

# COPYRIGHTABLE SUBJECT MATTER IN THE “NEXT GREAT COPYRIGHT ACT”

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## ABSTRACT

The drafters of the Next Great Copyright Act will have to establish the subject matter that their statute will protect. Currently, the 1976 Copyright Act protects a very broad range of subject matter, though its reach is not unlimited. Perfume, for example, falls outside all of the categories of subject matter protected in the current statute.

The question of what subject matter copyright law protects has been largely, though not entirely, uncontroversial in recent years, and this Article does not propose that the Next Great Copyright Act expand or contract copyright’s subject matter. Instead, it draws on experience under the current act and its predecessor (the 1909 Copyright Act) to offer lessons to guide legislators in drafting a new statute’s subject-matter provisions.

Most importantly, Congress should expressly and exhaustively enumerate in the statute all of the categories of subject matter that it intends to protect. Congress should not delegate authority to the courts or the Copyright Office to find other, unenumerated categories of subject matter copyrightable. In the past, Congress appears to have left open the possibility that subject matter not enumerated in the statute—such as, for example, perfume under the 1976 Act—might nevertheless be copyrightable, either by writing a statute (the 1909 Act) that could be read to protect every type of authorship that the Constitution authorizes Congress to protect or by indicating (in the 1976 Act) that the statutory list of categories of copyrightable subject matter is nonexhaustive. The Next Great Copyright Act should reject both approaches.

In addition to identifying all of the categories of authorship that it wishes to protect, Congress should statutorily define each enumerated category, and should do so with sufficient breadth that rapid technological developments do not quickly make the definitions obsolete. The current statute, in contrast to the 1909 Act, demonstrates how this can be done.

Finally, Congress should make clear that works of authorship incorporating preexisting material—in particular, compilations of preexisting material—are copyrightable only if they come within one of the expressly enumerated categories.

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Following these principles in establishing the subject matter protected by the Next Great Copyright Act would improve upon the 1976 Act's provisions and would resolve a number of uncertainties generated by the current statutory language.

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### I. INTRODUCTION

Register of Copyrights Maria A. Pallante has called for considering a comprehensive revision of current U.S. copyright law to produce the “Next Great Copyright Act.”<sup>1</sup> Drafting this Next Great Copyright Act will require defining the scope of subject matter protected by the Act. This key aspect of framing a revised copyright statute will determine what can and cannot be

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1. Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

protected by copyright and will represent Congress's judgment about which creations by authors need copyright's protection and which should remain free from claims of ownership that would restrict copying.

Not everything within copyright's subject matter will actually be protected by copyright, of course. Under the current statute, while copyright protects "works of authorship," not every work of authorship qualifies—only works that are both original and fixed in a tangible medium of expression can actually obtain copyright.<sup>2</sup> But the statutory articulation of subject matter provides the threshold: under current law, if something does not constitute a work of authorship, then it cannot be protected by federal copyright. Thus, for example, if someone today claims copyright protection in a perfume, that claim will be rejected if a perfume is not a work of authorship. Defining the subject matter of copyright law will thus be an important task for the drafters of a revised copyright statute because it will establish which creations may be protected by copyright, and which may not.

The last time Congress undertook a wholesale revision of the copyright statute (producing the 1976 Copyright Act), the question of whether to extend copyright protection to sound recordings was a major issue.<sup>3</sup> While much controversy surrounds many aspects of the present copyright statute and current proposals for reform, there is, at least at the moment, no comparable issue regarding which types of authorial creations should be

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2. 17 U.S.C. § 102(a) (2012). In the copyright context, "original" means that a work is both independently created by its author and minimally creative. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). A work is sufficiently fixed when it is embodied in a material object for a period of more than transitory duration. 17 U.S.C. § 101 (2012) ("fixed"). The requirement that a work be "original" in order to be protected is constitutional, *Feist Publ'ns, Inc.*, 499 U.S. at 345–51, so whichever categories of subject matter Congress chooses to protect in the Next Great Copyright Act, it will need to protect only works in those categories that are original. Whether the Constitution empowers Congress only to protect fixed works, or whether it can also grant copyright in unfixed works, remains a matter of some controversy. *See, e.g.*, 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.6.1, at 17:56 (3d ed. 2005–2014) (concluding "[t]here is little doubt that [unfixed] performances . . . are 'writings' in the constitutional sense for, beyond literalism, there is nothing in the mechanical act of fixation to distinguish writings from nonwritings"); *U.S. v. Martignon*, 492 F.3d 140, 145 (2d Cir. 2007) (accepting United States' contention that live performances are outside the scope of Congress's copyright power because they are not fixed).

3. *See, e.g.*, Barbara Ringer, *The Unauthorized Duplication of Sound Recordings (Study No. 26)*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 26–28, at 2–8, 21–37 (Comm. Print 1961) (discussing uncertainty of protection for sound recordings under the 1909 Act and legislative proposals between 1925 and 1951 to extend copyright to sound recordings).

protected by copyright. This Article therefore does not examine whether any particular type of creation should be added to, or removed from, the scope of statutory subject matter in the Next Great Copyright Act. Instead, this Article surveys what subject matter copyright law currently protects, how the law evolved to its current state, and what subject-matter obligations international agreements on copyright law impose on the United States. This Article then proposes four principles to guide the drafters of the Next Great Copyright Act in framing the act's subject-matter provisions.

Three principles address how Congress should approach the basic issue of how to statutorily define what is, and therefore what is not, subject to copyright protection. First, the central and most substantial principle calls on Congress to expressly enumerate in the copyright statute all of the categories of works that are protected and not to draft the statute to grant courts or the Copyright Office the power to recognize copyright in works that fall outside those enumerated categories. The next two principles are more minor and corollary to the first. Congress should not exhaust its constitutional power over copyright; it should affirmatively decide which categories of works to protect, rather than simply granting protection to everything that constitutes the "Writing" of an "Author" under the Constitution's Copyright Clause. And Congress should define each category of copyrightable works to which it grants statutory protection. This will allow Congress to ensure that the categories are defined broadly enough that the definitions will not rapidly become obsolete in the face of technological developments, while still giving those that administer the copyright statute—courts and the Copyright Office—guidance as to what each category does and does not include.

The final principle turns from the general question of how to define what can be protected by copyright to the more specific issue of compilations and derivative works. This fourth principle calls on Congress to grant copyright protection to a compilation or a derivative work only if that work falls within one of the expressly enumerated categories of protectable works and not simply to provide copyright protection for any authorial creation that can meet the statutory definition of "compilation" or "derivative work." This will reduce the likelihood that those categories could be used as a backdoor by which subject matter that is otherwise not expressly granted copyright protection could nonetheless obtain it.

## II. THE EVOLUTION OF COPYRIGHTABLE SUBJECT MATTER

The subject matter protected by U.S. copyright law has expanded gradually, but quite substantially, since Congress adopted the first copyright statute. The 1790 Copyright Act granted protection only to books, maps, and

charts.<sup>4</sup> Congress extended protection to “historical or other prints” in 1802.<sup>5</sup> In the 1831 revision, Congress granted copyright to musical compositions and restated the protection for prints as extending to “any print or engraving” or, in some instances, to “any print, cut, or engraving.”<sup>6</sup> The first express mention of dramatic works came in 1856, when Congress provided that a copyright for “any dramatic composition” would include the right to publicly perform the composition;<sup>7</sup> dramatic compositions had apparently already been within the Copyright Act’s subject matter as “books.”<sup>8</sup> “[P]hotographs and the negatives thereof” were granted protection in 1865.<sup>9</sup> The 1870 revision consolidated the subject matter of copyright protection as “any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or . . . painting, drawing, chromo, statue, statuary, and . . . models or designs intended to be perfected as works of the fine arts.”<sup>10</sup>

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4. Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). (The very first Anglo-American copyright law, the Statute of Anne, had covered only books. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). For a discussion of the scope of this term, and later developments in copyrightable subject matter under British law, see Pamela Samuelson, *Are Gardens, Synthetic DNA, Yoga Sequences, and Fashions Copyrightable?*, at 4–5, [http://www.law.berkeley.edu/files/Samuelson\\_Oct\\_14\\_cop\\_subject\\_matter.pdf](http://www.law.berkeley.edu/files/Samuelson_Oct_14_cop_subject_matter.pdf) (last visited May 16, 2014).) Nineteenth-century courts in the United States gave a broad construction to the term “book,” not limiting the term to the conventional bound volume but instead interpreting it to include, for example, single printed sheets. *See, e.g.*, Clayton v. Stone, 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872); Drury v. Ewing, 7 F. Cas. 1113 (C.C.S.D. Ohio 1862) (No. 4,095); *see also* EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 142–44 (1879). The liberal construction had limits, however. Thus, courts refused to consider product labels as “books” within the protection of the statute. *See, e.g.*, Scoville v. Toland, 21 F. Cas. 863, 864 (C.C.D. Ohio 1848) (No. 12,553); Coffeen v. Brunton, 5 F. Cas. 1184, 1184 (C.C.D. Ind. 1849) (No. 2,946). This broad construction of the statutory term book continued through the use of the term in the 1909 Act. *See infra* note 93 and *infra* text accompanying note 107.

5. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (repealed 1831).

6. Copyright Act of Feb. 8, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870). Musical compositions had in some instances been registered for copyright protection, apparently as “books,” prior to 1831. *See* Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2,872); FEDERAL COPYRIGHT RECORDS 1790–1800, at xvi (James Gilreath ed., 1987); Frederick R. Goff, *The First Decade of the Federal Act for Copyright, 1790–1800*, in ESSAYS HONORING LAWRENCE C. WROTH 101, 107–08, 109 n.1 (Frederick R. Goff ed., 1951); William F. Patry, *Copyright and Computer Programs: It’s All in the Definition*, 14 CARDOZO ARTS & ENT. L.J. 1, 24 (1996).

7. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 138 (repealed 1870).

8. Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1401 (2010).

9. Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540, 540 (repealed 1870).

10. Copyright Act of 1870, ch. 230, § 86, 16 Stat. 212, 212 (repealed 1909). The 1870 Copyright Act was reenacted in the Revised Statutes in 1873. Rev. Stat. § 4952 (1873).

When Congress completed its next general revision of the copyright law and produced the 1909 Copyright Act, it granted copyright protection to “all the writings of an author.”<sup>11</sup> In addition to this very general statutory statement of the works protected, the 1909 Act was also more specific in detailing that applications to register copyright in a work should specify in which of a closed list of classes the work belonged, and listed the following classes:

- books, including composite and cyclopædic works, directories, gazetteers, and other compilations;
- periodicals, including newspapers;
- lectures, sermons, addresses prepared for oral delivery;
- dramatic or dramatico-musical compositions;
- musical compositions;
- maps;
- works of art, models or designs for works of art, and reproductions of a work of art;
- drawings or plastic works of a scientific or technical character;
- photographs; and
- prints and pictorial illustrations.<sup>12</sup>

The statute expressly provided that this list of classifications “shall not be held to limit” the Act’s grant of protection to “all the writings of an author.”<sup>13</sup>

Just three years later, Congress amended the 1909 Act and added to the list of specified administrative classes two new classes: “motion-picture photoplays” and “motion pictures other than photoplays.”<sup>14</sup> The final expansion of subject matter under the 1909 Act came in 1971, when

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11. Copyright Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976); see also Staff of N.Y.U. Law Review, *The Meaning of “Writings” in the Copyright Clause of the Constitution (Study No. 3)*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 1–4 (Comm. Print 1960).

12. Copyright Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076–77 (repealed 1976).

13. As discussed below, see *infra* text accompanying notes 101–107 and 123–133, courts and the Copyright Office did not read the 1909 Act in all instances to provide copyright protection for subject matter that fell outside all of the categories listed in section 5 but arguably within the scope of “all the writings of an author” in section 4.

14. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488, 488 (1912) (repealed 1976).

Congress amended the Act to add “sound recordings” as another administrative class of works.<sup>15</sup>

The last general revision of U.S. copyright law produced the 1976 Act, which in section 102(a) describes the basic subject matter protected under current copyright law as “works of authorship.”<sup>16</sup> The Act, however, does not affirmatively define the term “works of authorship.”<sup>17</sup> Instead, as originally enacted, it stated that works of authorship “include” seven specific categories listed in the statute:

- literary works;
- musical works;
- dramatic works;
- pantomimes and choreographic works;
- pictorial, graphic, and sculptural works;
- motion pictures and other audiovisual works; and
- sound recordings.<sup>18</sup>

In 1990, Congress amended section 102(a) to add architectural works as an eighth protected category.<sup>19</sup> The impetus for this amendment was largely a

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15. Pub. L. No. 92-140, 85 Stat. 391 (1971) (repealed 1976). In 1939, Congress had revised the class identified in section 5(k) from “prints and pictorial illustrations” to read “prints and pictorial illustrations including prints or labels used for articles of merchandise.” Act of July 31, 1939, ch. 396, § 2, 53 Stat. 1142 (1939) (repealed 1976).

