

No. 11-101

IN THE
Supreme Court of the United States

CHAPMAN KELLEY,

Petitioner,

v.

CHICAGO PARK DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**MOTION FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF AND BRIEF OF BLANE DE ST. CROIX,
THOMAS LAWSON, MOLLY DILWORTH,
VOLUNTEER LAWYERS FOR THE ARTS,
AND ARTS & BUSINESS COUNCIL OF GREATER
BOSTON, INC. AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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**MOTION OF BLANE DE ST. CROIX, THOMAS
LAWSON, MOLLY DILWORTH, VOLUNTEER
LAWYERS FOR THE ARTS, AND ARTS &
BUSINESS COUNCIL OF GREATER BOSTON,
INC. FOR LEAVE TO FILE A BRIEF *AMICI
CURIAE* IN SUPPORT OF PETITIONER**

Blane De St. Croix, Thomas Lawson, Molly Dilworth, Volunteer Lawyers for the Arts, and Arts & Business Council of Greater Boston, Inc. hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Amici* are filing this motion because they have been unable to secure consent from Respondent.* The proposed brief is attached.

As more fully explained in the Statement of Interest of *Amici Curiae* beginning on page 1 of the attached brief, *Amici* are artists and art-support organizations who are concerned that the Seventh Circuit's decision, if allowed to stand, will have serious negative repercussions for *Amici* and the larger arts community. The brief of *Amici* will assist the Court in determining whether to grant certiorari, because the brief elaborates on why the Seventh Circuit's rulings regarding authorship and fixation under the Copyright Act were erroneous and set

*On July 21, 2011, counsel for *Amici* contacted counsel for Respondent, and asked whether Respondent would consent to *Amici* filing a brief in support of the Petition for Certiorari. On July 27, 2011, counsel for Respondent advised counsel for *Amici* that Respondent would not so consent.

potentially dangerous precedent. In particular, the brief explains why the Seventh Circuit's opinion concerning authorship runs afoul of this Court's ruling in *Feist Publ'ns., Inc. v. Rural Tel. Service Co., Inc.*, 499 U.S. 340 (1991), and why the Seventh Circuit's position on fixation is also wrong. *Amici's* brief will also assist the Court by explaining how these erroneous rulings, if allowed to stand, would impact both artists and arts organizations by creating uncertainty as to the protection of certain types of works of art under the Copyright Act. Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief as *Amici Curiae*.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*¹

The *Amici Curiae* are individual artists, arts educators, and arts law organizations who have extensive experience in the conceptualization, creation, protection, and enforcement of copyrightable works. They offer the Court their views of the negative repercussions and consequences that the Seventh Circuit's incorrect holdings regarding authorship and fixation under United States Copyright law would have on artists and arts organizations. In particular, the Seventh Circuit's holding regarding authorship runs afoul of the principles set forth in this Court's decision in *Feist Publ'ns., Inc. v. Rural Tel. Service Co., Inc.*, 499 U.S. 340 (1991), and its holding regarding fixation based on the "essence" of the work improperly burdens the basic requirements for fixation.

Blane De St. Croix is a contemporary artist who works in sculptural objects, installation, and drawing. He has been the recipient of numerous grants and awards, including The John Simon Guggenheim Memorial Foundation Fellowship, The Joan Mitchell Foundation Grant for Painters and Sculptors, The Pollock Krasner Foundation Grant, and the National Endowment for the Arts. He has also been awarded many notable national and international fellowships and artist residencies. His recent body of work explores the geopolitical landscape

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given at least 10 days notice of *Amici*'s intention to file this brief.

through sculptural installations. Employing a combination of natural and industrial materials, Mr. De St. Croix is interested in articulating humankind's desire to take command over the Earth, and its inherent conflicts, through free-standing sculptures and large-scale installations.

Thomas Lawson is an artist whose work encompasses painting, writing, editing, curating, and teaching. He has taught at the California Institute for the Arts, the Rhode Island School of Design and School of Visual Arts, and has been Dean of the Art School at the California Institute of the Arts since 1991. He has written extensively about contemporary art for various publications, curated numerous exhibitions of younger artists, and has received many fellowships and residencies, including a Guggenheim Fellowship, three Artist Fellowships from the National Endowment for the Arts, and a residency fellowship from the Rockefeller Foundation.

