

**IN THE BLINK OF AN EYE: NAVIGATING THE MURKY WATERS OF ORIGINALITY AND  
FIXATION OF  
'EPHEMERAL WORKS'**

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**ABSTRACT**

*In contemporary times, the term 'work' in the context of copyright has undergone tremendous evolution to make space for all kinds of work, irrespective of the medium used. Under the broader dimensions of literary, artistic, musical and dramatic works along with choreography and sound recording; works hitherto unheard of are seeking protection under copyright laws across jurisdictions. Even the Berne Convention, 1886 allows for a wide interpretation of what constitutes copyrightable material. The copyright lies in work only if it is "original" and fulfills the criteria of "fixation" as are statutorily mandated in multiple countries. Ephemeral Works like living art, food plating, landscape art, choreography etc. are works of a transitory nature. They are fleeting and may ultimately decay or perish. Even though these works qualify the subjective test of 'originality', such works come into collision with the requirement of "fixation" as a condition for copyright protection. Common law jurisdictions require works to be "fixed in a tangible medium/embodied in a form that can be perceived as a condition for copyright protection" which comes into conflict with the transitory nature of these works. But civil law countries like France, Germany and the Netherlands have a lower threshold for fixation and construe the term liberally to mean that "mere human perception" is enough. In such countries, fixation has an evidentiary purpose. The very relationship between originality and fixation is at odds, not only in the context of ephemeral works but even in general. The idea is to reconcile this conflict as both originality and fixation are important considerations for the copyright to subsist and have their own specific purposes in line with the ultimate aim of copyright protection, and the emergence of newer forms of art are only adding to the confusion.*

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## I. INTRODUCTION

Article 2(1) of the Berne Convention for The Protection of Literary and Artistic Works, 1886 (“Berne Convention”) enumerates the subject-matter of ‘Protected Works’, the scope of which is limited to *literary* and *artistic* works only. However, Section 2(y) of the *Copyright Act, 1957* (“1957 Act”) defines ‘work’ as follows:

“Work” means any of the following works, namely: —

- (i) a literary, dramatic, musical or artistic work;
- (ii) a cinematograph film;
- (iii) a sound recording.

The Berne Convention mandates minimum standards of protection for literary and artistic works which shall include “every production in the literary, scientific, and artistic domain, whatever may be the mode of its expression.” The term ‘every production’ would certainly include ephemeral works, the subject-matter of this paper. The phrase “whatever may be the mode of its expression” strengthens this interpretation. Thus, the Convention allows the broadest coverage known to artists, irrespective of the media used.<sup>1</sup>

In contemporary times, the term ‘work’ has undergone tremendous evolution to make space for all kinds of work, irrespective of the medium used. Under the broader dimensions of literary, artistic, musical and dramatic works along with choreography and sound recording, works hitherto unheard of, are seeking protection under copyright laws. The copyright lies in work only if it is *original* and fulfils the criteria of *fixation*, as is statutorily mandated by many common law countries, including India, which make a specific mention of fixation for ‘dramatic works’<sup>2</sup> and of other works, through case law jurisprudence. However, this requirement of *fixation* is liberally construed in civil law countries.<sup>3</sup> Especially in the domain of artistic works, the diversity as to

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<sup>1</sup> Caroline M. Reeb, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L. 41, 59 (2011)

<sup>2</sup> The Copyright Act, 1957, § 2(h), No. 27, Acts of Parliament, 1957 (India). [“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film.]

<sup>3</sup> Directive 2001/29/EC, of the European Parliament and the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information of Society, 2001 O.J. (L 167/10). [The Copyright Directive states that to be eligible for copyright protection, the creation in question must be able to be classified as a work. For it to be classified as a work there are two requirements: it must be an original intellectual creation, and there must be an expression of that creation.]

what constitutes the subject matter of copyright is expanding, with the emergence of newer art forms like conceptual arts; of which ephemeral works is a subset.

Ephemeral Works are works of a transitory nature, which are *fleeting*, that appear as installations and may ultimately, decay or perish. By and large, they fall under the domain of ‘artistic works’ and more specifically, the category of ‘any other work of artistic craftsmanship’ found under both the Indian and the UK law and interpreted by varied jurisdictions.<sup>4</sup> Ephemeral works of art, like *living art*, use natural materials as their medium, such as flowers, leaves, ice, pine cones, twigs, rocks and stones, among other natural objects. Andy Goldsworthy, a world -famous British sculptor and photographer, explaining his living artwork, states, “I can’t edit the materials I work with. My remit is to work with nature as a whole,” and understands that his work shall eventually disappear. Ephemeral works have heralded a marked shift from traditional works of art that are permanently fixed, like works of art seen in museums. Even choreography or any live performance for that matter, by its very nature, is ephemeral and in reality, it doesn’t last longer than the duration for which the dancer/performer gives it life.<sup>5</sup>

Even though these works qualify for “originality”, as shall be discussed, they come into collision with the requirement of “fixation” as a condition for copyright protection in common law countries. The Berne Convention gives flexibility to the contracting states to determine the limits of fixation as a condition for copyright protection.<sup>6</sup> Most jurisdictions (excluding mainly civil law countries) are focused on the necessity of the work being *fixed* in a tangible medium or embodied in a form that can be perceived. The transitory nature of many works has raised substantial questions over the grant of copyright protection to such works. They *inter alia* include, if at all copyright can subsist in such works? Or what recourse to remedy, if any, the creators have, should there be any infringement? Unlike the United States, which explicitly mandates fixation in any tangible medium of expression,<sup>7</sup> the 1957 Act is relatively silent on this except in case of

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<sup>4</sup>The Copyright Act, 1957, § 2(c), No. 27, Acts of Parliament, 1957 (India). [Artistic work means, — a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a [work of architecture; and any other work of artistic craftsmanship; as provided under § 2(c) of the Copyright Act.]; See *George Hensher Ltd. v. Restawhile Upholstery (Lanes) Ltd* [1.976] A.C. 64.

<sup>5</sup>Pujita Krishna, *Can dance be protected from plagiarism?*, THE HINDU Feb. 11, 2018 <https://www.thehindu.com/entertainment/dance/can-dance-be-protected-from-plagiarism/article22825491.ece>.

<sup>6</sup>Berne Convention For The Protection Of Literary And Artistic Works art. 2 (2), Sept. 9. 1886, 1161 U.N.T.S. 3.

