

COPYRIGHT CONSIDERATIONS FOR IMPERMANENT ART: PROTECTING TRANSIENT CREATIONS

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ABSTRACT

Copyright, as a form of intellectual property rights, plays a crucial role in safeguarding artistic creations by granting creators exclusive economic rights and economic rights over their works. However, the criteria laid down by copyright laws often present challenges for certain forms of art, particularly “ephemeral”, “impermanent” or “transient” art. Ephemeral art, characterized by its transient or developmental nature, is a rapidly growing sector of contemporary art and engages a diverse audience, unlike traditional static forms of art. Therefore, the author aims to determine that ephemeral art must receive copyright protection as an original artistic work under Section 2(c) of the Copyright Act, 1957. The requirements stipulated by copyright laws, such as expression, fixation, and originality, pose limitations on the protection of impermanent art. While traditional art forms are inherently static and easily preserved, ephemeral art, by its very nature, defies traditional notions of permanence. The issue of fixation is particularly pertinent in the realm of ephemeral art. Fixation, as mandated by copyright laws in various jurisdictions, raises questions regarding the degree of permanence required for a work to be considered fixed and eligible for protection. By striking a balance between acknowledging the tangible nature of artistic expression and accommodating the transient characteristics of impermanent art, a more inclusive copyright regime can be established. In order to understand the practical issues related to the traditional notion of copyright law, the author shall explore the case studies of mandap (wedding decoration) and culinary art. The author aims to offer solutions to include modern forms of art within the ambit of copyright protection.

I. INTRODUCTION

Modern art often sparks fresh perspectives on past, present and future, influencing both art and society. Artists frequently draw inspiration from others’ work, yet, using parts of existing works to create something new can raise copyright concerns. Copyright protects the original expression of ideas in various forms of art, literature and more. The idea-expression dichotomy allows others to express similar ideas, as long as their expression is original.

Work in the copyright regime is often accompanied by an attribute that points in a specific direction: “original”, “individual”, “created”, “independent”, or “unique”. It has often been critiqued that the traditional copyright law is heavily technique-centric rather than being more

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dynamic in its approach. This paper examines whether impermanent artworks such as mandap decorations and culinary art satisfy the requirements for the subsistence of copyright.

The Copyright Act, 1957 [“**1957 Act**”] sets out key conditions for copyright protection, granting authors and owners exclusive economic and moral rights. To qualify for protection, the creation must fit within a specified “type of work” such as “literary, dramatic, musical, cinematograph film, and sound recording,” and demonstrate a minimum level of creativity, defined as being “original” according to the 1957 Act.¹

Uptil now, the issue of impermanent art being an artistic work has not been appropriately addressed by the Indian judiciary, but with the evolving nature of copyright, it is pertinent to address transient art. Ephemeral art is a form of transient or developmental art and a growing sector of modern art, currently recognised as one of the most audience-engaging art form as well. Ephemeral art, found in temporary installations or created with transient materials like flowers or food, poses unique challenges in copyright law.²

In various jurisdictions, the concept of “fixation” is crucial for determining eligibility for copyright protection. This raises questions about the level of permanence necessary for a work to be considered fixed and thus eligible for protection. The analysis will explore Indian copyright law, alongside international developments, to understand how these factors impact the legal landscape for ephemeral art.³ As the legal landscape evolves, re-evaluating the concept of fixation is crucial to accommodate impermanent art within the framework of copyright protection. By balancing tangible expression with the transient nature of impermanent art, a more inclusive copyright regime can emerge that preserves artists’ creativity across diverse forms of expression. Through case studies like wedding decoration and culinary art, the author aims to understand practical issues within traditional copyright law and propose solutions to encompass modern art forms within copyright protection.

II. UNDERSTANDING THE LEGISLATIVE FRAMEWORK

Section 13 of the 1957 Act provides that copyright can only subsist in an “original literary, dramatic, musical or artistic work.”⁴ Of these four categories of works, wedding decorations fall

¹ The Copyright Act, 1957, Act No. 14 of 1957, § 2(y).

² Peter J. Karol, *The Threat of Termination in a Dematerialized Art Market*, 64 J.COPYRIGHT SOC’Y U.S.A. 187 (2017).

³ David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279 (2013).

⁴ The Copyright Act, 1957, Act No. 14 of 1957, §13.

under the category of artistic work. Section 13 provides that copyright can only subsist in “original” works and imposes a requirement of originality, however, the 1957 Act is silent on the requirement of fixation for artistic works. A decoration must satisfy the following requirement for copyright to subsist in an artistic work as per Section 2(c) of the 1957 Act, which defines an artistic work as:

- “a painting, a sculpture, an engraving or a photograph, whether or not any such work possesses artistic quality;
- a work of architecture; and
- any other work of artistic craftsmanship.”⁵

For a work to qualify as a work of artistic craftsmanship, there are essentially two ingredients that need to be satisfied, namely-⁶

- Work of a craftsman; and
- possession of artistic character.

Undoubtedly, work of artistic craftsmanship has been given inadequate protection and there is a strict need to evolve a standard for determining the artistic character of a work.

A. Relevance of the Intent of the Creator

In international jurisdictions, there has been a debate as to whether the author’s intent or the artistic quality must be the determining factor for a work of artistic craftsmanship.⁷

In the case of *Burge v. Swarbrick*, the Australian High Court observed that “A work of craftsmanship presupposes skill and knowledge for its production”.⁸ Lord Simon noted that if a work is reflective of the author’s intent, aim and impact, it would amount to work of a craftsmanship. Evidently, “real or substantial artistic effort” must be seen at the author’s end to decide whether it’s a work of artistic craftsmanship or not.

The presence of craftsmanship must be looked into with what was the “intent of the creator”, because if we read into the legislative language of Section 2(c) of the 1957 Act, it states that work means “a work of artistic craftsmanship”, and the phrase “whether of artistic quality or not”, is intentionally excluded from this category, suggesting that artistic quality is relevant in works of

⁵ *Id* at § 2(c).

⁶ ALKA CHAWLA, ALKA CHAWLA: LAW OF COPYRIGHT 45 (1st Ed. 2013).

⁷ Patrick Masiyakurima, *Copyright in Works of Artistic Craftsmanship: An Analysis*, 36 OXFORD J. LEGAL STUD. 505 (2016).

⁸ *Burge v. Swarbrick* [2007] HCA 17 (Austl.).

artistic craftsmanship.⁹ Therefore, the artist's intent to create a work of art though relevant is not determinative.¹⁰

Furthermore, Section 51 of the 1957 Act addresses infringement of copyright.¹¹ In *Cadbury India Ltd. v. S.M. Dyechem Ltd.*,¹² the Court determined if there is an infringement of an artistic work and evolved the "lay observer test", observing that, "it is based on the assumption that if the lay observer, one who is not an expert in artistic work, sees the visual and if it appears to him that the work is the reproduction of some other work then it would amount to the infringement of the artistic copyright." The Indian Courts are yet to decide on the relevance of intent in the context of artistic craftsmanship, however, reliance can be placed on foreign courts, to arrive at a settled position and a test to determine artistic craftsmanship.