Molly Dilworth is a New York-based painter who has exhibited her work both nationally and internationally. Since 2009, Ms. Dilworth has been creating a series of rooftop paintings, entitled *Paintings for Satellites*, to be photographed by the Google Earth mapping satellite. This project uses materials from the waste stream, including discarded house paint. Her most recent project is a five-block, 50,000-square-foot painting that covers a large outdoor surface area in New York City's Times Square. Ms. Dilworth's work invokes the effects of nature and weather conditions on artwork.

The individual *Amici*, Mr. De St. Croix, Mr. Lawson, and Ms. Dilworth, share the concern that the Seventh

Circuit's decision would preemptively strip them and other artists of the protections of United States Copyright law for no reason other than the artists' choice of medium or materials.

Established in 1969, Volunteer Lawyers for the Arts ("VLA") is the pioneer in arts-related legal aid and educational programming concerning the legal and business issues that affect artists and arts organizations. VLA believes that individual artists and arts organizations deserve access to dedicated legal representation and advocacy to ensure that their interests are protected. To achieve these goals, VLA provides low-income artists and nonprofit arts and cultural organizations with pro bono legal representation and counseling, advocacy, and educational programs. Since its establishment, VLA has played a tremendous role in the life of the arts community, serving more than 300,000 low-income artists and nonprofit organizations across the United States, and providing over \$7 million worth of pro bono legal services annually. Furthermore, in 2010, VLA launched an eight-month-long Art & Law Residency Program, the first of its kind, in order to educate eight visual artists and four arts writers annually on the effects of law on the production and reception of contemporary art in culture. In the same year, VLA also launched the Law School for Visual Artists. This five-week program teaches artists the fundamental legal and business doctrines that affect the making of their work, such as intellectual property (copyright and trademark), free speech, and consignment agreements.

Arts & Business Council of Greater Boston, Inc. ("A&BC") is a nonprofit dedicated to providing artists and arts organizations with essential support services,

including the Volunteer Lawyers for the Arts of Massachusetts program. Founded in 1989, A&BC annually provides \$1.5 million worth of pro bono legal services and education programming. A&BC exists to ensure fair legal treatment for the under-served arts community. Consequently, A&BC supports the reasonable and equitable application of copyright law for innovative means of artistic expression.

VLA and A&BC share the concerns of the individual *Amici*, and also believe that the incorrect decision of the Seventh Circuit, if allowed to stand, will challenge and harm the ability to advise and educate artists in the area of copyright law, especially with regard to works of art incorporating living materials and other innovative materials. Whether a given artwork is granted copyright protection significantly impacts an individual artist's livelihood and ability to contribute to the creative economy as a whole. Copyright law as written and as applied is capable of protecting new developments in art, whether such developments take the form of breaking new ground in medium or in message. Denying copyright protection to works of art involving living materials not only performs a disservice to individual innovative artists, but acts contrary to years of case law and violates the constitutional principle in Article I, Section 8 of promoting the useful arts. If the Seventh Circuit's decision is permitted to stand, it will significantly hinder future artistic and intellectual advancement in both nascent artistic disciplines such as biological art, and in traditional art forms that use natural materials. It is imperative that this Court reverse the Seventh Circuit's decision and provide the requisite guidance to the lower courts so that the Copyright Act continues to protect original authorship in keeping with

its constitutional purpose. *Amici* thus support Petitioner Chapman Kelley’s petition for a writ of certiorari.²

ARGUMENT

The Seventh Circuit held that Chapman Kelley’s design for *Wildflower Works* was “neither ‘authored’ nor ‘fixed’ in the senses required for copyright.” *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011). Telegraphing its conclusion that Mr. Kelley’s work was not a work of art, the Seventh Circuit summed up its reasoning as follows: “Simply put, gardens are planted and cultivated, not authored. A garden’s constituent elements are alive and inherently changeable, not fixed.” *Id.* The consequence of the Seventh Circuit’s twin holdings concerning authorship and fixation is that a work of art made from living materials is automatically disqualified from copyright protection because the use of living materials in art comes from nature and because it has the potential for change. This approach is demonstrably wrong—as a matter of law and as a matter of practical application.