<sup>7</sup>17 U.S.C. § 102 (2006)(U.S.). (Subject matter of copyright: In general- Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later

dramatic works (piece for recitation, choreographic work or entertainment in the dumb show) that necessitate the form of the work to be *fixed in writing or otherwise*. Much of the jurisprudence surrounding the element of fixation can be understood from the interpretation of the courts. Ephemeral art forms like food plating (the presentation and arrangement of food), sand art, living art, sonic arts (making visual art with sound waves and vibrations), choreography and even hairstyles and makeup etc. raise significant questions about fixation. The law surrounding the subsistence of copyright in works of choreography (under dramatic works) becomes ambiguous if the choreography is not reduced to fixation, except in the written format “or otherwise”. The format of fixation for different kinds of work is unclear. What do the words “or otherwise” mean in Section 2(h) of the 1957 Act?

In the case of food plating or other forms of ephemeral art for that matter, can it be said that taking a picture of the dish/the art concerned would fulfil the criteria of fixation since it amounts to reduction to a form that is tangible? Also, is fixation a precondition for copyright protection or proof of the same? The stand is different in civil and common law countries. Common law countries like the UK and New Zealand make a clear separation between the act of creation, known as authorship (discussed below) and the making/recording of the work. A work goes through two stages before it is complete- first, it exists in the mind of the author and then in a material form where it is considered complete and eligible for copyright protection.<sup>8</sup> Thus existence happens before fixation, although not in the real sense. Both these stages must be completed for the copyright to subsist in the work. In common law countries like India, for instance, as shall be discussed subsequently, fixation in writing or by the notation system is mandatory for dramatic works like choreography<sup>9</sup> but the law regarding other forms of ephemeral art is lacking in jurisprudence at present.

In civil law countries, fixation is not a precondition for copyright protection. The existence of the work, in such countries, is understood differently. The work is said to come into existence the moment it can be perceived. In two recent cases,<sup>10</sup> a Dutch and a French court ruled that

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developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.).

<sup>8</sup> Elizabeth Adeney, *Authorship and Fixation in Copyright Law: A Comparative Comment*, 35 MELB. U. L. REV. 677, 681 (2011).

<sup>9</sup> Krishna, *Supra* note 5.

<sup>10</sup> *Kecofa v. Lancôme*, ECDR (26) 363 (2006) (Dutch); *Roberts A. D. et al. v. Chanel et al.*, French Court of Cassation, (2008).

copyright subsists in ‘scents’ on the ground that the work is “available for human perception” and “bears the signature of the maker” and is perceptually available. Can such a liberal approach be taken, only on the ground that the works can be *perceived* by the senses? If yes, can that logic be extended to food presentation or choreography, if the basis for protection is a mere human perception and not fixation in some tangible form?

Does such a narrow understanding of fixation pose a threat to the idea-expression dichotomy or the use of fixation for evidentiary purposes in copyright infringement matters, which are the very reasons for fixation as a ground of copyright to subsist? What would Indian Courts decide if such cases were to arise in their jurisdiction in the near future? That being said, the Indian jurisprudence in all these aspects is at a nascent stage. However, the emergence of newer forms of art is on the horizon and the ambiguity surrounding fixation in general, calls for a deeper understanding of this issue.

This article proceeds in three parts. Part I of the article makes an honest attempt to understand the first condition for the copyright to subsist in a work, namely ‘originality’ and how does one assess whether ephemeral works fulfil this criterion. Special focus would be on works that assemble unprotected elements and to understand how they meet this requirement for the expression itself to be transformed into something original. Part II deals with understanding fixation and the rationale behind its incorporation as a prerequisite for copyright protection. Part III is the epicentre of the article as it deals with understanding the problematic relationship between different kinds of ephemeral works and fixation and tries to determine if fixation functions as a stumbling block or is it useful in protecting the idea-expression dichotomy and concludes with a section that attempts to understand the jurisprudence in civil law countries that are flexible in their need for fixation. Part IV revolves around the understanding of fixation as mere perception, while Part V deals with understanding whether authorship and fixation are part of the same creative act.

## **II. THE ORIGINALITY DEBATE**

“Originality”, a prerequisite for entrustment of copyright,<sup>11</sup> provides that copyright subsists in the “expression of an idea” and not in the idea itself. The standard of originality needed is encapsulated in two judicially-determined doctrines- the “sweat of the brow” and the “modicum

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<sup>11</sup> 17 U.S.C. §102 (2006)(U.S.); Copyright, Designs and Patent Act 1988, c.48, § 1(1) (Eng.); The Copyright Act, 1957, § 13, No. 27, Acts of Parliament, 1957 (India).

of creativity” doctrines and the Indian law is positioned between the two. Originality is a *sine qua non* for copyrightability.<sup>12</sup> In a U.S. case,<sup>13</sup> it was said that *industry* and *effort* in a work are sufficient to establish originality even when such work is devoid of imagination or judgment. The creator of the work gets copyright for the act of “due diligence” on his part. The focus lies on his “skill and labour” without caring much about the creative aspects of the work. It was further opined that “it is immaterial whether work is wise or foolish, accurate or inaccurate or whether it has or does not have any literary merit.”<sup>14</sup> The law seeks originality in expression and demands that the work must not be copied from another work. The point of origin of the work must be from the author,<sup>15</sup> and the work should be his own intellectual creation.<sup>16</sup> This, in essence, is the “sweat of the brow” doctrine, not requiring anything beyond hard labour on the part of the creator of the work.

This understanding was adopted by the Supreme Court of India for a considerably long time when it provided that copyright law places no bar on an individual from taking what is useful from an original work with “additions and improvements”.<sup>17</sup> The court made it clear that original thought and original research were not needed and even mundane compilations like dictionaries, gazettes, maps, encyclopaedias, etc. are worthy of having copyright protection.<sup>18</sup> Aspects of “novelty” and “creativity” were discarded by the U.S. Supreme Court too in *Bleistein v. Donaldson Lithographing Co* <sup>19</sup> where the Court ruled that a “distinguishable variation” from another work is the right yardstick to decide on originality. The quality is not of much concern since it is highly subjective. Here, Justice Holmes stated, “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits,”<sup>20</sup> thereby refusing to rule on artistic quality.

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<sup>12</sup> Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991).

<sup>13</sup> Jeweler's Circular Publishing Co. v. Keystone Publishing Co, 281 F 83, 88 2d Cir (1922) (U.S.).