B. Problems Eclipsing the Statutory Understanding of Artistic Works

1. Absence of a Clear Statutory Definition

Indian copyright law has long protected works of artistic craftsmanship, yet it has never explicitly defined 'artistic craftsmanship' in statute. This intentional flexibility aims to reduce the risk of arbitrary judgments. Accordingly, courts have emphasized that works of artistic craftsmanship must exhibit elements of both 'craftsmanship' and 'artistic quality' in their execution. However, due to the absence of a clear statutory or judicial definition of 'artistic craftsmanship', the concepts of 'artistic quality' and 'craftsmanship' remain areas of considerable uncertainty and subjectivity. In *Hayuk v. Starbucks Corporation*,¹³ the difficulties that a graffiti artist may face in trying to prove seemingly simple elements were highlighted due to a lack of statutory clarity. It was observed that "as Congress has never legislated the appropriate standard-and the Supreme Court itself has not weighed in to give definition to the field, so all the decisions.... that work to define a test for substantial similarity emanate from the inferior courts."¹⁴

2. Lack of Judicially Agreed Formula

There is no universally accepted judicial formula for determining whether a work qualifies as one of artistic craftsmanship under Indian copyright law. The term 'artistic' is interpreted according to

⁹ David M. Cummings, *supra* note 3.

¹⁰ Peter J. Karol, *supra* note 2, at pg. 11.

¹¹ *supra* note 1, at § 51.

¹² *Cadbury India Ltd. v. S.M. Dyechem Ltd.*, (2000) 1 RAJ 125.

¹³ *Hayuk v. Starbucks Corp.*, 157 F. Supp. 3d 285, 289 (S.D.N.Y. 2016).

¹⁴ *Streetwise Maps Inc. v. VanDam Inc.*, 159 F.3d 739 (2nd Cir. 1998).

its ordinary and natural meaning,¹⁵ and it is the role of the court to assess the evidence in each specific case to determine whether a work meets the criteria of artistic craftsmanship.

3. *Absence of Copyrightability to Impermanent Artworks*

The absence of copyright protection for temporary artworks creates challenges in addressing infringement, particularly due to the inability to claim such artworks under copyright law. This lack of clarity in the 1957 Act means that artists cannot prevent the recreation, restoration, or outright theft of their temporary artworks, as these works do not meet the criteria for copyright protection.

III. UNFOLDING THE FIXATION AND ORIGINALITY REQUIREMENTS UNDER COPYRIGHT LAW FOR IMPERMANENT ART

A. Understanding the Issue of Fixation

It is important to clarify that Indian copyright law does not explicitly exclude the protection of ephemeral artworks. There is no statutory provision in Indian copyright law that limits protection based on the form of fixation. Section 14(c) of the 1957 Act grants the exclusive right to commercially utilize various creative forms in “any material form” as long as the work can be perceived and reproduced by any means.¹⁶ Therefore, the key criterion for availing copyright protection in India is the requirement of “fixation” - that is, the work must be recorded or captured in a tangible form that allows for perception and reproduction through various means.

Practice and Procedure Manual of Artistic Works 2018 [**Copyright Manual**] defines artistic work as “Any work which is an original creation of an author or an owner fixed in a tangible form, is capable of being entered into the Register of Copyrights, irrespective of the fact that whether such work possess any artistic quality or not.”¹⁷

Indian courts have not directly addressed the issue of fixation specifically in relation to impermanent art. However, they have expressed the view in the case of Emergent Genetics India Pvt. Ltd v. Shailendra Shivam,¹⁸ wherein it was observed that “‘fixation’ (i.e. the existence of a literary or copyrightable work in tangible form) is not a pre-condition for a copyright to subsist in a work in India.”¹⁹

¹⁵ Rajendra Kumar Sethia v. Wealth-Tax Officer (1982) 2 ITD 394.

¹⁶ *supra* note 1, at § 14(c).

¹⁷ Practice and Procedure Manual of Artistic Works 2018, § 2.

¹⁸ Emergent Genetics India Pvt. Ltd v. Shailendra Shivam, (2011) 125 DRJ 173.

¹⁹ *Id* at para 11.

It is noteworthy that Indian courts have adopted a very liberal approach towards the interpretation of artistic works.²⁰ In the case of *Sartaj Singh Pannu v. Gurbani Media Pvt Ltd & Anr.*,²¹ the court observed that “what constitutes a work of art has evolved over time. We are in an age of multimedia art installations, where an artist might work on several media, in a single comprehensive presentation, to express or convey a creative moment or feeling or emotion.”²² Thereby, providing broader scope of copyright protection to contemporary arts.

Further, the court also observed that “When it comes to directing or making a film, the “directorial touches” that a director imparts to the film cannot be confined to any particular oeuvre. The expression of artistic craftsmanship is wide enough to accommodate the effort of a film maker director who brings to the final product a distinctive style, an “artistic touch” so as to qualify for acknowledgment as an “artist” in relation to an “artistic work”.²³

At the same time, it is not every directorial effort that can qualify for being considered an “artistic work”. That will again depend on an evaluation or assessment of the work, by experts, based upon some objective criteria. The most apposite analogy would be the work of juries in film festivals. Whether the work of a director in a particular film can be stated to be a work of artistic craftsmanship will be a matter for evidence. In the case on hand, it is difficult for the Court at the present stage to form even a *prima facie* opinion that Pannu’s directorial effort in the film is a work of artistic craftsmanship.”²⁴

A closer view of the United Kingdom’s [“**U.K**”] judicial approach indicates that fixation is a non-requirement for artistic works, much like India. In the landmark case of *Islestarr Holdings Ltd. v. Aldi Stores Ltd.*,²⁵ the U.K High Court granted copyright protection to a make-up palette in spite of its ephemeral nature and made an interesting observation that the content of artistic work must be given prime importance and not the medium used to capture/ record the work.

The United States of America [“**U.S.A**”] judiciary appears to rely on a very restrictive meaning of authorship and fixation, for instance, in the case of *Kelley v. Chicago Park District*,²⁶ the court

²⁰ *Amar Nath Sehgal v. Union of India*, (2002) SCC OnLine Del 390.

²¹ *Sartaj Singh Pannu v. Gurbani Media Pvt Ltd & Anr.*, (2015) 220 DLT 527.

²² *Id.*

²³ *Id* at para 48.

²⁴ *Id* at para 49.

²⁵ *Islestarr Holdings Ltd. v. Aldi Stores Ltd.* [2019] EWHC 1473 (Ch).

²⁶ *Kelley v. Chicago Park District*, 635 F.3d 290, 292 (7th Cir. 2011).

denied copyright protection to a “planned garden with natural and inherently changeable objects” due to lack of fixation and authorship. It included intricate motifs installed in Chicago’s Park District; the court of appeals ruled that the artwork was primarily influenced by ‘natural forces’ rather than human authorship. The court emphasised that plants being “inherently changing organisms,” contributed significantly to the evolving nature of the garden, raising questions about the degree of human creativity and control involved in the work, which means they grow at their own rate and way. To identify the artist as the ‘author’ of a work that changes shape, size, and quality over time, would go beyond the legal definition of an ‘author’.