16. 17 U.S.C. § 102(a) (2012). For a detailed examination of the consideration of issues of subject matter in the revision process that produced the 1976 Act, see Pamela Samuelson, *Are Gardens, Synthetic DNA, Yoga Sequences, and Fashions Copyrightable?*, at 12–20, [http://www.law.berkeley.edu/files/Samuelson\\_Oct\\_14\\_cop\\_subject\\_matter.pdf](http://www.law.berkeley.edu/files/Samuelson_Oct_14_cop_subject_matter.pdf) (last visited May 16, 2014).

17. “The phrase ‘original works of authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute.” H.R. REP. NO. 94-1476, at 51 (1976) [hereinafter 1976 HOUSE REPORT]. This article does not consider the meaning of the term “work,” separately from the term “work of authorship.” On that question, see generally Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 UCLA L. REV. 1175 (2011); Michael J. Madison, *The End of the Work As We Know It*, 19 J. INTELL. PROP. L. 325 (2012).

18. 17 U.S.C. § 102(a)(1)–(8) (2012). (The category of architectural works was added by the Architectural Works Copyright Protection Act, Pub. L. No. 101-650, Title VII, 104 Stat. 5089, 5133 (1990).) Compare with Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, S. Treaty Doc. No. 99-27 [hereinafter Berne Convention], which identifies “literary and artistic works” in Article 1 as the subject matter of protection under the treaty. Article 2(1) then states that this phrase “shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression,” and then offers a long list of examples. Berne Convention, *supra*, art. 2(1).

19. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, Title VII, 104 Stat. 5089, 5133 (1990).

desire to bring U.S. law into closer conformity to the requirements of the Berne Convention, which the United States had joined in 1988.<sup>20</sup>

### III. INTERNATIONAL OBLIGATIONS ON SUBJECT MATTER TO PROTECT

As the experience with architectural works indicates, in deciding what subject matter to protect in the Next Great Copyright Act, Congress should ensure that the subject-matter provisions of a revised copyright act satisfy international copyright obligations. The United States belongs to a number of international agreements that require U.S. copyright law to protect certain subject matter. These agreements thus provide some substantive guidance as to what particular subject matter copyright law should protect, at least if the United States wants to comply with its international obligations.<sup>21</sup>

The subject matter currently protected by the 1976 Act generally appears to meet these international requirements. The Berne Convention requires adhering countries to protect “the rights of authors in their literary and artistic works,”<sup>22</sup> and explains that this phrase “shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.”<sup>23</sup> This expansive and rather general statement of the

20. H.R. REP. NO. 101-735, at 19–20 (1990).

21. As a technical matter, most of these international agreements require that the United States grant protection in specified subject matter to nationals of the *other* nations that have signed those agreements, and would technically permit the United States to withhold such protection from U.S. citizens. See PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT 38 (2d ed. 2010) (“The Convention’s minimum standards do not apply in the country of origin . . . .”); 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND § 6.53, at 278 (“[S]o long as a member state affords the minimum Berne protections to authors whose countries of origin are in *other* Union states, it can provide far less to authors whose works originate in that state.”). But the United States has not generally drawn any distinction between U.S. authors and foreign authors with respect to what subject matter is protected by U.S. copyright law.

22. Berne Convention, *supra* note 18, art. 1.

23. Berne Convention, *supra* note 18, art. 2(1). The Convention also requires protection for “[t]ranslations, adaptations, arrangements of music and other alterations of a literary or artistic work.” Berne Convention, *supra* note 18, art. 2(3). Protection for derivative works satisfies this requirement, but does not call for protection of additional categories of subject matter, since protectable derivative works fall within the enumerated categories. Similarly, the requirement to protect “[c]ollections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations” is met by protection for compilations, which again fall within the already enumerated categories. Berne Convention, *supra* note 18, art. 2(5). The Universal Copyright Convention provides that each contracting state “undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and

subject matter that Berne nations must protect is fleshed out by a long list of examples, all of which seem to be encompassed in categories currently enumerated in section 102(a)—literary works;<sup>24</sup> musical works;<sup>25</sup> dramatic works;<sup>26</sup> pantomimes and choreographic works;<sup>27</sup> pictorial, graphic, and sculptural works;<sup>28</sup> motion pictures and other audiovisual works;<sup>29</sup> and architectural works.<sup>30</sup>

The TRIPS Agreement and the WIPO Copyright Treaty contain their own obligations to protect additional enumerated subject matter and, again, current U.S. law appears to meet those obligations. Both agreements require signatories to protect computer programs as literary works,<sup>31</sup> which section 102(a) currently does.<sup>32</sup> They also both require protecting compilations of

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cinematographic works, and paintings, engravings and sculpture.” Universal Copyright Convention art. 1, July 24, 1971, 25 U.S.T. 1341. The Convention thus does not appear to require protecting any subject matter beyond that required by the Berne Convention. See GOLDSTEIN & HUGENHOLTZ, *supra* note 21, at 44, 194–95 (describing the list of protected subject matter under the UCC as “similar” to and “tenser” than that under the Berne Convention).

24. See Berne Convention, *supra* note 18, art. 2(1) (“books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature”).

25. See Berne Convention, *supra* note 18, art. 2(1) (“musical compositions with or without words”).

26. See Berne Convention, *supra* note 18, art. 2(1) (“dramatic or dramtico-musical works”).

27. See Berne Convention, *supra* note 18, art. 2(1) (“choreographic works and entertainments in dumb show”).

28. See Berne Convention, *supra* note 18, art. 2(1) (“works of drawing, painting, architecture, sculpture, engraving, and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science”).

29. See Berne Convention, *supra* note 18, art. 2(1) (“cinematographic works to which are assimilated works expressed by a process analogous to cinematography”).

30. See Berne Convention, *supra* note 18, art. 2(1) (“works of . . . architecture . . . ; . . . illustrations, maps, plans, sketches and three-dimensional works relative to . . . architecture . . .”).

31. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 10(1), Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS]; WIPO Copyright Treaty, art. 4, Dec. 20, 1996, S. Treaty Doc. No. 105-17 2186 U.N.T.S. 121, [hereinafter WIPO Copyright Treaty]. The Berne Convention might independently require protection for computer programs if a computer program constitutes a “production in the literary, scientific [or] artistic domain,” Berne Convention, *supra* note 18, art. 2(1), which appears to be uncertain, and computer programs are not expressly listed as an example of a protected category in the Berne Convention. See, e.g., GOLDSTEIN & HUGENHOLTZ, *supra* note 21, at 102–05. The express requirements in TRIPS and the WIPO Copyright Treaty thus remove any uncertainty as to the international obligation to extend copyright to computer programs.

32. 1 GOLDSTEIN, *supra* note 2, § 2.15.2, at 2:190–91.

data “which by reason of the selection or arrangement of their contents constitute intellectual creations.”<sup>33</sup> Again, current law meets this requirement by specifying that the subject matter of copyright includes original (i.e., minimally creative) compilations.<sup>34</sup> The TRIPS Agreement also requires member states to protect some rights in phonograms,<sup>35</sup> and the grant of copyright protection to sound recordings<sup>36</sup> fulfills this requirement.

In sum, the subject matter currently protected under the copyright statute appears to meet the international copyright obligations of the United States, such that a revised copyright statute would not need to grant protection to any currently unprotected subject matter in order to comply with those obligations.<sup>37</sup> At the same time, though, any revision that removed protection from any currently protected subject matter might place the United States out of compliance with our international obligations.<sup>38</sup>

#### IV. FOUR PRINCIPLES FOR REVISION

As noted above, this Article does not take up the question of whether any particular type of authorial creation should be added to, or removed from, the scope of statutory subject matter in a revised copyright act.<sup>39</sup>

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33. TRIPS, *supra* note 31, art. 10(2); WIPO Copyright Treaty, *supra* note 31, art. 5.

34. 17 U.S.C. § 103(a) (2012).

35. TRIPS, *supra* note 31, art. 14(2).

36. 17 U.S.C. § 102(a)(7) (2012).

37. The United States has also entered into a number of bilateral or regional free-trade agreements which impose copyright-related obligations, but the provisions of these agreements do not seem to require protecting any subject matter not currently protected under U.S. law. *See, e.g.*, U.S.-Australia Free Trade Agreement, chapter 17; U.S.-Bahrain Free Trade Agreement, chapter 14; U.S.-Chile Free Trade Agreement, chapter 17; U.S.-Colombia Free Trade Agreement, chapter 16; U.S.-Central America Free Trade Agreement, chapter 15; U.S.-Jordan Free Trade Agreement, article 4; U.S.-Korea Free Trade Agreement, chapter 18; U.S.-Morocco Free Trade Agreement, chapter 15; U.S.-Oman Free Trade Agreement, chapter 15; U.S.-Panama Free Trade Agreement, chapter 15; U.S.-Peru Free Trade Agreement, chapter 16; U.S.-Singapore Free Trade Agreement, chapter 16.

38. Removing protected subject matter would not *necessarily* do so. For example, although the United States protects sound recordings as copyrightable works, many other nations meet their international obligations regarding sound recordings by protecting them not under copyright but under a “neighboring rights” regime. GOLDSTEIN & HUGENHOLTZ, *supra* note 21, at 54, 230–40. Thus, the United States could comply with its international obligations and remove sound recordings from copyright protection, as long as it were to provide alternative, neighboring-rights-like protection. Most other currently protected categories of subject matter, though, must be protected by copyright in order to comply with the Berne, TRIPS, and the WIPO treaties.

39. There are not currently any significant debates underway regarding the possibility of adding new subject matter to copyright’s protection, unlike in the revision process leading up to the 1976 Act, when the issue of copyright protection for sound recordings was a major issue.

Instead, this Article proposes four principles to guide how the subject-matter provisions of the Next Great Copyright Act should be crafted.

A. CONGRESS SHOULD ENUMERATE ALL CATEGORIES OF WORKS THAT THE STATUTE PROTECTS

The first and most significant principle that should guide any revision of copyright law's subject-matter provisions is that the statute should expressly enumerate all of the categories of works to which Congress chooses to grant copyright protection and should not extend protection to an open-ended and undefined category of works.

This approach would depart from that of the current statute. Section 102(a) of the 1976 Copyright Act currently describes the basic subject matter of copyright law as “works of authorship,”<sup>40</sup> and extends protection to all “original works of authorship fixed in any tangible medium of expression.”<sup>41</sup> However, the statute never defines the term “works of authorship.”<sup>42</sup> Instead, it states that “works of authorship *include*” eight specific categories listed in the statute: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>43</sup> Because the statutory definitions provide that the term “including” is “illustrative and not limitative,”<sup>44</sup> the statutory term “works of authorship” *can* include works that do not fall within any of the categories enumerated in section 102(a).<sup>45</sup>

Any number of creative human endeavors may produce results which arguably do not fall within any of the enumerated categories of works of

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40. 17 U.S.C. § 102(a) (2012).

41. *Id.* In the copyright context, “original” means that a work is both independently created by its author and minimally creative. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). A work is sufficiently fixed when it is embodied in a material object for a period of more than transitory duration. 17 U.S.C. § 101 (2012) (“fixed”).

42. “The phrase ‘original works of authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute.” 1976 HOUSE REPORT, *supra* note 17, at 51.

43. 17 U.S.C. § 102(a)(1)–(8) (2012) (emphasis added).

44. 17 U.S.C. § 101 (2012) (“including”).

45. 1976 HOUSE REPORT, *supra* note 17, at 51 (“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 subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor *that new forms of expression within that general area of subject matter would necessarily be unprotected.*”) (emphasis added) (as corrected by 122 CONG. REC. H10727 (daily ed. Sept. 21, 1976)).

authorship but which might nonetheless arguably constitute “works of authorship.” Copyright protection offers many benefits to the copyright owner—an automatically vested long-lived right to exclude most other people from making most uses of the copyrighted work without getting (and usually paying for) the copyright owner’s permission. So people who create things that have not traditionally been thought of as copyrightable works may try to claim copyright in their creations. Consider two examples drawn from actual cases. Should we recognize a claim that a particular yoga pose (or a sequence of poses) is copyrightable?<sup>46</sup> Or a claim that an artistically planted flowerbed is protected by copyright?<sup>47</sup> And one can imagine potential copyright claims in many other kinds of creations that seem to fall outside of the statute’s enumerated categories. At least one European court has extended copyright protection to perfumes, so a perfumer might try to claim that a perfume is copyrightable in the United States.<sup>48</sup> Chefs and restaurateurs are increasingly paying attention to the possibility of intellectual property protection,<sup>49</sup> so one could imagine a potential claim of copyright in a newly created culinary dish or cocktail, or even in the particular set of items available on a restaurant’s menu.<sup>50</sup> The sophistication required to produce a fine wine or a craft beer might lead a vintner or brewer to claim her creation as a work of authorship. Some companies that put on fireworks displays are fierce rivals, and perhaps one company’s copying of another company’s

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46. See, e.g., *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, L.L.C.*, 105 U.S.P.Q. 2d (BNA) 1162 (C.D. Cal. 2012); *Registration of Claims to Copyright*, 77 Fed. Reg. 37,605 (Jun. 22, 2012).

