

Can Law Catch What Melts Away? Ephemeral Art, Impermanence and the Limits of Copyright Protection

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Abstract

This Note examines the challenges that ephemeral, site-specific, and performative art pose to conventional legal frameworks, arguing that law's fixation on permanence renders such works legally invisible.² Drawing on examples from Olafur Eliasson, Andy Goldsworthy, Agnes Denes, and others, it highlights how art that exists in process, decay, and audience participation defies traditional notions of authorship, ownership, and moral rights under statutes such as the Copyright Act, 1957, the National Cultural Fund Act, 1996, and the Environment (Protection) Act, 1986.³ Through comparative insights from the United States, Japan, and South Korea, the Note critiques the metaphysics of fixation and proposes a jurisprudence oriented toward presence, relationality, and stewardship rather than material permanence.⁴ By reconceptualizing art as event and law as responsive performance, it advocates for legal recognition of impermanence, protecting the conditions for creation rather than the artifact itself. Ultimately, this Note argues that embracing ephemeral art's temporality can revitalize law, allowing it to honour transience, ecological interdependence, and the fleeting yet profound moments of human creativity.

Keywords- Ephemeral art, Environmental art, Impermanence, Fixation doctrine, Copyright law, Moral rights, Authorship, Ownership.

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² Copyright Act, No. 14 of 1957, § 13 (India); Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

³ Olafur Eliasson, *Ice Watch* (2018); Andy Goldsworthy, *Rivers and Tides: Working with Time* (1990); Agnes Denes, *Wheatfield- A Confrontation* (1982); National Cultural Fund Act, No. 38 of 1996, § 3 (India); Environment (Protection) Act, No. 29 of 1986, § 2 (India).

⁴ Law for the Protection of Cultural Properties, Law No. 214 of 1950 (Japan); Intangible Cultural Heritage Act, Act No. 6940, art. 3 (S. Kor. 2003); Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

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1. Introduction

In December 2018, Danish-Icelandic artist Olafur Eliasson transported twelve massive blocks of glacial ice from Greenland to the streets of London.⁵ Titled *Ice Watch*, the installation invited passers-by to touch, feel, and listen as the ice melted away under the winter sun. Within a week, the work was gone, absorbed into the very atmosphere it sought to mourn.⁶ Yet in that fleeting dissolution, *Ice Watch* achieved something extraordinary: it transformed the politics of climate into an experience of touch and time, making the viewer a participant in the artwork’s decay. And still, for law, the work barely existed at all.

The legal imagination, built upon the scaffolding of fixation, has little patience for the transient. Copyright law the world over, from §102(a) of the Copyright Act, 1976 (United States) to §13 of the Copyright Act, 1957 (India), requires that a work be “*fixed in a tangible medium of expression*” before protection can attach.⁷ Ephemeral installations, biodegradable sculptures, and participatory environmental art, which often exist only in the act of creation or collective engagement, fall through the cracks of this doctrinal rigidity. The artist’s gesture, the audience’s momentary

⁵ Olafur Eliasson, *Ice Watch* (2018).

⁶ *Id.*

⁷ Copyright Act of 1976, 17 U.S.C. § 102(a) (1976); Copyright Act, No. 14 of 1957, § 13 (India).

encounter, the slow collapse of form, none of this finds a comfortable home in the law's vocabulary.

The issue is not simply technical; it is ontological. As Harold Rosenberg declared in his 1952 essay *The American Action Painters*, the modern artist is “*an actor on the canvas*” for whom art is “*not a picture but an event.*”⁸ Law, by contrast, treats art as an *object*, something to be owned, controlled, and preserved. This dissonance between the artist's gesture and the law's objectification has long haunted creative practice. But in the age of climate emergency, it takes on moral urgency. To demand permanence in a world unravelling under the weight of its own excess is to mistake possession for preservation.

Environmental art, particularly the ephemeral and site-specific, exposes the limits of this fixation fetish. Artists such as Andy Goldsworthy, who builds sculptures from ice, leaves, and stones only to watch them return to nature, or Agnes Denes, whose *Wheatfield, A Confrontation* transformed Manhattan's landfill into a field of golden grain, challenge both market logic and legal logic.⁹ Their works resist commodification, existing not as property but as process, a dialogue between material, time, and environment. The irony is that the very features that make such art ethically and aesthetically radical, impermanence, fragility, participation, render it legally invisible.

