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PERMISSIVE CERTIFICATES: COLLECTORS OF ART AS COLLECTORS OF PERMISSIONS

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INTRODUCTION

He intended to invest in paper.

- Donald Judd on Count Giuseppe Panza¹

In 1990, Donald Judd authored an unrelenting four part polemic against Giuseppe Panza, then one of the world's foremost collectors of minimalist and conceptual art. The essay, *Una stanza per Panza*, opened with a short, declarative first sentence: "Giuseppe Panza makes my work himself, contrary to the original agreement that it be made only under my supervision."

Given the thirty-plus pages of invective that follow (Judd launches into an extended comparison of Panza to Richard Nixon one paragraph later) a reader could be excused for breezing by this sober opening statement of the case. Judd, it seems, is establishing some factual context to motivate the argument to come. He, a renowned artist late in his career, is angry at a collector of his works, Panza, because Panza did not follow an agreement to make Judd's art a certain way.

If one pauses to consider that initial description at length, however, it becomes increasingly provocative. At a minimum, it raises a range of questions centering around its passing reference to an "original agreement." How could a collector (that is, an art buyer) ever make an artist's work in the artist's name? What "original agreement" is Judd alluding to that could delegate such a power? Did Judd consent to this arrangement? If not, how could it be enforceable? If so, what motivated the artist to cede the right to create artwork in his name in the first place? Perhaps most perplexing of all to a lawyer, if Panza's fabrication of Judd's works was indeed "contrary" to an agreement, why didn't Judd sue to enforce its terms rather than attack

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¹ Donald Judd, *Una stanza per Panza*, in DONALD JUDD WRITINGS 630, 643 (Flavin Judd & Caitlin Murray eds., 2016) [hereinafter Judd, *Una stanza*].

Panza through polemical essays and paid advertisements in art magazines?²

As it happens, Judd along with many other leading figures in post-1960s American art did execute agreements, often labeled Certificate or Certificate of Authenticity, with Panza and other collectors.³ Detailed at length below, such documents (what this article will call “Permissive Certificates”) generally served a dual function. On the one hand, they resembled plans or blueprints instructing the collector how to fabricate and install the subject artwork. Indeed, at the time of purchase by Panza many of these artworks had never previously been fabricated and only existed in the form of such plans.⁴ On the other hand, these documents (akin to traditional certificates of authenticity familiar to collectors of high-value objects of any kind) purported to authenticate or warrant the subject works as genuine.

It should perhaps not come as a surprise that this nascent practice of creating, authorizing, and prospectively authenticating artworks solely through legal documents led almost immediately to a parade of disputes that continues to this day. The Guggenheim Museum, for instance, purportedly “knew” that it was attaining a “mare’s nest of problems” when it acquired hundreds of works (including many unfabricated Judd certificates and diagrams) from the Panza collection in the 1990’s.⁵ The extent of these problems eventually forced it to create its “Panza Collection Initiative.” That initiative, tasked with studying ethical, legal and conservational questions concerning conceptual and minimalist artworks, has since received over \$3 million in grant funding to reckon with art that exists as much on paper as it does in object form.⁶

While Judd’s anger over Panza’s alleged wrongful treatment and fabrication of his works is surely the most prominent dispute concerning certificate-based art, it is hardly the only example. Just this past year, for instance, a clash arose regarding a Sol LeWitt wall drawing.⁷ Akin to many

² See ART IN AMERICA 128 (March, 1990) (showing quarter-page advertisement that Judd took out to renounce authorship of works refabricated by Panza in Judd’s name for an exhibit in Los Angeles).

³ See generally, Martha Buskirk, *Public Experience/Private Authority*, 26 CORNELL J.L. & PUB. POL’Y 469, 471–76 (2017) (describing collecting practice of Panza with respect to leading U.S. conceptual and minimalist artists).

⁴ *Id.*

⁵ Randy Kennedy, *Tricky Business: Defining Authenticity, Guggenheim Project Confronts Conceptual Art’s Nature*, N.Y. TIMES, December 20, 2013.