47. See, e.g., *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 292–95 (7th Cir. 2011).

48. See Kamil Koelman, *Copyright in the Courts: Perfume as Artistic Expression?*, WIPO MAGAZINE, Oct. 2006, at 2; see also Charles Cronin, *Genius in a Bottle: Perfume, Copyright, and Human Perception*, 56 J. COPYRIGHT SOC’Y. U.S.A. 427 (2009); Thomas G. Field, Jr., *Copyright Protection for Perfumes*, 45 IDEA 19 (2004).

49. See, e.g., Pete Wells, *Chef Sues over Intellectual Property (The Menu)*, N.Y. TIMES, Jun. 27, 2007, at A1, A16; Tatiana Schlossberg, *Popular Snack on India’s Streets Is at Heart of Manhattan Court Fight*, N.Y. TIMES, Aug. 2, 2014, at A15.

50. See, e.g., Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Caroline Reeb, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DEPAUL J. ART TECH. & INTEL. PROP. L. 41 (2011); see also *Kim Seng Co. v. J & A Imps., Inc.*, 810 F. Supp. 2d 1046 (C.D. Cal. 2011) (claiming protection on a traditional Vietnamese dish of a bowl of rice sticks topped with egg rolls, grilled meat, and assorted garnishes as a “food sculpture”). The sculptural or pictorial elements of a particular culinary dish—such as, for example, a cake or cookie shaped and decorated like a cartoon character or a modernist artwork (see, e.g., *Rothko Cookies*, PIXEL WHISK, <http://www.pixel-whisk.com/2012/06/rothko-cookies.html> (last visited Aug. 17, 2014))—may be protectable under current law in the category of pictorial, graphic, and sculptural works.

display could lead to a suit claiming copyright in a fireworks display.<sup>51</sup> Other examples of potentially protectable works that fall outside of the enumerated categories include typography,<sup>52</sup> digital recordings of smells,<sup>53</sup> the design of golf courses,<sup>54</sup> tactile enhancements to books,<sup>55</sup> sports plays or routines, amusement park rides (such as rollercoasters), nonhabitable three-dimensional structures (e.g., highway bridges, cloverleaves, canals, dams, etc.),<sup>56</sup> body parts altered by cosmetic surgery,<sup>57</sup> invented languages,<sup>58</sup> and garden designs and other works of landscape architecture.

Under the current statute's open-ended use of the term "works of authorship," claims of copyright in any of these types of arguably authorial creations could potentially be recognized as valid by means of a judicial or administrative decision that the creation constitutes a work of authorship, even if the creation does not fall within one of the statute's expressly enumerated categories of protected works.<sup>59</sup> A court or the Copyright Office

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51. See Bobby Kerlik, *Judge Tosses Lawsuit Between Fireworks Rivals Zambelli, Pyrotecnico*, PITT. TRIBUNE-REVIEW (Nov. 11, 2010), [http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s\\_708880.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_708880.html) (reporting on dispute over alleged violation of noncompete clause when employee of one fireworks company left to work for a rival company); see also Sam Scott, *Scripting a Big Bang: 'Oobs' and 'Aabs' Without All the Work*, STANFORD MAG., July/Aug. 2012, at 40.

52. A claim that the design of a typeface is a copyrightable "work of authorship" outside of the currently enumerated categories would face a particular hurdle to acceptance because the legislative history of the current statute expressly states that the Congressional drafters did "not regard the design of a typeface . . . to be a copyrightable 'pictorial, graphic, or sculptural work' within the meaning of" the 1976 Act and had "considered, but chosen to defer, the possibility of protecting the design of typefaces." 1976 HOUSE REPORT, *supra* note 17, at 55. Given this express statement that the drafters did not view typeface design as protectable under the current statute, it would be difficult to interpret typeface design as a copyrightable "work of authorship."

53. See, e.g., Stephen Williams, *Plug-and-Play Aromas at Your Keyboard*, N.Y. TIMES, Jan. 20, 2011; William Grimes, *Now on the PC Screen: Scent of a Kitchen*, N.Y. TIMES, Sep. 13, 2000, at F1; Charles Platt, *You've Got Smell!*, WIRED, Nov. 1999, at 256.

54. Cf. *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526 (5th Cir. 1998) (finding trade dress protection in appearance of golf holes).

55. See, e.g., Elise Hu, *Sensory Fiction: Books That Let You Feel What The Characters Do*, NPR ALL TECH CONSIDERED (Feb. 6, 2014), <http://www.npr.org/blogs/alltechconsidered/2014/02/06/272044748/sensory-fiction-books-that-let-you-feel-what-the-characters-do/>.

56. See, e.g., H.R. REP. NO. 101-735, at 20 (1990).

57. See, e.g., Guy Trebay, *The Man Behind the Face*, N.Y. TIMES, Mar. 30, 2014, at ST1, 17 (Dr. Frederic Brandt, cosmetic dermatologist, noted that "I approach each face with a visual perception, an artistic perception and a medical perception.") (emphasis added).

58. See, e.g., Amy Chozick, *Athhilezar? Watch Your Fantasy World Language*, N.Y. TIMES, Dec. 12, 2011, at A1, A3; Adi Robertson, *Can you own a language?*, THE VERGE (Aug. 13, 2014), <http://mobile.theverge.com/2014/8/13/5998273/who-owns-a-language-wikipedia-palaw-a-kani-raises-old-debate/>.

59. Claims to typefaces or nonhabitable three-dimensional structures would be less likely to succeed because of express statements by Congress in 1976 and 1990 that it had

could render any of these human creations copyrightable without any further action by Congress.

The Next Great Copyright Act should end this invitation to courts and agencies to find copyright protection for creations that fall outside the categories of protected works that Congress has enumerated, and should instead expressly limit the statutory scope of copyrightable subject matter to the categories of works that Congress expressly identifies. As the following sections explain, Congress is the appropriate and best-positioned actor to determine what should and should not be protected by copyright, both because the scope of copyrightable subject matter is a policy question best answered by the elected legislature and because Congress is better equipped to appropriately tailor any protection it decides to grant.<sup>60</sup>

1. *Whether to Protect Additional Subject Matter Implicates Policy Questions Best Resolved by Congress*

Once international obligations regarding subject matter have been met, the decision whether to extend copyright protection to any particular subject matter should be based primarily on whether copyright protection is needed in order to encourage greater production or dissemination of such subject matter—or rather, whether any need for copyright protection outweighs any costs that such protection would impose. Indeed, that is the question that Congress has at one point or another asked and answered, at least implicitly, about all of the subject matter protected by U.S. copyright law today.

Congress is generally better positioned to answer that question than is a court or the Copyright Office. A court would consider the question in the context of a live controversy over a particular creation, in which the creator would like to claim copyright in order to stop another party from copying that creation. This very context might lead a court, relying in part on intuitions about those who reap where they have not sown, to incline toward recognizing the plaintiff's claimed creation as a “work of authorship” within copyright's protection.<sup>61</sup> As Benjamin Kaplan noted about copyright litigation generally:

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affirmatively decided *not* to grant copyright protection to those classes of works. 1976 HOUSE REPORT, *supra* note 17, at 55; H.R. REP. NO. 101-735, at 20 (1990).

60. For a discussion of the advantages and disadvantages of “open list” and “closed list” approaches to copyrightable subject matter in the European context, see Tanya Aplin, *Subject Matter*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 49–76 (Estelle Derclaye ed., 2009).

61. See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 151–56 (1992). Gordon suggests that a “common law trend toward granting new intellectual property rights has been fueled” in part by “an intuition of

Our gaze should not be confined to *this* plaintiff and *this* defendant. If the contest is conceived as being thus restricted, a court out of understandable sympathy would be inclined to hold for the plaintiff whenever the defendant was shown to have made any recognizable use of the plaintiff's contribution. That would be a very mistaken attitude. There is a further diffused public interest necessarily involved.<sup>62</sup>

At the very least, the litigation context tends not to provide the court with the information that would be useful in addressing the larger policy question beyond any issue of fairness in the individual case: whether we need to protect those who author and distribute this type of creation against unauthorized copying in order to generate the production and dissemination of a socially desirable amount and variety of these creations.

The Copyright Office, which would presumably decide such questions in response to an application by a creator to register a claim of copyright in a creation falling outside the statute's enumerated categories, might be in a better position than a court to look objectively at the larger policy question beyond the individual application. For example, the Office could, by publishing a proposal to amend its regulations to reflect any proposed decision on the registrability of a type of creation not previously viewed as registrable, attract public comments that could provide it with information useful to deciding the larger policy question. It is not clear, though, that the decision weighing that evidence and ultimately concluding whether copyright protection is warranted should rest with the Copyright Office instead of Congress, even if the Copyright Office could gather evidence as well as Congress could. Weighing the costs and benefits of extending copyright protection requires deliberation and an affirmative decision about the ultimate desirability of extending protection. That deliberation and decision ought to rest with the political organ that embodies the broadest representation of the public and its interests, which means that the decision should be legislative, rather than administrative or judicial.

An example of Congress weighing these larger policy considerations in deciding whether to extend copyright protection emerged in the decision to grant protection to architectural works in 1990. The House Judiciary Committee report on the bill that added architectural works to section 102(a)

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fairness—a norm often linked to natural rights—that one should not ‘reap where another has sown.’” *Id.* at 156. As Benjamin Kaplan pointed out, such an intuition on the part of a court may be at best incomplete: “[I]f man has any ‘natural’ rights, not the least must be a right to imitate his fellows, and thus to reap where he has not sown.” BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT 2* (Columbia Univ. Press 1967).

62. KAPLAN, *supra* note 61, at 76.

explained that an “architectural work” was originally defined as “the design of a building *or other three-dimensional structure*,” but that the italicized phrase was eventually deleted:

This phrase was included in [an earlier bill] to cover cases where architectural works [are] embodied in innovative structures that defy easy classification. Unfortunately, the phrase also could be interpreted as covering interstate highway bridges, cloverleaves, canals, dams, and pedestrian walkways. The Subcommittee examined protection for these works, some of which form important elements of this nation’s transportation system, and determined that copyright protection *is not necessary to stimulate creativity or prohibit unauthorized reproduction*.<sup>63</sup>

Whether or not copyright protection is needed “to stimulate creativity”—or is sufficiently needed to outweigh any costs that copyright protection would impose (such as, in this example, costs of operating a transportation infrastructure)—is a question that Congress, given its representative character and electoral accountability, is generally better positioned to answer than is a court or the Copyright Office.

## 2. *Congress Can Better Tailor Protection for New Subject Matter*

Congress should specifically decide whether to extend copyright to any new category of subject matter not only because the legislature is the appropriate site for the policy choices involved in such a decision but also because Congress has better tools at its disposal to tailor any protection that it grants. In particular, Congress can better account for notice and retroactivity concerns in granting protection and has more options with respect to the form and scope of protection.

### a) Notice and Retroactivity Concerns

Congress is better positioned than courts or the Copyright Office to deal with issues of notice and retroactivity if copyright is to be extended to a type of creation falling outside the statute’s currently enumerated categories.

If a form of expression isn’t completely new, any particular work in that form (at least any successful work) may well have been copied by some third party once its creator has made it public. Consider, for example, perfume, which has traditionally been understood in the United States as outside the

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63. H.R. REP. NO. 101-735, at 19–20 (1990) (emphasis added).

subject matter of copyright.<sup>64</sup> A perfumer may well find that its successful perfume has been copied by competitors.<sup>65</sup> As a matter of copyright law, of course, that copying would be perfectly lawful: copyright law in no way restricts anyone from copying a creation that is not subject to copyright protection.

What if a perfumer sues a copying competitor, claiming that the competitor's copying infringes a copyright in the copied perfume? Under the current statute, the court could determine that perfume constitutes a "work of authorship" and therefore the plaintiff's perfume comes within the subject matter of copyright protection under the 1976 Act.<sup>66</sup> The court could then conclude that the defendant's act of copying the perfume infringed the plaintiff's exclusive right to reproduce its copyrighted perfume, and could thus hold the defendant liable for copyright infringement. Indeed, if the suing perfumer were to succeed in claiming copyright in its fragrance, anyone who had copied that perfume at any time within the three-year statute of limitations on civil infringement suits<sup>67</sup> could be held liable for copyright infringement, even though at the time the copying occurred, everyone regarded perfume as uncopyrightable under the statute. After all, even someone who in complete good faith copies material she reasonably and genuinely believes to be unprotected by copyright law can be liable for copyright infringement if it turns out that the material she copied was protected, because copyright law imposes liability without regard to the mental state with which the infringer copied the copyrighted work.<sup>68</sup> And, of

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64. The copyright status of perfume elsewhere is somewhat unclear. A recent decision in France has confirmed that perfume is not subject to copyright protection in that country, while a decision in the Netherlands found that copyright law in that nation does protect perfume. GOLDSTEIN & HUGENHOLTZ, *supra* note 21, at 195.