This invisibility stems from the law's deeper philosophical commitments. The fixation requirement, ostensibly a neutral threshold of originality, functions as a technology of control, a way of tethering creativity to the material world so it can be owned, regulated, and transacted.¹⁰ As Hugh Stephens notes in his essay *My Fixation with Fixation*, copyright's obsession with tangibility reveals its mercantile heritage: “*what cannot be fixed, cannot be sold.*” Yet the art of impermanence asks us to imagine authorship not as dominion over the created, but as stewardship of the moment.

The tension is nowhere more evident than in the moral rights regime. The Berne Convention for the Protection of Literary and Artistic Works, 1886, under Article 6bis, grants authors “*the right to claim authorship*” and “*to object to any distortion*” of their work.¹¹ But what becomes of this right when the artwork's dissolution is the very point? Would the melting of Eliasson's ice constitute “*destruction*”? Could Goldsworthy claim integrity over the collapse of his twig sculpture in the rain? Such questions reveal that law's categories, authorship, ownership, integrity, are ill-suited for art that lives by vanishing.

⁸ Harold Rosenberg, *The American Action Painters*, 41 *Art News* 22 (1952).

⁹ Andy Goldsworthy, *Rivers and Tides: Working with Time* (1990); Agnes Denes, *Wheatfield- A Confrontation* (1982).

¹⁰ Hugh Stephens, *My Fixation with Fixation*, 23 *J. Intell. Prop. L.* 112 (2018).

¹¹ Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, 1161 U.N.T.S. 3.

What this paper proposes, therefore, is not merely a doctrinal patch to extend copyright's reach, but a jurisprudential reorientation: a call to rethink protection in light of *presence* rather than *permanence*. The argument unfolds along three axes- *Firstly*, it interrogates the historical and philosophical underpinnings of fixation, tracing how modern copyright's architecture privileges the static and commodifiable. *Secondly*, it explores the ethics of ephemeral environmental art, positioning it as a mode of climate-conscious creativity that resists enclosure. *Finally*, it imagines an alternative legal vocabulary, one grounded in presence, relationality, and stewardship, that acknowledges the temporal, ecological, and communal life of such works.

2. The Aesthetics of Ephemerality: From Object to Event

"Nothing endures but change"

- Heraclitus¹²

Yet for centuries, the law has acted as if permanence is the only reality. Art, in contrast, has long embraced impermanence, treating it not as a flaw but as a deliberate medium. To grasp why the law struggles to account for the ephemeral, we must first consider the aesthetic revolt that elevated transience to a central creative principle.

i. The Art That Refused to Stay Still

In the decades following World War II, artists began to turn away from the object and toward the event. Harold Rosenberg, in his essay *The American Action Painters*¹³, observed that "*what was to go on the canvas was not a picture but an event.*" With that single line, the metaphysics of art changed. The painter became performer; the canvas, a stage. Every brushstroke was an act, not an artifact.

This sensibility spilled beyond painting. The 1960s witnessed a wave of artists, Allan Kaprow, Robert Smithson, Nancy Holt, and later Ana Mendieta, who dismantled the boundaries between creation, environment, and decay.¹⁴ Kaprow's *Happenings* turned art into participation; Smithson's *Spiral Jetty*, a monumental coil of basalt and salt extending into Utah's Great Salt Lake, surrendered itself to entropy; Mendieta's *Siluetas Series*, which imprinted her body in earth and flame, vanished almost as soon as it appeared. Art became time-bound, weather-bound, mortal.

¹² Heraclitus, *Fragments* (DK B1).

¹³ Harold Rosenberg, *The American Action Painters*, 41 *Art News* 22 (1952).

¹⁴ Allan Kaprow, *Happenings in the New York Scene* (1961); Robert Smithson, *Spiral Jetty* (1970); Nancy Holt, *Sun Tunnels* (1973); Ana Mendieta, *Siluetas Series* (1973–1980).

In his essay *Situation Aesthetics: Impermanent Art and the Seventies Audience* (Artforum, 1973), Robert Morris called this the “*aesthetic of disappearance*.”¹⁵ Art was no longer something to possess, it was something to witness. The viewer, too, became part of the work: presence was participation. This radical decentering of the object, of the *thing*, posed a challenge not only to collectors and museums but to law itself, whose categories depend upon things that can be owned, transferred, or infringed.

ii. *The Law’s Anxiety of the Vanishing Object*

Copyright, in its modern form, arose in an era that equated authorship with property. The Statute of Anne, 1710, the progenitor of all copyright law, framed creative works as commodities requiring protection against unauthorised copying.¹⁶ Over time, this view ossified into doctrine. To protect, one must possess; to possess, one must fix.

