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Visualizing Copyright Law: Lessons from Conceptual Artists

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VISUALIZING COPYRIGHT LAW: LESSONS FROM CONCEPTUAL ARTISTS*

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When the flush of a new-born sun fell first on Eden's green and gold,
Our father Adam sat under the Tree and scratched with a stick in the mould;
And the first rude sketch that the world had seen was joy to his mighty heart,
Till the Devil whispered behind the leaves, "It's pretty, but is it Art?"

-Rudyard Kipling "The Conundrum of the Workshop"

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith revives the long-standing worry that art and law develop along their own

*This essay uses the term conceptual art and conceptual artists broadly to encompass art movements including minimalism where the realization of the work is not fully in control of the artist and may depend on fabricators or installers, or readymade objects, may be site specific, and where the concept and planning needed to effectively manifest the work is of primary importance.

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paths and that if those two paths ever meet it generally goes poorly for the artists.[1] The Federal Court of Appeals for the Second Circuit apparently worried about this perception too—so much so, that in its ruling against the Warhol Foundation it actually thought it necessary to explain that it had not banned any art forms.[2] For the most part, however, artists seem to innately understand copyright principles and how they should work—even though they often seem to take pleasure in tweaking them, posing litmus-test problems, or even choosing to work outside of or supplement the protections offered by copyright.

This copyright essay has no policy agenda. It seeks neither to expand nor to contract copyright law. It does not advocate for exceptions or limitations to the law, nor does it suggest more stringent enforcement. It is a thought experiment that explores how art has simultaneously pushed and recognized—maybe even conceptualized and anticipated—the boundaries of copyright law. The Essay describes how theories undergirding the development and popularization of conceptual art in particular foreshadowed developments in copyright law decades before their arrival. The Essay begins with Marcel Duchamp's revolutionary severing of the value of artistic labor from the artwork itself in his Readymades more than half a century before the Supreme Court announced the death of "sweat of the brow" labor as a justification for copyright in *Feist.*[3] Duchamp's bold artistic move simultaneously freed

1. *See* CHRISTINE HAIGHT FARLEY, IMAGINING THE LAW 305 (Austin Sarat, Cathrine O. Frank & Matthew Anderson eds., 2010) ("Over the centuries the art world has developed its customs and practices for the most part without any regard for possibly relevant legal principles. Similarly, it is thought . . . that the legal world has developed its rules and standards without any input from artists, but then something occurs that causes these two separate worlds to collide. What is discovered in this interaction is that the two worlds are incompatible. Moreover, some conclude that when the two collide, art is the invariable loser.") (internal quotations omitted).

2. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 52 (2d Cir. 2021); *see also* Blake Gopnik, *Warhol a Lame Copier? The Judges Who Said So Are Sadly Mistaken.*, N.Y. TIMES (last updated Sept. 24, 2021), https://www.nytimes.com/2021/04/05/arts/design/warhol-copyright-appeals-court.html [https://perma.cc/SPT2-YMD7].

3. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991). *Feist* denied protection to a rural telephone directory arranged in alphabetical order, even though the directory was compiled with great effort. It thus ended the sweat of the brow doctrine as a justification for copyright. The court nevertheless retained a low standard of originality to obtain protection. *Feist* defines originality as "possess[ing] some creative spark, no matter how crude, humble, or obvious, it might be." *Id.* at 345 (internal quotation marks omitted). This low level of originality suggests that there must be some "creative spark" but the opinion does not discuss what a creative spark is except to suggest it is not "obvious," "garden-variety," or "expected." *Id.* at 362–63. There is an apparent inconsistency between claiming that a creative spark can be "crude, humble or *obvious*" on the one hand but then dismissing works as unprotectable and lacking such a spark when they are "*obvious*" on the other. The author doubts the Supreme Court was playing word games on the order of Duchamp in this particular instance.

the art world to think about the duality of the artistic object and opened the door to infinite possibilities of what could constitute art. This presaged other analytic challenges in the copyright world concerning the separability of utilitarian and artistic aspects of objects, and under what circumstances objects of such duality may be copyrighted.[4] Rather than developing against the grain of copyright, the art world was anticipating where copyright thinking would eventually go.

Some think of conceptual art as foreign and seek to exclude it from the copyright world. To the contrary, these art currents take their roots not just from Duchamp, but from art forms that have enjoyed copyright protection since the late 19th century, notably, photography. To ground conceptual art in something more familiar, this Essay next turns to Ansel Adams—arguably, the most popular American photographer. Ansel Adams rejected pictorialist photography that sought to imitate fine art paintings, yet he still made a strong case for authorial expression in photographic images.[5] He and colleagues like Edward Weston and Paul Strand developed a modern vernacular in Western and landscape photography that sought to portray their subject matter employing and working with—rather than seeking to mask and prettify—the mechanical abilities of their equipment.[6] Adams often claimed that photography is conceptual[7] and that "the negative is the score, and the print is the performance."[8] The way he thought about "pre-visualization of images," the importance he ascribed to the viewer, and the "zone system" he pioneered for judging lighting and maximizing the available tonal range in prints of black and white images, can all be seen as precursors to ways of thinking about conceptual art. Adams explained that his approaches even allowed him to create abstract and modernist works from natural subjects. He did this through pure devotion to his medium, rather than using artification.[9] If photography—including how it has evolved—is copyrightable and the source of much of our jurisprudence on originality,

4. *See* Mazer v. Stein, 347 U.S. 201, 217 (1953) (holding that "the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art. Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold."); *See also* Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 411 (2017).

5. Univ. of Ariz., *Ansel Adams*, CENTER FOR CREATIVE PHOTOGRAPHY, https://ccp.arizona.edu/artists/ansel-adams (last visited Nov. 27, 2022) [https://perma.cc/ZM5Y-VYNU].

6. *See id.*; Lisa Hostetler, *Group f/64*, THE MET (Oct. 2004), https://www.metmuseum.org/toah/hd/f64/hd_f64.htm [https://perma.cc/4G4T-G5CC].

7. Ansel Adams, *A Personal Credo*, *in* AMERICAN ANNUAL OF PHOTOGRAPHY (1944).

8. RALPH W. LAMBRECHT & CHRIS WOODHOUSE, WAY BEYOND MONOCHROME 98 (2d ed. 2010).

9. *See id.* 105–07.

conceptual art should be just as easy to accept as a natural part of the copyright ecosystem.

The essay concludes with a closer examination of how Adams and Sol Lewitt each approached the conceptual elements of their works and explains how better understanding what is protectable about photography can serve as a bridge to understanding how conceptual artists realize and preserve their authorial intentions when copyright protections for their works seem inadequate.[10] Conceptual artists rely in part on copyright law, and in part on contracts and art world norms and conventions to secure expectations between themselves and their collectors. The copyright concepts of authorship/originality, fixation, and the distinction between the idea and its expression, have posed particular copyright challenges to conceptual artists, because to the untrained observer, these elements may appear absent in conceptual artworks.[11] A careful examination of the legal approaches used by artists like Lewitt and Felix Gonzalez-Torres demonstrates that artists and their representatives are keenly aware of the challenges copyright law might pose, and have developed certificates of originality and other arrangements that seek to control the manifestation of the works in accord with the artist's envisioned expression. These arrangements, in combination with art world norms, have in many ways strengthened and made persistent the role of the artist even post-acquisition, often in ways that copyright law alone could not. For some artists like Donald Judd and his estate, this has meant rigid manufacturing controls and installation controls operate to uphold a moral-rights-like interest in preserving the artist's vision.[12] Others, like Felix Gonzalez-Torres and his Foundation, have adopted a more open and flexible demeanor towards collectors, seeking to enlist them in a shared curatorial endeavor towards the work in which the collector agrees to make choices about the shape the work will take while using "utmost care"[13] to preserve the artist's ideals and standards. It is my contention that the artists have adopted their protective mechanisms for particular reasons, which are

10. *See* Nadia Walravens*, The Concept of Originality and Contemporary Art, in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE 170, 171–72 (Daniel McClean & Karsten Schubert eds., 2002) for a refined critique of copyright law's challenges in accommodating contemporary art which lays claim to ideas as works in their own right.

11. *See id.* at 175.

12. *See* Hilarie M. Sheets, *What Would Donald Judd Do?*, N.Y. TIMES (Aug. 12, 2022), https://www.nytimes.com/2022/08/12/arts/design/donald-judd-marfa-texas-debate.html [https://perma.cc/Y3LW-V4YT].

13. This is a term used in Felix Gonzalez-Torres's certificates. *See* JOAN KEE, *Double Embodiments: Felix Gonzalez-Torres's Certificates*, *in* MODELS OF INTEGRITY: ART AND LAW IN POST-SIXTIES AMERICA 191, 225 (2019).

often consistent with their artistic practices, and therefore lend an additional conceptual layer to the works.

Sometimes conceptual artists have a need to sever relationships with collectors or with works. If the relationship with the work and the collector is premised on a certificate of originality, the end of the relationship may also be signaled through a transaction involving a notice. If the original certificate was deemed an artwork, why not the one ending the relationship? As original works of authorship, both certificates of originality and notices or other documents withdrawing artistic intentions from works have been displayed in museums as art themselves.[14] The essay thus comes full circle—closing by noting the implications of such manifestations and de-manifestations of aesthetic intentions in light of *Bleistein's* focus on the way in which the personality of an artist expresses itself with singularity.[15]

I. WHAT IS ART?

The Copyright Act does not limit its protections to art, so it does not define art directly. But the Act and cases interpreting it tell us what is not art (or when art is not protectable by the law). Useful articles cannot be protected by copyright[16] so they are not art. Ideas or concepts[17] are not copyrightable (only their expression), and facts are likewise beyond the Act's scope.[18] To obtain protection a work must be original and fixed in a tangible medium from which it can be perceived.[19] On one hand, this

14. Compare Donald Judd's minimalist announcement in the March 1990 issue of Art in America disavowing authorship of his-also minimalist-works manufactured without his authority by collector Guissepe Panza to the elaborate legally notarized document by Robert Morris "Statement of Esthetic Withdrawal" discussed *infra* Section VI.

15. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

16. Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 411 (2017) ("The statute does not protect useful articles"); *See also* 17 U.S.C. § 101 ("[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.").

17. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("since otherwise the [copyright holder] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.").

18. 17 U.S.C. § 102(b); Harper & Row Publrs. v. Nation Enters., 471 U.S. 539, 556 (1985) ("No author may copyright his ideas or the facts he narrates.").

19. 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression."); *See also Star Athletica, L.L.C.*, 580 U.S at 411.

means that contemporary art—which often requires its viewer to interact with or interpret the work, sometimes even becoming a participant in it, or altering it[20]—can appear in tension with the requirements of copyright that do not allow protection of ideas or concepts, or that require fixation of a work in a format from which it can be perceived. On the other hand, since the seminal case of *Mazer v. Stein*[21] which held that the patentability of an object did not bar its copyrightability as a sculptural work,[22] courts have attempted to draw the art/not art line by separating the useful article from its artistic elements. This means that courts must engage in the same type of thinking that conceptual artists do in conceiving works.

In *Star Athletica v. Varsity Brands, Inc.* the Supreme Court finally resolved a circuit split to announce a two-part test for determining whether a feature of an object is a sculpture or a utilitarian object.[23] In the first prong, the viewer must be able to look at the object and spot some two- or three-dimensional element that appears to have pictorial, graphic or sculptural qualities.[24] In the second, the viewer must be able to imagine the feature existing as its own pictorial, graphic or sculptural work, once it is imagined apart from the utilitarian article.[25] In order to apply this test, much like conceptual artists, courts are also focused on the general problem of how a work of art "validates itself" as an object among all other objects in the world.[26] Analytically, courts are engaged in an act of imagination much like Duchamp creating his Readymades in order to determine whether an object or a feature of an object can be designated as art/not art for copyright purposes.

Philosopher and art theorist Arthur Danto's writings confirm that the art world wrestles with many of the same questions the copyright world confronts. Danto had a specific interest in Andy Warhol's work, in

20. *"Untitled" (Portrait of Ross in L.A.)*, THE FELIX GONZALEZ-TORRES FOUND., https://www.felixgonzalez-torresfoundation.org/works/untitled-portrait-of-ross-in-l-a (last visited Aug. 7, 2022) (inviting the viewer to take candy from the work) [https://perma.cc/3WE6-BE8G]; *see also Yves Klein: Blue Monochrome*, MOMA, https://www.moma.org/collection/works/80103 (last visited Aug. 7, 2020) (calling the viewer to actively interpret the work to understand its meaning based on the artist's history) [https://perma.cc/G57Z-7B7Y].

21. 347 U.S. 201 (1954).

22. *Id.* at 217.

23. *Star Athletica, L.L.C.*, 580 U.S. at 411–12.

24. *Id.* at 412–13.

25. *Id.* at 414.

26. *See* Jeff Wall, *"Marks of Indifference": Aspects of Photography in, or as, Conceptual Art*, *in* RECONSIDERING THE OBJECT OF ART, 1965-1975 247, 247 (Ann Goldstein & Anne Rorimer eds. 1995).

particular Brillo Box.[27] Brillo Box consisted of exact facsimiles of Brillo soap pad cartons made by Warhol.[28] The cartons were constructed of wood, whereas the grocery store versions were cardboard.[29] The differential in price for the art object versus the grocery item could not be ascribed to the durability or quality of the plywood versions, nor that they were "handmade" by the artist. Indeed, Warhol was known for not making many of his artworks and instead relying on apprentices from his studio "Factory" to create much of his work, which he sometimes only signed.[30] In an address to the American Philosophical Association in the mid-60's Danto wrote about Warhol and Brillo Box:

> To paraphrase the critic of the *Times*, if one may make the facsimile of a human being out of bronze, why not the facsimile of a Brillo carton out of plywood? . . .
>
> But the difference cannot consist in craft: a man who carved pebbles out of stones and carefully constructed a work called *Gravel Pile*[31] might invoke the labor theory of value to account for the price he demands; but the question is, What makes it art? And why need Warhol *make* these things anyway? Why not just scrawl his signature across one? . . . Is this man a kind of Midas, turning whatever he touches into the gold of pure art? And the whole world consisting of latent artworks waiting, like the bread and wine of reality, to be transfigured, through some dark mystery, into the indiscernible flesh and blood of the sacrament?[32]

Danto's musings raise the essential questions copyright law wrestles with. Danto's speech also clearly situates Warhol and much of contemporary art as an outgrowth of the innovation from Duchamp's Readymades.

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27. Danto rightly points out that the art object claimed by Warhol as his work Brillo Box is a replica of the graphic design for the commercial product created by second-generation Abstract Expressionist painter James Harvey, but disputes that this is why Brillo Box is compelling as an artwork. *See* ARTHUR C. DANTO, BEYOND THE BRILLO BOX: THE VISUAL ARTS IN POST-HISTORICAL PERSPECTIVE 154 (1998).

28. *Brillo: Is It Art?*, THE WARHOL:, https://www.warhol.org/lessons/brillo-is-it-art/ (last visited Nov. 27, 2022) [https://perma.cc/624U-QSP4].

29. *Id.*

30. *See id.*

31. Amusingly, the U.S. Copyright Office uses an example of an artist creating an original sculpture out of stones as an illustration of a work that could be copyrightable in its Compendium of Copyright Office Practices, but not on labor theory grounds (since those are not valid under *Feist*). Instead it is protectable purely based on the author's original expression. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 312.1 (2021).

32. Arthur, C. Danto, *The Artworld*, 61 THE J. OF PHIL. 571, 580–81 (1964).

II. MARCEL DUCHAMP'S READYMADES: MANIFESTATION OF THE ARTIST'S PERSONALITY

In 1903, faced with the question of whether low art circus posters his colleagues on the bench found scandalous could be protected by copyright just like works of fine art, Justice Holmes ruled in favor of protection for the commercial advertising posters. He did so even though the posters were meant to titillate,[33] and despite the fact that they were mere advertisements, depicting actual circus acts that could be viewed.[34] Holmes considered himself an aesthete[35] and carefully considered the impact his decision would have on the art world. Accordingly, he drafted an opinion that ensured protection for all genres of artwork by holding that originality depends on manifesting the personality of the artist in a work of authorship.[36]

> The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it

33. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 240 (1903).

34. *See id.*

35. Diane Leenheer Zimmerman, *The Story of* Bleistein v. Donaldson Lithographing Company*: Originality as a Vehicle for Copyright Inclusivity*, *in* INTELL. PROP. STORIES 77, 95 (Jane C. Ginsburg & Rochelle Copper Dreyfuss eds., 2006).

36. *Bleistein*, 188 U.S. at 250.

Of course, not every original creative work will qualify as a work of authorship. The Copyright Act and its implementing regulations explicitly exclude from protection certain building blocks of creativity including words and short phrases, such as names, titles and slogans, because they contain a *de minimis* amount of authorship. *See* 37 C.F.R. § 202.1(a). However, Sol LeWitt and other conceptual artists address many of these issues by issuing certificates of originality which are protected by copyright. *See* Richard Chused, *"Temporary" Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 2, 11–12.

Familiar symbols and designs or common geometric shapes likewise cannot be registered with the U.S. Copyright Office either in two- or three-dimensional form by themselves or when combined with minor spatial variations. They may be registered "if the work as a whole contains a sufficient amount of creative expression." U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(J) (2021). Colors, coloring and coloration or variations in coloring are not eligible for copyright protection, nor are typefaces. 37 C.F.R. § 202.1(a), (e). As a general rule, the copyright office will also not accept registrations for the spatial format or layout of a work, and it discourages applicants from using the term "installation art" in applications to register visual artworks because it is ambiguous. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 906.5, 918. Instead, the office directs applicants to identify copyrightable elements in the work and "describe that content using terms such as 'sculpture,' 'painting,' 'photographs' or the like . . . even if the overall installation itself is a registerable work of authorship. In such cases the applicant should use accepted terms to describe the work, such as 'a series of sequentially and thematically related photographs interspersed with drawn and painted images to create a larger work of authorship.'" *Id.* § 918.

> something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[37]

It is unlikely that Marcel Duchamp was aware of the details of the Supreme Court's pronouncement in *Bleistein* when he famously tested the boundaries of what could be called art by splashing the signature "R.Mutt" on the outside rim of a urinal purchased from a plumbing manufacturer, giving it the evocative title "Fountain," and submitting it to the Society of Independent Artists Exhibition.[38] Duchamp claimed that he submitted the work using a pseudonym in order to test the Society's commitment to its stated principles.[39] The show was to be open to any artist who paid the required fee, but Fountain was rejected, and the six dollar entry fee was returned to "Mr. Mutt," together with a letter explaining that the urinal did not belong in an art exhibition.[40] Duchamp resigned from the Society, explaining in a now famous letter the only works of art America has produced are "her plumbing and her bridges."[41]

Duchamp's Fountain is now recognized as one of the most important artworks of the 20th Century.[42] It has had an outsize influence on art and artists that have come since, but in 1917 the idea that a utilitarian article purchased in a plumbing store could become art based purely on the artist's "reaction"[43] to it and by taking it out of context and displaying it in a new light was revolutionary for the art world.[44] In the copyright world, the concept that there is something legally protectable in the *embodiment* of the act of giving the object a "new thought"[45] remains a challenge that is difficult to overcome for a significant portion of the copyright academy.[46] But why shouldn't the Readymades be protectable?