65. *See, e.g.*, *Smith v. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968).

66. To qualify for protection, the plaintiff's perfume would have to meet the statutory standards of originality and fixation. The fragrance would appear to meet the statutory definition of fixation, as it is embodied in a material object—the liquid that constitutes the perfume—from which it can be perceived for a period of more than transitory duration. *See, e.g.*, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993). If the plaintiff created the fragrance itself, without copying it from other fragrances, and if the fragrance was minimally creative, then the fragrance would satisfy the originality requirement. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

67. 17 U.S.C. § 507(b) (2012). Even if the perfumer had failed to sue copying competitors for many years, laches would apparently not bar the assertion of copyright claims that accrued within the statute of limitations. *Petrella v. Metro-Goldwyn-Mayer*, 134 S. Ct. 1962 (2014).

68. *See, e.g.*, R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 175–83 (2007). Remedies, though, can be affected by the infringer's mental state. *Id.*

course, for any work—in this case, any perfume—first published after February 28, 1989,<sup>69</sup> copies of the work (presumably, in this case, the bottles of the perfume) need not have carried any notice of a claim of copyright.<sup>70</sup> And if the plaintiff perfumer were to prevail on an infringement claim against the defendant in the case establishing perfume as copyrightable, it is hard to see why the plaintiff would not prevail on claims against other copying competitors in subsequent litigation. Even if a court were to conclude that perfume constitutes a “work of authorship” entitled to copyright protection under the statute, penalizing as copyright infringers those who copied other people’s perfumes when those perfumes were uniformly understood to be outside the scope of subject matter protected by copyright seems unfair. But limiting the court’s decision to prospective application would seem quite difficult.

And the retroactive effect of a court decision recognizing one perfumer’s fragrance as copyrightable would seem to extend beyond that particular perfume and that particular producer. At least in the absence of a declaratory judgment action, a plaintiff perfumer’s infringement claim seeking a determination that the copied perfume is copyrightable would necessarily involve a work created and made publicly available before the date on which the court ultimately decided that a perfume could constitute a work of authorship. It is not clear what principle would allow a court to grant protection to a perfume that the plaintiff created before the date of the decision recognizing perfume as copyrightable while also denying protection to perfumes that others created before that same date.

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69. This is the date the Berne Convention Implementation Act amendments to the 1976 Act took effect and made the placement of proper copyright notice on published copies or phonorecords of copyrighted works entirely optional. 1 GOLDSTEIN, *supra* note 2, § 3.4, at 3:41–42.

70. 17 U.S.C. §§ 401–402 (2012). Indeed, even before the 1976 Copyright Act was amended to make notice optional, it is not clear that a published copy of a perfume would have had to bear a copyright notice in order to preserve any copyright protection in the perfume. The 1976 Act as originally enacted only contained provisions requiring notice on “visually perceptible copies,” *Id.* § 401, and on “phonorecords of sound recordings,” *Id.* § 402, and perfume would appear to fall in neither category.

Of course, in order for the original perfume producer to bring an infringement claim, at least if the perfume constituted a “United States work” as defined in the statute, it would have to have registered the claim of copyright, or have attempted to do so and had the attempt rejected by the Copyright Office. *Id.* § 411(a). Such registration, however, could be made after the competitor had begun copying the perfume, so the requirement for registration as a prerequisite to suit would not necessarily provide a copying competitor with advance notice of the claim of copyright in the perfume. In any event, it seems unlikely that competing perfume producers would check the Copyright Office’s registration records before deciding whether to copy another producer’s perfume, given that perfume has widely been understood not to be copyrightable under current U.S. law.

Congress, of course, is well positioned to take into account issues of fair notice to potential copiers and to avoid imposing liability retroactively when it decides to extend copyright protection for the first time to a previously unprotected form of expression. For example, if Congress were to decide that perfume warranted copyright protection and were to amend the statute to extend protection to perfume, it could provide that such protection would only extend to perfumes created on or after the amendment's effective date. Indeed, throughout its history, Congress has generally extended copyright protection to new categories of subject matter only prospectively. For example, when Congress in 1971 amended the 1909 Act to grant protection to sound recordings, it protected only sound recordings fixed on or after February 15, 1972,<sup>71</sup> and in the 1976 Act Congress left the many sound recordings that had been made prior to that date to whatever protection existed under state law.<sup>72</sup> Similarly, when Congress extended protection to architectural works as a separate category of works of authorship in 1990, it essentially limited protection only to "any architectural work created on or after the date of the enactment of this Act."<sup>73</sup> And throughout the nineteenth century, when Congress expanded the scope of copyright protection to include new forms of expression—whether newly enabled by technological development (such as photographs) or newly recognized from among long-established forms of expression (such as musical compositions)—it generally granted protection only prospectively, to works created (or at least first

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71. Sound Recording Amendment Act of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (repealed 1976).

72. 17 U.S.C. § 301(c) (2012). *See also* REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 13–14 (2011).

73. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 706(1), 104 Stat. 5089, 5134 (1990). With respect to architectural works that were unconstructed and embodied in unpublished plans on the Act's effective date, Congress provided that the work would be protected from the effective date only until Dec. 31, 2002, unless the work was constructed by that date. *Id.* at § 706(2). This treatment was consistent with the approach that the 1976 Act originally took to existing, unpublished works of authorship that had been protected under state law but were brought into federal copyright protection for the first time by the 1976 Act. *See* 17 U.S.C. § 303(a) (2012); R. Anthony Reese, *Public but Private: Copyright's New Unpublished Public Domain*, 85 TEX. L. REV. 585, 588–91 (2007).

published) after the enactment of the law extending protection.<sup>74</sup> So if new categories of subject matter, such as perfume, are to be recognized, they should be recognized by Congressional action, which can appropriately address the timing of that recognition.

b) Calibrating the Scope of Protection Granted

Another reason why Congress, rather than the Copyright Office or the courts, should decide whether to extend copyright protection to creations not already within the statute's enumerated categories is that if Congress decides to grant protection, it can simultaneously determine the appropriate scope of protection for such creations.

If copyright protection were extended to perfumes, which exclusive rights would the owner of the copyright in a particular perfume have? For example, would the copyright owner have the right to block any derivative work based on that perfume? If a court decision were to recognize a perfume as a copyrightable "work of authorship" falling outside any of the statute's enumerated categories of works, that decision would seem to grant the derivative work right to copyrighted fragrances. The copyright statute grants copyright owners three exclusive rights—to reproduce the work in copies or phonorecords, to distribute copies or phonorecords of the work, and to prepare derivative works based on the copyrighted work—for every kind of

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74. See, e.g., Act of Mar. 3, 1865, ch. 123, § 1, 13 Stat. 540 (repealed 1870) (extending copyright protection to "photographs and the negatives thereof *which shall hereafter be made*") (emphasis added); Copyright Act of Feb. 8, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870) (extending copyright protection to any musical composition "which may be now made or composed, and not printed and published, or shall hereafter be made or composed"). But see Copyright Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831) (allowing copyright for works previously created as part of initial creation of federal copyright system). The 1912 amendment to the 1909 Act adding express provisions for copyright protection in motion pictures was silent as to whether it applied to works created before or only after the enactment of the amendment, but motion pictures had already been treated as copyrightable as photographs, so it is not clear that the amendment was extending protection to a new form of copyrightable subject matter. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488, 488 (1912) (repealed 1976).

Presumably Congress might also take account of fairness and retroactivity concerns by extending copyright to works produced *before* the effective date on which Congress grants copyright protection to works in the newly protected form of expression but providing protections to "reliance parties" who had copied such works at a time when such copying did not constitute copyright infringement. Congress took this approach when it restored copyright in foreign works that had fallen into the public domain in the United States for failure to comply with formalities required by U.S. law prior to March 1, 1989. 17 U.S.C. § 106A (2012); see *Golan v. Holder*, 132 S. Ct. 873 (2012) (upholding constitutionality of copyright restoration provisions). But Congress has not generally used this approach when recognizing new types of subject matter as copyrightable.

copyrighted work, regardless of the category of subject matter in which that work falls.<sup>75</sup> As a result, a judicial (or administrative) decision that a fragrance constitutes a work of authorship would allow a perfume's copyright owner to enjoy the reproduction, distribution, *and* derivative work rights.<sup>76</sup>

Judicial recognition of perfume as a "work of authorship" would thus automatically confer the derivative work right. But if perfume is copyrightable, *should* a perfume copyright owner have the right to block any derivative work based on that perfume? If Congress, rather than a court, were considering whether to extend copyright protection to a perfume, it might determine that granting perfume copyright owners protection against other people creating derivative versions of their copyrighted perfumes would be unwise. Congress, for example, might decide that courts would find it too difficult to determine whether an allegedly infringing perfume constitutes an "adaptation" of another, copyrighted perfume. And if Congress decided to limit the scope of copyright protection for perfume, it could simply withhold the derivative work right entirely from perfume, as it withheld the public performance right from sound recordings and the public display right from architectural works when it granted copyright protection to those types of works.<sup>77</sup>

Congress could instead decide to grant the derivative work right to fragrances but to limit that right. Congress took this approach for sound recordings in the 1976 Act. While section 106(2) grants the derivative work right to all copyrighted works (including sound recordings), section 114(b) provides that in the case of sound recordings, the derivative work right "is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in

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75. 17 U.S.C. § 106(1)–(3) (2012).

76. The perfume copyright owner would not, however, enjoy any public performance or public display rights under sections 106(4), (5), or (6). Those rights are extended only to specified subsets of section 102(a)'s enumerated categories of works, and perfume clearly does not come within any of those categories. *See* 17 U.S.C. § 106(4) (2012) (extending public performance right only to literary, musical, dramatic, and choreographic works and to pantomimes and motion pictures and other audiovisual works); *id.* § 106(6) (extending digital audio transmission public performance right only to sound recordings); *id.* § 106(5) (extending public display right only to literary, musical, dramatic, and choreographic works, to pantomimes, to pictorial, graphic, and sculptural works, and to individual images of motion pictures and other audiovisual works).

77. 17 U.S.C. §§ 106(4), 114(a), 106(5) (2012). The 1976 Act has never granted the general exclusive right of public performance to sound recordings, though in 1995 Congress granted sound recording copyright owners a limited exclusive right to publicly perform their works by means of a digital audio transmission. *Id.* §§ 106(4), 106(6).

sequence or quality.<sup>78</sup> Similarly, when Congress granted protection to architectural works in 1990, it simultaneously enacted specific limits on the scope of the reproduction, distribution, and derivative work rights in those works.<sup>79</sup> Specific limitations on the copyright owner's rights might well be justified for forms of expression to which copyright protection is newly granted, and Congress could easily consider such limitations when deciding whether to grant such protection. But again, a court (or the Copyright Office) could not easily impose these limitations as part of a decision determining that an unenumerated form of expression constituted a statutorily protectable work of authorship.

Calibrating the scope of new protection for any type of authorial creation not expressly enumerated in the statute could also go beyond tailoring the exclusive rights and limitations applicable to that type of work. For example, even if Congress chose to grant copyright protection to perfume, it might grant protection for a relatively short term, or only on the condition of compliance with certain formalities.<sup>80</sup> Or, after examining the issues surrounding a particular type of possible subject matter, Congress might decide that the subject matter does not need copyright protection, but that it should receive some more tailored, *sui generis* form of protection against copying. Although such *sui generis* protection is not common in U.S. law, it is not unheard of. Protection short of full copyright already exists for semiconductor mask works and the designs of boat hulls.<sup>81</sup> *Sui generis*

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78. 17 U.S.C. §§ 106(2), 114(b) (2012). Section 114(b) also limits the reproduction right in sound recordings “to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording” and excludes from the copyright owner’s control “the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.” *Id.* § 114(b).

79. 17 U.S.C. § 120(a) (2012) (allowing the making, distribution, and public display of pictorial representations of a constructed architectural work if the building embodying it is visible from a public place); *id.* § 120(b) (allowing the owner of a building embodying a copyrighted architectural work to alter or destroy the building without violating the derivative work right in the work).