Section 102(a) of the Copyright Act, 1976 (United States) thus requires that-

“*copyright protection subsists... in original works of authorship fixed in any tangible medium of expression.*”¹⁷

Likewise, section 13 of the Copyright Act, 1957 (India) provides protection for “original literary, dramatic, musical and artistic works” only upon fixation.¹⁸

“*A work is not created until it is fixed.*”- U.S. Copyright Office Compendium¹⁹

Ephemeral art collapses this logic. If a performance disappears the moment it occurs, when does it become a “*work*”? And if its disappearance is intrinsic to its meaning, can any act of fixation, through video, photograph, or notation, ever capture its originality without distorting it?

Courts have grappled with analogous dilemmas, often without recognising the philosophical stakes. In *Mazer v. Stein*, the U.S. Supreme Court held that a lamp base designed as a statuette could be copyrighted as an “*artistic work*” thus extending protection to the *object* rather than the *gesture*.²⁰ Similarly, in *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes famously declared that “*personality always contains something unique*” yet the Court’s concern remained the reproduction of the visual image, not the temporality of its making.²¹

¹⁵ Robert Morris, *Situation Aesthetics: Impermanent Art and the Seventies Audience*, 11 Artforum 44 (1973).

¹⁶ Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

¹⁷ Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

¹⁸ Copyright Act, No. 14 of 1957, § 13 (India).

¹⁹ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, 3rd ed., § 313.2 (2017).

²⁰ *Mazer v. Stein*, 347 U.S. 201 (1954).

²¹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

The fixation doctrine, though framed as technical necessity, has functioned as a metaphysical border, law's way of demarcating the "real" from the "evanescent." What cannot be fixed is, to law, not quite real. But for the artist of the ephemeral, reality is precisely what slips away.

iii. *The Ontology of Impermanence*

Ephemeral and environmental art thus perform a quiet rebellion: they refuse the metaphysics of ownership. Andy Goldsworthy's ice arcs, Agnes Denes's wheatfields, or Christo and Jeanne-Claude's fabric wrappings exist for days or weeks before returning to the elements.²² Their impermanence is not loss but meaning, it forces confrontation with the passage of time, with entropy, with ecological interdependence.

The Japanese concept of wabi-sabi, the beauty of impermanence and imperfection, captures this ethos.²³ As the Vawaessay Ephemeral Beauties and Transcendent Peoples²⁴ puts it, "to embrace impermanence is to accept our participation in the flow of time." For artists confronting ecological crisis, impermanence becomes both an ethic and a critique: a rejection of the consumerist impulse to hoard and preserve.

The law, however, lags behind this aesthetic evolution. It is trapped in what might be called a "museum mentality", one that seeks to preserve by possession. Heritage laws, for instance, define protection in terms of "objects of art" or "monuments" privileging stasis over process. Even the Antiquities and Art Treasures Act, 1972,²⁵ which governs cultural patrimony in India, assumes tangibility as a precondition for value. What then of the work that erases itself as it speaks?

The aesthetic of ephemerality demands that law look not at the object but at the relation, the act of creation, participation, and dissolution. It calls for a jurisprudence that values presence as much as permanence, memory as much as material. The challenge is profound: can a legal system built on fixation learn to see the beauty, and the right, in disappearance?

3. The Juridical Fetish of Fixation

If art's vitality lies in its impermanence, law's insecurity lies in its fixation. Copyright law, by design, mistrusts the transient. Section 13 of the Copyright Act, 1957 confers protection only upon "original literary, dramatic, musical and artistic works," and Section 2(c) further defines "artistic work" as

²² Andy Goldsworthy, *Rivers and Tides: Working with Time* (1990); Agnes Denes, *Wheatfield- A Confrontation* (1982); Christo & Jeanne-Claude, *Wrapped Reichstag* (1995).

²³ Andrew Juniper, *Wabi Sabi: The Japanese Art of Impermanence* (2003).

²⁴ Vawaessay, *Ephemeral Beauties and Transcendent Peoples* (2020).