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37. *Bleistein*, 188 U.S. at 250.

38. *See* William A. Camfield, *Marcel Duchamp's Fountain: Its History and Aesthetics in the Context of 1917*, 16 DADA/SURREALISM 64 (1987).

39. *Id.* at 72.

40. *The Fascinating Tale of Marcel Duchamp's Fountain*, PHAIDON, https://www.phaidon.com/agenda/art/articles/2016/may/26/the-fascinating-tale-of-marcel-duchamps-fountain/ (last visited Nov. 29, 2022) [https://perma.cc/3E9Z-N64A].

41. *Id.*

42. *See Duchamp's Urinal Tops Art Survey*, BBC NEWS (Dec. 1, 2004, 5:56 PM), http://news.bbc.co.uk/1/hi/entertainment/4059997.stm [https://perma.cc/NE5E-Y6F6].

43. *See* Marcel Duchamp, *Apropos of "Readymades"* (1961), http://members.peak.org/~dadaist/English/Graphics/readymades.html [https://perma.cc/LS3V-P7PF].

44. *See The Fascinating Tale of Marcel Duchamp's Fountain*, *supra* at note 40.

45. *The Richard Mutt Case*, THE BLIND MAN (1917), https://monoskop.org/images/6/6f/The_Blind_Man_2_May_1917.pdf [https://perma.cc/T996-XBQR].

46. This arguably includes members of the Supreme Court. The dissent in *Star Athletica* by Justices Breyer and Kennedy included, but did not specifically comment on, an image of Duchamp's Readymade "In Advance of the Broken Arm." The work consists of a shovel, inscribed with that legend. Presumably, the work is included because the dissenting Justices believe it should not be

Duchamp disliked "retinal" art, which is art that does not require much interpretation by the viewer.[47] In his view, the moment of interpretation by the viewer is a crucial part of the artistic equation, and makes the viewer part of the artistic enterprise.[48] He wrote about how the concept of Readymades had crystalized for him, and how he conveyed his intended expression to the viewer:

> In New York in 1915 I bought at a hardware store a snow shovel on which I wrote "In advance of the broken arm."It was around that time that the word "Readymade" came to my mind to designate this form of manifestation.A point that I want very much to establish is that the choice of these "Readymades" was never dictated by aesthetic delectation.The choice was based on a reaction of visual indifference with at the same time a total absence of good or bad taste . . . in fact a complete anesthesia.One important characteristic was the short sentence which I occasionally inscribed on the "Readymade."That sentence instead of describing the object like a title was meant to carry the mind of the spectator towards other regions more verbal.Sometimes I would add a graphic detail of presentation which, in order to satisfy my craving for alliterations, would be called "Readymade aided."At another time, wanting to expose the basic antinomy between art and "Readymades," I imagined a "Reciprocal Readymade": use a Rembrandt as an ironing board[49]

A fundamental question behind Readymades is whether the manifestation of the artist's personality is sufficient to render something art when the artist so designates it.[50] Personality is also the crux of the originality

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copyrightable. Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 439 (2017) (Breyer, J., dissenting); Justice Thomas, responded for the majority in a footnote "The dissent suggests that our test would lead to the copyrighting of shovels. But a shovel, like a cheerleading uniform, even if displayed in an art gallery, is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. §101. It therefore cannot be copyrighted. A drawing of a shovel could, of course, be copyrighted. And, if the shovel included any artistic features that could be perceived as art apart from the shovel, and which would qualify as protectable pictorial, graphic, or sculptural works on their own or in another medium, they too could be copyrighted. But a shovel as a shovel cannot." *Star Athletica*, 580 U.S. 449 n.2. As the analysis of the Readymades will show, they were neither mere representations of the utilitarian objects referenced, nor the objects themselves. They were intended as entirely new authorial expressions—new thoughts for the objects. As such, the artistic feature of In Advance of the Broken Arm is the graphic message combined with the shovel. Taken together they become authorial expression and are no longer a useful object intended for clearing your walkway, but rather, a sculpture conveying the artist's dry sense of humor. Arguably, separability analysis might even be superfluous.

47. *See* Dalia Judovitz, *Unpacking Duchamp*, 97 (University of California Press, 1998).
48. Marcel Duchamp, *supra* note 43.
49. *Id.*
50. *See* Walravens, *supra* note 10, at 176.

determination according to Justice Holmes in *Bleistein.*[51] After Fountain was rejected from the Society of Independent Artists' Exhibition a defense of the work published in Duchamp's art magazine *The Blind Man*, presumed by scholars to be written by Duchamp himself, claimed: "Whether Mr. Mutt with his own hands made the fountain or not has no importance. He CHOSE it."[52]

Or as Danto put it in reference to Warhol's Brillo Boxes: can an artist not but make art "[a]nd the whole world consist[s] of latent artworks waiting, like the bread and wine of reality, to be transfigured?"[53] The copyright world struggles with parallel questions: Does a utilitarian object have features that make it capable of taking on a separate life as an artwork? Can you separate the artistic aspects of a work from the utilitarian ones? These are more or less the questions that the Supreme Court in *Star Athletica* directed a party to answer when performing a separability analysis under copyright law. Duchamp's answer is to recognize that there can be art in the utilitarian, and vice versa. The less talked about and never formally realized Reciprocal Readymades help to explain the complete Readymades concept and demonstrate that Duchamp was anticipating where copyright law would go a century before it got there.[54]

One can hardly imagine a better illustration of the *Star Athletica* separability analysis than Duchamp's explanation of Readymades and Reciprocal Readymades. The first step in the *Star Athletica* analysis is to identify a feature of the seemingly utilitarian article that has sculptural, pictorial, or graphic elements. Both the form of Fountain itself, unplumbed and displayed in a new orientation, and the graphical element of the signature "R.Mutt" rendered in a crude hand on the rim of the bowl, as if dripping, would qualify. The next step is to determine whether the feature could exist as a pictorial, graphic or sculptural work on its own. This is the existential question of the art/not art inquiry, because as the Supreme Court explains, the test is whether the identified feature:

> has the capacity to exist apart from the utilitarian aspects of the article. In other words, the feature must be able to exist as its own pictorial graphic or sculptural work as defined in section 101 once it is imagined

51. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

52. *See* William A. Camfield, *Marcel Duchamp's Fountain: Its History and Aesthetics in the Context of 1917*, 16 DADA/SURREALISM 64, 76 (1987).

53. Danto, *supra* note 32, at 580.

54. Although the duality of objects was first presented in *Mazer v. Stein* where the Supreme Court recognized that a statuette protected by copyright was infringed when mass reproduced as a base for a lamp. 347 U.S. 201 (1954).

> apart from the useful article. If the feature is not capable of existing as a pictorial, graphic or sculptural work, once separated from the useful article then it was not a pictorial, graphic or sculptural feature of that article, but rather one of its utilitarian aspects.[55]

The shape of Duchamp's Fountain can be imagined as a sculptural work as soon as the plumbing is removed and displayed in the backwards orientation (at which point the shape ceases to be related to any function). The crude application of the pseudonymous artist's signature along the rim of the urinal is also a separate graphical element that itself holds multiple meanings. Not only does it stand up as a graphic design element when considered alone,[56] when applied to Fountain, it simultaneously reminds the viewer of the article's original and new purpose. By employing these graphical elements, the signature adds additional expression and storyline to the work that does not merely describe or name the article but relates back to the work and leads the viewer to the intended "new thought" for the urinal.[57] The separate graphic element also adds nothing functionally to the utilitarian features of the urinal. It has not even been applied as decoration, but rather to transform what remains of the urinal into art.

Copyright law recognizes that an object can be two things at once. In the famous case of *Mazer v. Stein*—both an artwork and the base for a lamp.[58] In *Mazer v. Stein* the respondents copyrighted a statuette depicting a dancer. It was intended for use either as a lamp base—when wiring, sockets, and a lamp shade were attached—or could be sold separately as a statuette alone.[59] The petitioners copied the statuette and sold it as a lamp base. They argued that it did not infringe the respondents' statuette, because the respondents did not have a copyright for a statuette intended

55. Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 414–15 (2017).

56. If popular taste is any guide, the element is clearly strong. Dozens of t-shirt designs are available with the famous graphic. *See, e.g.*, *R Mutt 1917 T-Shirts*, REDBUBBLE, https://www.redbubble.com/shop/r+mutt+1917+t-shirts (last visited Dec. 2, 2020) [https://perma.cc/PM8Y-T5CA].

57. The meaning of the name R. Mutt has been probed and speculated upon. Duchamp suggested it was at least in part a reference to the then-popular comic strip characters Mutt and Jeff—one short, one tall, in common parlance alluding to "Mutt and Jeff" signifies an odd couple or mismatched pair. The name is also a homonym for the German word "armut" meaning poverty and has also been speculated to be a jab at those with a poverty of imagination. Persistent efforts have also been made to celebrate the aesthetic qualities of the urinal in decades since—often comparing it to a Buddah or the female form—despite Duchamp's explicit disavowal of aesthetics playing any role in identifying objects for Readymades. This might nevertheless give some additional weight to the argument that the work or elements of it are capable of being seen as "art."