80. To the extent that international copyright treaties do not require the United States to protect perfume, those treaties’ obligations to grant a minimum term or not to impose formalities would not apply to any copyright protection granted to perfume. *See, e.g.*, GOLDSTEIN & HUGENHOLTZ, *supra* note 21, at 156, 220; 1 RICKETSON & GINSBURG, *supra* note 21, § 8.14, at 412.

81. 17 U.S.C. §§ 901–914 (2012) (mask works); *id.* §§ 1301–1332 (boat hulls). Neither *sui generis* regime has been used much, at least in comparison to copyright.

protection has been proposed in the past for industrial designs generally,<sup>82</sup> and is currently under consideration for fashion design.<sup>83</sup> In considering whether to protect any particular new subject matter, Congress has the power to decide whether to bring that subject matter fully within the existing copyright regime, or whether to grant some other type of protection, which might, for example, last for a much shorter period of time or confer narrower rights.<sup>84</sup> A court or the Copyright Office, on the other hand, faced with a claim that the same subject matter constitutes a “work of authorship” already protected under the copyright statute, would have only a binary choice: the claimed work either is or is not protectable by copyright as a “work of authorship.” A judicial or administrative decision granting copyright protection to a form of expression not expressly enumerated in the statute may overprotect a type of subject matter that Congress would have found needed only a more tailored form of protection.

3. *Judicial or Administrative Recognition of New Subject Matter Creates Problems If Congress Disagrees*

Even when Congress grants statutory copyright in an undefined, open-ended category such as “works of authorship,” the policy question as to whether a type of work (such as perfume) that falls outside all of the enumerated categories *should* be protected ultimately remains for Congress to determine. But allowing a court or the Copyright Office to answer the question first could complicate Congress’s ultimate determination.

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82. See Title II, S. 22, 94th Cong. (1976) (as passed by Senate, Feb. 19, 1976); 1976 HOUSE REPORT, *supra* note 17, at 49–50 (detailing repeated attempts at adopting sui generis protection for industrial designs). Past proposals for sui generis protection for databases would have offered protection under the Commerce Clause to subject matter that was outside of Congress’s Copyright Power. See, e.g., Collections of Information Antipiracy Act, H.R. 354, 106th Cong. (1999); Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1997); Database Investment and Intellectual Property Antipiracy Act of 1996, H.R. 3531, 104th Cong. (1996). If enacted, this protection would not have represented a choice by Congress to offer a separate sui generis regime instead of full copyright protection, since Congress could not have offered copyright protection to facts in databases or to selections and/or arrangements of facts that were not minimally creative. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345–51 (1991).

83. See, e.g., Innovative Design Protection Act, S. 3523, 112th Cong. (2012); Design Piracy Prohibition Act, H.R. 2511, 112th Cong. (2011); Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010); Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

84. For example, Congress granted boat hull designs protection only for ten years, 17 U.S.C. § 1305 (2012), and excluded from infringement acts committed without certain types of knowledge, *id.* § 1309(c).

For example, if a court were to decide that perfume constitutes a protectable “work of authorship,” Congress, of course, could consider the issue itself, and it might determine that copyright protection for perfume is not justified. Congress could then amend the statute in order to clarify that perfume does not constitute a protectable “work of authorship.”<sup>85</sup> But how should Congress then deal with the claims of perfume copyright made after the judicial decision and before the Congressional amendment? What of any licensing agreements made in the interim, and the money that has changed hands in any transfers of perfume copyrights? Should Congress provide that those “interim” claims are not valid? If it does so, would that work a taking that would require compensation to owners of copyright in perfumes created before Congress had amended the statute? Should Congress instead preserve the “interim” claims but not recognize any copyright claim to any perfume created after the statute is amended, creating a patchwork of protected and unprotected fragrances?

Congress can avoid these problems by not giving courts or the Copyright Office the authority to recognize protection for unenumerated categories of works of authorship. And these problems do not arise in the inverse scenario. If copyrightable subject matter is limited to the categories of works enumerated in the statute, then if and when Congress takes up the question of copyright protection for an additional type of work, it would be writing on a blank slate, without any issues of “interim” copyright claims to address.

*4. Congress Can Allow Judicial and Administrative Flexibility without Protecting Unenumerated Categories of Authorship*

As the previous sections show, allowing courts or the Copyright Office to declare that copyright protects statutorily unenumerated types of creations presents a number of potential difficulties. Accepting those difficulties might nonetheless make sense if they were the necessary price for keeping Congress from frequently having to decide whether to amend the statute to grant protection to additional forms of expression. Before the 1909 Act, Congressional action was generally needed to recognize new copyrightable subject matter, because copyright statutes identified the subject matter under their protection in relatively narrow terms. When the statute protected only books, maps, charts, musical compositions, and prints and engravings, it would have been difficult to argue, for example, that sculptures or photographs were entitled to copyright protection, and amending the statute

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85. Congress might instead, as noted above, create a sui generis regime that it views as more appropriate than copyright if it is convinced that creators of perfumes need some protection.

was likely necessary to protect them. Modern copyright law should be more flexible, but such flexibility can be achieved without an open-ended Congressional grant of protection in unnamed categories of works of authorship.

Two kinds of flexibility seem important. First, for a form of creative expression that was known when Congress enacted the copyright statute (such as, for example, sandcastles), Congress may neither have expressly identified that form as copyrightable nor expressly indicated it was withholding protection from that form.<sup>86</sup> It seems unwise to require Congress to identify by name every particular form of creative expression to which it wishes to extend protection, and courts and the Copyright Office ought to have the flexibility to determine that a particular form of expression not specifically named in the statute is within the scope of copyright protection already granted by Congress.

Congress, though, can achieve this judicial and administrative flexibility without granting open-ended copyright protection to unnamed *categories* of works. Congress need merely continue the approach, taken in the 1976 Act, of enumerating the protected categories of authorship in broad, conceptual terms. For example, current law protects textual material primarily in the broad category of “literary works,” in contrast to the 1909 Act, which protected textual material primarily in the more narrow categories of books, including composite and cyclopædic works, directories, gazetteers, and other compilations; periodicals, including newspapers; and lectures, sermons, or addresses prepared for oral delivery.<sup>87</sup> And the current statute defines the category in very broad terms, as any work “expressed in words, numbers, or other verbal or numerical symbols or indicia.”<sup>88</sup>

Enumerating protected categories of authorship in broad, conceptual terms will extend protection to many authorial creations that may not have been conventionally considered copyrightable and that may not have been

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86. Such express indication could come in the statute itself, as in the definitions of many of the categories enumerated in § 102(a). Or it could come in the legislative history, as in the declaration in the 1976 House Report that the committee reporting the copyright revision bill “has considered, but chosen to defer, the possibility of protecting the design of typefaces.” 1976 HOUSE REPORT, *supra* note 17, at 55.

87. See Copyright Act of Mar. 4, 1909, ch. 320, § 5(a)–(c), 35 Stat. 1075, 1076 (repealed 1976). In both cases, some textual works, such as the dialog of a play or the lyrics of a song, would be protected primarily as dramatic or musical works, respectively. See also Pamela Samuelson, *Are Gardens, Synthetic DNA, Yoga Sequences, and Fashions Copyrightable?*, at 19, [http://www.law.berkeley.edu/files/Samuelson\\_Oct\\_14\\_cop\\_subject\\_matter.pdf](http://www.law.berkeley.edu/files/Samuelson_Oct_14_cop_subject_matter.pdf) (last visited May 16, 2014) (noting that the 1976 Act “shifted away from artifact-specific subject matters (e.g., books) to more abstract conceptions of them (e.g., ‘literary works’ . . . .)”).

88. 17 U.S.C. § 101 (2012) (“literary works”).

expressly considered by Congress in drafting the statute, but that nonetheless fit within at least one of the broadly defined categories. Take the question of whether the current statute can protect a sandcastle. People were making sandcastles long before the 1976 Act was adopted, but there is no indication that Congress ever considered the copyrightability of sandcastles in its two decades of work on the 1976 Act. Nonetheless, it is relatively easy to conclude that a sandcastle is currently within the subject matter of copyright. Although the statute never mentions sandcastles expressly, it specifically grants protection to “pictorial, graphic, and sculptural works,” which it defines to include “three-dimensional works of fine, graphic, and applied art.”<sup>89</sup> A sandcastle seems to constitute a sculptural work<sup>90</sup> and to come within that term’s definition as a three-dimensional work of art. Any particular sandcastle, of course, would need to meet other requirements in order to obtain copyright protection—most importantly, the castle would need to be original and fixed.<sup>91</sup> But the analysis of whether the sandcastle’s creator is making a claim to something that constitutes a work of authorship within the scope of copyright protection seems relatively straightforward, given Congress’s grant of protection to the broadly defined category of pictorial, graphic, and sculptural works.

A second type of flexibility that seems desirable is the flexibility to protect creative works that are *embodied* in new technological forms that may have been unknown at the time that Congress enacted the copyright statute. Courts and the Copyright Office should be able to protect such works without the need for congressional amendment of the statute. Particularly in an age of rapid technological advances, it seems unwise to require Congress to affirmatively act to protect creative expression each time a new medium is developed to embody that expression. Again, however, Congress can provide this judicial and administrative flexibility by enumerating and defining the

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89. *Id.* § 101 (“pictorial, graphic, and sculptural works”).

90. The statute does not define “sculptural work,” but the Copyright Office has expressed a view on what constitutes sculptural authorship and that view seems to encompass a sandcastle: “If the expression is sculptural, the authorship could, for example, be expressed by means of carving, cutting, molding, casting, shaping, or otherwise processing the material into a three-dimensional work of sculpture.” U.S. COPYRIGHT OFFICE, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 503.02 (1984).

91. People create spectacularly elaborate sandcastles, which seem likely to qualify as independently created and minimally creative, and thus original. *See, e.g.*, U.S. SAND SCULPTING CHALLENGE, <http://www.ussandsculpting.com/> (last visited Aug. 22, 2014); LUCINDA WIERENGA, SANDCASTLES MADE SIMPLE: STEP-BY-STEP INSTRUCTIONS, TIPS, AND TRICKS FOR BUILDING SENSATIONAL SAND CREATIONS (2009). Photographs of completed sandcastles would seem to satisfy the fixation requirement of 17 U.S.C. § 102(a).

protected categories of works of authorship in media- and technology-neutral terms.

Consider, for example, the question of whether a textual webpage or blog post is protectable by copyright. The World Wide Web was, of course, unknown when Congress adopted the 1976 Act.<sup>92</sup> Nevertheless, the statute makes it easy to conclude that the webpage is within copyright's subject matter. Again, this is in part because the statute enumerates and defines the protected categories of authorship in broad terms, and the text on the webpage easily satisfies the definition of a "literary work" as a work "expressed in words, numbers, or other verbal or numerical symbols or indicia."<sup>93</sup>

But does it matter that the text on the webpage may never have been printed on a piece of paper, the way more traditional literary works were? As the current statute demonstrates, new technological forms for storing and accessing authors' works need not pose problems of copyrightability that would require extending protection to unenumerated categories of works. The current definition of "literary works" itself encompasses those works "regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."<sup>94</sup> Even without that portion of the definition,<sup>95</sup> the electronic

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92. The Copyright Office had, in the 1960s, foreseen the possible development of connected computer networks that could widely transmit copyrighted material. See R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, 2001 U. ILL. L. REV. 83, 99–100.

93. 17 U.S.C. § 101 (2012) ("literary works"). The question might have been more difficult if it had arisen under the 1909 Act. None of the administrative classes of protected works appears obviously to include the webpage. Only four classes covered texts, and the webpage would not likely constitute a dramatic composition or a lecture, sermon, or address prepared for oral delivery. Copyright Act of Mar. 4, 1909, ch. 320, § 5(c)–(d), 35 Stat. 1075, 1076 (repealed 1976). Perhaps the webpage could be protected as a periodical, *id.* § 5(b), though the Copyright Office interpretation of that classification required that issues of the periodical appear "at regular intervals of less than a year," which might or might not apply to the webpage. U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 2.3.2.I, 2-125 (1973) ("Periodicals registrable in Class B include newspapers, magazines, reviews, bulletins, etc. issued at regular intervals of less than a year, the successive issues bearing the same title (with a distinguishing number or date for each issue) and being similar in the general character of their subject matter."). The webpage seems most likely to be copyrightable under the 1909 Act only on a very broad reading of the statutory term "book"—broader than most ordinary understandings of that word—which the Copyright Office appears to have taken. See MARGARET NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE FOR WRITERS, PUBLISHERS, AND AGENTS 74 (2d ed. 1956) (the term "books" in § 5(a) of the 1909 Act "includes almost any embodiment of an idea in readable form").

94. 17 U.S.C. § 101 (2012) ("literary works").