<sup>14</sup> Walter v. Lane, [1900] AC 539 (1900); *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, 1 WLR 273 (1964) (U.K.).

<sup>15</sup> University of London Press v. University Tutorial Press, 2 Ch. 601 (1916) (U.K.).

<sup>16</sup> Infopaq International A/S v. Danske Dagblades Forening FSR 20 (2010).

<sup>17</sup> Kartar Singh Giani v. Ladha Singh, A.I.R. Lahore 777 (1934).

<sup>18</sup> Mishra Bandhu Karyalaya v. Shivratn Lal Koshal, AIR 1970 MP 261.

<sup>19</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>20</sup> *Id.* at 251 cited in Krishna Hariani & Anurudh Hariani, *Analyzing Originality in Copyright Law: Transcending Jurisdictional Disparity*, 51 IDEA 491, 496 (2011).

Departing from the “sweat of the brow doctrine”, the court in the case of *Feist Publications*,<sup>21</sup> demanded a ‘minimum amount of creativity’ as a prerequisite to ask for copyright protection and the same was adopted by the Indian Supreme Court in *Burlington Home Shopping v. Rajnish Chibber*.<sup>22</sup> Similarly, in the landmark case of *Eastern Book Company v. D.B. Modak*,<sup>23</sup> it was held that to gain copyright, the threshold of creativity is not in the line of being “novel or non-obvious” like patents, but a little bit of creativity in the work is required, thus establishing the doctrine of “modicum of creativity”. To summarise, the work must originate from the author (he must have created it independently) and not a mere copy but a substantial variation of the same with a “spark of distinctiveness” to clothe it with some creativity. Herein, the *de minimis*<sup>24</sup> rule is applied. As the U.S. Supreme Court stated, “copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.”<sup>25</sup>

#### **A. THE ORIGINALITY OF EPHEMERAL WORKS**

Having established the understanding as to what *originality* entails, it must be examined as to whether ephemeral works fulfil this requisite for copyright protection. It is pertinent that works of a transitory nature must be “original works of authorship too”.<sup>26</sup> In the U.S., the phrase “works of authorship” is “deliberately undefined” as the Congress intended to mould a flexible definition of the same that would “neither freeze the scope of copyrightable technology nor allow unlimited expansion into areas completely outside the present congressional intent.”<sup>27</sup> In the U.S. and India, the threshold of originality for copyright protection is low, but not negligible.<sup>28</sup> A combination of elements that are unprotected on their own would get protection based on the originality of their selection and arrangement, so as to make the resultant work an original work of authorship. These lines fit perfectly well in the case of an artistic work like food

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<sup>21</sup> *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>22</sup> *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber & Anr.*, PTC (15) 278 (1995).

<sup>23</sup> *Eastern Book Company v. D.B. Modak*, PTC 641 (2002).

<sup>24</sup> United States Copyright Office, *Compendium of U.S. Copyright Office Practices*, § 101 (3d ed. 2017), (The term *de minimis* comes from the legal principle “de minimis non curat lex,” which means “the law does not take notice of very small or trifling matters.”).

<sup>25</sup> *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>26</sup> 17 U.S.C. § 102 (2006)(U.S.).

<sup>27</sup> H.R. Rep. No. 94-1476, at 51 (1976). [The history of copyright law has been one of gradual expansion in the types of works accorded protection... Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas ... completely outside the present congressional intent].

<sup>28</sup> *Satava v. Lowry*, 323 F.3d 805, 810 9th Cir. (2003).

plating or living art or even a work of choreography which, although made up of really simple and basic steps may be original when assessed on a whole. In the *DB Modak* case, the Court stated that “even if the work is derived from data contained in pre-existing works, then by selection, co- ordination or arrangement of such data, the new work should be somewhat different from the pre-existing ones.” The condition here is that, if the raw materials used have utilitarian purposes, or if the work has any functional characteristics, it is precluded from being recognised as a work of art.<sup>29</sup> This is logical because the copyright law protects an artist’s original, creative expression and does not extend to protect merely utilitarian things. In the case of food plating, since food is a useful article, copyright law will apply only if the food plating incorporates highly creative features (maybe physical and conceptual) that are separable from the food’s utilitarian features.<sup>30</sup> In food plating, the data is food. A food presentation comprises elaborate artistic arrangements that are both aesthetic and utilitarian (food being a subject-matter of consumption and source of energy for the body to function). However, not all aspects of food plating need to be functional. Creativity in how he makes it can also be displayed in the use of colours and the display of the food, the case in point being the ‘Herb crusted scotch eggs baby greens’.<sup>31</sup>

The standard to be adopted is quite similar to that adopted in the regular subject-matter of copyright. For instance, in the process of food presentation, even though it is within the law to take ideas and derive inspiration from prior works to ensure the free flow of ideas and spur innovation, the question is whether the chef has taken a lot, and without consent, created a derivative work, or whether he/she has transformed the original into something new, and that is original by itself and not a derivative otherwise owing to “substantial similarity” between the prior work and the new work. The chef could be in trouble of copyright infringement claims in the former case.

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<sup>29</sup> Reeb, *supra* note 1, at 43.

<sup>30</sup> Natasha Reed, *Eat your art out: Intellectual Property for Food*, FOLEY HOAG LLP (Aug. 24, 2020, 10:00 PM), <https://www.trademarkandcopyrightlawblog.com/2016/06/eat-your-art-out-intellectual-property-protection-for-food>.

<sup>31</sup> Suman Prasad, *Haute Indian Cuisine: The growing trend of creating Instagrammable dishes*, Architectural Digest Aug. 26, 2020, <https://www.architecturaldigest.in/content/indian-chefs-increasingly-thinking-like-designers>. [ Prepared by Momin Faqi, Executive Chef at Kode, it is a dish comprising scotch eggs with a thin harissa-spiced minced chicken crust with a crispy golden exterior lying in a pool of smooth, creamy and pale yellow béarnaise sauce with a few flecks of green herbs and a few drops of red chili oil].

