whether an unenumerated creation is or should be eligible for U.S. copyright protection. It posits that limits on copyright subject matter often serve important functions, including retention in the public domain of subject matters that do not require copyright incentives to bring them into existence and maintaining meaningful boundaries between copyright and other forms of intellectual property protection (especially patents). It explores how well gardens, synthetic DNA, yoga moves, and fashion, among other categories of unconventional creations, fare in light of these criteria.