⁶ *Id.*; and see <https://news.artnet.com/art-world/guggenheim-museum-gets-750k-mellon-grant-1339031> (announcing an additional \$750,000 in funding for the third phase of this initiative).

⁷ See, e.g., Paula Newton, *Disappeared Sol LeWitt Painting Slowly Reappears in Houston Home*, GLASSTIRE (Jan. 6, 2018), <http://glasstire.com/2018/01/09/disappeared-sol-lewitt-painting-slowly-reappears-in-houston-home/>; Dan Singer, *The Unerasing, SWAMPLLOT* (Jan. 5, 2018), available at <http://swamplot.com/how-the-30-ft-tall-ghost-of-a->

artworks in the Panza collection, LeWitt's work was often memorialized and transferred only in certificate and diagram form.⁸

When the Menil Collection attained the work, by taking title to the underlying certificates, it dutifully had the original wall-drawing (located on a wall in a private residence) painted over pursuant to LeWitt's recognized intention for transfer of his works.⁹ The successor owner of the residence, however, had different ideas and later decided to "un-erase" and reexpose the original wall-drawing by having the added layer of sheetrock mud removed.¹⁰ The ensuing outcry was so thorough that a local art blogger was pressured to issue a correction for even alluding to the original (re-exposed) painted wall as "a LeWitt."¹¹ A successor owner of a Certificate of Authenticity for a LeWitt wall-drawing, in other words, persuaded a third-party commentator to retract her reference to LeWitt's authorship of the original painted mural despite the fact that no one disputes that he created it. On what grounds? The certificate had since changed hands.¹²

sol-lewitt-drawing-is-slowly-reappearing-in-houstons-museum-district/2018-01-05/. See also Julia Halperin, *One Texas Woman's Paradoxical and Controversial Quest to Prove She Rediscovered a Major Work of Conceptual Art*, ARTNET NEWS (Jan. 18, 2018), <https://news.artnet.com/art-world/sol-lewitt-drawing-menil-texas-1201514>.

⁸ Specifically, LeWitt's wall drawings are generally memorialized in the form of transferable certificates, accompanied by an illustrated diagram, instructing an owner how to recreate the work anew each time it is (re)installed. See generally, Peter J. Karol, *The Threat of Termination in A Dematerialized Art Market*, 64 J. COPYRIGHT SOC'Y U.S.A. 187, 187-90 and Appendix A and B (Spring 2017) [hereinafter Karol, *Termination*] (describing same in detail).

⁹ Singer, *supra*. n. 7.

¹⁰ There is even a website for the "un-erasing" project itself: <http://unerasingsollewitt.com/index.html>.

¹¹ Paula Newton, *UPDATE: Why "Unerasing" a Sol LeWitt is Impossible*, GLASTIRE (Jan. 11, 2018), <http://glasstire.com/2018/01/11/update-why-unerasing-a-sol-lewitt-is-impossible/>.

¹² *Id.* This LeWitt example closely parallels a prior dispute involving the British artist Damien Hirst. In 1988, as an early example of his "spot painting" series, Hirst painted a series of bright, multi-colored spots directly onto a wall in a London home. See generally, Ben Bryant and Robert Mendick, *Spot of Bother over Damien Hirst Wall Art Painting*, THE TELEGRAPH (July 12, 2014), <https://www.telegraph.co.uk/culture/art/10963754/Spot-of-bother-over-Damien-Hirst-wall-art-painting.html> [hereinafter Spot of Bother]. At the same time, he created a handwritten "Certificate of Authenticity" for the work (known as "Bombay Mix") which specifically required that "this piece must be painted out before it is re-made for anywhere else." When the original home owner sold the home and moved, Hirst allegedly painted a new version of Bombay Mix on canvas for the original owner to take with him pursuant to the instructions in the certificate. For whatever reason, however, the original wall was never over-painted and the new home owners (aware of the value of Hirst spot paintings), later had the section of wall professionally removed and remounted in preparation for sale. Hirst's attorneys sent a cease and desist letter to the new home owners, demanding that they destroy the work and not refer to it as a Hirst. By all accounts,

Art historians, artists, cultural critics, economists, and philosophers of art have spent decades unpacking or critiquing the aesthetic and pecuniary paradoxes underlying these Permissive Certificates.¹³ This article, by contrast, takes a narrower approach. Namely, it studies these documents solely and simply as legal instruments, trying to understand them as focal points of legal as opposed to aesthetic value.