58. Mazer v. Stein, 347 U.S. 201, 204 (1954).

59. *Id.* at 202–03.

for use as a lamp base.[60] The court disagreed and held that the respondents copyright applied to the statuette even when it was meant for use as a lamp base.[61] It also held that it is irrelevant whether a work is created first as part of a useful article or vice versa.[62] Relating these holdings to Fountain, the only thing Duchamp could seek to protect is an unplumbed urinal, displayed in a reclined position, with a cryptic signature by an unknown artist meant to provoke the viewer to think about the urinal as something other than a sanitary fitting in a bathroom. The artistic concept does not work with plumbing fittings attached and the urinal installed in the correct position. This limits the possible copyright claims so that we need not worry that plumbing manufacturers will be impeded in their ability to produce real urinals to relieve the physical needs of art lovers. On this basis Fountain meets the second *Star Athletica* separability test: it is possible to imagine the work as an artwork on its own. And that mental exercise was Duchamp's point.

Duchamp forces us through the mental gymnastics necessary to imagine a urinal as art by deploying wordplay and visual cues together. In order to enable viewers to follow Duchamp's new thought for the urinal as art object, Fountain is carefully displayed not only in a new context but with a new graphical element added. It is situated differently than viewers are used to encountering urinals, so that they may perceive it differently, and it was to be shown in an art exhibition in New York City along with other art objects (not in the men's room, where one would typically encounter a urinal). But there is only so much any artist can do to make their point. Perhaps it is not that viewers failed to comprehend Fountain when it was first submitted, maybe they just didn't like it. As Ansel Adams has said about art:

> I believe that the artist and his art are only a part of the total human experience; the viewer in the world at large is the essential other part. I feel that a true work of art is like nothing else in the world. . . . For me a work of art does not cry for comprehension, only for reaction at the level of art itself.[63]

Or as Sol Lewitt said:

60. *Id.* at 204–05.

61. *See id.* at 214.; *See also*, Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 416 (2017).

62. *See Mazer*, 347 U.S. at 218–19.

63. ANSEL ADAMS & MARY STREET ALINDER, ANSEL ADAMS: AN AUTOBIOGRAPHY 137 (LITTLE, BROWN AND COMPANY, 6TH PRINTING 1985).

> It doesn't really matter if the viewer understands the concepts of the artist by seeing the art. Once out of his hand the artist has no control over the way a viewer will perceive the work. Different people will understand the same thing in a different way.[64]

Some may argue that because Fountain was rejected as art by the Society of Independent Artists, who were required by their rules to accept all entries, it fails the second prong of the test, but that would be calling for "comprehension" rather than "reaction at the level of art itself,"[65] to quote Adams. Works by many celebrated artists including Monet, Cezanne, Picasso, and Van Gogh were likewise scorned when first shown. Holmes in *Bleistein* warns courts against succumbing to that folly. He explains that it would be a "dangerous undertaking" for those trained only as lawyers to judge the copyrightability of art based on their own tastes and cautions that the very novelty of some "works of genius" would cause the public to find them "repulsive" until they "learn the language in which the author speaks."[66]

Fountain is now rightly revered as pathbreaking and has been referenced in numerous forms by other artists demonstrating the important role it and the other Readymades play in art history. Among others, Andy Warhol's manufactured plywood Brillo Boxes modeled after the real thing were a variation on the Readymade, whereby Warhol also elevated the mundane into art. Feminist artist Sherrie Levine, known for reimagining the works of male artists to comment on and question their role in the art world, recast a urinal in bronze to make Fountain (Buddha). Further upgrading the urinal experience, if not the social commentary, Maurizio Cattelan installed a fully-functioning, 18-carat gold toilet at the Guggenheim that museum-goers were invited to use. That experience was a hit on social media.[67] More generally, artists as varied as Robert Rauschenberg (famous for his "combines"—3D collages) and Damien Hirst have called out Duchamp as the inspiration behind works like Hirst's "The Physical Impossibility of Death In the Mind of Someone Living" which consists of a tiger shark embalmed in formaldehyde, and with its sensibility and evocative title calls to mind Duchamp's "In Advance of the Broken Arm." All of these examples not only cement Fountain's and the Readymades place in art history, they also demonstrate that these works can be imagined as art. In so imagining them, Duchamp was also

64. Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967, at 79, 80.

65. ANSEL ADAMS & MARY STREET ALINDER, ANSEL ADAMS: AN AUTOBIOGRAPHY 137 (LITTLE, BROWN AND COMPANY, 6TH PRINTING 1985).

66. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

67. One wonders if Cattelan planned this (over)sharing as part of the artistic concept.

precipitating copyright law's inevitable need to account for the modernists' self-critique of art. Ironically, whatever the ultimate outcome of any particular analysis applying the *Star Athletica* separability test, applying the test itself becomes somewhat of an exercise in conceptual art. Duchamp's influence has resulted in the ultimate masterwork—transforming Supreme Court justices into conceptual artists!

III. ANSEL ADAMS: A NEGATIVE IS LIKE A SCORE—TEMPORALITY, VISUALIZATION AND FIXATION

Few would think of Ansel Adams as an art world disruptor on the order of Duchamp. Adams is known for his iconic black and white photographs of the American West, which these days have become ubiquitous on calendars and greeting cards. Nevertheless, Adams introduced revolutionary approaches to photography. Ansel Adams founded group *f64*.[68] The group was named after the setting on a camera lens that provides the finest detail—a reference to the group's belief that it is possible to achieve clarity and perfection in their chosen medium by relying on mechanical controls of the equipment, rather than artifice in presentation.[69] Group *f64* were proponents of so-called "straight photography," which rejected pictorial photographers' attempts to imitate other art forms.[70] Adams called the pictorialists' staged composition and the use of techniques to give photographs the feel of etchings or lithographs "questionable."[71] In contrast to them, Ansel Adams became known for his devotion to the capacities of the craft of photography.[72] This was revolutionary at the time and the group received many letters of protest after their first gallery show at the de Yong gallery in New York City in 1932.[73] According to Adams, they came "mostly from artists and gallery people, complaining that valuable space at a public museum had been given to photography *which was not Art*!" [74]

When viewed solely through a copyright lens the art/not art protests raised with respect to the work of group *f64* were slightly different than those raised against Duchamp's Readymades. Photography had already

68. ANSEL ADAMS & MARY STREET ALINDER, ANSEL ADAMS: AN AUTOBIOGRAPHY, 110 (LITTLE, BROWN AND COMPANY, 6TH PRINTING 1985).

69. *Id.* at 111–12.

70. *Id.* at 110.

71. Ansel Adams, *"A Personal Credo,"* PHOTOGRAPHY IN PRINT 377, 378 (Vicki Goldberg eds., 1943).

72. ANSEL ADAMS & MARY STREET ALINDER, ANSEL ADAMS: AN AUTOBIOGRAPHY, 112 (LITTLE, BROWN AND COMPANY, 6TH PRINTING 1985).

73. *Id.* at 111–12.

74. *Id.* at 112.

overcome the hurdle of being recognized as a protectable medium before the turn of the century. The early legal disputes challenging the medium were rooted in discomfort with the mechanical nature of photography, and a suspicion that there is something ordinary about photography that does not necessarily require the skill of an artist. Consequently, the cases focused on the definition of original works, and more specifically "writings" in the IP clause of the Constitution, rather than on separating artistic elements from utilitarian objects as in *Mazer v. Stein* or ensuring that the boundary between ideas (not protectable) and their expression (protectable) is properly maintained. In *Burrow-Giles v. Sarony*,[75] concerning an early celebrity portrait of Oscar Wilde, the Court elevated Sarony's composed portrait of Wilde above "ordinary" documentary photographs of objects which would not necessarily enjoy copyright protection and found it protectable.[76] The Court was persuaded by Sarony's narrative explaining how he "made"[77] the photograph precisely because he made it "entirely from his own mental conception."[78] A few years later, *Bleistein* built on *Sarony* to ensure that not just composed studio photographs but art depicting people or scenes the artist had not staged, and nature as it exists, could also be copyrighted. Although the case did not concern photographs, Holmes instructs that the artists' expression is "the personal reaction of an individual upon nature" and because personality always contains something unique, any work manifesting the individual's personality can be copyrighted.[79] Unfortunately, despite the recognition of photography as a protectable medium based on the artist's intellectual contributions, courts still have an incomplete understanding of how photographers express themselves and where protectable authorship resides, so courts reach inconsistent results in visual arts cases.

The Copyright Act does not expressly define the term author, but authorship is initially vested in someone who creates a copyrightable work.[80] A work is created when it is fixed in a tangible medium for the

75. Burrow-Giles v. Sarony, 111 U.S. 53 (1884).

76. *Id.* at 59.

77. Ansel Adams also intentionally referred to "making" rather than "taking" photographs in order to emphasize the creative nature of the act. *See* ANSEL ADAMS & MARY STREET ALINDER, ANSEL ADAMS: AN AUTOBIOGRAPHY, 79 (LITTLE, BROWN AND COMPANY, 6TH PRINTING 1985); "The terms *shoot* and *take* are not accidental; they represent an attitude of conquest and appropriation. Only when the photographer grows into perception and creative impulse does the term *make* define a condition of empathy." *Id.*

78. *Id.*

79. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

80. 17 U.S.C. § 201(a).

first time, by or for the author.[81] From the time of *Sarony*, photographers have relied on darkroom assistants and others to facilitate their creative work, which can sometimes be physically laborious. Although there are informal art world norms governing how prints of works are attributed to artists,[82] there has never been any suggestion that copyright ownership is affected by such norms. After all, the fixation, even if accomplished by an assistant, is created "for the author."[83] The discussion to follow will show how the fixation issue in photography mirrors challenges copyright lawyers find confounding with respect to conceptual art.[84]

Adams was trained as a pianist and used references to music to explain his work. His phrase that the negative is like a score, and the print is like the performance suggest that straight photography might face some of the same challenges as conceptual art. Writing about the traveling exhibition "Ansel Adams at 100" New York Times photo critic Sarah Boxer noted that "[p]hotography has a tense problem. Past, present, future; which of these is engaged when the shutter blinks? When a print is made?"[85] She is correct that temporality and fixation are always theoretically an issue for photography. They are more acutely present in Adam's work, because he professed a belief in the primacy of straight photography and took full advantage of the tools of his craft, while nevertheless seeking to evoke for viewers his subjective memory of the thing or moment being photographed. As the curator of the exhibit demonstrates in its catalog:

> Adams's shockingly radiant landscapes—where trees glow white, skies are deep black, and mountains are step tones of gray—appear not as perfectly pure, transparent and instantaneous records of nature itself but rather as a record of his restless attempts to locate his memories and projections.[86]

Copyright law easily recognizes that the artistic choices made by the photographer are protectable—but because courts often lack a full understanding of the nuances of photography, they articulate this

81. 17 U.S.C. § 101.