I. WILDFLOWER WORKS IS A WORK OF AUTHORSHIP

On authorship, the Seventh Circuit drew a bright line in the sand, stating that “works owing their form to the forces of nature cannot be copyrighted,” irrespective of what an artist may do to control the visual perception of his subject. *Id.* The court further stated that “[m]ost

2. *Amici* do not address whether *Wildflower Works* is entitled to protection under the Visual Artists Rights Act, 17 U.S.C. § 106A, and leaves this issue to the parties.

of what we see and experience in a garden—the colors, shapes, textures, and scents of the plants—originates in nature, not in the mind of the gardener.” *Id.*

The Seventh Circuit confused the concepts of artistic materials and artistic works. Mr. Kelley does not claim exclusivity in the use of natural materials, but rather the original manner in which he selected and arranged flowers and other materials to form *Wildflower Works*. Although it encompasses materials originating in nature, just as all works of visual art necessarily do, *Wildflower Works* is a unique work of art that did not previously exist in nature. It was entirely and intentionally conceived, modeled, designed, organized, and physically executed—and thus authored—by Mr. Kelley.³ And thus the “form”—to use the Seventh Circuit’s term—is not the individual natural elements, but the combined impact of thousands of flowers, arranged with other materials in a manner that did, indeed, originate in the mind of the artist.

In more traditional terms, Michelangelo would not have claimed exclusivity in the materials he used to paint the ceiling of the Sistine Chapel, but rather what he created with those materials. Using the materials chosen by Mr. Kelley is no different than an artist choosing a pigment to paint with, a particular stone to carve, a sheet of steel to weld, or a piece of wood to whittle. An artist who

3. The Seventh Circuit in fact recognized that Mr. Kelley specifically chose each plant bulb according to his concept, brought the bulbs into a foreign environment, deliberately planted and framed the bulbs with steel partitions and gravel, and simultaneously arranged them in a unique sculptural format. *Id.* at 293. The court’s decision on authorship is at odds with these undisputed facts.

uses a feather in her artwork owes the colors, shapes, and textures of that feather to the forces of nature. The colors, shapes, and textures did not originate in the mind of the artist, but the manner in which she chose to use the feather did—and the latter is what the Copyright Act protects.

The Seventh Circuit’s opinion thus runs afoul of this Court’s holding in *Feist Publ’ns. Inc., v. Rural Telephone Service Company*, 499 U.S. 340 (1991). This Court defined “author” as “he to whom anything owes its origin; originator; maker.” *Id.* at 346 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)). Just as “facts do not owe their origin to an act of authorship,” *id.* at 347, neither do artistic materials. Nevertheless, just as the selection and arrangement of facts can receive copyright protection, so can the selection and arrangement of natural materials to make a work of visual art because when they “are made independently by the compiler and entail a minimal degree of creativity,” works of art made from natural materials “are sufficiently original [such] that Congress may protect such compilations through the copyright laws.” *Id.* at 348. This Court thus taught that unoriginal, non-copyrightable components can be brought together to create something original and protectable. It does not matter if the individual elements were created by the artist or not—indeed in most cases they probably were not—as long as the overall work meets the basic tests for copyright protection.

Nor should the fact that individual living flowers change over time be a disqualification for authorship, for all works of art succumb to the forces of nature and change over time. (The fixation requirement is addressed separately, *infra*.) Indeed, the ceiling of the Sistine Chapel

did change over time, eventually requiring restoration. Surely, copyright law would not have stripped Michelangelo of his rights due to fading and chipping paint. The Seventh Circuit's opinion suggests that if Mr. Kelley had used cut flowers, rather than live planted ones, there would be no question as to his entitlement to protection. *Kelley*, 635 F.3d at 304-05. But of course cut flowers change as well—and probably change faster than live ones if steps are not taken to preserve them. *Amici* cannot conceive, however, of any court saying that an artist who selects cut flowers and affixes them to a board in an original arrangement would not be entitled to a claim of original authorship sufficient for copyright protection, even though it is clear that the flowers (and thus the arrangement) would wither and likely decompose within days.

If the Court does not grant certiorari to Petitioner, it will not only allow a decision at odds with its own decision in *Feist* to stand. In addition, it will leave the copyright and artistic communities with a substantial and untenable degree of uncertainty as to the protectability of works based solely on the materials and media utilized. Mr. De St. Croix, one of the individual *Amici*, creates politically-oriented sculptural pieces using a mix of natural and artificial materials, including Spanish moss, tumbleweed, and sage.⁴ He does not claim authorship over these materials, but rather the manner in which he selects and arranges them to achieve a certain desired effect. The fact that he cannot claim authorship over the materials used for each individual component of his work obviously

4. See Images 1 through 2. Additional examples of Mr. De St. Croix's artwork are available on his website at <http://blanedestcroixstatement.blogspot.com/>.

has no bearing on his right to copyright protection for his sculptural work as a whole. Mr. De St. Croix and the other *Amici* are concerned that the Seventh Circuit has held precisely that, however, or at least that there is a serious risk that its decision will be interpreted that way in the future.