In Indian copyright law, the requirement of fixation is interpreted more flexibly compared to many European countries.²⁷ This flexibility allows for the potential protection of temporary or impermanent artworks under Indian copyright law, as there is ambiguity surrounding the exact scope and criteria of fixation in Indian legal interpretations.

In contrast, countries like the U.S.A. have a more stringent definition of fixation. Fixation in the U.S.A. is defined as the representation of a work that is stored or contained in a tangible medium, which must be sufficiently permanent and exist for a longer duration of time.²⁸

The argument emphasises the fundamental purpose of copyright protection: to safeguard artists’ original creative expressions. It challenges the traditional emphasis on the permanence of artistic vehicles, such as tangible mediums, suggesting that this focus can undermine the core principle of protecting creativity itself. Drawing from Hegelian philosophy, the expression of art often embodies the artist’s personality, feelings, and innovative perspectives on the world.²⁹ However, the fixation requirement in copyright law tends to exclude impermanent art forms and improvisational works like sketches, freestyle songs, and unrehearsed choreography from full commercial exploitation by their creators.

The lack of clear judicial interpretations and remedies for ephemeral art contributes to a global problem where artists are left without legal recourse when their works are subject to unauthorized alteration or exploitation. Excluding certain forms of creativity based on their ephemeral nature limits the scope of intellectual property and fails to account for the potential impact and cultural

²⁷ *Id* at para 14.

²⁸ Tabrez Ahmad and Snehil Soumya, *Significance of Fixation in Copyright Law*, SSRN (May 12, 2011), <https://ssrn.com/abstract=1839527>.

²⁹ Cheng-chi (Kirin) Chang, *The Clash of Theories: Semiotic Democracy and Personality Theory in Intellectual Property Law*, 9 LAW AND WORLD 20 (2023).

significance of impermanent artworks. While complete abandonment of the fixation requirement may not be ideal, there is merit in reevaluating its application to foster greater motivation for artistic innovation. By refining the concept of fixation, copyright law can contribute to a more vibrant artistic landscape, encouraging creativity without arbitrary limitations based on the duration of an artwork's existence.³⁰

In the context of Indian law, the frustration lies in the lack of clarity and definition surrounding the scope of fixation as an essential element of copyright protection. Despite acknowledging fixation as integral, the legislature and the judiciary have not provided clear guidelines, thereby leaving artists and creators without adequate legal recourse and protection for their works. This ambiguity underscores the urgency for legal reforms that align with international standards and support the rights and interests of artists in the evolving creative landscape.

B. Decoding the Originality Criteria

The essence of copyright protection for artistic creations hinges on the presence of inherent originality. It's important to clarify that this threshold of originality in Indian law is characterised by the "modicum of creativity" and "skill and judgment" tests.³¹ Although the 1957 Act does not provide a specific definition of "original," it is generally understood that copyright can only protect an idea once it has been put into any form of words, or any form of expression and reduced into writing, or into some tangible form, or capable of sensory perception by the audience.³² The courts have tried to ascertain originality through various judgments, the most important being *University of London Press Ltd. v. University Tutorial Press Ltd.*³³ In this case, the Court relied on the "Sweat of the Brow" doctrine and observed that the "work need not be original in a revolutionary way. However, it should not be of a trivial nature either. Certain efforts must be made to ascertain whether it is original."³⁴ Further, the "Modicum of Creativity" test stipulates that the work must involve minimal originality to be authentic and copyrightable, as laid down in the case of *Feist Publications, Inc. v. Rural Tel. Serv. Co.*³⁵ originality requires independent creation plus a modicum of creativity, which translates into the work being a fruit of intellectual labour.

³⁰ Minelli E. Manoukian, *Graffiti on Cities's Forgotten Landscapes: An Application of Adverse Possession Law to the Visual Artists Rights Act*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 592 (2022).

³¹ *Eastern Book Company v. D.B Modak & Navin Desai*, (2008) AIR SC 809.

³² *R.G.Anand v. Deluxe Films*, (1978) AIR SC 1614; *Zee Telefilms Limited v. Sundial Communications Private Limited*, (2003) (5) BOM CR 404.

³³ *London Press Ltd. v. University Tutorial Press Ltd.* (1916) 2 Ch. 601.

³⁴ *Id.*

³⁵ *Feist Publications, Inc. v. Rural Tel. Serv. Co* 499 U.S. 340 (1991).

In the case of *Macmillan & Co. Ltd. v. K&J Cooper*, it was decided that “sufficient labour, skill and capital that have been put to the product possess quality or character that the original raw material didn’t possess. The work is original only if the author has applied some labour or skill.”³⁶ This case was also relied upon in the case of *A. Sirkar and Co. (Jewellers) Pvt. Ltd. v. B. Sirkar Jahuree Pvt. Ltd.*, wherein, it was observed that, “To qualify for copyright protection an artistic work must be original i.e. it must originate from the author. In respect of painting, scripture, drawing, or work need not any artistic quality but author must have to store skill, judgment and efforts upon the work. The required skill, the Judgment and effort is minimum. Copyright protection is given to the work and not idea and that it is not originality of thought that has to be established to obtain copyright protection to but original skill and labour in execution.”³⁷

Copyright protection applies only to original works, so installations incorporating ready-made or natural objects may initially seem to lack the required originality. In the U.S.A., courts have grappled with determining whether artistic elements can be conceptually separated from the utilitarian aspects of an article to qualify for copyright protection. If the aesthetic component can exist independently from the functional aspect, the work may be classified as an ‘artistic work’. Conversely, if the aesthetic and utilitarian aspects are intertwined, the work may not be considered artistic.³⁸ In the case of *Star Athletica, L.L.C v. Varsity Brands Inc.*,³⁹ it was observed that “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. It therefore cannot be copyrighted.”⁴⁰ The Court in this case upheld that copyright extends only to “solely artistic” features of articles.

In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the Second Circuit Court of Appeals highlighted Christo’s *Running Fence* as an example of conceptual art meeting the originality requirement. Although the physical sculptural features were inseparable from the utilitarian aspect (the fence), the artistic value was conceptually separable.⁴¹

In India, the 1957 Act does not explicitly define “originality”, but judicial precedents suggest that it pertains to the expression rather than the underlying ideas. The term “original” in this context refers to the work originating from the author and their effort and intellectual labour, not

³⁶ *Macmillan & Co. Ltd. v. K&J Cooper*, (1924) 26 BOM LR 292.

³⁷ *A. Sirkar and Co. (Jewellers) Pvt. Ltd. v. B. Sirkar Jahuree Pvt. Ltd.*, (2021) MANU/OT/0018/2021.

³⁸ Angelo Marchesini, *Thin Separability: An Answer to Star Athletica*, 43 SEATTLE U. L.REV. 1087 (2020).

³⁹ *Star Athletica, L.L.C v. Varsity Brands Inc.* 137 S. Ct. 1002 (2017).

⁴⁰ *Id* at para 12.

⁴¹ *Kieselstein- Cord v. Accessories by Pearl Inc*, 632 F.2d 989.

necessarily implying novelty or uniqueness in the conventional sense. In contrast, in the U.S.A, courts distinguish between artistic and utilitarian elements, with only purely artistic features qualifying for copyright protection.