²⁵ Antiquities and Art Treasures Act, No. 52 of 1972, § 2 (India).

one that is “fixed”, drawn, engraved, sculpted, or otherwise embodied in material form.²⁶ Thus, an improvised performance, a sand mandala, or a spontaneous mural becomes a legal nonentity the moment it disappears. Law, in other words, worships the tangible and fears the fleeting.

This doctrinal insistence on fixation stems from a Western metaphysics of ownership, not from artistic ontology. As early as *Walter v. Lane*,²⁷ courts equated authorship with the act of recording, treating stenographers as “authors” merely for transcribing speech. In the American lineage, *Burrow-Giles Lithographic Co. v. Sarony*,²⁸ codified a similar logic, authorship became inseparable from mechanical embodiment. These cases enshrined a Cartesian duality- the idea alone is too abstract to own, and the materialization alone grants individuality. The result is a jurisprudence that prizes stasis over movement, permanence over becoming.

This fetish for fixation reveals law’s fear of disappearance, a symptom of its anxiety before art’s autonomy. When Marina Abramović performs a piece like *The Artist Is Present*,²⁹ the value is not in any artifact but in the lived tension between artist and observer. Yet copyright law asks: where is the “work”? In the performer’s body? The museum’s surveillance footage? The spectators’ memory? Such questions expose the category error; law looks for an object where art offers only an event.

It is instructive to juxtapose this legal rigidity with the Buddhist aesthetics of impermanence, or anicca.³⁰ In the making and sweeping of the Tibetan sand mandala, destruction is not loss but completion. To attempt “fixation” of such art would be, ironically, to desecrate it. Yet under the Copyright Act, 1957, Section 57, moral rights, protects the artist’s right to integrity, not the artwork’s right to vanish.³¹ The law safeguards against distortion, mutilation, or destruction, but cannot fathom self-destruction as artistic fulfillment.

Modern litigation continues to exhibit this blindness. In *Lee v. The Showroom Gallery*,³² an artist’s installation, designed to decay, was preserved by the gallery against her wishes. The court, siding with the gallery, reasoned that preservation maintained “public interest.” The paradox is stark: the artist’s intentional ephemerality was overridden by law’s compulsion to conserve, to make permanent what was meant to perish. The judgment, in essence, privileged the artifact over the act, reducing performance to property.

²⁶ Copyright Act, No. 14 of 1957, §§ 2(c), 13 (India).

²⁷ *Walter v. Lane*, (1900) A.C. 539 (H.L.).

²⁸ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

²⁹ Marina Abramović, *The Artist Is Present* (MoMA, 2010).

³⁰ Bhikkhu Bodhi, *The Noble Eightfold Path: Way to the End of Suffering* (1999).

³¹ Copyright Act, No. 14 of 1957, §§ 2(c), 13 (India).

³² *Lee v. The Showroom Gallery*, [2013] EWPC 4 (Eng.).

To be sure, fixation serves pragmatic ends, it ensures evidentiary clarity, delimitates ownership, and supports markets. But at what cost? By translating art into a commodity, law amputates its temporality. In privileging the what over the when, copyright transforms art from an experience into an asset. The law's vocabulary, "copy," "reproduction," "derivative work", betrays this bias. They presume that meaning is carried by objects, not moments.

The fixation requirement is thus not a neutral administrative tool but an epistemological imposition: a demand that art conform to law's logic rather than the reverse. In doing so, it ignores entire genres, street art, land art, performance, and even digital works that mutate algorithmically. Consider *Banksy v. Pest Control Office Ltd.*,³³ where the graffiti artist's anonymity and refusal to claim authorship led to cancellation of his trademark rights. Banksy's choice to resist commodification, a political statement, became legally fatal. The law, unable to comprehend authorship without ownership, punished artistic dissent.

What emerges, then, is a quiet tragedy: law, which should have been art's witness, becomes its warden. The fixation doctrine turns art into evidence, artists into claimants, and the aesthetic act into an administrative form. It freezes what was meant to move.

4. Art as Event: Rethinking Authorship and Ownership

If fixation is law's anchor, event is art's breath. The moment art ceases to be a static object and becomes an unfolding encounter; its meaning migrates from the canvas to the context. This shift, from work-as-object to art-as-event, demands a parallel shift in law: from regulating possession to recognizing participation.