95. The definitions of audiovisual works and of sound recordings contain similar language. *Id.* § 101.

storage and display of the text on the webpage would not prevent the text from being a protectable literary work, since section 102 extends protection to works of authorship “fixed in any tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,”<sup>96</sup> and the computerized storage and display of the webpage would certainly meet that fixation requirement.

The 1976 Act is technology-neutral with regard to the physical form in which a work is embodied and accepts forms enabled by technologies developed after the statute was adopted (and even entirely unforeseeable to the statute’s drafters). The Act also enumerates the categories of protected works of authorship in broad, conceptual terms. As a result, changes in technology over the last forty years have not generally raised hard questions for determining what subject matter copyright protects. Indeed, despite the fact that the years since 1978 have seen enormous technological development in the ways in which authorial creativity is expressed and embodied, there has been remarkably little controversy over whether new digital forms of expression fall within copyright’s subject matter and little need for Congress to act to expand copyright’s subject matter to cover those new forms. Many other questions may arise—for example, is a videogame sufficiently fixed for protection if the displays change with every player’s game play?<sup>97</sup>—but the existing statute has happily had little trouble in recognizing new digital forms for embodying literary, musical, dramatic, pictorial, graphic, sculptural, and audiovisual works as protectable subject matter. And it has done so by reference to the enumerated categories of protectable works of authorship, rather than by interpreting the residual category of “works of authorship” to extend to some unenumerated form of expression.

This process shows every sign of continuing. Consider the immersive virtual-reality environments created by headsets such as the Oculus Rift, made by a company that Facebook acquired last year. The *New York Times* described the Rift as “a boxy set of goggles that envelops the eyes of its wearers, completely surrounding their field of view with high-resolution screens that create 3-D images.”<sup>98</sup> These images seem to fit comfortably within copyright under current law as “audiovisual works,” which the statute defines as

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96. *Id.* § 102(a) (emphasis added).

97. *See, e.g.,* M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 440–42 (4th Cir. 1986); Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855–57 (2d Cir. 1982); Williams Elecs., Inc. v. Artic Int’l, Inc., 685 F.2d 870, 873–74 (3d Cir. 1982).

98. Nick Wingfield & Vinu Goel, *Facebook in \$2 Billion Deal For Virtual Reality Company*, N.Y. TIMES, Mar. 26, 2014, at B1, B4.

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.<sup>99</sup>

Thus, the broad scope of the statute's enumerated categories of works of authorship and the definitional acceptance of new technological forms for embodying creative expression significantly diminish the need for Congress to grant copyright protection to some residual undefined category of "works of authorship" in order to prevent the statute's coverage from being frozen at one particular technological moment.<sup>100</sup> To the extent that technological development enables a new form of authorial expression that falls outside all of the numerous and broadly defined categories of protected works enumerated in the statute, Congress (rather than the courts or the Copyright Office) *should* make the initial determination of whether copyright protection is appropriate for that new form of expression.

5. *Courts and the Copyright Office Have Generally Declined Congressional Invitations to Recognize Copyright in Statutorily Unenumerated Subject Matter*

Past experience suggests that an open-ended statutory designation of potentially copyrightable subject matter beyond specifically enumerated categories may not likely be interpreted as granting copyright protection to works outside those categories. Since 1909, the copyright statute has been drafted in ways that would allow courts and the Copyright Office to recognize as copyrightable types of subject matter that Congress did not expressly enumerate in the statute. For more than a century, however, neither the courts nor the Copyright Office has taken up these Congressional invitations.

In section 4 of the 1909 Act, Congress defined the statutory subject matter of copyright as "all the writings of an author,"<sup>101</sup> and expressly noted that the specific administrative classes of work identified in section 5 of the

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99. 17 U.S.C. § 101 (2012) ("audiovisual works").

100. If Congress's goal in using the open-ended term "works of authorship" was not "to freeze the scope of copyrightable subject matter at the present stage of communications technology," 1976 HOUSE REPORT, *supra* note 17, at 51 (as corrected by 122 CONG. REC. H10727 (daily ed. Sept. 21, 1976)), then Congress in fact seems to have achieved that goal better by its use of broad conceptual categories and technology-neutral definitions than by leaving "works of authorship" undefined.

101. Copyright Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976).

statute “shall not be held to limit the subject-matter of copyright.”<sup>102</sup> Nevertheless, courts and the Copyright Office interpreted the 1909 Act as *not* extending protection to *all* of the “Writings” of “Authors” within Congress’s constitutional power to protect.<sup>103</sup> In particular, courts declined to read the statute’s broad declaration of subject matter as granting copyright protection to sound recordings, which were not a class specifically enumerated in the statute but which courts did view as “Writings” of “Authors” within Congress’s constitutional power.<sup>104</sup> Courts and the Copyright Office essentially viewed the scope of statutory subject matter under the 1909 Act as coextensive with the list of enumerated administrative classes.<sup>105</sup> As the Register of Copyrights observed in 1961, “[f]or all practical purposes, section 5 has operated as a list of the categories of works capable of being copyrighted.”<sup>106</sup>

Indeed, even when a new form of expression—the computer program—was enabled by technological advances unforeseen in the drafting of the 1909 Act, the Copyright Office did not register computer programs as a “writing” of an “author” within the meaning of section 4, but falling outside any of the enumerated administrative classes in section 5. Instead, the Office chose to register computer programs in the administrative class of “books,” noting that “a computer program, as far as classification for registration is concerned, is similar to a ‘book,’ in that it contains a series of instructions

102. *Id.* § 5.

103. *See* Staff of N.Y.U. Law Review, *supra* note 11, at 74–76; *Capitol Records, Inc. v. Mercury Record Corp.*, 221 F.2d 657, 661 (2d Cir. 1955).

104. *Capitol Records, Inc. v. Mercury Record Corp.*, 221 F.2d 657, 660–61 (2d Cir. 1955). In addition, courts and the Copyright Office apparently did not read section 4’s grant of protection for “all the writings of an author” as extending protection to choreographic works that did not qualify in the expressly enumerated category of “dramatic works,” although such nondramatic choreographic works fall comfortably within the scope of Congress’s constitutional copyright power, as reflected by their accepted protection under the 1976 Act. Borge Varmer, *Copyright in Choreographic Works (Study No. 28)*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 26–28, at 94–96 (Comm. Print 1961).

105. STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 10 (Comm. Print 1961) [hereinafter REGISTER’S REPORT] (“[A]ll works that have been held copyrightable under the [1909 Act] can be fitted into the classes enumerated in section 5.”).

106. REGISTER’S REPORT, *supra* note 105, at 11. *But see* *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938) (concluding that a chart for analyzing handwriting “would seem to be a book [under Copyright Office regulations], but whether a book or not it certainly comes within the definition of ‘all the writings of an author’ described in Section 4 which is not limited to the classes in Section 5 because of the express terms of the latter section”).

related to the operation of a computer to achieve a particularized result; . . . it is really a ‘How to Do It’ book.”<sup>107</sup> However far the drafters of the 1909 Act intended “all the writings of an author” to extend beyond the enumerated administrative classes, those charged with interpreting the act did not read that phrase as generally protecting works outside of those classes.

In the 1976 Act, Congress again made it possible for a court or the Copyright Office to interpret the statute as granting copyright protection to subject matter not expressly enumerated in the statute. The 1976 Act abandoned the “all the writings of an author” formula, in order to make clear that Congress was not exhausting the full scope of its constitutional power.<sup>108</sup> But in defining copyright’s subject matter as “works of authorship,” and listing specific categories as illustrative but not limitative, Congress indicated that other, unenumerated categories of works of authorship *could* be recognized as copyrightable, and the legislative history confirms this statutory reading:

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 subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.<sup>109</sup>

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107. George D. Cary, *Copyright Registration and Computer Programs*, 11 BULL. COPYRIGHT SOC’Y 363, 366 (1964). Cary recounts the Copyright Office’s consideration of whether a computer program constituted the “writing” of an “author,” but he frames that consideration solely in terms of deciding whether a computer program was within the *constitutional* copyright power and not in terms of whether it constituted one of the “writings of an author” identified in section 4 of the 1909 Act as protected subject matter under the statute. *Id.* at 363–65.

108. 1976 HOUSE REPORT, *supra* note 17, at 51 (“In using the phrase ‘original works of authorship,’ rather than ‘all the writings of an author’ now in section 4 of the statute, the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the constitutional provisions are coextensive. . . . [C]ourts have indicated that ‘all the writings of an author’ under the present statute is narrower in scope than the ‘writings’ of ‘authors’ referred to in the Constitution. The bill avoids this dilemma by using a different phrase—“original works of authorship”—in characterizing the general subject matter of statutory copyright protection.”).

109. 1976 HOUSE REPORT, *supra* note 17, at 51 (as corrected by 122 CONG. REC. H10727 (daily ed. Sept. 21, 1976)).

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. . . . Although the coverage of the present statute is very broad, and would be broadened further by the explicit recognition of all forms of choreography, there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.<sup>110</sup>

The legislative history makes clear that, at least with respect to new forms of expression enabled by technological development, Congress intended neither to exclude those new forms categorically from copyright protection nor to include them automatically in copyright. The House Report, though, offers no guidance whatsoever on how to determine *whether* copyright protects creations in a particular new form of expression enabled by technological progress. Would granting protection constitute “unlimited expansion into areas completely outside the present congressional intent?”<sup>111</sup> Or would denying protection contradict Congress’s view that new forms of expression are not necessarily unprotected under the current statute? New forms of expression *might* constitute “works of authorship,” and thus be protectable by copyright—Congress just didn’t give the Copyright Office or the courts any guidance in how to decide, in any particular instance, *whether* the new expressive form is protectable.<sup>112</sup>

Nevertheless, to date no court has held that copyright protection under the current statute extends to a type of subject matter outside of all of the enumerated categories in section 102(a). And just two years ago the Copyright Office took the position that section 102 grants flexibility in interpreting “*the scope* of the categories designated by Congress in section 102(a)” but does “not delegate authority to the courts [or the Copyright Office] to create new categories of authorship.”<sup>113</sup> Instead, the Office

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110. 1976 HOUSE REPORT, *supra* note 17, at 51–52.

111. *Id.*

112. Pam Samuelson has suggested five criteria that courts and the Copyright Office should use to decide whether a work outside of all the enumerated categories should be a protectable “work of authorship.” Pamela Samuelson, *Are Gardens, Synthetic DNA, Yoga Sequences, and Fashions Copyrightable?*, at 20–23, [http://www.law.berkeley.edu/files/Samuelson\\_Oct\\_14\\_cop\\_subject\\_matter.pdf](http://www.law.berkeley.edu/files/Samuelson_Oct_14_cop_subject_matter.pdf) (last visited May 16, 2014). I have argued that the statute can be interpreted not to allow courts or the Copyright Office to find that forms of expression known to Congress at the time it adopted the 1976 Copyright Act but falling outside the statute’s enumerated categories constitute protectable “works of authorship.” R. Anthony Reese, *What Is a “Work of Authorship”?* (on file with author).

113. Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (Jun. 22, 2012).

concluded that Congress “reserved . . . to itself” the ability to recognize new categories of authorship and has announced that it will not register claims of copyright in material that falls outside all of the eight expressly enumerated categories.<sup>114</sup> For the reasons noted above, this interpretation seems like a prudent approach for the agency to adopt, though not one compelled by the language and legislative history of the statute. The experiment of giving courts leeway to recognize as copyrightable works that Congress did not expressly identify as such has thus been no more productive under the 1976 Act than it was under the 1909 Act.

In sum, for over a century, courts and the Copyright Office have remained extremely reluctant to tread new paths in the territory of copyrightable subject matter where Congress has not clearly marked the way. The 1976 Act’s approach of defining copyright’s subject matter using broad, technology-neutral categories has proven quite capable of giving courts and the Copyright Office sufficient flexibility to provide copyright protection to works embodied in new media of expression enabled by technological developments, as well as to older forms of expression apparently not expressly contemplated as copyrightable at the time the statute was framed. Given the potential problems described above with allowing courts or the Copyright Office to recognize additional *categories* of works of authorship as protectable, the advice of the Register of Copyright at the beginning of the last, quarter-century long statutory revision process seems equally relevant today: “[w]e believe that the extension of the copyright statute to entirely new areas of subject matter should be left to the determination of Congress rather than to the chance interpretation of an omnibus [statutory] provision.”<sup>115</sup>

B. CONGRESS SHOULD NOT EXHAUST ITS CONSTITUTIONAL  
COPYRIGHT POWER

My second proposed revision principle is a corollary of the first: because Congress should affirmatively decide which subject matter it wishes to protect by copyright, and should protect only that subject matter, Congress should not take the route of simply granting protection to all of the subject matter that the Constitution would empower it to protect. A common thread runs throughout the 225-year history of copyright in the United States: Congress has never effectively exercised the full subject-matter scope of its *constitutional* copyright power. This principle continues that approach, because

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114. *Id.* That policy statement expressly addresses only claims in *compilations* of materials that fall outside all of the enumerated categories, but its interpretive conclusion applies with equal force to noncompilations.