IV. APPLICABILITY OF THE DOCTRINE OF DE MINIMIS AND MORAL RIGHTS TO IMPERMANENT ART

The concept of moral rights represents a personal and reputational connection between an artist and their creative work, existing alongside economic rights protected by copyright law in many countries worldwide. Moral rights are often incorporated into copyright statutes and afford creators a degree of control over how their art is used, beyond mere economic exploitation. The right of integrity, a key aspect of moral rights, empowers artists to oppose treatment of their work that could damage their honour or reputation, such as mutilation or distortion.⁴² The Right of Integrity allows creators to oppose any modifications that could harm their work's reputation. The Right of Attribution ensures creators are recognised as the authors of their work. The Right of Communication to the Public gives creators control over how their work is presented publicly. Lastly, the Right of Withdrawal or Circulation allows creators to withdraw their work from circulation when necessary, safeguarding their moral interests beyond economic rights granted by copyright law.⁴³

Notably, the Agreement on Trade-Related Aspects of Intellectual Property Right ["**TRIPS**"], which obliges World Trade Organization ["**WTO**"] members to adhere to the Berne Convention's substantive provisions, explicitly excludes Article 6bis, the moral rights provision.⁴⁴

Importantly, limitations and exceptions to copyright law must account for moral rights. Even the acts falling under the ambit of statutory limitation of fair use or dealing must honour the moral rights of authors. Moral rights thus serve as a vital safeguard for creators, ensuring their artistic integrity and reputation are preserved regardless of economic exploitation or assignment of copyright. These rights grant creators of copyright-protected works a certain level of control over how their art is used, not only by the owners of the physical medium but also by the general public.

⁴² Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1994).

⁴³ Anand Patwardhan v. Director General Doordarshan, (2006) INSC 558.

⁴⁴ Berne Convention for the Protection of Literary and Artistic Works, art. 6-bis, Sept. 9, 1886, 828 U.N.T.S. 221.

The moral right of integrity is especially significant in this context. It enables artists to object to treatments of their works, such as mutilation or distortion that could harm their honour or reputation. This right empowers artists to preserve the integrity of their creations and ensure that they are presented and treated in a manner consistent with their artistic vision and personal values.⁴⁵

In the case of *Amarnath Sehgal v. Union of India*,⁴⁶ the Delhi High Court, while declaring the sculpture as part of the cultural heritage of the nation observed that the “destruction of the work to be ‘an extreme form of mutilation’,⁴⁷ which by reducing the volume of the author’s creative corpus, affected his reputation prejudicially.”⁴⁸ The Court’s decision broadened the scope of interpretation of Section 57 of the Act. While the law explicitly prohibited certain acts like “distortion, mutilation, modification, and other acts”, it did not explicitly mention ‘destruction’. The Court recognised the special relationship between the artists and their creations, even after economic rights have been transferred. This case has since been a guiding precedent for the judiciary’s dedication to upholding moral rights and advocating for the respectful treatment of the nation’s cultural assets.⁴⁹ In the landmark judgment of *Raj Rewal v. Union of India*, The Court clarified the law regarding the protection of moral rights for architectural works.⁵⁰ The case involved a building that was considered a copyrighted work of architecture. Although classified as an artistic work under the Act, the Court distinguished it from other works in this category by carving out an exception based on the nature of architectural works. In reaching this conclusion, the Court examined the inherent differences between architectural works and other types of copyrighted works such as paintings, sculptures, and drawings. This analysis led to a nuanced understanding of how moral rights should be applied specifically to architectural creations, recognising the unique considerations and challenges posed by this particular form of artistic expression within the framework of copyright law. The Court observed that “land being a subject-matter of multiple independent legislations, a straitjacket application of moral rights without due consideration of the laws affecting the land (on which the building stands) cannot confer proper justice.”⁵¹

⁴⁵ *Id.*

⁴⁶ *Amar Nath Sehgal v. Union of India*, (2002) SCC OnLine Del 390

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Mira T S Rajan, *Moral Rights and the Protection of Cultural Heritage: Amar Nath Sehgal v Union of India* , 10(1) INT’L J CULTURAL PROP. 79 (2001).

⁵⁰ *Raj Rewal v. Union of India &Ors*, (2018) CS (COMM) 3/2018.

⁵¹ *Id* at para 15.

The Court balanced the constitutional and basic human right to property against the moral rights of an architect, which are statutory rights without a basis in common law and are considered to be of lesser significance. It was held that “the moral rights are pre-empted by property rights. Unless any specific provision in law is made, the Act cannot be interpreted to triumph over the right of the owner of certain property to deal with it as they like.”

The Court’s decision to prioritise property rights over the moral rights of architects in cases where they are not the owners of the buildings they designed, echoes a similar approach seen in certain foreign jurisdictions regarding impermanent art. In context of impermanent art, legal frameworks often struggle to fully empower artists with absolute rights against the destruction or alteration of their works. In the context of transient creations, moral rights still play a crucial role. These creations, despite their impermanence, reflect the author’s original expression. Therefore, protecting the integrity of the work and ensuring proper attribution remain important, even if the work is not intended to last or be commercially exploited in the long term.

In addressing these issues, it becomes essential for legal systems to evolve and develop nuanced statutory provisions that recognise and protect the moral rights of creators, regardless of the permanence or ownership status of their artworks.⁵² This entails establishing a framework that upholds the integrity and attribution rights of artists while also respecting the legitimate property interests of owners or custodians of public spaces where impermanent art is displayed. Such a balanced approach would contribute to the fair and equitable treatment of creators of impermanent art within the broader scope of intellectual property and cultural heritage preservation.

A. Takeaways from the Visual Artists Rights Act [“VARA”]

The U.S.A stands out as a jurisdiction that explicitly protects visual artists, including street artists, through the VARA of 1990,⁵³ which grants them the right to oppose the destruction of their works if they have “recognised stature.”⁵⁴ Further, it is a significant piece of legislation in the realm of visual arts, particularly in granting artists certain moral rights that go beyond economic

⁵² Anjali Raj, *Moral Rights of the Author in Copyright Laws in India: A Paradigm Shift*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).

⁵³ The Visual Artists Rights Act, 1990, 17 U.S.C. §106A.

⁵⁴ *Id* at § 104A(a)(3)(B).

considerations associated with copyright law. It provides for the right of attribution, and the right of integrity.⁵⁵

These moral rights granted by VARA aim to protect artists' connections to their creations and the inherent dignity of their work beyond merely financial interests. They recognise the personal and emotional investment that artists have in their creations and seek to preserve the authenticity and integrity of those creations.

These provisions act as a gatekeeping mechanism, offering protection only to artworks considered to have artistic merit by art experts, the art community, or society at large, as clarified in legal cases such as *Carter v. Helmsley-Spear Inc.*⁵⁶ This case establishes a two-part test requiring evidence that: (1) the visual art in question is deemed meritorious or possesses "stature," and (2) this stature is acknowledged or "recognised" by art experts, members of the artistic community or a broader cross-section of society.