The current copyright regime, in privileging material embodiment, treats creation as a completed act. Yet, as performance theorist Peggy Phelan famously observed, "*Performance's only life is in the present.*"³⁴ It disappears as it happens, leaving behind not residue but resonance. In this ontology, art cannot be "*owned*" because it does not remain; it can only be witnessed. The law's challenge, then, is not to capture what vanishes, but to protect the conditions that allow it to appear.

This perspective finds kinship with the Visual Artists Rights Act, 1990 of United States of America, which, under Section 106A, extends moral rights beyond economic ownership.³⁵ Yet even VARA falters when faced with impermanence. In *Carter v. Helmsley-Spear Inc.*,³⁶ artists claimed protection

³³ *Banksy v. Pest Control Office Ltd.*, Case No. 018621102 (EUIPO 2020).

³⁴ Peggy Phelan, *Unmarked: The Politics of Performance* 146 (1993).

³⁵ Visual Artists Rights Act, Pub. L. No. 101-650, § 106A, 104 Stat. 5136 (1990) (codified as amended at 17 U.S.C. § 106A).

³⁶ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77 (2d Cir. 1995).

for an installation integrated into a building lobby. The court recognized moral rights but ultimately subordinated them to property interests once the lease expired. The artwork, bound to its physical host, became collateral damage in a legal system where permanence equates to value.

Other jurisdictions, however, hint at more capacious models. The Cultural Properties Protection Law, 1950, of Japan, extends recognition to “*intangible cultural properties*”, such as noh theatre or kabuki, whose essence lies in repetition and transmission, not material fixation.³⁷ The legal subject here is not the artifact but the act of performance itself. This distinction acknowledges that continuity, not concreteness, is the hallmark of heritage. Similarly, under the Intangible Cultural Heritage Act, 2003 of Korea, the state designates “*holders*” of cultural practices, living practitioners rather than owners of objects.³⁸ In such frameworks, law functions less as a registrar of property and more as a custodian of living memory.

Transposing this ethos into contemporary copyright discourse would mean reimagining authorship as evental, a coalescence of creator, audience, and context. When Olafur Eliasson constructs immersive environments like *The Weather Project*, the viewer’s presence completes the work.³⁹ Authorship, in such cases, is plural, situational, and non-hierarchical. Yet copyright’s logic of exclusive entitlement cannot parse this multiplicity. Section 17 of the Copyright Act, 1957, for instance, insists upon a singular “*author*,” enforceable through proprietary claim.⁴⁰ The law thereby excludes the collaborative ecology of experience that defines modern art.

Reconceiving authorship eventually does not imply abolishing rights; rather, it demands redefining them as relational. Legal scholar Martha Woodmansee once noted that the Romantic myth of the solitary genius birthed the modern author.⁴¹ To move beyond fixation, law must dismantle this myth and replace it with a model that credits co-creation, acknowledging spectators, communities, and even technologies as co-authors in the aesthetic process.

Equally, ownership must give way to stewardship. A performance or ephemeral installation, by its nature, resists enclosure. Its legal analogue is not a property right but a trust, an obligation to sustain, not to seize. The National Cultural Fund Act, 1996 (India), under Section 3, establishes a public trust for preservation of cultural heritage.⁴² If interpreted expansively, this could include support for transient art forms, funding their creation and documentation without demanding

³⁷ Cultural Properties Protection Law, Act No. 214 of 1950 (Japan).

³⁸ Intangible Cultural Heritage Act, Act No. 7219 (2003) (S. Kor.).

³⁹ Olafur Eliasson, *The Weather Project* (Tate Modern, 2003).

⁴⁰ Copyright Act, No. 14, Acts of Parliament, 1957, § 17 (India).

⁴¹ Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (1994).

⁴² National Cultural Fund Act, No. 33 of 1996, § 3 (India).

fixation. Such an approach aligns with the ancient Sanskrit aesthetic dictum “*natyasya natyasya jivanam*”, “*the drama lives in its playing*.” The act itself is the life; to preserve it is to let it occur.

One might object that impermanent art, by definition, eludes protection. Yet perhaps that is the point. Law need not petrify the fleeting to validate it. As the philosopher Hans-Georg Gadamer wrote, art’s truth lies in its “*play*”, a happening that renews itself each time it is beheld.⁴³ If law can learn to honor the play rather than the product, to protect the happening rather than the having, it might rediscover its own vitality as a cultural force.