115. REGISTER’S REPORT, *supra* note 105, at 11.

as discussed in Section III.A, simply granting blanket protection to everything that might qualify as copyrightable under the Constitution, without the opportunity to address issues of the need for protection (and the scope of and limits on that protection) for particular kinds of subject matter, may cause mischief.

The Constitution's Copyright Clause authorizes Congress to grant to "Authors" exclusive rights to their "Writings." Although opportunities for interpreting these terms have arisen only infrequently, the Supreme Court has on a few occasions addressed what constitutes an author's writing for purposes of the clause, both in considering Congressional grants (or the possibility of Congressional grants) of protection to relatively new forms of creative expression such as photographs<sup>116</sup> or sound recordings,<sup>117</sup> and also in delineating the subject matter of copyright protection from the subject matter of other types of intellectual property protection.<sup>118</sup> In those instances, the Court has generally interpreted the subject matter of Congress's copyright power quite generously. In *Burrow-Giles*, the Court read the word "Author" in the Intellectual Property Clause to mean "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature,"<sup>119</sup> and concluded that "[b]y writings in that clause is meant the literary productions of those authors," which include "all forms of writing, printing, engraving, etching, & c., by which the ideas in the mind of the author are given visible expression."<sup>120</sup> Nearly a century later, the Court expanded its understanding of "writings" beyond the "visible" to include "any *physical* rendering of the fruits of creative intellectual or aesthetic labor."<sup>121</sup> Under the Supreme Court's interpretations, then, the subject matter to which Congress can grant copyright protection is extremely broad.<sup>122</sup>

Congress, though, has apparently never granted copyright protection to all of the "Writings" of "Authors" that it *could* protect under the Constitution. Congress might have tried to do so in the 1909 Act, when it chose statutory language identical to the constitutional terms and granted

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116. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56–61 (1884).

117. *Goldstein v. California*, 412 U.S. 546, 561–62 (1973).

118. *Trade-Mark Cases*, 100 U.S. 82 (1879).

119. *Burrow-Giles*, 111 U.S. at 58 (1884) (quoting Worcester).

120. *Id.* (emphasis added).

121. *Goldstein v. California*, 412 U.S. 546, 561 (1973) (emphasis added).

122. The constitutional subject matter of copyright is not, however, unlimited. *See, e.g.*, *Trade-Mark Cases*, 100 U.S. 82 (1879); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

copyright protection to “all the writings of an author.”<sup>123</sup> Courts and commentators reading the 1909 Act faced the question of whether the statutory scope of subject matter under the act was coextensive with the scope of Congress’s constitutional power.

At least one copyright treatise took the position that the two were coextensive.<sup>124</sup> Learned Hand also took that position as a district judge in 1921, noting the expansive language of section 4 and the proviso that section 5’s enumerated administrative categories did not limit that expansive language: “[t]he act must therefore be understood as meaning to cover all those compositions which, under the Constitution, can be copyrighted at all.”<sup>125</sup> Three decades later, however, Judge Hand, on the Second Circuit, took a different view in a case involving phonograph records.<sup>126</sup> He concluded that a sound recording could indeed be a “Writing” of an “Author” that Congress *could* constitutionally protect by copyright. He explained that “[s]ection 4, if read literally, would leave no doubt that the Act covers all that can constitutionally be copyrighted,” and he noted (citing, among other sources, his own 1921 decision) that “it has been so assumed on occasions where the statute did not elsewhere disclose an opposite intent.”<sup>127</sup> But at least with respect to sound recordings, he concluded that

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123. Copyright Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976). For a discussion of whether Congress in fact intended to exhaust its constitutional power, see Staff of N.Y.U. Law Review, *supra* note 11, at 74–76.

124. ARTHUR W. WEIL, *AMERICAN COPYRIGHT LAW* 181 (1917) (“Congress has, by using the very words which are used in the section of the Constitution from which it drew the power to pass this Act, shown its intention to exercise that power with respect to all matter in which it could allow copyright constitutionally.”).

125. *Reiss v. Nat’l Quotation Bureau, Inc.*, 276 F. 717, 718 (S.D.N.Y. 1921). At issue in *Reiss* was a book consisting of 6325 consecutively numbered coined five-letter pronounceable words with no meaning, for use in creating a cable code. *Id.* at 717–18. The constitutional analysis in *Reiss* does not really seem to address the issue of copyrightable *subject matter*, as there seems little doubt that the plaintiff’s work constituted a “book,” and Congress unarguably intended the 1909 Act to protect books, which were the first enumerated class in section 5 for registration purposes. Copyright Act of Mar. 4, 1909, ch. 320, § 5(a), 35 Stat. 1075, 1076 (repealed 1976). The real issue in *Reiss* seems to be whether this particular type of book—one that simply listed thousands of words with no meaning—was a book capable of copyright protection, and on that question, the court’s conclusion that the *standards* for copyright protection under the 1909 Act were identical to the constitutional standards seems unremarkable. *See, e.g., Feist Publ’ns, Inc.*, 499 U.S. at 344–51, 354–61 (1991) (concluding that 1976 Act provisions on standards for protectability and scope of protection for factual compilations were identical to those the Court identified in the Copyright Clause).

126. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J., dissenting).

127. *Id.* at 664 (Hand, J., dissenting) (citing, *inter alia*, *Reiss v. Nat’l Quotation Bureau, Inc.*, 276 F. 717 (S.D.N.Y. 1921) (Hand, J.)).

other provisions in the 1909 Act<sup>128</sup> implied a Congressional purpose in drafting the statute *not* to extend copyright protection to sound recordings despite the constitutional power to do so: “I think that the records [at issue in the case], though they are “Writings” under the Constitution, could not have been copyrighted under the [1909] Act.”<sup>129</sup>

Ultimately, the general view of courts,<sup>130</sup> the Copyright Office,<sup>131</sup> and commentators<sup>132</sup> seems to have been that the 1909 Act did not extend copyright protection to all subject matter that Congress could protect under the Constitution, evidenced at least by the refusal of courts and the Copyright Office to read the 1909 Act as protecting sound recordings. Actual case decisions involving other types of potentially protectable “writings” that did not come within the enumerated statutory classes appear to have been rare.<sup>133</sup>

Any remaining uncertainty about whether the copyright statute did protect everything Congress could protect ended in 1978. In adopting the 1976 Act, Congress made clear that the scope of subject matter protected under the statute is narrower than the full scope of constitutional subject matter. The legislative history of the 1976 Copyright Act expressly states that Congress deliberately chose not to exercise its full constitutional authority but chose instead to grant copyright only to a more limited subset of

128. In particular, the compulsory mechanical license allowing the licensee to make a recording of a copyrighted musical composition.

129. *Capitol Records*, 221 F.2d at 665 (Hand, J., dissenting). Hand noted: “[t]rue, it is a serious matter to impose implied limitations upon the words of a statute that apparently express the deliberate purpose of exercising a constitutional power to its full scope; nevertheless, this appears to me to be an occasion when we are forced to do so.” *Id.*

130. *Capitol Records*, 221 F.2d at 660–62; see also Barbara Ringer, *The Unauthorized Duplication of Sound Recordings (Study No. 26)*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 26–28, at 5–6 (Comm. Print 1961) (discussing cases prior to *Capitol Records* in which courts considered, but did not squarely face, the question).

131. Staff of N.Y.U. Law Review, *supra* note 11, at 75.

132. See Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719 (1945), 734–36 (concluding that Congress *could* protect phonograph records under the Constitution but that the 1909 Act should be interpreted not to protect them); 1 HERBERT ALLEN HOWELL & ALAN LATMAN, *HOWELL'S COPYRIGHT LAW* 16–17 (4th ed. rev. 1962); see also Barbara Ringer, *The Unauthorized Duplication of Sound Recordings (Study No. 26)*, in STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY, STUDIES 26–28, at 6 (Comm. Print 1961) (“With two exceptions, virtually every commentator on the subject assumed or stated that performances and recordings are uncopyrightable” under the 1909 Act).

133. See, e.g., the discussion of *Reiss*, *supra* note 125; see also text accompanying note 107, *supra* (computer programs).

constitutionally copyrightable material. The committee reports accompanying the 1976 Act explain that the phrase “works of authorship” is *not* synonymous with the constitutional terms “Writings” of “Authors.”<sup>134</sup> The drafters of the 1976 Act thus stated very clearly that the “works of authorship” protected under the statute do not encompass every writing of an author as those constitutional terms are understood.

So Congress appears never to have effectively granted copyright protection to every possible “Writing” that it could protect under the Constitution’s Copyright Clause. Instead, Congress has exercised its copyright power and actually granted copyright protection to particular kinds of “Writings”—particular subject matter—only when it has been persuaded that protection is necessary to encourage the creation and dissemination of a sufficient quantity and quality of such subject matter, or is necessary to fulfill the international copyright obligations of the United States, or both. In drafting a new copyright act, Congress should continue that approach and expressly enumerate which types of works the statute protects, rather than simply granting protection to every possible “Writing” that the Constitution empowers it to protect.

C. CONGRESS SHOULD DEFINE ALL ENUMERATED CATEGORIES OF PROTECTED WORKS

The third revision principle requires that in a revised Copyright Act Congress should define each category of works of authorship to which it grants protection. The current statute defines five of the eight enumerated

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134. The House Report explained the distinction and its motivation:

In using the phrase “original works of authorship,” rather than “all the writings of an author” now in section 4 of [the 1909 Act], the committee’s purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect [when it enacted the 1909 Copyright Act], or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that “all the writings of an author” under the present statute is narrower in scope than the “writings” of “authors” referred to in the Constitution. The bill avoids this dilemma by using a different phrase—“original works of authorship”—in characterizing the general subject matter of statutory copyright protection.

1976 HOUSE REPORT, *supra* note 17, at 51.

categories of works, but Congress purposely left the categories of musical works, dramatic works, and choreographic works and pantomimes undefined because it felt that those categories “have fairly settled meanings.”<sup>135</sup> But the lack of statutory definitions can create difficulties for courts and the Copyright Office in ruling on claims of copyright, and definitions could provide useful Congressional guidance for making those decisions.

Consider, for example, the protected category of “pantomimes and choreographic works.” The statute contains no definition, and the legislative history provides only that “‘choreographic works’ do not include social dance steps and simple routines.”<sup>136</sup> That leaves substantial ambiguity about what the statute does protect as a choreographic work, and provides no guidance as to pantomimes. Does a sequence of yoga poses constitute a copyrightable choreographic work?<sup>137</sup> Do gymnastic routines, or synchronized swimming routines, constitute copyrightable choreographic works? What about “forklift ballet,” in which two or more of the vehicles are driven in synchronized formations?<sup>138</sup> And does a magician’s silent performance of a magic trick constitute a copyrightable pantomime?<sup>139</sup> The lack of a definition leaves courts and the Copyright Office with little guidance to help answer such questions. Or consider the protected but undefined category of “dramatic works.” A statutory definition might help resolve the question raised by the recent Ninth Circuit case of *Garcia v. Google*: does an actor’s performance itself constitute a “dramatic work” (or does it, at most, constitute an expressive contribution to a larger dramatic work or audiovisual work)?<sup>140</sup>

135. *Id.* at 53.

136. *Id.* at 54. The Copyright Office has indicated its view that “a choreographic work must contain at least a minimum amount of original choreographic authorship” and that “[c]horeographic authorship is considered, for copyright purposes, to be the composition and arrangement of a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole.” Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (Jun. 22, 2012).

137. *See, e.g.,* *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, L.L.C.*, 105 U.S.P.Q.2d (BNA) 1162 (C.D. Cal. 2012); Registration of Claims to Copyright, 77 Fed. Reg. 37,605 (Jun. 22, 2012).

138. *See, e.g.,* *Toyota Forklift Ballet*, YOUTUBE (Sept. 27, 2011), <http://www.youtube.com/watch?v=pbQmBLVyCWU>.

139. *See, e.g.,* *Teller v. Dogge*, 110 U.S.P.Q. 2d (BNA) 1302, 1305–06 (D. Nev. 2014).

140. *Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir. 2014), *reh’g en banc granted*, 771 F.3d 647 (9th Cir. 2014). The case raises the question, but the majority opinion by the original three-judge panel does not squarely address it. The majority quotes section 102(a)’s grant of protection to “works of authorship” but says that once an artistic contribution is fixed, the “key question” is “whether it’s sufficiently creative to be protectible,” *id.* at 934, and refers to the “work” it is evaluating as the “actor’s performance,” *id.* at \*3 or “a dramatic performance” *id.* at 934 n.3. The dissent, by contrast, expressly concludes that an actor’s

Thinking about whether a fireworks display comes within any of the protected categories of authorship offers a concrete example of how helpful statutory definitions can be. The statutory definitions of literary works, sound recordings, motion pictures, and architectural works make it relatively easy to determine that those categories do not include fireworks displays, and such displays seem fairly clearly not to constitute musical works, even though that category is not defined.<sup>141</sup> But might a fireworks display qualify as an audiovisual work? Might the category of pictorial, graphic, and sculptural works cover fireworks? And what about dramatic works?