In the case of *Cohen v. G&M Realty* related to the demolition of the 5Pointz mural complex in New York, the court granted twenty-one graffiti and street artists a landmark award of \$6.7 million in statutory damages.⁵⁷ This ruling marked a historic moment, as it was the first time such protection was extended to graffiti and street art in the U.S.A. under VARA. Judge Block determined that the whitewashed artworks at 5Pointz met the criteria of "recognized stature" and found that the property owner had wilfully and illegally destroyed them without proper notice under VARA.

The court's decision in this case rejected a restrictive interpretation of "recognized stature" proposed by the property owner's expert, emphasising the importance of professional achievement, media coverage, academic recognition, and community support as evidence to meet this standard.⁵⁸ Additionally, Judge Block highlighted the artistic and social significance of 5Pointz, acknowledging its role as a cultural attraction and the impact of curator Meres One in its preservation efforts. However, the 5Pointz case signifies a shift in attitude toward preservation within communities, with artists and advocates rallying to protect their work from destruction.

⁵⁵ Drew Thornley, *The Visual Artists Rights Act's Recognized Stature Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351 (2019).

⁵⁶ *Carter v. Helmsley-Spear Inc.*, 861 F Supp 303 (S.D.N.Y. 1994).

⁵⁷ *Cohen et al. v. G&M Realty L.P. et al.*, Case No. 13-CV-05612(FB) (RLM).

⁵⁸ Enrico Bonadio, *Street art, graffiti and the moral right of integrity*, 1 NUART JOURNAL 17-22 (2018).

Despite these efforts, challenges persist in balancing preservation with impermanence within urban environments. The outcome ultimately underscores the complexities of preserving ephemeral art amid urban development. It calls attention to the delicate balance between artistic expression and property rights, emphasizing the cultural significance of these temporary artworks in contemporary society.⁵⁹ Judges are urged to consider the delicate balance between artistic expression and property rights, recognising the cultural significance of these transient works.

V. EXPLORING CASES: IN-DEPTH STUDIES OF IMPERMANENT ART

In this chapter, we delve into detailed case studies examining the complexities of impermanent art. Through in-depth analysis, we explore the legal and practical considerations surrounding the protection and recognition of impermanent artistic expressions within copyright frameworks.

A. Mandap Decoration

A mandap is traditionally a ceremonial structure in Indian weddings, typically a canopy-like framework, decorated with flowers, fabrics and other ornamental elements. Mandaps are customised to portray the emotions of the wedded couple through a creative moment, leading to a comprehensive presentation that represents the couple. Thus, the intent of the creator of the wedding decorations can be inferred to be to create something artistry in nature, which would make it a work of artistic craftsmanship, the conscious intention of the craftsman was the primary test,⁶⁰ as reiterated in the case of *George Hensher v. Restawile Upholster*.⁶¹ Furthermore, Lord Simon noted that if a work is reflective of the author's intent, aim and impact, it would amount to a work of craftsmanship.

For wedding decorations to qualify as artistic craftsmanship, they must be looked into with the help of the following factors-

- The purpose behind such creation of work; and
- Some objective criteria and evidence.⁶²

It's a growing trend to have installation art as mandap. Installation art is a contemporary art form that involves creating immersive, three-dimensional artworks in a specific space. At a wedding, the

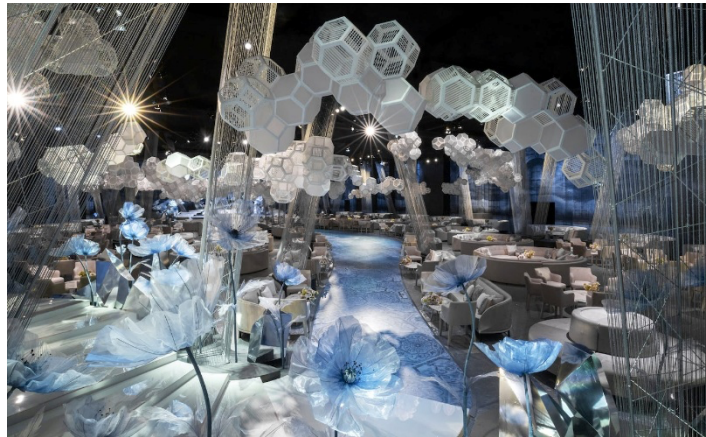
⁵⁹ *Id* at pg 18.

⁶⁰ David Tan and Yong Neng Chan, *Copyright Subsistence in Contemporary Times: A dead shark, an unmade bed and bright lights in an empty room*, SINGAPORE JOURNAL OF LEGAL STUDIES 402 (2013).

⁶¹ *George Hensher v. Restawile Upholster* (1976) AC 64.

⁶² Justine Pila, *Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work*, 36 FED. L. REV. 365 (2008).

theme, venue and overall aesthetic of the event are aligned to create an impactful experience evoking emotions. Let's understand this with the help of a case study; the picture below is of "Embracing Petals", it is an installation of silver threaded columns reached from floor to ceiling. It created a sense of illusion of floating stairs as the bride walked down. Further, modern geometrical cloud formations were used to create a dramatic sky over the landscape. Using installation art as wedding decoration can add a unique and artistic touch to the event.



Project Embracing Petals⁶³

If we look at "embracing petals" it involves some degree of production by hand that is guided by special training or skill and implies a manifestation of pride in "sound workmanship". The clouds' white colour created a surreal atmosphere as they contrasted with the dark architectural backdrop of a fog-covered palace. By looking, into the picture objectively, the purpose was to create something aesthetic and a creative moment to represent emotions possessing artistic quality. The work required specific artistic skills and would arguably be a work of artistic craftsmanship.⁶⁴

Furthermore, setting up of a mandap involves floral arrangement which is a floral art in itself. The author shall seek reference of the Ikebana Art, wherein flowers are used as an artistic expression, which is termed as a fine art,⁶⁵ with its own historical traditions, and precepts of composition.⁶⁶ Moreover, it is also seen that floral artists' eyes are trained to measure spaces and recognize the harmonies of rhythm which make design decorative. This is indicative of the fact that the floral

⁶³ *Project Embracing Petals*, DESIGNLAB EXPERIENCE (2019), <https://www.designlabexperience.com/projects/embracing-petals>.

⁶⁴ Masson Douglas, *Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*, INDIANA LAW JOURNAL 1066 (1996).

⁶⁵ Dorothy Meigs, *Flower Arrangement as a Fine Art*, 27(9), THE AMERICAN MAGAZINE OF ART (1934).

⁶⁶ *Ansehl v. Puritan Pharmaceutical Co*, 61 F.2d 131 (8th Cir.).

decorators at a wedding use their skill and judgment to make an intellectual effort in decorating a wedding.

For mandap decorations to be eligible for copyright protection, it is pertinent to understand the craftsman's aim and intent. In the case of *Lucasfilm Ltd v. Ainsworth*,⁶⁷ it was held that the craftsman's intent is of prime importance and noted that "the artwork must have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose well".⁶⁸ Conceptual artworks like that of Mandaps encourage an audience experience that may create a degree of coherence among audience experiences. If the elements of a conceptual artwork that create coherence among audience experiences are decided and implemented by an author, the work may be fixed in terms of Section 101.⁶⁹ Hence, the coherence among user experiences may be an indicator of fixation, if it indicates authorship.