82. *See* Association of Art Museum Directors, *Guidelines for the Use of Copyrighted Materials and Works of Art by Museums*, ASSOCIATION OF ART MUSEUM DIRECTORS (Oct. 11, 2017), https://aamd.org/sites/default/files/document/Guidelines%20for%20the%20Use%20of%20Copyrighted%20Materials.pdf [https://perma.cc/KM6Q-B5X8].

83. 17 U.S.C. § 101.

84. *But see generally* Guy A. Rub, *Owning Nothingness: Between the Legal and Social Norms of the Art World*, BYU L. REV. 1147 (2019).

85. Sarah Boxer, *Critics Notebook: Memories Live in Ansel Adams's Dreamscapes*, N.Y. TIMES, September 1, 2001, at B9.

86. *Id.*

protection as applying to "the image produced in the interval between the shutter opening and closing"[87] Adams planning and pre-visualizing of images happens *before* the shutter opens, his perfecting and finalizing of images that resulted in the unnaturally stark tonal variations that characterized his landscape work happens *after* the closing of the shutter. Both are core to the artistic expression achieved. And, as is the case with conceptual art, everything but the pre-visualization (the concept) can theoretically be done by others.

Similar to Adams, Sol Lewitt, a conceptual artist whose active career overlapped Adams and who was also strongly influenced by classical music, said of the plans for his wall drawings, "I think of them . . . like a musical score."[88] With their comments, both artists were alluding to the significant need to plan and make decisions before executing the final product.[89] Lewitt announced in his Paragraphs on Conceptual Art:

> "In conceptual art the idea of concept is the most important aspect of the work," while Adams said with equal conviction in his Personal Credo some years earlier:
>
> "A photograph is not an accident—it is a concept."[90]

While each artist placed different stress on skill and craftsmanship of the artist and the desired level of emotional versus intellectual impact of the work, both realized that they worked in mediums where the work could be conceived of and planned by the artist, and the final product completed by someone else. The ultimate outcome and success of a work could vary—at least within a given range—depending on a variety of factors, however, the fundamental thing which is conceived of at or before the moment of exposure of the negative (in Adams's case), or in detailing instructions for the work (in Lewitt's case) should remain unaltered in basic concept.[91]

As important as Adams's skill in calculating lighting of shots when he visualized them and subsequent darkroom work was to his own work,

87. *See, e.g.*, Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115–16 (2d Cir. 1998).

88. Veronica Roberts, *Like a Musical Score; Variability and Multiplicity in Sol LeWitt's 1970's Wall Drawings*, 50 MASTER DRAWINGS 193, 193 (2012).

89. *See* Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967, at 79, 80; Ansel Adams, *"A Personal Credo" (1943, excerpt)*, *in* PHOTOGRAPHY IN PRINT 377, 379 (Vicki Goldberg ed., 1981).

90. Ansel Adams, *"A Personal Credo" (1943, excerpt)*, *in* PHOTOGRAPHY IN PRINT 377, 379 (Vicki Goldberg ed., 1981).

91. *See* Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967, at 79, 80; Ansel Adams, *"A Personal Credo" (1943, excerpt)*, *in* PHOTOGRAPHY IN PRINT 377, 379 (Vicki Goldberg ed., 1981).

Adams did not limit his definition or understanding of what is conceptual in photography to mechanical capabilities alone. He recognized different creative and expressive skills employed through visualization by other straight photographers. For example, Henri Cartier-Bresson, known for identifying the "decisive moment" at which to capture a portrait—used his skill in pre-visualizing images to recognize and formulate the image in the correct temporal moment—not earlier or later. Photographers who work like Cartier-Bresson also cannot "bracket" their images with shots taken an f-stop below and an f-stop above the correct setting as insurance in case they have not calculated their image exposure correctly. They must rely even more heavily on techniques and instincts developed over years of practice to visualize and correctly capture works in an instant. Ansel Adams recognized this—he discounted the idea of accidental photography:

> Truly "accidental" photography is practically non-existent; with preconditioned attitudes we *recognize* and are arrested by the significant moment. The awareness of the right *moment* is as vital as the perception of values, form, and other qualities.[92]

Adams's ability to recognize and articulate different explanations of authorial intent and expression in creative photography still exceeds courts' desire and patience to articulate what makes a photograph—or any work of art—original and protectable and the various points at which an author's invisible presence may play a role.[93] Too often courts merely recognize that most photographs are original and copyrightable, and move on to other issues in a case without explicitly articulating why that is so.[94] Clearly, courts recognize that originality is not restricted merely to what can be composed and controlled via studio portraits.[95] Yet neither have courts succeeded in capturing more varied accounts of originality in authorship as articulately as Adams explains them.

To illustrate photographer's challenges in securing appropriate protections for their works, one need only look to the 1990 Visual Artists Rights Act (VARA) which was intended to secure aspects of moral rights protections to qualifying works by visual artists.[96] The protections of the Act are so narrowly drawn that it almost certainly does not protect the

92. Ansel Adams, *"A Personal Credo" (1943, excerpt)*, *in* PHOTOGRAPHY IN PRINT 377, 379 (Vicki Goldberg ed., 1981).

93. *See* Manion v. Coors Brewing Co., 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005) ("These lists [of components of a photograph's originality], however, are somewhat unsatisfactory.").

94. *See, e.g.*, Cariou v. Prince, 784 F. Supp. 2d 337, 346 (S.D.N.Y. 2011).

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

96. *See* Visual Artists Rights Act ("VARA") of 1990, 17 U.S.C. § 106A.

work of Ansel Adams. The challenges stem from a combination of the definition of a "work of visual art"—which protects only originals and up to 200 signed and consecutively numbered copies of a *print*—with the requirement that "still photographic *image*[*s* be] produced for exhibition purposes only."[97] This coupling of an intent to produce only images destined for exhibitions which excludes all other images, such as those produced for publication in a book or for advertising, not only narrows the category of images that will qualify at the outset, but means that later authorized multiple copies of an image originally intended for exhibition might also disqualify the original limited edition "because the *image* (as opposed to the copy of the print) will no longer have been 'produced for exhibition purposes *only*.'"[98]

IV. CLOSING THE GAP—FROM ANSEL ADAMS TO THE CONCEPTUAL ARTISTS

If the law still struggles to appropriately understand photography like other visual art forms, it is no wonder that conceptual artists may find themselves outside the protections of copyright law too—whether willingly, willfully, or woefully. Understanding photography more fully can serve as a bridge to conceptual art and the legal arrangements concerning its creation, installation, display, transfer, and if necessary its destruction or deaccessioning. It is a popular conceit to overcomplicate conceptual art and to mock the forms that have evolved to govern it.[99] In reality, arrangements such as those covering the manifestations of Sol Lewitt's wall drawings emerged not as opportunistic copyright land grabs, but rather to account for unique properties of the works so as to ensure adequate installation and appropriate licensing of the interests of the craftspeople engaged to manifest them. This is because conceptual artists like Lewitt did not always sell a physical copy of a work—they often transferred a certificate of authenticity with instructions and/or a diagram explaining how to make and install the work.[100] As a result, like an

97. 17 U.S.C. § 101.

98. Jane Ginsburg, *Fifty Years of US Copyright: Toward a Law of Authors' Rights?*, AM. INTELL. PROP. L. ASS'N Q.J. (forthcoming) (manuscript at 12), https://ssrn.com/abstract=4230363 [https://perma.cc/KCS3-XHHP].

99. *See* Brian L. Frye, *SEC No-Action Letter Request*, 54 CREIGHTON L. REV. 537, 537–38 (2021) (Which the author describes as a work of conceptual art in the form of a law review article. "[M]any works of conceptual artworks are probably defined as unregistered securities under the 1933 Act, and the art market is replete with unwitting violations of the securities laws.").

100. *See Certificate for A Wall Divided Vertically into Fifteen Equal Parts, Each with a Different Line Direction and Colour, and All Combinations*, TATE, https://www.tate.org.uk/art/artworks/lewitt-a-wall-divided-vertically-into-fifteen-equal-parts-each-

architect licensing a builder to use a blueprint to build a house for a client or a photographer authorizing the making of a print from a photograph, the arrangement that ultimately results in the authentic manifestation of the conceptual artwork, like the other arrangements, involves several parties working in concert with each other.

- The collector of the Lewitt work acquires a certificate and an instruction set from which the work can be installed.
- The certificate—assuming it is original and expressive enough to meet the low bar of originality established by copyright law and justify copyright protection—is protectable just like a blueprint[101] or a negative is protectable. However, the owner of the physical copy of the certificate acquires only the right to display[102] the physical copy itself—not the other property rights associated with the work,[103] such as the right to have it "recast, transformed, or adapted" as a derivative work.[104] That right still belongs to the original author of the conceptual artwork/certificate. So the owner of the certificate must collaborate with the artist to physically manifest the work.
- Since Lewitt considered the concept to be the most important aspect of the work, and the execution secondary, he did not personally install most of his works. "When an artist uses a conceptual form of art it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair." Nevertheless, the artisans installing the work are important because "This kind of art is not theoretical . . . it is intuitive."[105] Therefore Lewitt, and now his estate, maintains control over an approved list of artisans who can manifest the artworks from the instructions in the certificates with accuracy. Professor Chused's detailed

with-a-different-line-t01766 (last visited Nov, 29, 2022) [https://perma.cc/XAK9-5K7U]; Richard Chused, *Temporary Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 1 (2019).