I am aware that this will immediately strike some readers as a tedious way of approaching stirring and original artworks. I do so, however, for two reasons. First, I hope to show that Permissive Certificates are not just documents of art historical interest. They also function as highly complex (and equally paradoxical) legal devices defining valuable legal rights. If the early Permissive Certificates of conceptual art captured (as art historian Benjamin Buchloh put it) an “aesthetic of linguistic conventions and legalistic arrangements,” this article intends to show that those latter arrangements were, and still are, real ones.¹⁴

More specifically, their legal function is twofold. As their name suggests, they initially warrant that the named artist created the conceptual

Hirst’s actions made the wall-drawing unsellable even though no one appeared to dispute that Hirst personally created the original mural, and the new homeowners legally possessed good title to the piece of wall as part of their purchase of the home. As summed up by the gallerist trying to sell the original Bombay Mix painted wall surface, “I am essentially not allowed to say that I have a picture by the artist that is actually by the artist.” *Id.*

¹³ For a few such perspectives, see MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* (2003); Benjamin Buchloh, *Conceptual Art 1962-1969: From the Aesthetic of Administration to the Critique of Institutions*, *OCTOBER* 55 (Winter 1990), in *OCTOBER: THE SECOND DECADE, 1986-1996*, 117-155 (MIT 1997) [hereinafter Buchloh] (surveying a history of the Conceptual Art movement); Laura A. Heymann, *Dialogues of Authenticity*, 58 *STUD. L. POL. & SOC’Y* 25 (2015) [hereinafter Heymann, *Dialogues*] (exploring questions of authorship and authenticity in the context of certificate-based and other artworks); NICOLAS BOURRIAUD, *RELATIONAL AESTHETICS* (Simon Pleasance & Fronza Woods, trans., 2002) [hereinafter BOURRIAUD, *Relational Aesthetics*] (essays on the works of Gonzalez-Torres and others). For artist statements on the subject, see, for example., Sol LeWitt, *Paragraphs on Conceptual Art*, *ARTFORUM* (June 1967); Judd, *Una stanza*, *supra* n. 1 (lamenting mistreatment of Judd’s certificate-based works by collector Giuseppe Panza). For an aesthetic philosopher’s account of certificate-based and related art, see: K.E. GROVER, *ART AND AUTHORITY* 165-173 (2018) [hereinafter, GROVER, *Authority*]. For market-based discussions see, e.g., NOAH HOROWITZ, *ART OF THE DEAL: CONTEMPORARY ART IN A GLOBAL FINANCIAL MARKET* 87-142 (2014) (describing market for what he calls experiential art”) [hereinafter HOROWITZ, *Art*]; DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 14-15 (2008) (commenting on pricing of works by Gonzalez-Torres and others). Most of the certificates discussed in this article may be found in the catalog for a seminal show on the subject, which contains a range of essays on certificates. See generally, SUSAN HAPGOOD AND CORNELIA LAUF, *IN DEED: CERTIFICATES OF AUTHENTICITY IN ART* (2011) (Hereinafter *In Deed Catalog*).

¹⁴ Buchloh, *supra* n. 13, at 131.

content of the underlying work. In this regard, they parallel traditional fine art certificates of authenticity, though with important differences detailed below. Their other (underappreciated) legal function, however, is not to promise retrospective authentication but rather to grant prospective permissions. They grant, that is, the owner of the documents the right to realize an artwork and label it as a work by the artist if the work remains materially unaltered from its original plan. As such, they are essentially copyright licenses coupled with a right of source association.