The same logic can be extended to living art like that of Andy Goldsworthy's, who in one of his artworks bound some leaves together with the help of thorns in a long serpentine shape and extended it like a serpent down a river, where the leaves came in contact with each other, the current of the water along with the rocks above as if conversing with nature. It is not impossible to conceive that not just a modicum, but there is a greater need of originality than the necessary aspect of originality in all of his works; even though the elements used maybe unprotectable, the resultant work is not mere sweat and brow and includes a high level of creative ingenuity. However, in the case of *Kelly v. Chicago Park District*,<sup>32</sup> a U.S. court agreed that Wildflower Works satisfied the test of originality but did not satisfy the "authorship" requirement of copyright law. It found that Wildflower Works "plainly possessed more than a little creative spark," and thus was original. Although the court determined that the work was not copied and that the author's combination of elements was original, it nevertheless ruled that Wildflower Works was devoid of authorship. In *Burrow-Giles Lithographic Co. v. Sarony*,<sup>33</sup> defining the term "author", the Court declared "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature" to be an author. Justice Holmes in this case equates authorship to "inherent uniqueness of human personality" and further clarifies as to an author that "as long as he does not copy from another, a creator has done enough to merit copyrightable authorship merely by placing his pen upon the paper".<sup>34</sup> Thus, in the *Kelly case*, there seems to be an apparent inconsistency in the reasoning and the ruling of the court.<sup>35</sup> According to the court, a garden cannot be 'authored'. It originates in nature and is subject to natural forces. However, the reasoning seems illogical, as with precision, gardens can be made artistic by the gardener using his creativity and ingenuity.

In works of choreography too, the element of originality is bestowed on an assessment of the overall work and copyright can lie in the simple steps because they are the raw materials or the building blocks and are under the ownership of none. Thus, they are the property of all. They are like basic tools on which the choreography is based.<sup>36</sup>

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<sup>32</sup> *Kelley v. Chicago Park Dist.*, 635 F. 3d 290 7th Cir. (2011).

<sup>33</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, (1884)(U.S.).

<sup>34</sup> *Id.*

<sup>35</sup> Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 *FORDHAM L. REV.* 2221, 2242 (2014).

<sup>36</sup> Krishna, *supra* note 5.

A choreographer can take inspiration from the veterans in his field and create his own version where copyright can lie. However, the situation is different for some signature postures. These works have a higher threshold of originality that makes them eligible for copyright protection.

In the words of Lord Pearce,<sup>37</sup> “In deciding ... whether a work in the nature of a compilation is original, it is wrong to start by considering individual parts of it apart from the whole...For many compilations have nothing original in their parts, yet the sum total of the compilation may be original.”

## **B. ORIGINALITY IN CIVIL LAW COUNTRIES**

Coming to civil law countries, Article 1 of the Dutch Copyright Act, 1912 protects “works of literature, science or art.”<sup>38</sup> Under Article 10(2), the Act protects “every production in the domain of literature, science or art, whatever may be the mode or form of its expression.” No express mention of originality exists in the Act and as per the ruling of the Dutch Supreme Court (*Hoge Raad*) in the *Kecofa* decision; a work must possess an “individual character” and “bear the personal imprint of its creator”. The court has also clarified that even a combination of unprotected elements would qualify the criteria of originality. Under the Act, the list of the protected subjected matter is also not exhaustive. Anything would thus be eligible for copyright protection, provided it is “perceptible” and “original” and by extension of that logic, the “Wildflower Works” would have certainly been deemed original and also fixed. The smell of scent too would be a subject matter of copyright as the same can be perceived by human sensation and also qualifies as an expression of the work.<sup>39</sup> As for the taste of cheese spread, a Dutch Court in *Levola Hengelo BV v. Smilde Foods BV*<sup>40</sup> ruled that the taste of cheese spread is not work, but it did not decide whether taste by itself would qualify as a work by making a comparison with the *Kecofa* decision. Court of Justice of the European Union has a request pending with it on such a ruling regarding the possibility of copyright subs isting in taste. In the same case, Advocate General Wathelet rejected the idea and declared that flavours or tastes can be called “original expressions”, but for it to be called works, it must be “sufficiently accurately and objectively identifiable.”

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<sup>37</sup> *Ladbroke (Football) Ltd v. William Hill (Football) Ltd.*, 1 W.L.R. 273 (1964).

<sup>38</sup> J M MEIJER-VAN DER AA ET. AL *Auteurswet 1912 : Wet Van 23 september 1912, Stb. 1912, 308*, (16<sup>th</sup> ed. 2005), (Copyright is the exclusive right of the author of a literary, scientific or artistic work, or of his assignees, to make such work public and to reproduce it, subject to the limitations provided in the Law.).

<sup>39</sup> *Kecofa v. Lancôme*, ECDR (26) 363 (2006) (Dutch).

<sup>40</sup> *Levola Hengelo BV v. Smilde Foods BV*, 2018 ECLI:EU:C:2018:899.

In France, the law of originality mandates the imprint of the author's personality in the work concerned. What separates one's work from others is the reflection of the mind of the author and is more like the author's "creative choice"- a choice made by the author but not based on the function of the work, or any other method applicable.<sup>41</sup> Speaking of databases and other forms of compilations, courts have ruled that originality is more than mere labour. In the Swiss copyright scene, scholars Bannelet and Egloff put forth that originality comes from the choices made by the author that does not emanate from custom or good practice.<sup>42</sup>

### III. THE ISSUE OF FIXATION

The Berne Convention clearly states "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."<sup>43</sup> The U.S. Copyright Act defines a work as, "fixed in a tangible medium of expression when its embodiment in a copy . . . 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."<sup>44</sup> The 1957 Act, as already mentioned, has expressly stated the requirement of fixation for copyright protection only in the case of dramatic works and is totally silent on such a prerequisite in case of artistic works.<sup>45</sup> U.K.'s Copyright Design and Patent Act, 1988 provides that, "copyright in literary, dramatic or musical works does not subsist until the work is recorded in writing or otherwise."<sup>46</sup> The need to be fixed in a tangible medium is not explicitly given for artistic works.

The issue here is that there are many works of art (used in a broader context to denote all kinds of work) which by nature are unfixed because they are transient and incorporate elements that undergo changes like food, land, sand, ice etc. as their medium. In such forms of art, the spotlight is on the "process and the effect of constant change" than the final work and the

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<sup>41</sup> Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis Of The Notion Of Originality In Copyright Law*, 49 J. OF THE COPYRIGHT SOCIETY OF THE U.S.A., 976, (2002).

<sup>42</sup>: *Id.*, at 969

<sup>43</sup> Berne Convention, art. 2(2).

<sup>44</sup> 17 U.S.C. § 101 (1976).

<sup>45</sup> The Copyright Act, 1957, §2(c), No. 27, Acts of Parliament, 1957 (India), (Artistic work means- a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; a [work of architecture]; and any other work of artistic craftsmanship; as provided under Section 2(c) of the Copyright Act).