101. 17 U.S.C. § 101 (An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings).

102. Relevant to that point, the certificate says that it is the signature for the artwork and must accompany the work if it is sold or transferred, the diagram accompanying the certificate, which is a colorful illustration of the wall drawing, disclaims that it is anything other than part of the certificate. It specifically disclaims being a drawing on its own.

103. 17 U.S.C. § 202 (Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied).

104. 17 U.S.C. §§ 101, 106.

105. Sol LeWitt, *Paragraphs on Conceptual Art*, ARTFORUM, Summer 1967, at 79, 80.

exploration of Lewitt's certificates brings to life the supposedly mundane decisions artisans must make when executing Lewitt artworks, and how loaded with creative decision-making these can be. For instance:

> Wall Drawing #1180 is described as requiring a person using a marker within a four meter (160") circle, to draw 10,000 black not straight lines. All lines are randomly spaced and equally distributed. Those executing the drawing had to make "mundane" decisions about which markers to use, where to place each of the 20,000 lines, and how hard to press on the marker, as well as ineffable judgments about the meaning of "randomly spaced" and "equally distributed."[106]

- One imagines that these decisions are not unlike those made by assistants learning how to print Ansel Adams's negatives implementing his zone system for ensuring stark tonal contrasts. The negative, like the instructions in the certificate, provides the conceptual structure and available range, but there are judgment calls left to the assistant doing the printing, and the results may vary depending on the condition of the negative and the skill of the assistant. Minimalist artist Frank Stella put it bluntly when discussing the process of creating a painting from a diagram: "A diagram is not a painting. I can make a painting from a diagram, but can you?"[107]
- For works like Lewitt's, it is also necessary to account for any copyright interests that might arise from the manifestation of the work by independent contractors. Since they are not Lewitt employees, any copyright interests they might have by virtue of creating a derivative work would not belong to the Lewitt estate. They must be accounted for—either through the terms of the certificate, or by separate contract or norms of art world practice in order to meet the expectations of the collector and the artist. As a practical matter, this issue does not matter much for the initial installation of the wall drawing, as the collector would acquire the right to the physical object and the right to

106. Richard Chused, *Temporary Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 1, 24 (2019).

107. Bruce Glaser, *Questions to Stella and Judd*, MINIMAL ART 148, 161 (1995).

> display it upon installation, even under normal operation of copyright law. Since the work becomes a permanent physical feature of the collector's home many variables one would ordinarily think about relevant to the display right are less relevant.[108] However, issues could arise if ownership in a work is transferred.

A variety of copyright conundrums which are beyond the scope of this Essay[109] were presented in a case involving Lewitt's Wall Drawing #679. The work at issue had originally been installed in the home of a renowned Houston architect. Upon his death, the home and its art collection were donated to a museum which chose not to accept the Wall Drawing and to cover it up and sell the house instead—ostensibly ending the "visible life" of the installation. The new owners discovered that the light covering was easy to remove and decided to restore the work to view. Metaphysical madness ensued.[110] Can a work be unerased? Is something that appears to be a colorful drawing still at least a colorful drawing if it is not a Lewitt? The example highlights that painting over and subsequent uncovering and restoration of a work is a real-world scenario. In such a situation, if the artisans who originally manifested/installed the work retained rights and are deemed to be either full or joint authors of the work, the new homeowners could avoid restrictions in the certificate (in particular the restriction that requires the certificate to accompany the work like a signature) and obtain permission for their intended actions solely from the artisans—since joint copyright owners are entitled to exercise all the licensing privileges of ownership individually, other than issuing an exclusive license. The restrictions in the certificate—like the right to control reproduction of copyrighted works granted to copyright owners—are intended to authenticate the work and preserve its value, ensuring that a single instantiation of a work does not become multiple unauthorized copies as a collector relocates or loans out works.[111]

108. 17 U.S.C. § 106(5) ("the owner of copyright under this title has the exclusive rights to . . . in the case of . . . pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly").

109. Richard Chused, *Temporary Conceptual Art: Property and Copyright, Hopes and Prayers*, 45 RUTGERS COMPUT. & TECH. L.J. 1, 4–10 (2019) (describing the controversy thoroughly).

110. *Id.*

111. Chused, *supra* note 109 at 11.

V. FELIX GONZALEZ-TORRES CANDYWORKS AND PRACTICES RELATING TO CERTIFICATES OF ORIGINALITY

Logically, certificates appear to adapt along with the concept of the artwork and the needs of the artist and the installation. Because they are so intimately tied to a work, elements of an artist's practice and intentions for their work logically express themselves in certificates as well, thereby leaving an additional imprint of personality on the conceptual work. The conceptual works of Felix Gonzalez-Torres—including his Candy works—are powerful examples of how everyday items can be transfigured by an artist to involve the viewer in an emotional narrative. "Untitled" (Portrait of Ross in L.A.) 1991 is a work of candies in variously colored wrappers. The ideal weight upon installation is 175 pounds: the weight of an average healthy man like Gonzalez-Torres's partner Ross before he was diagnosed with HIV.[112] Viewers are permitted to take a candy from the pile so that the pile diminishes in size and weight over time.[113] The candies are replenished periodically—the certificates direct that the medium of the work is an "endless supply" of candies.[114] According to the Felix Gonzalez-Torres Foundation, the work has been installed in or resides in at least 33 exhibitions or permanent collections and its overall dimensions vary with the installation.[115]

The current owner of each Candy work is named in a Certificate of Authenticity and Ownership.[116] The certificates reflect certain "Core Tenets" which set guiding principles for the works. Gonzalez-Torres's art practice intentionally invited variations in works even as they were manifested by owners and curators in order to foster "engagement and questioning."[117] The certificates can be read as an attempt to construct a cooperative and flexible relationship—not just a legal agreement—between the collector and the artist, and when read against the political

112. *"Untitled" (Portrait of Ross in L.A.)*, *supra* note 20.

113. Nat'l Portrait Gallery, *Hide/Seek: "Untitled (Portrait of Ross in L.A.)" by Felix Gonzalez-Torres – National Portrait Gallery*, SMITHSONIAN (last visited Aug. 7, 2022), https://www.si.edu/es/object/yt_37bSb-aQ4BM [https://perma.cc/7FPD-XWXE].

114. *Id.*

115. *"Untitled" (Portrait of Ross in L.A.)*, *supra* note 20.

116. *Practice of Re-Issuance of Certificates*, THE FELIX GONZALEZ-TORRES FOUND., https://www.felixgonzalez-torresfoundation.org/foundation-activities/practice-of-re-issuance-of-certificates (last visited Aug. 7, 2022) [https://perma.cc/A4RC-XEKF]. These Core Tenets are shared on the Foundation's website as part of an ongoing language development project for the Certificates.

117. *See, e.g.*, *Core Tenets of Gonzalez-Torres' Candyworks,* THE FELIX GONZALEZ-TORRES FOUND., https://issuu.com/felixgonzaleztorresfoundation/docs/ct_candy_9jan2023?fr=sZDMxNTU2OTcwMTg (last visited Jan. 26, 2023) [hereafter *Core Tenets*] [https://perma.cc/8RWY-XYWX].

and legal developments in the art world and society at large at the time the certificates were developed, the agreements are a clear statement by a gay man making art about AIDS that he intends to work from a position of power in the marketplace—not as an outsider, protesting legal norms, or begging to be recognized.[118]

Felix Gonzalez-Torres created multiple categories of works to which he applied certificates. They range from billboards of a rumpled, empty bed to commemorate the day his love died which were scattered throughout New York City, to stacks of paper displayed in galleries—sometimes printed with phrases or images—that visitors could take.[119] The most well-known of his works are the Candy works to which category "Untitled" (Portrait of Ross in L.A.) 1991 belongs. The work shares some attributes of Duchamp's Readymades. It is composed of candies that the artist does not alter in any manner, yet through an interaction with viewers participating, the candies transfigure themselves into a representation of Ross as his form diminishes.[120] Gonzalez-Torres has given them a new thought. The participation of viewers who understand and contribute to the multi-layered messages of the work—involving change, the sweetness of love, the inevitability of death, the unknown—by taking pieces of candy away from the work, contributes to the challenge the work faces in securing copyright protection. Is it ever fixed?

To deal with these characteristics of the work and the ideals the artist had for it, Gonzalez-Torres—and later his Foundation—have taken a different path than Lewitt's. Although the Foundation issues certificates of originality and authenticity for the Candy works, the certificates are phrased in a manner that sets the terms for a relationship between the artist and the owner of the work—intended to last for as long as the collector owns the work. A scholar familiar with the certificates, which are not generally made publicly available because they are intended for the acquirer alone[121] described them as "an attempt to forge a sustainable working relationship between juridical privileging of ownership interests in visual-art cases and what might be called "art world law" or the rules, customs, and other behavioral norms governing relationships between artists, institutions, dealers and collectors."[122] As an openly gay man

118. KEE, *supra* note 13, at 194.

119. *About the Works Section Methodology*, THE FELIX GONZALEZ- TORRES FOUND., https://www.felixgonzalez-torresfoundation.org/about/about-the-works-section-methodology# (last visited Nov. 30, 2022) [https://perma.cc/LMQ7-6XNX].