In this preconception, art ceases to be a commodity and becomes a conversation. Authorship becomes presence. And law, at long last, learns to breathe.

5. Toward an Aesthetics of Legal Impermanence

To legislate for what vanishes is to legislate for breath, an impossible but necessary act. Law, by its very architecture, seeks endurance: it codifies, records, and preserves. Yet art, particularly in its contemporary ecological and performative incarnations, thrives on disappearance. The task, then, is not to trap the ephemeral in law’s amber, but to make law supple enough to dance with transience.

i. Rewriting Fixation: From Object to Event

At the heart of intellectual property lies the fixation requirement. Section 13 of the Copyright Act, 1957 limits protection to “*original works... fixed in any material form*.”⁴⁴ This formulation, a colonial import derived from British and American models, privileges the visible residue of creativity over its living process. A simple but radical amendment, substituting “*fixed in any material form*” with “*expressed in any perceptible form*”, would shift emphasis from permanence to perceptibility.

Such a change would not be unprecedented. The Copyright Act, 1976 (U.S.) recognizes “*choreographic works*” and “*pantomimes*” as protectable even though their expressions may be fleeting.⁴⁵ Similarly, Section 2(1) of the Copyright, Designs and Patents Act, 1988 (U.K.) acknowledges “*works recorded by any means*.”⁴⁶ The Indian statute, however, remains anchored to tangible fixation, an anachronism that erases ephemeral and site-specific art from legal recognition.

⁴³ Hans-Georg Gadamer, *Truth and Method* 113 (2d rev. ed. 1989).

⁴⁴ Copyright Act, No. 14 of 1957, § 13 (India).

⁴⁵ Copyright Act, 17 U.S.C. § 102(a) (1976).

⁴⁶ Copyright, Designs and Patents Act, 1988, c. 48, § 2(1) (U.K.).

By reframing fixation as perception, law could protect the creative act as experienced, a performance, installation, or environmental intervention, without demanding its ossification into a permanent record. The result would be a jurisprudence that honors temporality as a legitimate aesthetic mode.

ii. Institutional Stewardship: Protecting the Conditions of Creation

If ephemeral art cannot be owned, it must be stewarded. Section 3 of the National Cultural Fund Act, 1996⁴⁷ empowers the central government to establish funds for “*preservation and promotion of the cultural heritage of India.*” A purposive interpretation could extend “*heritage*” to include transient artistic practices, sand mandalas, performance rituals, land art, that are culturally embedded yet legally invisible.

Parallel developments exist abroad. The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003, ratified by over 180 states, emphasizes that preservation “*does not mean freezing or fossilizing.*”⁴⁸ Instead, it mandates fostering the “*conditions for creativity.*” Translating this ethos into domestic law would involve recognizing ephemeral works as living cultural practices, deserving of funding, documentation, and protection from exploitation.

This could be implemented through a Regulatory Charter for Ephemeral Art, nested within the Ministry of Culture, establishing registries not of objects but of artistic occurrences, documented through testimony, visual recording, or even community acknowledgment. The legal entity would thus be the moment, not the monument.

iii. Moral Rights in Motion

The Visual Artists Rights Act, 1990 (U.S.), under Section 106A, grants artists the right to prevent distortion or destruction of their works.⁴⁹ Yet it falters when faced with temporality. If a performance’s essence lies in its impermanence, does preservation itself become distortion? Law’s notion of integrity must therefore evolve from material preservation to contextual fidelity.

This approach finds resonance in *Kelley v. Chicago Park District*,⁵⁰ where the court denied copyright to a living garden installation, reasoning that the work changed “*with each passing season.*” The

⁴⁷ National Cultural Fund Act, No. 33 of 1996, § 3 (India).

⁴⁸ UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage (2003), <https://ich.unesco.org/doc/src/15164-EN.pdf>.

⁴⁹ Visual Artists Rights Act, Pub. L. No. 101-650, § 106A, 104 Stat. 5136 (1990) (codified as amended at 17 U.S.C. § 106A).