Critically, as with all copyright and source-based permissions, they are generally conditioned on the owner/licensee complying with use guidelines. Material variations from such terms place the owner/licensee outside the scope of the license, or otherwise in breach of its conditions, and therefore at risk of claims of infringement by the artist.¹⁵

This takes me to the second goal of this article. Namely, I hope to show that Permissive Certificates harbor an unappreciated power to be an effective tool for artist control, particularly in jurisdictions such as the U.S. where moral rights remain relatively weak. They could serve as something of a super-moral-right to artists inclined to use them in this way. To be clear, I do not intend in this piece to make a normative case for giving artists and their representatives more control over sold works. Rather, I mean only to show that these certificates exist as an available, alternative and potent source of legal rights for artists and artist estates, for better or worse.

Part I of this article will chronologically survey exemplary uses of Permissive Certificates in conceptual, post-representational, and new media art.¹⁶ The final section of this part will reveal and explain a central legal paradox behind all of the foregoing certificates. Namely, traditional certificates of authenticity function retrospectively by making a factual claim about a particular object that exists in history. Permissive Certificates, however, purport to certify the authenticity of (i.e., make a factual claim about) something not yet in existence, prospectively.

Part II of this article seeks to resolve this paradox by arguing that these

¹⁵ See *infra* Part II.

¹⁶ References to “conceptual, post-representational and new media art” are meant broadly to encompass any artistic practice including reproducible components or that is in any degree recreated anew for each realization or exhibition. I do not mean to refer to “Conceptual Art” in the limited sense by which that (controversial) term might be understood as a specific and time-bracketed art-historical moment. My use of the term includes for instance artists, such as Josh Kline, whose work includes 3D-printable components meant to be recreated each time the work is shown, video or digital artists, classic conceptualists like Sol LeWitt, and post-representational contemporary artists such as Rikrit Tiravanijia. Due to space constraints, the artists discussed throughout are simply representative examples of the countless practitioners in these spaces.

documents are not unitary instruments, but rather an amalgamation of two distinct legal structures. In particular, they couple retrospective and more or less traditional, if narrow, warranties on the one hand with copyright licenses and prospective rights of source authentication on the other. It begins by analyzing traditional certificates of authenticity in fine art, showing how Permissive Certificates still perform a typical authentication function though in the limited sense that the artist is warranting creation of the underlying content of the work and not a particular tangible object. It next provides an overview the U.S. law of non-patent IP licensing, including basic questions of contract formation and enforceability as well as quasi-licensing doctrines such as the first-sale exceptions in trademark and right of publicity law.

The next section of this part applies these foregoing legal structures to two representative examples of actual Permissive Certificates. It demonstrates, under U.S. law, how they are structured as copyright licenses coupled with basic rights of source association (arising primarily from first sale rights).

Part III explores the implications of the conclusions in Part II. It approaches the question from two perspectives. First, it takes a practical approach and shows how Permissive Certificates can function as a potent tool for artists to exert legal control over works they sold long ago (significantly beyond the limited protections offered by U.S. moral rights regimes such as VARA). Second, it steps back and reflects more generally on what this might mean for artists and collectors of art as we move into the middle of the 21st century. It argues that as art becomes increasingly more dematerialized, digitized, and recreateable, and ever more legalized in turn, Permissive Certificates will grow more and more into the locus of value for such works. Over the long run, museums and other collectors of fine art will become collectors of permissions.

I. PERMISSIVE CERTIFICATES IN CONCEPTUAL, POST-REPRESENTATIONAL AND NEW MEDIA ART

By 2011, certificates of authenticity containing both instructional and authenticating components, what this article is calling Permissive Certificates,¹⁷ had become prolific enough to warrant their own traveling

¹⁷ I mean to exclude from this definition artworks or art practices that purport to create or define legal rights as a component of the work itself. For instance, *Donorcard* (2005) by the artist Carey Young consists of a series of small business-card-sized cards, resembling organ donor cards, signed by Young. *In Deed Catalog*, *supra* n. 13, at 71. The cards, given away to viewers, read:

In consideration of the donation of this card to me by the Artist, I hereby agree that this object will only become an artwork by her upon the inclusion of my signature, and that it

exhibition. A quick flip through the catalog for the show, entitled *In Deed: Certificates of Authenticity in Contemporary Art*, reveals the wide range of practices and sheer number of different artists who have created art by use of certificates over the last five or so decades.¹⁸