<sup>46</sup> Copyright, Designs and Patent Act, 1988, c.48, §3(3), (Eng.).

aspects of art lie in the process than the final result work.<sup>47</sup> Improvisational works, for instance, improvisation to a work of choreography, also have this problem unless they are recorded, photographed or fixed some way. Even then, logic dictates that what receives protection in this manner is not the underlying improvisational work, but the secondary work that was captured or recorded. The same can be extended for live events.<sup>48</sup>

In the landmark U.S. case of *Kelley*, the court held that landscape art failed to clear the fixation obstacle because it was “inherently changeable” and thus made it clear that the garden could not be considered fixed because of the flux it undergoes through exposure to nature’s variations which are not under the control of the creator. In consequence of this problem, fixation works as an illogical exclusion of copyright to ephemeral works of art.<sup>49</sup> However, the existing jurisprudence to a large extent is unclear and unlike civil law countries like Spain, France, Belgium, Netherlands, etc., common law countries have not done away with the necessity of fixation on the ground of its functional aspects and neither are they liberal in their approach. The rationale of fixation being, that it is an outcome of the Idea-Expression Dichotomy.

Civil law countries like France and Germany accord more importance to perception (by human or by machine). At the Stockholm Revision Conference of the Berne Convention in 1967, many Berne Union countries had asserted that fixation cannot be a precondition for the copyright to subsist and only possessed evidentiary value, which was also echoed by the civil law countries. This position is well-explained in the following words by the authors of Copinger and Skone James on Copyright-

*Since fixation addresses the issue of the definition of the work, and proof as to its existence and content, there is no reason of principle why the person who creates the work and the person who fixes the work should be the same. The functions of creation and fixation are distinct ... Copyright protects the skill and labour of the author, and once he has created and expressed his work, it is immaterial how his work comes to be fixed.*

These words outline the fact that since authorship and fixation is separate from each other; much emphasis need not be given to fixation in its varied forms possible.

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<sup>47</sup> Carpenter & Hetcher, *supra* note 35, at 2228.

<sup>48</sup> *Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416, 1425 (C.D. Cal. 1994). (finding that the live radio program, or primary work at issue, was not fixed, but the recording of it, that is, the secondary work, was fixed.).

<sup>49</sup> Z.K. Said, *Copyright’s Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS. 335, 337 (2016).

In the UK, Andy Goldsworthy’s ephemeral art is unfixed because of its transitory nature. Photography and visual recording are used to capture the work when it appears most alive, but still the digital image or recording is not the art itself. While such photographs and recordings operate as “fixing” the work, actually, the work itself stays unfixed as per the law. Thus, this form of fixation is not of the work itself but, a representation of the work and thus is called fixation by proxy.<sup>50</sup> Using the medium of light and space, James Turrell’s installations in museums and galleries are unique to say the least. He makes solid objects seem like they are hanging or suspended in the air. However, these objects are actually made of light and only give an impression of being solid. He explains, “I like to use light as a material, but my medium is really perception.”<sup>51</sup> The Serbian performance artist Marina Abramovic, uses her body as a medium of art. Rejecting traditional art and bridging the distance between the artist and the audience, she desires her audiences to become collaborators in the process of art by inviting them to observe her. In fact, one of her art works is titled “I am the Object” where she invites visitors to use any object on her body however they may like, surrendering control.<sup>52</sup> It would be quite an ordeal to decide on fixation in these matters where the medium itself is transient in nature and can never be permanently lodged in one place. In such instances, it is pertinent to revise the requirement of fixation for such works of art so that they become fit for copyright protection and the creators can defend themselves upon infringement of their works.

#### **A. THE RATIONALE OF FIXATION**

The strongest logic for the insistence of fixation is that it serves as an evidence of the very existence of the work. Fixation has an evidentiary role to play, in case, for instance, when a case of infringement comes up. It makes it possible to ascertain what the work actually is.<sup>53</sup> In the absence of fixation, “copyright law would forever be mired in disputes over the definition and boundaries of the works claiming copyright protection.”<sup>54</sup> When art is fixed in a tangible form, it becomes easier for the courts to determine originality. It is not enough for an author to describe his creative process... 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

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<sup>50</sup> Carpenter & Hetcher, *supra* note 35, at 2229.

<sup>51</sup> *Id.* at 2230.

<sup>52</sup> *Id.* at 2231.

<sup>53</sup> Jane C. Ginsburg, *Overview of Copyright Law*, COLUM. PUB. L. RESEARCH PAPER NO. 14-518 (2016).

<sup>54</sup> Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers*, 97 COLUM. L. REV. 1363, 1400 (1997).

required exists.<sup>55</sup> Fixation helps in defining the contours of a copyrighted work. Thus, fixation accords a tangible boundary to the work, enabling others to make a decent interaction with it.

Also, fixation as a requirement exists to meet the principle that copyright should protect the expression and not the idea. Fixation stimulates creativity. In the absence of fixation, proof of the very foundation of the expression of the work falls apart. The principle that copyright protects only an expression of work and not the underlying ideas, and that the ideas are available for free appropriation is called the Idea-Expression Dichotomy and is another rationale for the insistence on the work being fixed. This long-standing principle of copyright law has been affirmed by the TRIPS Agreement as well under Article 9(2).<sup>56</sup> The leading U.S. case *Baker v. Selden*,<sup>57</sup> was further codified in Section 102 (b) of the U.S. Copyright Act.<sup>58</sup> In *RG Anand v. Deluxe Films*,<sup>59</sup> the Supreme Court of India held that even though the underlying idea behind the stories of both the plaintiff and defendant was the same, their expression was different. Therefore, it was not held to be copyright infringement.

#### IV. EPHEMERAL WORKS AND THEIR FIXATION

##### A. LANDSCAPE AND LIVING ART

In the *Kelly* case of 1984, Chapman Kelley, on account of a contract with the Chicago Park District had designed and installed an urban landscape work called Wildflower Works in Chicago's Grant Park, wherein he planted many seeds to optimize the blooms at specific times during the year. The design of the garden was planned keeping in mind the seasonal changes of nature and how as a result of that, his landscape art would evolve. The focus was on the process. The artistic merit laid in observing this beautiful process of change. The court in a related dispute ruled that no copyright subsisted in the work due to lack of fixation. As per the reasoning of the

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<sup>55</sup> Laura A. Heymann, *How To Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 844 (2009).