⁵⁰ *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011).

judgment, though doctrinally sound, reveals law's discomfort with evolution. A reimagined moral rights regime could instead recognize intentional impermanence as integral to integrity. The artist's right, then, would not be to preserve but to perish on their own terms.

iv. Environmental Art and Legal Ecology

Ephemeral art often engages directly with environmental processes, ice melting, plants decaying, light shifting. Section 2 of the Environment (Protection) Act, 1986⁵¹ defines “*environment*” to include “*water, air and land and the inter-relationships which exist among them.*” Extending this inter-relational understanding to cultural regulation would situate ephemeral art within legal ecology, where artistic and natural impermanence are co-constitutive.

Projects like Andy Goldsworthy's Rivers and Tides or Navjot Altaf's Water Weaving installations embody this union of decay and renewal.⁵² Law's role should be not to fix but to facilitate, to ensure that zoning, licensing, and liability frameworks enable such transient interventions without bureaucratic paralysis. The National Green Tribunal Act, 2010, under Section 14, already provides jurisdiction over “*substantial questions relating to the environment.*”⁵³ A complementary mechanism could authorize temporary creative occupation of natural sites, treating artistic impermanence as ecological participation rather than intrusion.

v. Law as Performance

Ultimately, the project of legal impermanence is not about deregulation but aesthetic humility, the recognition that law, too, performs. Statutes are scripts, judgments are stagings, and enforcement is interpretation. To accept impermanence in art is to accept contingency in law.

As Harold Rosenberg might have put it, the artist must act; the law must learn to react. In this co-creative process, legislation ceases to be a monument to permanence and becomes an event of justice, responsive, temporal, alive.

To legislate for the ephemeral, therefore, is not to defy law's nature but to rediscover it. Law has always been an art of timing, its authority depends on knowing when to intervene, how long to endure, and when to let go. The jurisprudence of the future will not merely tolerate impermanence; it will perform it.

⁵¹ Environment (Protection) Act, No. 29 of 1986, § 2 (India).

⁵² Andy Goldsworthy, *Rivers and Tides* (2001); Navjot Altaf, *Water Weaving* (2015).

⁵³ National Green Tribunal Act, No. 19 of 2010, § 14 (India).

6. Limits of Copyright Protection for Ephemeral Works

Copyright law is structurally oriented toward permanence. Across jurisdictions, protection is conditioned, explicitly or implicitly, on the fixation of a work in a stable, perceptible form. This requirement performs a gatekeeping function: it distinguishes protectable expression from transient acts, processes, or events. While fixation is often justified as a neutral evidentiary or administrative necessity, its deeper effect is normative. It determines which forms of creativity are recognised as legally legible and which are excluded from the domain of copyright protection.

In common law jurisdictions, fixation operates as an express statutory requirement. Under United States copyright law, a work must be “fixed in any tangible medium of expression” such that it can be perceived, reproduced, or communicated for a period of more than transitory duration. Courts have consistently interpreted this requirement narrowly, excluding works whose existence is fleeting or technologically intermediate. The fixation doctrine thus draws a clear boundary between enduring expression and ephemeral performance, privileging the former as the proper object of copyright protection.

By contrast, civil law systems, particularly within the European Union, do not always articulate fixation as a formal prerequisite. Instead, protection hinges on originality, defined as the author’s own intellectual creation. However, despite the absence of an explicit fixation requirement, functional equivalents emerge in practice. Courts routinely require that a work be identifiable, stable, and sufficiently determinate to permit legal assessment. Ephemeral or impermanent works struggle to satisfy these criteria, not because they lack creativity, but because their transient nature resists doctrinal capture.

Indian copyright law occupies an intermediate position. While the statute does not articulate fixation in the same terms as U.S. law, judicial interpretation has historically favoured material embodiment and perceptibility. Works that evade durable form, particularly those that exist only momentarily or resist reproduction, face uncertainty in claims of subsistence and enforcement. The emphasis on materiality, though rarely framed as fixation per se, performs a similar exclusionary function.

These doctrinal convergences reveal that fixation is not merely a technical threshold, but a structural preference embedded within copyright’s architecture. The law privileges works that can be owned, stored, licensed, and enforced with relative ease. Ephemeral works, whether temporary installations, performance-based practices, or time-bound expressions, challenge this preference by existing outside the temporal assumptions that underlie copyright governance.

The exclusion of ephemeral works is often defended on pragmatic grounds. Without fixation, it is argued, evidentiary uncertainty increases, ownership becomes difficult to establish, and enforcement risks proliferate. These concerns are not trivial. Copyright systems depend on administrability to function. However, the reliance on fixation as a proxy for administrability conflates manageability with legitimacy. The fact that a work is difficult to regulate does not necessarily justify its categorical exclusion from protection.