It must be seen that while arranging or displaying natural objects in an artistic manner can involve some creative decisions and judgment, the arrangement itself must exhibit a sufficient degree of originality to be eligible for copyright protection.⁷⁰ Notably, mandap decorations satisfy the minimum level of originality, thus, a copyright can subsist in mandap decorations.⁷¹ As discussed earlier, a mandap is aligned with the overall aesthetic of the event to create an emotional experience, which is a form of visual appeal with a clear artistic purpose, thereby, satisfying the primary test of the craftsman's intent to create a work of artistic craftsmanship.

The author concludes by claiming that the mandap decorations would qualify as an artistic work as per the 1957 Act by looking into the skill and technical knowledge of craftsmen and the artistic intent and purpose behind the art.⁷² Mandap decorations satisfy the minimum threshold of being original, therefore, making them an original work of artistic craftsmanship.

B. Food Art

Food art refers to the meticulous preparation and presentation of food on a plate, designed to be visually appealing and enjoyable for diners in a restaurant. When a chef creates food art, they craft each dish with intricate arrangements of colours, textures, and shapes, aiming to stimulate diners'

⁶⁷ *Lucasfilm Ltd v. Ainsworth* [2011] UKSC 39.

⁶⁸ *Id.*

⁶⁹ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud (1989).

⁷⁰ Chloe Francis, *The Protection of Contemporary Art under UK Copyright Law*, 23 ART ANTIQUITY & L. 289 (2018).

⁷¹ Alka Chawla, *supra* note 6, at pg 115.

⁷² Robert Brauneis, *How Much Should Being Accommodate Becoming? Copyright in Dynamic and Permeable Art*, 43 COLUM. J.L. & ARTS 381 (2020).

aesthetic senses. This creative plating not only enhances the visual appeal of the dish but also contributes to the overall dining experience. Diners often appreciate and critique the artistic presentation of food as a delightful expression of both visual and flavourful artistry. Importantly, food art serves a practical purpose beyond aesthetics; by influencing the taste of the dish and elevating the restaurant's quality and reputation by offering a unique culinary experience.

While the 1957 Act in India provides protection for original artistic works, including works of artistic craftsmanship, the applicability of these provisions to the presentation of food on a plate remains a complex issue.⁷³ The 1957 Act does not define the standard of originality. However, after *EBC v. D.B. Modak*,⁷⁴ the originality standard in India is situated between the two extremes of 'Sweat of the Brow' and the 'Modicum of Creativity' tests. The understanding is that a work is original if the author has put his/her mind, skill and labour into the work and further upheld "the principle that anyone who by his or her own skill and labour creates an original work of whatever character, shall enjoy an exclusive right to copy that work and no one else would be permitted to reap the crop what the copyright owner had sown."⁷⁵

The above standard would not be the ideal standard to follow in the current case. There is a strong tradition in the culinary industry of drawing inspiration from each other's work in the same cuisine, and many works are derivative. Then there are certain cuisines that are innately presented in a particular way. By current standards, a chef who makes only a minimal change to create a 'somewhat different' presentation of such cuisine than the existing ones, would easily satisfy the criteria for originality. However, this would allow the creation of a monopoly in that cuisine and cause its appropriation.

The second requirement is for the original creation to be a 'work' as required under section 13 of the Act.⁷⁶ One such category of work is artistic work, as defined under section 2(c). Food presentations can find protection under this category as works of 'artistic craftsmanship'. They are always seen as artwork in the industry. Artistic Craftsmanship under this Section can be understood as the quality of being artistic. There are two essential ingredients of this sub-clause. First, the work has to be of a craftsman and secondly, it has to be of artistic value.⁷⁷

⁷³ Nikhitha Naveen Kumar & Chiranthana N. Yadav, *Copyright Protection to Culinary Presentations: An Analysis*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023).

⁷⁴ *EBC v. D.B. Modak*, (1916) 2 Ch. 601.

⁷⁵ *Id* at para 40.

⁷⁶ *Supra* note 1, at § 13.

⁷⁷ Alka Chawla, *supra* note 6.

It is largely understood as a work that “owes its origin to the author”, i.e. the work must originate from the skill and labour of the author and must not be a copy of any other work. Another prerequisite of copyright protection is the fixation of work in a tangible form.

The question of whether the arrangement or presentation of food can be copyrighted in India delves into the realm of culinary arts, challenging conventional perceptions of artistic expression and intellectual property rights. Plating a dish involves more than just culinary preparation; it requires meticulous attention to detail, combining ingredients in aesthetically pleasing ways to enhance visual appeal. This creative process raises intriguing questions about the distinction between functional and artistic aspects of food presentation.

In *Kim Seng Company v. J&A Importers, Inc.*,⁷⁸ the Court examined whether a “bowl-of-food” sculpture was original enough to be entitled to copyright protection. J&A Importers created this sculpture in 1998 as part of an advertising campaign. Kim Seng alleged that J&A had copied the sculpture, thereby infringing its copyright. The court examined whether the bowl-of-food sculpture met the criteria for copyright protection. To qualify for copyright, a work must be original, meaning it must possess a sufficient degree of creativity. The court analysed whether the arrangement of rice sticks, egg rolls, meat, and garnishes in the bowl constituted a sufficiently creative expression. It was also contended by the Plaintiff that one of its employees “chose the foods (depicted in the sculpture) out of thousands of possibilities and directed their arrangement to be in a certain fashion out of infinite possibilities.” The court, however, held that “the combination of a common bowl with the contents of a common Vietnamese dish indicated a “lack of originality,” and was therefore not eligible for copyright protection.”

The U.S. Supreme Court case of *Baker v. Selden* was detrimental to the idea that recipes are copyrightable.⁷⁹ In *Baker*, the Court held that “if, on being copyrighted, a monopoly ensues, not only of the piece itself but also of the process upon which it is based, then copyright should not be enforced.” This holding could have been narrowly applied, but scholars and some courts have interpreted *Baker* to mean instead that “because recipes are traditionally reproduced to be used for cooking rather than for their literary or artistic value, they are not considered susceptible to

⁷⁸ *Kim Seng Company v. J&A Importers, Inc.* 810 F. Supp. 2d 1046.

⁷⁹ *Baker v. Selden*, 101 U.S. 99 (1880).

copyright protection.” But this argument, that a dish’s artistic merit is secondary to the artistic value, is not supported by the current cannons of cultural and artistic interpretation.⁸⁰

The above decisions seem to emerge from the fact that under the US Copyright regime, ‘fixation in a tangible medium’ is an expressly provided requirement and a work can be said to be fixed if its copy is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. It must be noted, that there are no corresponding provisions under the 1957 Act. Though the requirement of fixation is parallel, as copyright subsists in expression and not mere idea, the term ‘fixation’ has not been defined in such narrow terms. In fact, there is no definition of ‘fixation’ given under the Act. Therefore, under the Indian regime, a broader interpretation of ‘fixation’ is conceivable.⁸¹

Plating is an expression of a chef’s particular idea to present the dish in a manner that enhances the overall experience of eating and brings out the natural flavors. The fact that the dish is intended to be eaten, or that the food by its very nature is perishable, does not mean that its presentation isn’t fixated. The presentation of a dish which is an original artwork oozed out of the chef’s intellect and which can be exactly re-created, can be said to be fixated. Hence, in case a question arises as to the copyrightability of a presentation of food, the court can find the presentation of food to be an ‘original work of authorship’ and to be ‘fixed in a tangible medium’, and thus, copyright can be bestowed on the same.