120. Nat'l Portrait Gallery, *supra* note 113.

121. Interview with Holly McHugh, Associate: Licensing, Archives, Research, THE FELIX GONZALEZ-TORRES FOUND. (Nov. 23, 2022) (notes on file with the author).

122. KEE, *supra* note 13, at 194.

living with and making art about AIDS, Gonzalez–Torres stated that it is "more threatening" that "people like me are operating as part of the market." He therefore did not protest copyright or contractual relationships but sought to meld them to his needs.[123]

Gonzalez-Torres, through his certificates, also evinced a willingness to have his works be melded to fit collector and curator circumstances and needs, so long as certain "standards" outlined in the certificates were adhered to. For the Candy works that meant that owners were directed to routinely replenish the works and adhere to a general standard of size (an "ideal" size or weight was referenced), but that not everything was mandatory. For instance, although certain Candy works have the word "corner" in their title, not all owners have installed them in corners—some installations are flat, and some are in piles.[124] The truest expression of the nature of the relationship the artist sought was one of curator or caretaker of the work—even when it resided with a private collector. This was expressed in certificates both by allowing the owner to determine how to share the work with others—including reconfiguring or reconstructing the work and loaning the work to others.[125] According to the certificates, the work's value is not diminished by being shown in multiple locations.[126] Yet all of this flexibility in interpretation,[127] manifestation, and

123. *Id. See also Core Tenets*, *supra* note 117. On the one hand, the Core Tenets celebrate the uniqueness of each artwork, and tie that uniqueness to property rights through the use of contract provisions:

- Each of the candy works is a unique artwork.
- The uniqueness of Gonzalez-Torres's manifestable works is linked to ownership.
- Each authorized manifestation of a candy work is the work and should be referred to only as the work. (Individual pieces of candy, and pieces of candy taken collectively do not constitute a unique work nor are they considered the work. The Foundation refers to this material as "individual pieces of candy from a manifestation of [title and date of work] from [exhibition details, when known].)"
- Regardless of how the work may vary with each manifestation and throughout the course of each manifestation, each element of the work's caption remains consistent, including the precise wording and punctuation of the title (including placement of quotation marks and parentheses), the date of the work, the specified medium and description of dimensions.
- Candy works are accompanied by Certificates of Authenticity and Ownership.

124. KEE, *supra* note 13, at 215. *See also Core Tenets*, *supra* note 117.

125. *Core Tenets*, *supra* note 117. The owner is requested to "use discretion in accepting or rejecting the loan of the work for exhibitions, prioritizing exhibitions . . . and borrowers who understand that by borrowing the work, they are taking on rights and responsibilities to engage with the work and understand the works ability to shift over time."

126. KEE, *supra* note 13, at 224–25.

127. *Core Tenets*, *supra* note 117. Even the language in the Certificates of Authenticity and Ownership may change over time to "reflect nuanced understanding of the work and how language evolves in its ability to articulate ideas."

reproduction was only possible with a reciprocal promise from the owner to use "utmost care" in upholding the integrity of the work.[128]

None of these extra obligations attached to works affect how other artists can interact with the works. Other artists draw inspiration from or create homages to Felix Gonzalez-Torres and his work without committing copyright infringement.[129] The Foundation established in his name also actively invites the public to participate in manifestations of his work to further explore its meaning.[130] Gonzalez-Torres himself never hesitated to reference the work of his contemporaries when it was appropriate. His artistic dialogue with other artists is attuned to the values of copyright. A beautiful homage to Roni Horn—created after viewing an exhibit of her work with his partner Ross, by then ill with AIDS—references Horn's work (which is itself a response to Emily Dickinson's poetry) to make a statement about the nature of artistic inspiration and to gently poke fun at the supposed ideals of minimalism.[131]

Horn's *Gold Fieldnone* consists of a gold square of foil displayed alone on the floor of an empty room.[132] It was part of a project interpreting the poetry of Emily Dickinson.[133] The particular work references Dickinson's poem 14: "Some things that stay there be—Grief, hills, eternity."[134] Gonzalez-Torres's response was *Untitled (Placebo—*

128. *Id.*

129. See for instance a recently mounted exhibit "linking scent and shame in an absolution ceremony involving a scent pillory" in a New York City gallery by the artist Maxwell Williams. In addition to the performance, visitors are invited to partake in Williams' Untitled (for Felix Gonzalez-Torres) "consist[ing] of hand-made scented soaps for visitors to take home (as long as supply lasts)." (invitation on file with the author); *see also* Maxwell Williams, *CNC Musk Factory*, OLFACTORY ART KELLER, https://www.olfactoryartkeller.com/exhibitions/cnc-musk-factory (last visited Aug. 7, 2022) [https://perma.cc/6HN6-Q8KL]. Given that Gonzalez-Torres and the Foundation rely primarily if not exclusively on certificates of ownership rather than copyright registration to protect the manifestations of the artist's work it is unlikely that a claim based on copyright infringement would be asserted against Williams.

130. Felix Gonzalez-Torres, *"Untitled" (Fortune Cookie Corner), 1990*, THE FELIX GONZALEZ-TORRES FOUND., https://www.felixgonzalez-torresfoundation.org/exhibitions/felix-gonzalez-torres-untitled-fortune-cookie-corner-1990-fortune-cookies-endless-supply-overall-dimensions-vary-with-installation-original-installation-approximately-10-000-fortune-cookies/press-release [https://perma.cc/HL2L-HVLJ].

131. *See* Felix Gonzalez-Torres, *1990: L.A., The Gold Field*, *in* RONI HORN: EARTH GROWS THICK 65, 65–69 (Ann Bremmer ed., 1996) https://www.felixgonzalez-torresfoundation.org/attachment/en/5b844b306aa72cea5f8b4567/DownloadableItem/5ec823df5fc138f119efccb3 [https://perma.cc/R7HJ-LG4F].

132. *Id.*

133. Lucy Raven, *Felix Gonzalez-Torres and Roni Horn*, BOMB (July 1, 2015), https://bombmagazine.org/articles/felix-gonzalez-torres-and-roni-horn/ [https://perma.cc/WGK8-QAX7].

134. *Id.*

Landscape for Roni).[135] The work mentions Horn by name and alludes to her work—which Gonzales-Torres described as "a new landscape, a possible horizon . . . waiting for the right viewer willing and needing to be moved to a place of the imagination"—via the mountain of gold-foil wrapped candies spilled in the gallery.[136] As with other of the artists' Candy works viewers are invited to take the sweets, and they are replenished each evening—in this instance with the effect that the mound "shrink[s] and swell[s] in defiance of the supposed monumentality and nonrepresentational ideals of Minimalism."[137]

VI. DEATH, DECAY AND DEACCESSIONING

On the other end of the emotional spectrum, in September of 2020 an anonymous donor gifted Maurizio Cattelan's *Comedian* to the Guggenheim Museum in New York.[138] The work consists of a banana duct taped to the wall.[139] It was first shown at Art Basel Miami and has been sold three times for prices between $120,000 and $150,000.[140] Upon acquiring the artwork, the new owner does not receive a banana nor a roll of duct tape, but rather a certificate of authenticity and a document specifying how the banana is to be installed and how often it should be replaced (every 7 to 10 days).[141] This specification in the certificate—similar to the requirement in Felix Gonzalez-Torres's certificates that owners replenish Candy works periodically—brings into focus the issue of deterioration of artworks. Some conceptual artworks are meant to have very short lives indeed. Some have questioned why if anyone can duct tape a banana to a wall, or spill candy in a corner, art collectors should pay hundreds of thousands of dollars for the privilege,[142] and the decay issue is in some ways a version of the same question. Does the fact that

135. *Id.*

136. *Id.*

137. *Id.*

138. Graham Bowley, *It's a Banana. It's Art. And Now It's the Guggenheim's Problem*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/arts/design/banana-art-guggenheim.html [https://perma.cc/HQB7-CRRA].

139. *Id.*

140. Robin Pogrebin, *Banana Splits: Spoiled by Its Own Success, the $120,000 Fruit is Gone*, N.Y. TIMES (Dec. 18, 2019), https://www.nytimes.com/2019/12/08/arts/design/banana-removed-art-basel.html [https://perma.cc/AL63-5ZBA]. It was also eaten by performance artist David Datuna at Art Basel Miami who pronounced it very delicious. *Art Basel: Maurizio Cattelan's $120,000 Banana Eaten by Artist*, BBC (Dec. 8, 2019), https://www.bbc.com/news/world-us-canada-50704136 [https://perma.cc/35CD-A479].

141. Bowley, *supra* note 138.

142. *See* Kristelia García, *The Emperor's New Copyright*, B.U.L. REV. (forthcoming 2023) (manuscript at 29–31).

the banana in *Comedian* will decay in a week's time mean that the next banana makes it a new work? According to art world practices, and the certificates pertaining to these works, no.[143] Decay is an inevitable part of all art and of life, generally. A Rembrandt is also constantly decaying, and museums have entire departments dedicated to the appropriate conservation and restoration of valuable artworks.[144] If decay and restoration were to invalidate the artist's copyright in a work, then no work would be safe. In both cases the certificate of authenticity and the document describing the method of installation is what realizes and describes the artist's concept, cements the spark of originality, and fixes the work of authorship in a way that allows the work to be legally installed and reinstalled under the authority of the author, consistent with copyright law and art world practices.