<sup>56</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299. (Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.).

<sup>57</sup> *Baker v. Selden*, 101 U.S. 99 (1879). (Bardley J.: "Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way....Now whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein.").

<sup>58</sup> 17 U.S.C. § 102 (2006). (In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.).

<sup>59</sup> *R.G Anand v. M/S. Delux Films & Ors.*, AIR 1978 SC 1613.

court, the constitutive elements of the garden are unfixed by nature despite the fact that the garden could clearly be “perceived for more than a transitory duration,”<sup>60</sup> as was the statutory need. The court based it on an inherently vague test called the “essence test” and underlined the fact that the essence of the concerned work was dynamic. The court declared that “the law must have some limits; not all conceptual art may be copyrighted.” In the U.S., the problem lies in the interpretation of the term “more than a transitory duration” which is sufficiently unclear. The essence test too seems highly subjective to even be set as a precedent.

However, the U.S. law is flexible enough to make space for any technological change that might give scope for new ways of fixing a work. If the way is such that the artistic expression remains intact, or at least is able to withstand any change of medium and if its persistence through time is without any loss of its intrinsic properties, then we can say that it has enough stability needed for copyright protection. Stability lies in fixation which lies in the control of the author.<sup>61</sup>

In the U.K., the Copyright, Designs and Patents Act, 1988 does not explicitly contain a fixation requirement; nevertheless, fixation still prevails in some form when we see the case jurisprudence. A general understanding is that the work in question must be in possession of certain attributes that enable it to be “experienced” and “reproduced”. In other words, it must be more than a sensory phenomenon. An assumption lies that it should have some extension i.e. the work must have some position in space and be viewed from varying angles. Is occupation in space equivalent to a material foundation of the sculptural work? The same is debatable as works can be seemingly occupying space and yet be non-material like a hologram.<sup>62</sup> In U.K. law, the term artistic expression permeates each of the categories in Section 4,<sup>63</sup> but its reach does not

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<sup>60</sup> 17 U.S.C § 101 (1976). (The work must be fixed in a copy or phonorecord “by or under the authority of the author” and the work must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”)

<sup>61</sup> Sophie Arquette, *Observations on the Nature of Fixation in U.K. and Dutch Copyright Law*, 27 YALE J.L. & HUMAN . 335, 337 (2015).

<sup>62</sup> *Id.* at 338.

<sup>63</sup> Copyright, Designs and Patent Act 1988, c.48, § 4, (Eng.). (1) In this Part “artistic work” means-

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
- (b) a work of architecture being a building or a model for a building, or
- (c) a work of artistic craftsmanship.

(2) In this Part-

“building” includes any fixed structure, and a part of a building or fixed structure;

“graphic work” includes—

- (a) any painting, drawing, diagram, map, chart or plan, and
- (b) any engraving, etching, lithograph, woodcut or similar work;

extend so as to cover borderline artworks such as sound sculptures or landscape art or olfactory art in its fold.<sup>64</sup> So there lies a limitation. Even without a specific fixation mandate, courts in the U.K. are reluctant to let go of it and the fixation of most ephemeral works (excluding live performances) is unclear. The U.K. copyright law does not offer any concrete guidance on this ambiguity.

Talking about his unusual art, Andy Goldsworthy says, “I enjoy the freedom of just using my hands and “found” tools—a sharp stone, the quill of a feather, thorns. I take the opportunities each day offers: if it is snowing, I work with snow, at leaf-fall it will be with leaves; a blown-over tree becomes a source of twigs and branches. I stop at a place or pick up a material because I feel that there is something to be discovered. Here is where I can learn.”<sup>65</sup> He describes that his art is “alert to nature” and that the transience in his work is a reflection of the transience in nature. These descriptions are enough to state that his artworks would have to wade through the murky waters of the U.K. copyright law to secure protection. His work is undoubtedly a work of high artistic craftsmanship and deserving of copyright protection as there is more than a minimum level of creativity and looking at the case jurisprudence, should extend to provide copyright protection to his artworks.

## **B. CHOREOGRAPHY**

Copyright for choreographic work is still in a developing stage in India. Section 2(h) of the 1957 Act puts choreography under the larger category of dramatic works and needless to say, it is a work of expression. Choreography is defined as “the art of composing a dance or ballet” in the U.S. jurisprudence. But what is dance? It is definitely more than mere human movement and simple basic steps or routines. The Indian law offers no answer on this.

Fixation is a hurdle in the protection of choreography because movement cannot be fixed. Music also seems to have similar issues but recording dance is more difficult than recording music because of the movement factor in the former. Therefore, a performed but unfixed choreography will not be entitled to copyright or so it seems as the same disappears as soon as it is performed. Even the passing of the traditions orally is in an impermanent form.

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“photograph” means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film; “sculpture” includes a cast or model made for purposes of sculpture.).

<sup>64</sup> Arkette, *supra* note 61, at 339.

<sup>65</sup> Carpenter & Hetcher, *supra* note 35, at 2268.

A U.S. Court in the 1986 case of *Horgan v. MacMillan, Inc.*<sup>66</sup> looked into many key points regarding the copyright of choreographic works. Citing the case *Martha Graham School v. Martha Graham Center*,<sup>67</sup> it stated that, “explicit federal copyright protection for choreography is a fairly recent development, and the scope of that protection is an uncharted area of the law.” The *Horgan* decision states that choreography “is the flow of steps” and “that the central characteristic of choreography is ‘movement’.

Choreographic works may be fixed by visual recording or by a notational system. An elaborate verbal description of a work can also be a notation, if the work could be reconstructed from the same. The choice of medium is relevant if an infringement claim arises on choreographic works. In India, written format is accepted as a mode of fixation that would include the notational system or even an elaborate verbal description from which the work could be reconstructed. However, no interpretation is given as to what constitutes other methods of fixation under the term “or otherwise”, as used in Section 2(h). Visual recording of the work as a mode of fixation has not been stated expressly. Choreographers complain about the fact that recorded or notated versions of choreographic works do not really capture the “soul” of the work and the same is unsatisfactory for them, although they accept that the fixation requirement is necessary to avoid unnecessary limitations on a natural right.<sup>68</sup>

The art of dance is subjected to self-improvisation leading to individual interpretations/expressions. The dancer may perform the choreography of the choreographer but he/she may embellish it with his/her own interpretations.<sup>69</sup> Fixation of choreography through visual recording records only a specific performance of the choreography along with the interpretations of the dancers. Fixation in this way results in a copyrighted work that may be more detailed in some aspects than the written formats. The problem with the visual recording is that it captures only that specific performance of the choreography and might be different from the intent of the choreographer. However, it is too hyper technical an interpretation, to state that little interpretations by the performers, like style or expressions, would be a significant departure from the choreographer’s intent as the core aspect of the work generally remains unchanged. Thus, all

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<sup>66</sup> 789 F.2d 162 (2d Cir. 1986).