In the author’s opinion, the plating of a dish requires precision, with chefs strategically placing colours for aesthetic appeal. It demands creativity and culinary skill to arrange items on a plate, akin to creating a piece of artwork. Dish presentation is comparable to painting or artistic creation, elevating culinary experiences to visual artistry.

The analysis of culinary works under the works of artistic craftsmanship category reflects potential challenges in judicial determination due to subjective interpretations of artistic merit.⁸² Consequently, courts are likely to set a low threshold for artistic classification, focusing more on unconstrained artistic expression than on aesthetic appeal. Culinary creations, crafted skilfully by

⁸⁰ Britney Karim, *The Right to Create Art in a World Owned by Others - Protecting Street Art and Graffiti under Intellectual Property Law*, 23 INTELL. PROP. & TECH. L. J. 53 (2019).

⁸¹ Caroline M. Reeb, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 41 (2011).

⁸² Roscoe Moore, *Copyright in Culinary Works: Can the Copyright Act 1994 Accommodate Culinary Creations?*, 17 OTAGO L. REV. 185 (2021).

chefs, often exhibit artistic qualities, although not all dishes may appeal aesthetically. The works of artistic craftsmanship category thus presents a framework where culinary works could be recognized as art, acknowledging the complexities of subjective interpretation. The categorisation of culinary works as works of artistic craftsmanship involves consideration of function alongside artistic quality, potentially leading to subjective assessments of culinary merit by the court. Despite the functional nature of food, characteristics of culinary creations—such as innovative appearance and visual focus—can counterbalance utility concerns. Modern chefs prioritize aesthetic presentation, demonstrating separate aesthetic features warranting copyright protection distinct from utilitarian aspects.⁸³

Some authors argue that granting copyright protection to food art could undermine the culinary industry's culture of openness and sharing knowledge.⁸⁴ However, others believe that such protection would foster innovation, leading to new dishes and presentations.⁸⁵ With the growing significance of food art, expanding intellectual property protections, especially through judicial interpretations in India, becomes increasingly important.⁸⁶ Therefore, it is very important to grant adequate copyright protection to such creations in the culinary industry to chefs and restaurants mainly because of the economic aspects.

In the forthcoming chapter, we explore several proposed solutions aimed at addressing challenges in protecting impermanent art, including expert evaluation, copyright law amendments, copyright society establishment, and adoption of VARA-inspired legislation.

VI. SUGGESTIONS AND FINDINGS

The evaluation of originality in impermanent art involves applying criteria similar to those established in copyright law. Like any copyrightable work, impermanent art must demonstrate a level of creativity that exceeds de minimis content—content lacking a discernible creative spark. Drawing from the judicial precedents, the originality of impermanent art hinges on its ability to exhibit at least a basic degree of creativity.

⁸³ *Id* at pg 200.

⁸⁴ J. Auston Broussard, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691 (2008).

⁸⁵ *Id* at pg 707.

⁸⁶ Anuttama Ghose and S M Aamir Ali, *Protection of Cuisine under Intellectual Property Law: A Global Perspective*, 27 JIPR 171 (2022).

Coming to the issue of fixation across jurisdictions, it can be seen that while fixation plays a different role in copyright law between the UK and the U.S.A., both jurisdictions aim to protect creative works by establishing authorial control and categorising works as eligible for copyright protection based on defined criteria. The UK's approach emphasises artistic categorisation and recognises the potential for temporary works to be protected, whereas the US prioritizes tangible fixation to establish authorial control over the work. These differences underscore the nuanced interpretations of copyright law across different legal systems. Regarding the notion of works of artistic craftsmanship, there has been a conventional view, exemplified in legal discourse such as the *Burge* case, that these works possess exceptional status due to their artistic quality requirements. However, a more nuanced perspective challenges this notion by asserting that works of artistic craftsmanship should be considered paradigmatic rather than exceptional within copyright law frameworks. Furthermore, the acknowledgment of functional constraints on copyright entitlement underscores the court's role in respecting established categories of copyright works. This stance suggests that judicial intervention to broaden copyright protection for specific objects deemed deserving is not appropriate. Instead, the courts should adhere to existing legal frameworks that balance creativity and functionality within copyright law.

The goal of copyright, whether applied to traditional or unconventional forms of art like graffiti, is to foster the spread of knowledge and encourage learning, this is also envisioned in the U.S. Constitution, which empowers Congress to promote the progress of science and the arts by securing exclusive rights to authors and inventors.⁸⁷ Granting copyright protection to graffiti would expand the scope of non-conventional subject matter eligible for copyright. Under the Indian Constitution, freedom of expression is a fundamental right, ensuring that diverse forms of artistic expression, regardless of medium, should be protected.⁸⁸ Aligning intellectual property rules with constitutional principles is essential to accommodate these expressions. In the coming section, there are certain solutions to remedy the problem of the inclusion of impermanent art.

A. Unlocking Solutions: Pioneering Approaches to Copyrightability of Impermanent Art

1. Amendment to Copyright Act, 1957

It is clear from the discussion that there's a need to settle the dust surrounding the scope of copyright protection and for that, we need another amendment to the 1957 Act. The Copyright

⁸⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸⁸ INDIA CONST, art. 19(1)(a).

(Amendment) Act, 2012, brought much-needed relief to original authors of literary and artistic works by granting them the right to receive a royalty. Similarly, an amendment can be made to Section 2 (c) of the 1957 Act to include impermanent art in artistic works due to growing relevance of works like Art Shanty Projects that create ephemeral art on a frozen lake in Minneapolis and seek contribution for their art,⁸⁹ and “The Impermanent Strip of Light by Angela Shaffer”.⁹⁰ Furthermore, there is a critical need to harmonise the national copyright regime, as the 1957 Act is silent on the fixation requirement.

However, the Copyright Manual specifies that an artistic work, when “fixed in a tangible form,” is eligible for entry into the Register of Copyrights. This disparity creates inconsistency and confusion within the copyright framework thus, legislative enquiry is required in this aspect. Therefore, an amendment to the 1957 Act is the need of the hour to address various grey areas such as artificial intelligence-generated works and contemporary forms of art, to provide more clarity and safeguards to the stakeholders.

2. *Appointment of an Expert*

It is suggested that the courts while deciding the subsistence of copyright, must be guided by the theories of art. There are primarily institutional theory and aesthetic definition theory of art that can be used as a guiding force. Aesthetic definition theory defines artworks as works that aim at creating an aesthetic experience for the audience, whereas, the institutional theory focuses on the “agents of art” such as philosophers, curators, and audiences. Impermanent art is created with the aim of creating an aesthetic experience for the audience, therefore, the author is of the opinion that if the expert evidence on the basis of the theories of art and agents, such as curators and audiences,⁹¹ is taken into consideration, objectively, impermanent art would be perceived as original artistic works.