Here too the works take something from Duchamp's Readymades legacy. When Duchamp originally bought the urinal for Fountain it was actually paid for (as a urinal from the plumbing supplier J.L. Mott) by Duchamp's art patron and collector Walter Aransberg.[145] The original Fountain was destroyed or lost, and the work has been remade many times over with Duchamp's authorization. Duchamp also confirms that Aransberg was the first one to purchase it as an artwork—making him the first purchaser of Fountain both as art and not art.[146] Fountain's history has a certain resonance here—both because it isn't the specific "original" object that matters so long as the replacement is made with the authorization of the artist, and because it demonstrates the practice of collectors supplying (or replenishing) the materials that comprise the artworks they have purchased. Of course, that practice is nothing new. The very definition of arts patronage has since Aristotle's time embodied not only the active consumption of art, but also the formal support and involvement with artists' efforts.

These examples center the certificates of authenticity and originality used by artists as the means to ensure a concrete understanding of works

143. *See* Rub, *supra* note 84, at 149–50.

144. *See e.g.,* Smithsonian Am. Art Museum, *Lunder Conservation Center*, Smithsonian Am. Art Museum https://americanart.si.edu/art/conservation (last visited Dec. 2, 2022) [https://perma.cc/GG45-64AW]. The Smithsonian American Art Museum even makes its Lunder Conservation Center part of its exhibitions to tourists. Visitors can see conservators at work throughout the laboratories and studios through floor-to-ceiling glass walls, allowing them to view conservation activities that typically take place behind the scenes at other institutions.

145. 27 EDWARD BALL & ROBERT KNAFO, ARTFORUM, THE R. MUTT DOSSIER, (Oct. 1988), https://www.artforum.com/print/198808/the-r-mutt-dossier-34682 [https://perma.cc/XF99-TW73].

146. *See* PIERRE CABANNE, DIALOGUES WITH MARCEL DUCHAMP 55 (Ron Padgett trans., 1971).

so that the artist's and collector's intentions can be realized in the marketplace even when copyright law may present open questions for interpretation and argument. As a marketplace solution controlled by artists, collectors, and their representatives, the primary focus of these documents is to address issues related to the realization of the artworks—not to resolve academic disputes about nuances of copyright law. As a result, the certificates naturally express the personalities and artistic temperaments of the authors of the works they pertain to. This comes out when disputes arise over works as well. Artists have rescinded certificates of originality too. In 1963 Robert Morris created a sculptural work *Litanies* which consists of 27 keys, each inscribed with a word from a text by Marcel Duchamp. Morris sold the work to architect Phillip Johnson but did not receive timely payment.[147] As a result, he typed and had notarized a document which purports to negate the "aesthetic quality and content of the original work."[148] That document was purchased by Johnson and is now displayed as a work of art—*Document*—together with the original—*Litanies*—by the Museum of Modern Art—proving that even legal documents can become art when drafted by the right hands.[149] Whether he knew it or not, by seeking to revoke all aesthetic quality and content he had supplied to the work Morris also created an apt illustration of *Bleistein's* rule of originality, which depends on the stamp of the artist's personality. Morris withdrew his artistic intentions from one object but simultaneously created another art object through the force of his personal imprint on the document. Whether a facsimile of a legal document can rise to the aesthetic level of a facsimile of a Brillo Box is a question for others to ponder.

As we also know from *Bleistien,* commercial advertisements are protectable by copyright.[150] In 1990, minimalist artist Donald Judd placed a quarter page advertisement in the March issue of Art in America—framed in black and printed somberly like an obituary:

> The Fall 1989 show of sculpture at Ace gallery in Los Angeles exhibited an installation wrongly attributed to Donald Judd. Fabrication of the

147. Robert Morris, *Litanies:1963*, The MUSEUM OF MODERN ART, https://www.moma.org/collection/works/81535 (last visited Aug. 7, 2022) [https://perma.cc/H6DK-86EU].

148. *Id.*

149. *Id.*

150. *See* discussion *supra* Section II. They are not protected by VARA, however. *See* discussion *supra* Section III.

> piece was authorized by Giuseppe Panza without the approval or permission of Donald Judd.[151]

The ad concerned a dispute with Judd's longtime collector (with whom he had many disputes) over Panza's authorization without Judd's knowledge and approval of a copy of a Judd work that Panza owned.[152] The work was installed in Panza's villa in Italy, and Panza had "loaned" it to a California gallery by allowing them to fabricate and install a new version of the work in their gallery.[153] This was supposedly done in accord with the directions in the certificate Panza owned, but without the knowledge or approval of Judd.[154] The work consists of a row of uninterrupted, five-foot high, galvanized steel plates installed with hidden brackets to appear to float away from the wall.[155] Like many works of minimalist art, the work relied on industrial materials, simple forms, and repetition because the concept behind the work at least in part requires elimination of the visible hand of the artist.[156] The removal of the artist from view (which can be a distraction in considering the work on its own merits) does not remove the artist from the work, however. To the contrary, it can require greater involvement of the artist to ensure the work is properly executed without manufacturing flaws, installation errors, or other defects that could inject different distractions and unintended meanings into the work.[157] Compliance with the requirements of the certificates, and approval and involvement of the artist or estate, takes on even greater meaning under these circumstances.

A full analysis of Donald Judd's use of certificates and how they influence the understanding and legal status of his work is beyond the scope of this project.[158] It is worth noting at least in passing, however, the

151. 60 CHRISTINE MEHRING, ARTFORUM, GETTING REAL, (Sept. 2021), https://www.artforum.com/print/202107/christine-mehring-on-the-panza-collection-initiative-86323 [https://perma.cc/RD2S-KUQU].

152. *Id.*

153. *See* MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 41–42 (2005).

154. *Id.*

155. *Id.* at 37.

156. *See id.* at 38.

157. *See* MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 1–2 (2005).

158. Judd's disputes with Guiseppe Panza ultimately led the Guggenheim to conduct a lengthy evaluation of their holdings donated by Panza. *The Panza Collection Initiative*, GUGGENHEIM, https://www.guggenheim.org/conservation/the-panza-collection-initiative (last visited Nov. 30, 2022) [https://perma.cc/C9QY-9TQR]. The study was directed to the thorough investigation of "the terms and conditions that govern the production, ownership and display of individual works of art. Chief considerations included an object's materials and means of fabrication; its replication over time (authorized and unauthorized); the changing parameters for its installation, from site to site; and the proliferation of contracts, certificates, working drawings, and other documents devised to support its authenticity through strict rules of ownership, fabrication and display." *Id.*

difference in treatment the Robert Morris and the Donald Judd statements withdrawing rights from the respective works have received in the art world if not the copyright world. The withdrawal of "aesthetic intentions" by Robert Morris is displayed in a major museum as an artwork even though it is a notarized legal document to which no aesthetic intentions have been overtly added—or have they? In contrast, Judd's advertisement was treated by the art world simply as a legal notice, despite the fact that advertisements (particularly ones created by artists) *do* enjoy copyright protection. Moreover, the aesthetic of the advertisement was wholly consistent with Judd's minimalist ethos, and its graphic design was likely intentional, which we cannot say for sure with respect to *Document* since it looks like an ordinary legal document.

What accounts for this difference in treatment that is directly the opposite of what we might expect given the aesthetic characteristics of the two documents? Bringing our contemplation of copyright conundrums full circle: to the art world Morris's document was a withdrawal of "aesthetic intentions" and thus only returned the keys in Litanies to their previous state as "not art." That did not necessarily make them a forgery.[159] Instead, the legal document, displayed together with Litanies adds another layer of conceptual intent for the art world to contemplate and have fun with. It is art upon non-art that was once art, but is no longer, having been returned to its original state by the "legal document" (which is art). Got it?

In contrast, the Judd announcement is a renouncement of all authorship.[160] The work is dead. In effect, a forgery.[161] His form may be minimalist, but its function is absolute. There is nothing left to contemplate. No former non-art life to return to. The obit-style of the announcement itself seems to say, "touch this work, and you are dead to Donald Judd."

For copyright lawyers, however, these remain distinctions without a difference. If we are prepared to recognize a conceptual artwork based on the Readymades concept like Morris's *Litanies* at all, it is because Morris has imbued the 27 keys with an aesthetic message and content that we can recognize as his protectable expression. If he withdraws that aesthetic content, the work is no longer an original expression, fixed in a tangible

159. BUSKIRK, *supra* note 157, at 2.

160. *Id.*

161. *See* Rub, *supra* note 84, at 1183–84, noting that art world norms would preclude a gallery from installing a work of conceptual art displayed elsewhere without the artist's permission.

medium—it is merely a utilitarian object without any expression.[162] Similarly, with respect to Judd: if we accept that his certificates have any validity in the first place, his announcement that the work was fabricated by Panza without Judd's approval means it was not "fixed by or under the authority of the author." This literally means the work was never "created" as a matter of copyright law, and therefore it is also not an original expression, fixed in a tangible medium.

In the end, Certificates of Authenticity and Originality are intended to avoid disputes with collectors. The Guggenheim study of the Panza collection suggests that Judd did not originally begin to manifest and sell his works to collectors using certificates, and that Guiseppe Panza was the originator, and that his representatives were the drafters of some of the documents surrounding the disputed works.[163] Perhaps artists are better at drafting legal documents than lawyers are at describing how to make art. Regarding Morris's work—the dispute over the money owed for *Litanies* was resolved amicably in the end, and both *Document* and *Litanies* were paid for and acquired by Phillip Johnson.

It remains to be seen whether Felix Gonzalez-Torres's more collaborative approach to collectors will result in fewer disputes than other approaches. For my part I hope so. Then maybe we can all learn to relax and love the art (not the candy).

162. That Morris believes he can withdraw his "intentions" may doom the project in any event by suggesting that the work is in fact insufficiently fixed, despite its physical form.

163. *See Donald Judd*, GUGGENHEIM, https://www.guggenheim.org/conservation/the-panza-collection-initiative/donald-judd (last visited Jan. 22, 2023) [https://perma.cc/SP52-D2WV].