These questions seem easier to answer with respect to those categories that are defined in the statute. Congress defined audiovisual works as

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.<sup>142</sup>

At the very least, fireworks don't seem to fit this definition because even if they "consist of a series of related images," they are not "intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment."<sup>143</sup>

The question is perhaps closer with respect to pictorial, graphic, and sculptural works, which are defined in relevant part in the following way:

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship

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performance is not a work of authorship. It notes that "[t]he nature of [the] works [listed in § 102 as examples of copyrightable works] is significantly different from an actress's individual performance in a film, casting doubt on the conclusion that the latter can constitute a work." *Id.* at 941 (N.R. Smith, J., dissenting). It concludes that "the Copyright Act does not clearly place an acting performance within its sphere of copyrightable works." *Id.* at 942 (N.R. Smith, J., dissenting).

141. Musical works is the only undefined category from which it seems easy to exclude a fireworks display.

142. 17 U.S.C. § 101 (2012).

143. *Id.*

insofar as their form but not their mechanical or utilitarian aspects are concerned . . . .<sup>144</sup>

The definition is not exhaustive but instead lists items which the category includes. Fireworks displays are not among the specifically itemized works (photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings). That leaves the possibility that a fireworks display might be a three-dimensional work of fine, graphic, or applied art. Those terms have not generally been understood as including fireworks displays. It is possible that a court or the Copyright Office might disagree, but the definition at least provides a concrete illustration of Congressional intent as the basis for deciding what the term “pictorial, graphic, and sculptural works” means.

By contrast, the question of whether a fireworks display might constitute a “dramatic work” is more difficult to answer in the absence of a statutory definition. Fireworks do not seem to be “dramatic” in the sense of the dictionary definition “pertaining to drama or the theater.”<sup>145</sup> A fireworks display also might not be “dramatic” in the sense of the definition “[r]esembling a drama in emotional content or progression,”<sup>146</sup> though some fireworks displays for some viewers might well evoke emotional content more effectively than some plays. And a fireworks display might well be “dramatic” in the sense of “[s]triking in appearance or forcefully effective.”<sup>147</sup> Courts, of course, are not without interpretive tools to use in deciding what the term “dramatic works” means.<sup>148</sup> And the Copyright Office has adopted a definition for use in evaluating applications for copyright registration: “[a] dramatic composition is one that portrays a story by means of dialog or acting and is intended to be performed.”<sup>149</sup> A conventional fireworks display would seem not to meet that definition, as it would not seem to “portray a story.” But the task for courts and the Office would be easier if Congress provided a definition instead of leaving those who administer the statute to guess at one.

144. *Id.*

145. AMERICAN HERITAGE DICTIONARY 423 (2d. coll. ed. 1982).

146. *Id.*

147. *Id.*

148. *See, e.g.*, 1 GOLDSTEIN, *supra* note 2, § 2.9.1, at 2:104–05 (“Judicial decisions have defined ‘dramatic work’ to imply a story consisting of plot and incident in which the characters’ actions, usually with accompanying dialogue, advance the narrative.”); *O’Neill v. Gen. Film Co.*, 152 N.Y.S. 599, 604 (1915) (“a work in which the narrative is told by dialogue and action, and the characters go through a series of events which tell a connected story”).

149. U.S. COPYRIGHT OFFICE, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 431 (1984).

As discussed above, the 1976 Copyright Act shows that statutory definitions of the categories of protectable works need not be particularly restrictive. The current statutory definitions are framed in broad, conceptual terms. They can easily accommodate new technological developments. For example, presentation software such as Microsoft PowerPoint, Apple Keynote, Prezi, and any similar program was unknown when the definition of “audiovisual works” was first proposed in 1966.<sup>150</sup> Indeed, the definition seems to have been intended to extend protection to decidedly older technologies such as “filmstrips, slide sets, and sets of transparencies.”<sup>151</sup> Nonetheless, the definition of “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment” clearly encompasses presentations created and shown using such software. And definitions can be framed in ways that are broadly inclusive even in the absence of exhaustive enumeration. The definition of “pictorial, graphic, and sculptural works,” for example, never mentions quilt designs, and yet it seems clear that quilt designs are protectable as “two-dimensional . . . works of fine, graphic, [or] applied art,” and a search of the Copyright Office online registration records indicates that the Office registers claims of copyright in quilt designs. Defining by statute each protected category of authorship would provide guidance to courts and the Copyright Office in determining what is and isn’t protectable by copyright but need not unduly limit the forms of expression protected within each category.

D. CONGRESS SHOULD IDENTIFY COMPILATIONS AND DERIVATIVE WORKS AS SUB-TYPES OF THE ENUMERATED CATEGORIES OF PROTECTED WORKS

The final proposed revision principle is that Congress should make clear that original compilations and derivative works are protectable if they come within any of the enumerated categories of protected subject matter but are not independently protectable if they do not fall within any of those categories.

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150. H.R. REP. NO. 89-2237, at 32, 47–48 (1966).

151. 1976 HOUSE REPORT, *supra* note 17, at 56. In this context, “slide sets” refers to a physical collection of photographic slides—individually mounted positive photographic images on a transparent film, capable of projection onto a screen—not the individual pages in presentation software which are commonly referred to as “slides.” These works do not necessarily come within the statutory definition of “motion pictures” because they do not necessarily, “when shown in succession, impart an impression of motion.” 17 U.S.C. § 101 (2012) (“motion pictures”).

The current statute is arguably ambiguous in its treatment of compilations and derivative works. Section 103(a) states that “[t]he subject matter of copyright as specified by section 102 includes compilations and derivative works.”<sup>152</sup> Of course, copyright’s subject matter as specified in section 102(a) includes both the general statement that copyright subsists in “original works of authorship” and the statement that the term “works of authorship” includes the enumerated categories. Section 103(a) might be read to mean that within each of the enumerated categories, copyright will protect any original work, including any original compilation or derivative work. For example, the protection of “literary works” means that copyright will extend to any original literary compilation (such as an anthology of poetry) and to any derivative literary work (such as a translation of a novel from Turkish to English, or a novelization of a motion picture).

But section 103(a) might instead be read to mean that the term “works of authorship” in section 102(a) includes, in addition to the categories expressly enumerated there, two additional categories: compilations and derivative works. This would mean that the current statute protects a compilation or derivative work even if the work does not come within any of the enumerated categories of works in section 102(a). Under this reading, as long as a work constitutes a compilation or a derivative work, it would be a “work of authorship” that can qualify for copyright protection if it meets the standards of originality and fixation.

This broader reading of section 103(a) would potentially allow for a substantial expansion of the scope of copyrightable subject matter beyond what is currently understood to be copyrightable, and likely beyond what Congress intended to protect, particularly with respect to compilations.<sup>153</sup> The statute defines a compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>154</sup> If this alone defines a protectable category of works of authorship, then many collections that do not fall within any of the

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152. 17 U.S.C. § 103(a) (2012).

153. The risk of expansion is less acute with respect to derivative works, at least as long as the category of “derivative works” is seen as including only works that incorporate some protectable expression from an underlying work of authorship. *See, e.g.*, 1976 HOUSE REPORT, *supra* note 17, at 57 (“the ‘preexisting work’ [on which a derivative work must be based] must come within the general subject matter of copyright set forth in section 102”). It seems more difficult to incorporate protectable expression *from* a work that falls within one of the eight enumerated categories *into* a form of creative expression (such as perfume or a fireworks display) that does not fall within any of them.

154. 17 U.S.C. § 101 (2012) (“compilation”).

expressly enumerated categories in section 102(a) may nonetheless be subject to copyright protection.

Take, for example, the operator of a botanical garden, which has carefully collected the plants that it grows on its grounds, has selected those plants from among the much larger universe of plants that it could grow, and has arranged those plants by deciding where to plant all of them. The statute offers no definition of “preexisting materials,” and the plain meaning of the term seems to include plants. If plants qualify as preexisting materials, then the botanical garden would seem to qualify as a compilation, at least if the selection or arrangement of the plants is sufficiently minimally creative to qualify as “original.” And if section 103(a) is read as granting copyright protection in any fixed, original compilation, the botanical garden is protected by copyright if the planting of the specimens on the garden’s grounds count as fixation.<sup>155</sup> This is true even though a botanical garden does not itself seem to fall within any of the expressly enumerated categories in section 102(a), and there is no indication that Congress intended botanical gardens to qualify as “works of authorship” under that section.<sup>156</sup> A similar conclusion might be drawn as to a zoo, or as to a museum’s collection of butterflies or geological specimens. If animals or butterflies or rocks constitute “preexisting materials,” then any original, fixed collection of those materials would constitute a copyrightable compilation. Under this reading, a photograph of the botanical garden that showed a substantial part of the original selection and arrangement of the collected plants would seem to constitute a prima facie infringement of the reproduction or derivative work rights of the owner of the copyright in the botanical garden as a compilation.<sup>157</sup>

Indeed, this approach could potentially allow a backdoor to protection for many of the items identified in Section III.A above as falling outside the

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155. The Seventh Circuit has taken the view that, at least in some circumstances, growing plants do not meet the statutory definition of fixation. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 302–06 (7th Cir. 2011). This view, however, has been subjected to substantial criticism. *See, e.g.*, 1 GOLDSTEIN, *supra* note 2, § 2.4.1, at 2:46.2; Randal C. Picker, *A Walk in a Chicago Park*, THE MEDIA INSTITUTE (Apr. 27, 2011), <http://www.mediainstitute.org/IPI/2011/042711.php>.

156. Some elements of the botanical garden might come within some of the enumerated categories in section 102(a) and qualify for protection. Topiary, for example, might qualify as a sculptural work, and a bed of flowers planted in a pictorial or graphic pattern might constitute a pictorial or graphic work (as, for example, a flowerbed planted in the form of Mickey Mouse’s head at a Disney amusement park would likely constitute a copy of a pictorial work).

157. *See, e.g.*, *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 160–64 (2d Cir. 1986) (holding that still photographs could constitute infringing reproductions of, or derivative works based on, copyrighted choreographic work).

scope of the current enumerated categories of copyrightable subject matter. If a culinary dish is “preexisting material,” isn’t a chef’s choice of which dishes to serve in her restaurant a compilation fixed in the restaurant’s printed menu and therefore copyrightable as long as the selection is original? Does putting together the physical items needed to produce a fireworks display create a compilation, such that anyone else who puts together the same items in order to produce a similar display might be infringing on a copyright in the compilation, even if the fireworks display itself is not copyrightable?

The Copyright Office has recently announced that it interprets the existing statute not to grant protection for compilations unless the compiler’s effort “results [in] a work of authorship that falls within one or more of the eight categories of authorship listed in section 102(a).”<sup>158</sup> The Copyright Office’s interpretation of the statute, though, is not the only possible interpretation of how sections 101, 102(a), and 103(a) interact. Indeed, the Copyright Office admitted that “[t]he relationship between the definition of compilations in section 101 and the categories of authorship in section 102(a) has been overlooked even by the Copyright Office in the past,” which led the Office to issue “in error” registrations of claims of copyright in compilations that did not come within any of the expressly enumerated categories of works of authorship.<sup>159</sup> Thus, it seems sensible that Congress should, in revising the copyright statute, make clear that compilations are protectable only if they come within the expressly enumerated categories of protected works of authorship.

## V. CONCLUSION

From today’s vantage point, the drafting of the Next Great Copyright Act seems unlikely to involve substantial controversy over copyright’s subject matter, and the drafters do not seem likely to face demands for including new types of subject matter. While the subject-matter provisions of current law generally operate fairly well, they can, as this Article has suggested, be improved. If Congress in fact undertakes a general revision of U.S. copyright law, that process will present a rare opportunity to fine-tune all aspects of the law. Congress should be encouraged to take this opportunity for improvement and (1) eliminate the current statute’s open-ended grant of copyright in “works of authorship” outside the categories it enumerates as protected; (2) define all protected categories of works; and (3) clarify that

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158. Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (Jun. 22, 2012).

159. Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607–08 (Jun. 22, 2012).

compilations and derivative works must come within an enumerated category of protectable works in order to qualify for protection. These revisions would keep the authority for deciding which types of works should and should not be protected by copyright with Congress, while giving courts and the Copyright Office sufficient flexibility to interpret copyright law to apply to claims of copyright in works within the conceptual and media-neutral definitions of protectable works.