II. WILDFLOWER WORKS IS FIXED FOR PURPOSES OF COPYRIGHT

Certiorari should also be granted to address the Seventh Circuit's erroneous holding that *Wildflower Works* was not fixed for purposes of copyright law. As noted above, the Seventh Circuit's reasoning on this point is almost identical to its reasoning regarding authorship: "A garden's constituent elements are alive and inherently changeable, not fixed," and thus *Wildflower Works* is "not stable or permanent enough to be called 'fixed.'" *Kelley*, 635 F.3d at 305. As discussed in the previous section, many artists, including more traditional artists, employ natural materials in their work. Whether the materials are alive or dead is irrelevant to the fixation requirement in the Copyright Act, as no work of art is immune from the external changes brought about by exposure to the elements.

Indeed, as discussed above, it is likely that a work of art comprised of living flowers would change much more slowly than an identical work of art comprised of cut flowers, and it is also likely that the former would long survive the latter. Yet under the Seventh Circuit's view, only the latter would receive protection. For the same reasons expressed above, this outcome is unsupportable under the Copyright Act, and *Amici* urge the Supreme

Court to grant certiorari to Petitioner to resolve the uncertainty created by the Seventh Circuit’s decision.

The Seventh Circuit, aware that there is no specific temporal limit in the Copyright Act for fixation,⁵ improperly attempted to apply a different gloss, never before used in any copyright jurisprudence:

Seeds and plants in a garden are naturally in a state of perpetual change; they germinate, grow, bloom, become dormant, and eventually die. This life cycle moves gradually, over days, weeks, and season to season, but the real barrier to copyright here is not *temporal* but *essential*. The essence of a garden is its vitality, not its fixedness. It may endure from season to season, but its nature is one of dynamic change.

5. The question of whether there is a particular durational requirement has been recognized as the subject of disagreement between the Courts of Appeal for the Second and Ninth Circuits, albeit on the question of when fixation occurs for purposes of copyright infringement, rather than the initial creation of copyrighted works. In 1993, the Ninth Circuit held that the loading of software in a computer’s Random Access Memory (“RAM”) is sufficient for purposes of fixation—it “occurs when a computer program is transferred from a permanent storage device to a computer’s RAM”—even though the software only resides in RAM temporarily, and is automatically erased when the computer is turned off. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993). In 2008, however, the Second Circuit held that digital television content which remained in the buffer of Cablevision’s Broadband Media Router for “a fleeting 1.2 seconds” was not sufficiently fixed to create a copy that could give rise to copyright infringement. *Cartoon Network LP v. CSC Holding, Inc.*, 536 F.3d 121, 129-30 (2d Cir. 2008), *cert. denied*, *Cable News Network, Inc. v. CSC Holdings*, 129 S. Ct. 2890 (2009).

Kelley, 635 F.3d at 305 (emphasis in original). Thus, the Seventh Circuit acknowledges that the rate of change in *Wildflower Works* is very slow. As noted above, there are examples of artwork that change faster than *Wildflower Works*, such as through natural decay. Yet, no challenge would be raised to authorship or fixation in this example. The Seventh Circuit simply says that because the “essence” of living flowers is to change, a work made of them is ineligible for protection. If this were the rule, it would leave artists, particularly those working with organic materials, in the dark as to the scope of potential copyright protection for their creations. This outcome is untenable.

Consider, for example, choreography, which is one of the enumerated subjects of copyright. *See* 17 U.S.C. § 102(a)(4). All choreography, when performed, is fleeting. Its “essence” as the Seventh Circuit uses the term, is its “vitality, not its fixedness.” *Kelley*, 635 F.3d at 305. Yet, when a choreographer registers his works with the Copyright Office, he provides a notation form that is designed to represent the embodiment of the choreographic work itself. When it comes time for enforcement, however, enforcement is not limited to slavish photocopying of the notation form—a copyist of the actual choreography in a live stage performance can be liable for copyright infringement. This comports with the guidelines for fixation set out in the Copyright Office’s Compendium II. U.S. Copyright Office, Compendium II: Copyright Office Practices § 450 (1984). The fixed form of a choreographic work must be one which is “capable of performance as submitted.” *Id.* § 450.05. The main forms of fixation that garner protection for choreography are an elaborate notation system, *id.* § 450.07(c), or via videotape. Neither notation symbols nor the image on a videotape

should be confused for the actual work that is protected by copyright. Rather, both are necessary conventions recognized by the Copyright Office for representing the content of what is being protected and to provide evidence in the case of any enforcement actions.