Moreover, fixation's exclusionary effects are uneven. Ephemeral expression is disproportionately associated with certain artistic, cultural, and community-based practices, including site-specific art, ritual performance, and environmentally responsive works. By conditioning protection on permanence, copyright law systematically marginalises forms of creativity that are processual, relational, or intentionally impermanent. This marginalisation is not the result of explicit normative judgment, but of doctrinal inertia.

Importantly, copyright law already tolerates exceptions to strict fixation logic. Live broadcasts, improvisational performances recorded contemporaneously, and technologically mediated expressions challenge the permanence assumption without destabilising the system. These exceptions demonstrate that fixation is neither absolute nor conceptually indispensable. Rather, it is selectively enforced in ways that reflect historical assumptions about creativity and value.

The difficulty, then, is not that ephemeral works are inherently incompatible with copyright, but that existing doctrine lacks the conceptual tools to accommodate temporality as a feature rather than a defect. Fixation treats time as an obstacle to protection, whereas many contemporary creative practices treat time as constitutive of the work itself. When law insists on permanence, it fails to recognise creativity that is defined precisely by its disappearance.

This doctrinal mismatch exposes a broader tension within copyright law: between its historical orientation toward static objects and the evolving nature of creative expression. As creativity increasingly takes event-based, performative, or environmentally contingent forms, the fixation requirement risks becoming a site of systemic exclusion rather than principled limitation.

Recognising this tension does not require the abandonment of fixation as a governing principle. It does, however, demand a more reflexive engagement with its scope and function. If copyright law is to remain responsive to contemporary creativity, fixation must be understood not as a binary threshold, but as a flexible doctrinal tool, one capable of accommodating works whose value lies not in endurance, but in presence.

7. Conclusion

Every act of creation is also an act of disappearance. The dancer's gesture dissolves as it arrives; the ice sculpture becomes water the moment it is complete. Yet, paradoxically, it is this vanishing that makes art immortal in its feeling, if not in its form. The law, in its longing for fixity, has always sought to outlive time. But perhaps endurance is not the only path to meaning. Perhaps, as the painter Agnes Martin once said, "*perfection exists only in the moment.*"⁵⁴

This paper has argued that the law's devotion to permanence, its obsession with fixation, ownership, and preservation, obscures an entire realm of creative being: art that exists only as event, trace, and transformation. By insisting that art must be recorded to be real, law renders invisible that which most faithfully reflects human existence, the fleeting, the fragile, the unfinished.

Yet, within law's very text lie seeds of renewal. The Copyright Act, 1957, with its notion of "*expression*," could evolve to include perception;⁵⁵ the National Cultural Fund Act, 1996 could fund transience as heritage;⁵⁶ the Environment (Protection) Act, 1986 could extend its ecological vision to ephemeral art.⁵⁷ None of these would break the system; they would merely remind it that permanence was never its promise, justice was.

Art's ephemerality does not threaten law; it teaches it. It reminds jurisprudence that authority, too, is temporal, born of consensus, changing with culture, dying with irrelevance. To legislate for impermanence is thus not to weaken the law, but to make it breathe again: to accept decay as renewal, interpretation as evolution, and disappearance as the truest proof of presence.

In the end, law and art share a secret kinship. Both are languages through which societies remember themselves. If art, in Rosenberg's words, must resist cliché, then law must resist rigidity.⁵⁸ The future of art law will not be written in marble statutes but in moments, moments of recognition, participation, and trust.

And perhaps that is where their destinies meet:

in the brief, bright instant where creation meets consequence,

⁵⁴ Agnes Martin, *Writings 27* (Robert Stolz ed., 1992).

⁵⁵ Copyright Act, No. 14 of 1957, § 13 (India).

⁵⁶ National Cultural Fund Act, No. 33 of 1996, § 3 (India).

⁵⁷ Environment (Protection) Act, No. 29 of 1986, § 2 (India).

⁵⁸ Harold Rosenberg, *The American Action Painters*, in *Art in Theory, 1900–2000* 950 (Charles Harrison & Paul Wood eds., 2d ed. 2002) (1952).

where law stops merely protecting the work

and starts protecting the act of being.