<sup>67</sup> 380 F.3d 632 (2d Cir. 2004).

<sup>68</sup> Evie Whiting, *Square Dance: Fitting the Square Peg of Fixation into the Round Hole of Choreographic Works*, 65 VAND. L. REV. 1261 (2019).

<sup>69</sup> *Kecofa v. Lancôme*, ECDR (26) 363 (2006) (Dutch).

interpretative aspects fixed by visual recording must be protected since finding out the differences between the two is almost impossible. Thus, no question should arise in this regard as to who should be attributed as the author of the work. It is very clearly the choreographer. The interpretations/additions on the part of the performer/dancer are negligible compared to the choreographer's contribution; the very work originates from the latter.

What can be taken as a standard here is the comparative contribution between the choreographer and the performers and for reasons based on simplicity, the choreographer is presumed to be the author unless the challenger proves otherwise. The notation system has some inherent flaws as it is usually drawn from the audience's point of view and right and left need to be reversed by the dancer reading it; it cannot indicate the third dimension; and it gives a description of the position rather than movement and can only record positions and not movements in space and time.<sup>70</sup>

The grave differences between the two possible forms of fixation i.e. written and visual recording, is problematic in a case of infringement. The recording might reveal some distinctive elements that might form the subject of the alleged substantial similarity and the same would not be reflected in the written format. In such a situation, it is unclear as to which method shall be given preference. Also, recording is done through certain angles that may not capture everything in its frame. In case a work has multiple revisions, each of those would be considered as work, provided they have been fixed. A question here is, can photography be enough fixation? Reconstructing from the photographs seems highly unlikely although not possible but it would be too frustrating an undertaking. Thus, still photographs would not be sufficient as a form of fixation.

Under German copyright law,<sup>71</sup> protection begins the moment the work is created, prior to any fixation and fixation cannot be separated from the person of the author. As given, such low levels of fixation pose a huge problem in proving infringement claims. Some kind of fixation requirement must exist for copyright protection to come to aid in future infringement cases. The oral tradition of dancers performing dances and passing them to succeeding generations does not seem adequate enough for preservation of dances.

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<sup>70</sup> Laurent Carrière, *Choreography and Copyright: Some comments on choreographic works as newly defined in the Canadian Copyright Act*, ROBIC Aug. 22, 2020, <https://www.robic.ca/wp-content/uploads/2017/05/105-LC.pdf>.

<sup>71</sup> Urheberrechtsgesetz [UrhG] [Copyright Act], Sep. 9, 1965, BGBL. I at 1273 (Ger.).

It must be noted that choreography is radically different from other forms of art and raises unique problems. It shares some similarities with musical and dramatic works but is not really the same and thus a separate discussion on this issue is warranted. In the following words the court illustrated this point in the *Horgan* case, “the single instant” of a photograph of a movement, it said, “communicates far more than a single chord of a Beethoven symphony.”<sup>72</sup>

## V. PERCEPTION: A LIBERAL CONSTRUCTION OF FIXATION

The Dutch Copyright Act mandates no fixation requirement but that does not mean that anything under the sun is deserving of such protection. However, the precedent set by the *Kecofa* case, that scent of a perfume is eligible for copyright protection is unsettling as it is a matter for experts to decide whether a certain smell is distinguishable from another; even though civil law countries do not function based on precedents. But the court made a point in its favour that copyright law is used to handling software infringement cases that rely heavily on expert opinions.<sup>73</sup> This broad interpretation of ‘work’ can be due to the overarching domain of literature, science, and art. But even if that were the case, it would not answer the charge as to why works such as chemical formulae, tastes, or perfume scent would fit within this domain.<sup>74</sup> In the *Kecofa* case, three things were looked into on the basis of which the copyright protection was given; (i) whether the product is open to human perception? (ii) whether it has an original character of its own and (iii) whether it bears the personal stamp of the maker? On point (ii), it is clear that the original character of the work must not be utilitarian i.e. it should be non-functional and must not be to achieve some technical effect and the court ruled that perfume scent has no technical effect. The court paid no heed to the limited abilities of humans to distinguish different kinds of scents. Upon stating this, the court might be entering the difficult terrain of establishing that fixation extends to a work’s constitutive properties, going to the molecular level stability that though largely durable are prone to changes that may be subjective, like the enzymes in the nose. The court distinguished the scent from its underlying recipe or the liquid that holds it, comparing the liquid to a paper of a book, which is not subject matter of copyright, but the content of the book is.<sup>75</sup>

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<sup>72</sup> 789 F.2d 163 (2d Cir. 1986).

<sup>73</sup> Carpenter & Hetcher, *supra* note 35, at 2268.

<sup>74</sup> Arkette, *supra* note 61, at 339.

<sup>75</sup> Kamiel Koelman, *Copyright in the Courts: Perfume as an Artistic Expression?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION MAGAZINE, ISSUE 5/2006, Aug. 25, 2020, [https://www.wipo.int/wipo\\_magazine/en/2006/05/article\\_0001.html](https://www.wipo.int/wipo_magazine/en/2006/05/article_0001.html)

The court, however, ruled in the *Levola case* that works like the taste of cheese spread is highly subjective and in that specific case was not given protection, although it did not clarify if taste, in general, is exempt from protection. However, Article (1) and Article 10(1) of the Dutch Copyright Act, 1912 give no hint of a purely sensory phenomenon as work, even though the work is expressed in a form that is perceptual in one or more of the senses. Thus, civil law countries like France, Germany, Netherlands, Spain and Switzerland generally meet the Idea-Expression dichotomy by giving credence to the term “expression” in a literal sense. They interpret expression to mean “something that is perceivable” and hence, this problem does not arise and that is why, for them, perfume scents are not mere ideas.