Fundamentally too, there is no doubt that a public performance of a new unrecorded song created by a musician on the fly, which is of shorter duration than the changes in the floral arrangements in *Wildflower Works*, is unquestionably fixed when reduced to registrable form by music notation symbols. *See* 17 U.S.C. §§ 102(a) (2), 106(4). Once fixed in such form, if a copyist records or performs the song, there is no debate that it is an infringement and that the work was fixed, although its original iteration was of short duration. Indeed, even the Seventh Circuit acknowledges that “blueprints” of *Wildflower Works* could be registrable. *Kelley*, 635 F.3d at 305. That is correctly the case and renders the rest of its holding concerning fixation incomprehensible. That is because an infringement of the blueprints would not be limited to a photocopy of the blueprints. By way of example, it could include a photograph of the actual garden placed on a t-shirt. In Mr. Kelley’s case, registration was not a prerequisite to suit because it was brought under 17 U.S.C. § 106A, and thus no registration was at issue. *See* 17 U.S.C. § 411 (excepting claims under Section 106A from preregistration or registration before filing suit). The Seventh Circuit’s language, however, is general and not limited to VARA claims. Thus, its holding that an artistic work consisting of the selection and arrangement of natural materials is not fixed because its “essence is vitality” cannot be allowed to stand lest the consequence

be that the aforementioned hypothetical t-shirt, recording, or public performance not be deemed an infringement of a protected work.

“Change” or “essential change” has also never been a barrier to copyright protection. Indeed, for example, the Copyright Office has taken the opposite view when it comes to the fixation requirement for copyrighted Internet websites: “Many works transmitted online, such as websites, are revised or updated frequently,” and therefore “copyrightable revisions to online works that are published on separate days must each be registered individually.”⁶ While this statement suggests that the registration of a particular website at a particular moment covers only that iteration of the website, it demonstrates that works in a constant state of change—even if change is known and expected at the moment of registration—are still undoubtedly fixed for purposes of the fixation requirement of the Copyright Act.

III. THE SEVENTH CIRCUIT’S OPINION WOULD HAVE SEVERE CONSEQUENCES FOR ARTISTS AND ARTS ORGANIZATIONS

The individual *Amici* are deeply concerned that the Seventh Circuit’s decision, if left standing, puts into doubt the extent to which their creative output will be protected going forward. By way of example, *amicus* Mr. De St. Croix creates large sculptures using a combination of natural and industrial materials to convey messages

6. U.S. Copyright Office, *Circular 66: Copyright Registration for Online Works*, May 2009, <http://www.copyright.gov/circs/circ66.pdf>.

that include the impact of people upon the environment.⁷ Mr. De St. Croix uses natural materials, such as Spanish moss, tumbleweeds, and sage in his artwork for two reasons. First, his use of natural materials is crucial to his ecological concerns and critique of humankind's exploitation of natural resources. Second, natural materials are substantially cheaper than using synthetic materials. The Seventh Circuit's opinion suggests that by using natural instead of synthetic materials, Mr. De St. Croix risks his ability to obtain copyright protection.

In addition to Mr. De St. Croix, other well-known artworks use natural materials to convey their artistic messages. For example, *White Cabinet and White Table* (Marcel Broodthaers, 1965) is comprised of painted eggshells piled upon a table. *Central Garden* (Robert Irwin, 1997) is a large outdoor work at The Getty Museum in Los Angeles, which includes a ravine, a tree-lined walkway, a floating azalea maze and over 500 types of plants. *Spiral Jetty* (Robert Smithson, 1970) is a spiral arrangement of black basalt rocks and earth on the Great Salt Lake in Utah. *The Library for the Birds of Antwerp* (Mark Dion, 1993) has a tree at its center, upon which are arranged (among other things) birds, a rat, a snake and bird nests. *Gnaw* (Janine Antoni, 1992) is comprised of two large blocks—600 pounds of chocolate and 600 pounds of lard—each of which is gnawed in a unique pattern by the artist.⁸

7. See Images 1 through 2. Additional examples of Mr. De St. Croix's artwork are available on his website at <http://blanedestcroixstatement.blogspot.com/>.