The Indian Patent system provides ample provisions for the procurement of specialised “technical” expertise in the courts, adjudicating patent disputes,⁹² however, the 1957 Act is silent on the appointment of experts to adjudicate copyright disputes. A temporary expert an ad-hoc set of experts with a diverse range of technological expertise would ensure that courts are able to draw on the appropriate expert for a particular patent case involving a specific technological domain.

⁸⁹ *ArtShanty Projects*, <https://artshantyprojects.org>.

⁹⁰ Angela Shaffer, *The Impermanent Strip of Light*, PHMUSEUM (2021), <https://phmuseum.com/projects/the-impermanent-strip-of-light>.

⁹¹ Alka Chawla, *supra* note 6, at pg 406.

⁹² The Patents Act, 1970, 39 of 1970, §115.

3. *Lessons from other Creative Industries*

The suggestion proposed draws an analogy from the requirement for restaurants to pay license fees for publicly performing music, even if it's just playing a CD, highlighting the need for similar compensation in the culinary realm. The argument posits that akin to music being incidental in restaurants where cuisine is the primary product, compensating recipe inventors for the use of their creations is fair and logical. Given the significance and centrality of recipes to the culinary industry, the originators deserve recompense or, at the very least, recognition through attribution. This framework aims to acknowledge the value of culinary creativity and ensure equitable treatment for recipe creators within the food industry.

For instance, in the case involving Night Fever Club and Lounge and Indian Singers Rights Association [“**ISRA**”], where the defendant used songs from ISRA without obtaining a license. ISRA, the plaintiff, sought an injunction and compensation for this infringement. The Delhi High Court not only ordered the defendants to cease using ISRA members’ songs but also required them to provide a detailed account of the earnings generated from playing these songs. This ruling highlights the importance of respecting intellectual property rights and emphasises the consequences of the unauthorised use of copyrighted material.⁹³

4. *Establishment of Copyright Societies*

The concept of collective administration of copyrights, as outlined under Section 33 of the 1957 Act,⁹⁴ offers a strategic framework for managing and protecting copyright works across diverse fields under a single society comprised of original work producers as members. Such societies streamline the process of copyright distribution by serving as centralized entities through which interested parties can purchase copyrights for original songs, books, and other creative works. Copyright societies are empowered to grant licenses for works where copyright subsists and administer other related rights under the 1957 Act. Their primary function is to administer these rights on behalf of their members, issuing licenses for commercial exploitation and collecting royalties or license fees, which are then distributed among members after deducting administrative expenses.

In light of this, the establishment of a copyright society tailored to industries dealing with impermanent art, such as the culinary industry, could significantly enhance the protection and

⁹³ The Indian Singers Rights Association v. Night Fever Club & Lounge, CS (OS) 3958/2014.

⁹⁴ *Supra* note 1, at § 33.

recognition of creators' rights.⁹⁵ By initiating such an effort within the culinary sector, chefs and restaurants could benefit from greater copyright protection for their culinary creations, acknowledging the effort and creativity invested in their work. This collective approach would enable culinary professionals to assert their rights more effectively, ensuring fair compensation and recognition for their contributions to the culinary arts. Ultimately, a copyright society dedicated to impermanent art industries like culinary arts would contribute to fostering a culture of respect and protection for creative endeavours in these specialised fields.

5. *Change in Judicial Approach*

The current approach in judicial interpretation of copyright protection for artistic works highlights a pressing need for reform. Under the existing framework, particularly in the absence of specific definitions within the 1957 Act, courts are compelled to resort to the ordinary meanings of terms.⁹⁶ This reliance on literal interpretations can present significant challenges, particularly for unconventional or non-traditional works seeking recognition as artistic creations.

The crux of the issue lies in the ambiguity surrounding what constitutes an “artistic work” within the confines of the law. Without explicit definitions or guidelines, the scope of protection becomes constrained by interpretations that may not adequately account for evolving forms of artistic expression. Consequently, artistic endeavours that diverge from conventional norms or established categories often face hurdles when seeking recognition and protection under copyright law.

This inherent limitation is particularly notable in the context of contemporary art, where the boundaries of artistic expression continually expand to encompass new mediums, styles, and interpretations. Works that defy traditional definitions of artistry—such as digital art, conceptual installations, or experimental performances—may struggle to fit neatly into preconceived legal categories, potentially depriving creators of the recognition and rights they deserve. To address this challenge effectively, there is a compelling need for a more adaptive and nuanced approach within the judicial system.

6. *Adoption of a Model Similar to the U.S.A.'s VARA*

The lack of existing literature and legal precedents in certain art forms calls for judicial activism beyond established norms, possibly through the creation of legislation like the VARA, as an

⁹⁵ Prashant Reddy, *The Fortunes of Indian Copyright Societies*, SPICYIP, <https://spicyip.com/2020/07/the-fortunes-of-indian-copyright-societies.html>.

⁹⁶ *Metix v. Maughan*, [1997] FSR 718.

alternative to the inability to make an amendment to the 1957 Act. This act addresses moral and economic rights arising from evolving art forms and the interests of creative individuals. It grants artists lifetime rights of integrity and attribution for original visual artworks created after its enactment. The emergence of Conceptual art during this period, known for its transient nature and reliance on external factors, coincided with the expansion of legal protection for art under VARA.

The primary goal of VARA is to preserve clearly defined original works of art for future generations, emphasising the importance of tangible and lasting records of human expression in visual arts. VARA's inclusion of moral rights, such as attribution and integrity, has received widespread praise in discussions about artist rights in the U.S.A. This legislation broadened copyright protection by acknowledging the moral rights of artists who create specific copyrightable physical works of visual art, ensuring the preservation of their artistic integrity and contributions. Implementing a VARA-like model could facilitate enhanced copyright protection for contemporary art through distinct legislation.

VII. CONCLUSION

It is essential to adopt a nuanced approach that considers the intrinsic creativity and cultural significance of these transient artworks. While traditional copyright law emphasises fixation in a tangible medium, a more expansive interpretation is warranted to accommodate impermanent art forms like street art, mandaps, and culinary art. The focus should shift towards recognizing the effort and originality embedded within impermanent artistic expressions, rather than solely emphasising tangible outcomes. Courts can play a pivotal role by acknowledging alternative forms of fixation that capture the essence and impact of impermanent art on societal discourse. In the interim, based on the provisions discussed, impermanent works such as impermanent art may potentially qualify for copyright protection in a limited sense. This interpretation acknowledges the evolving nature of art forms and seeks to provide some level of protection within the current legal framework. Based on the arguments presented, it is evident that the courts have emphasised the importance of the tangibility of artistic works rather than fixation, suggesting a legislative intent that prioritises the actual expression of the work. However, for the 1957 Act to be fully effective and to provide comprehensive protection for existing and evolving art forms, there is a critical need for a holistic understanding of copyright law. Therefore, it is imperative for both the legislation and the judiciary to address the existing gaps in the law.