Article L. 112-1 of the French Code of Intellectual Property provides that, “the provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.” Therefore, the form of the work is of no consequence as the same could be visual, auditory, olfactory, or have any other form. In the French case of *Roberts*, the court reasoned that the “purpose for fixation is merely to serve as evidence in an infringement suit and is not a precondition for the copyright to exist.” Thus, copyright accrues in a work the very moment it is expressed in a perceivable form. Such a lenient approach would be difficult to conceive in a closed copyright regime like that in India. Going by this approach, food plating or for that matter, all forms of ephemeral art could be considered an “expression” by being “sufficiently perceivable”. Even though it may perish eventually, the work would exist, even for a transient nature till consumption happens.<sup>76</sup> Taking that approach, even hairstyles and makeup would be considered work, worthy of copyright protection. In the case of ephemeral works, endurance (appearance in space) is understood as a solid proof of fixation. Space is preferred over time. Civil law countries seem to be stressing the point that artistic expression can be realised in sensory modes other than vision, thus focusing more on perception and not on the requirement of being fixed in a solid tangible medium. The Indian law is unclear as to what comprises fixation. It is clear that copyright subsists on the expression of an idea but what exactly is that expression? Are expression and perception taken to be the same? That is what the civil law regimes seem to hold.

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<sup>76</sup> Aatmik Jain, *Does Copyright Law Protect Presentation of Gastronomic Creations?*, SPICYIP Aug. 25, 2020, <https://spicyip.com/2020/08/does-copyright-law-protect-presentation-of-gastronomic-creations.html>.

## VI. NEXUS BETWEEN AUTHORSHIP AND FIXATION

A pertinent question arises on the nexus between authorship and fixation i.e. whether fixation and authorship are parts of the same creative act, to be carried out by the same person,<sup>77</sup> and this assumes significance in case of choreography. If they are different, is it possible for a person, independent of the author, to reduce the work to a material form for purposes of copyright? Is consent necessary for that? Different jurisdictions hold differently. For instance, can copyright subsist if a visual recording is taken by a member of the audience or it should happen from the author himself? This is possible only if fixation is viewed separately from authorship.

In an Australian case, the court decided that the word ‘author’ means the person who ‘created’ the work and that this person was the “person who brings the copyright work into existence in its material form”<sup>78</sup> and it is the authors who “who select, order and arrange the fixation of the work in its material form.”<sup>79</sup>

However, English law divulges significantly when it provides that a work can be fixed for copyright purposes by a person independent of the author<sup>80</sup> to imply that the recording of the work is not an element in the act of authorship since it can be done by a person who may not be the author and who may be acting without the author’s permission. In the English law, ‘author’ is the person who ‘created’ the work and not a person who either ‘made’ or ‘recorded’ it. In 1967, U.K. took a stand that “fixation of a work by a third person created a copyright in favour of its author” implying that the recording/fixation of a work, though has evidentiary value, is not a condition for copyright subsistence. Even the U.S. law requires the work to be recorded “by or under the authority of the author”.<sup>81</sup>

This position is of civil law countries. For example, copyright protection in Germany is given to unfixed speeches and unfixed musical works expressed only in the form of sound, the precondition being perception. This is extended for the recording of extempore speeches by a third party too. Seeing authorship and fixation separately is problematic in civil law countries because lines are blurred between the acts of creation/authorship and

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<sup>77</sup> Adeney, *supra* note 8.

<sup>78</sup> Ice T.V. Pty. Ltd. v. Nine Network Australia Pty. Ltd., 239 CLR 458 (2009).

<sup>79</sup> Telstra Corporation Ltd. v. Phone Directories Co. Pty. Ltd., 264 ALR 617, 624 (2010).

<sup>80</sup> Copyright, Designs and Patent Act 1988, c.48, § 3(3), (Eng.).

<sup>81</sup> 17 U.S.C § 101 (1976) (U.S.). (A work is “fixed” in a tangible medium of expression when its embodiment in a copy in a copy or to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.).

expression/perception/fixation and their position that existence is possible even without fixation. Since both creation and expression/fixation occur simultaneously, these acts cannot be construed separately and thus, no question arises of these acts being carried by two different individuals. Creation/expression and expression/fixation of the work fuse in a way that demarcation of these acts and the very question of two individuals executing them does not arise. Such a demarcation is only needed for closed copyright regimes like the U.S, U.K. and by that extension, India.

## **VII. CONCLUSION**

Authors are constantly seeking new ways of expressing themselves, and many new forms of expression are emerging. Copyright, patent and trademark law have some inherent limitations. The Berne Convention allows for a wide interpretation of the subject matter of copyright protection as a result of which we are witnessing an expansion in the very notion of what constitutes 'work'.

Coming to fixation, it is generally, strictly a requirement only for copyright protection in the common law countries; its main purpose being evidence in infringement claims and differentiating idea from expression. Furthermore, a tangible embodiment produces a 'copy' that is easier to engage in commerce with. However, this reasoning applies more for commercial creators and not for artists who are just passionate about their work. Nevertheless, even they are to be shielded from blatant copying, on account of their moral rights and Locke's theory of intellectual property that a man is entitled to the sweet rewards of his hard work. Otherwise, such a creator might lose the incentive to create more even if he does not commercialise his work. Such artistic works embody the Personality Theory of Immanuel Kant and are definitely emanating from the author itself. The question might arise that whether works that are not commercialised but created out of pure passion are of use to society. The answer to this is a resounding yes because the progress of a society can also happen on the basis of ideas which are always available in the public domain for appropriation and inspiration. The ideas behind such ephemeral works can always be used freely and in the right spirit in the manner of inspiration. For these reasons, the copyright law surrounding ephemeral works needs more clarity.

At the moment, the very relationship between originality and fixation is at odds because a very broad interpretation exists for originality and a cabined interpretation exists for fixation in common law countries. As a consequence of which, works having low creativity get protection just because they happen to be fixed while works possessing a high level of creativity go

unprotected on account of being transitory in nature and not adequately meeting the statutory level of fixation. A balance between the two is definitely needed. The need of fixation need not be stretched unnecessarily to altogether deny protection to such works. Maybe common law nations can look at the precedents set by the civil law countries albeit, without stretching loose the requirement of fixation too much that say that perception meets the need of perceiving, reproducing and communicating the work to the public, which is the aim of copyright law.

As discussed above, the Berne Convention allows for a wide interpretation of what constitutes copyrightable material. India, even though a signatory to the Berne Convention, follows a closed copyright regime. But with time and technological advancements, we can hope for changes in the copyright regime and a sufficiently detailed and clear law on originality and fixation of ephemeral works in the near future.