8. See Images 3 through 4. Additional images of referenced artworks are available at http://www.vlany.org/vla_SCOTUS_petition_images.php.

If the Seventh Circuit's opinion is allowed to stand, then the protection of the above works, and indeed of all works that use natural materials in new ways, are called into question. If artists lose copyright protection, they lose the right to stop other parties from commercializing their works. Anyone would be free to copy and commercialize such works without any benefit to the artist contrary to Article I, Section 8 of the U.S. Constitution and the Copyright Act.⁹ *Wildflower Works* could be recreated by another city without payment or attribution to Mr. Kelley, while the party doing the copying could enjoy unearned financial gain. Factoring in the potential revenues derived from the sale of derivative items, such as catalogues, postcards, posters, t-shirts, mugs, and other commercial items, the significance cannot be ignored.¹⁰ Indeed, based on the Seventh Circuit's statement that it *would* protect *Wildflower Works*' blueprints, *Kelley*, 635 F.3d at 305, one could photograph *Wildflower Works*, file a copyright registration for and commercialize the photograph, all without any compensation to Mr. Kelley or providing him any right to injunctive relief.

In addition to jeopardizing the protections enjoyed by artists under the Copyright Act, the Seventh Circuit's decision makes it difficult for attorneys to provide reliable copyright advice to artists using natural, ephemeral, or

9. See *All Things Considered: Mardi Gras Indians Seek to Copyright Costumes* (National Public Radio broadcast, Feb. 8, 2011) and Campbell Robertson, *Want to Use My Suit? Then Throw Me Something*, N.Y. Times, Mar. 23, 2010, at A13 (efforts to obtain compensation through copyright for use of traditional garb in images).

10. Robert Irwin licensed The Getty Museum to reproduce and sell images of *Central Gardens*.

changing materials. The Seventh Circuit's opinion could also deter artists from using natural and organic materials and methods, thus depriving the world of art that might otherwise have been created.

As the values of society change and focus more on urban space and the environment, art too follows this trend. The artist's media changes, as do the messages underlying the work. VLA and A&BC have noted this trend through the experience of their clients. This Court has long held that "the purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested. To induce individuals to undertake the personal sacrifices necessary to create such works, federal copyright law extends to the authors of such works a limited monopoly to reap the rewards of their endeavors." *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 678 (7th Cir. 1986) (citing Supreme Court opinions). The Seventh Circuit's opinion would lead to a reversal of these incentives. Artists would shy away from experimentation and boundary-pushing, and their counselors, like VLA and A&BC, would have to advise them accordingly. The aesthetic and economic incentives created by copyright law should not be withheld on the basis of an artist's choice of materials or subject matter, but rather the protections should be guaranteed in equal measure to all those who promote the progress of the useful arts.

IMAGE 1

Blane De St. Croix. *Landscape Triptych*, 2011.

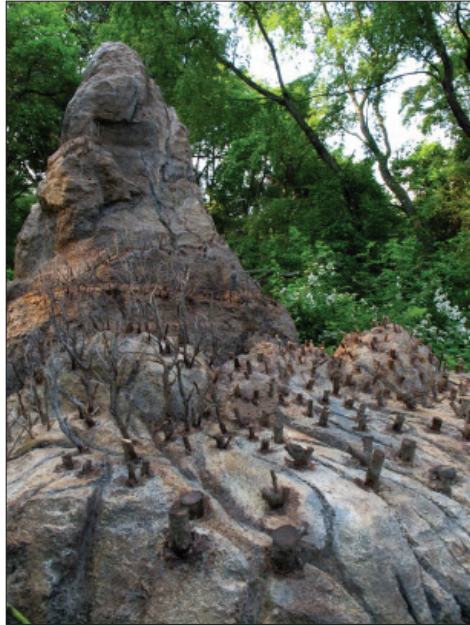


IMAGE 2

Blane De St. Croix. *Landscape Section: Marsh*, 2009



IMAGE 3

Janine Antoni. *Gnaw*, 1992. 600 lbs. of chocolate and 600 lbs. of lard, both gnawed by the artist.



IMAGE 4

Robert Irwin. *Central Garden*, Getty Museum, Los Angeles, 1997. 134,000-square-foot design featuring a natural ravine, tree-lined walkway, floating azalea maze, and more than 500 varieties of plant material.



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