The genesis of this practice, however, summarized recently by the art historian Martha Buskirk, came as much from the demands of collectors as from the creativity of artists. Giuseppe Panza, in particular, was focused on finding ways to memorialize his ownership of conceptual works that he was increasingly acquiring in the late 1960s and early 1970s solely in the form of paper permissions. As Buskirk describes, “[T]he documents that appear in Panza’s files were clearly instigated by the collector rather than by the artist with Panza wanting evidence of ownership not only for pieces purchased as objects, but far more urgently, for a number acquired in the form of plans for future works.”¹⁹ Indeed, Judd was himself at best ambiguous about his early certificate practices, and arguably adopted the form at the behest of Panza.²⁰

Judd essentially confirms this in his *Una Stanza* essay, where he laments of his early certificates that they were the creation of Panza in collaboration with Judd’s former gallerist, the legendary Leo Castelli, and lawyers that did not represent Judd’s interests.²¹ Be that as it may, Judd’s early certificates still form paradigmatic examples of how early American conceptual and minimalist artists created and sold works in the form of paper permissions.²²

will retain its status as an artwork solely for the duration of the Artist’s life, or my life, whichever is the shorter.

This is followed by a countersignature block meant to be signed by the viewer. Young is (captivatingly) using the language and conventions of law to create art. The cards are not, though, certifying the authenticity of a separate work. The cards are thus not Permissive Certificates as I am using that term.

¹⁸ *In Deed Catalog*, supra n. 13.

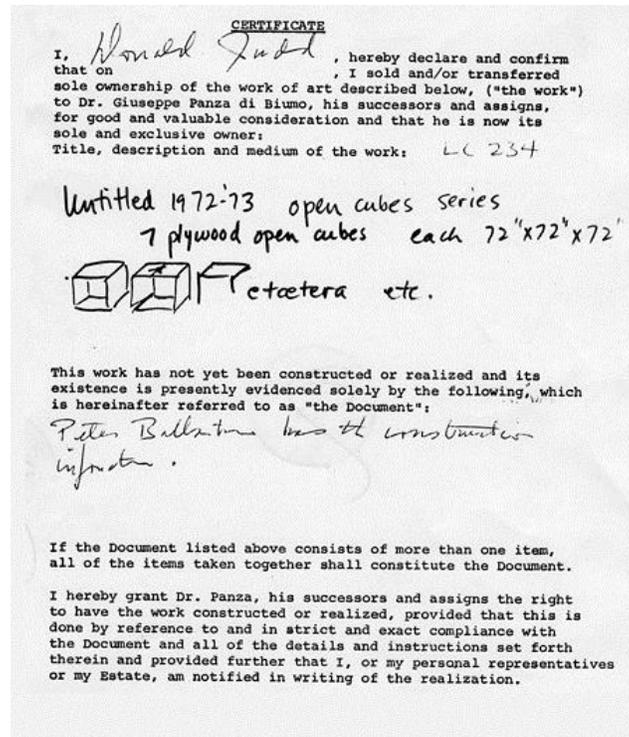
¹⁹ Buskirk, *Private experience*, supra n. 3, at 472.

²⁰ *Id.*

²¹ For instance, “It’s important to say that all arrangements with Panza were made by Castelli and his lawyer, not mine.” Judd, *Una stanza*, supra n. 1, at 11.

²² This practice should be distinguished at the outset from two similar modes of art creation, the outsourcing of fabrication by sculptors and the commissioning of works through the use of contracts. It has, of course, long been a common practice of sculptors to have professional foundries create casts of works under his/her oversight or with his/her authorization using molds created by the artist. See Sharon Hecker, *The Afterlife of Sculptures: Posthumous Casts and the Case of Medardo Rosso (1858–1928)*, 3 JOURNAL OF ART HISTORIOGRAPHY (June 2017) (discussing same). That practice, however, assumes oversight and involvement by the artist, and often is anchored by a physical mold created by the artist him or herself. *Id.* This is different from Permissive Certificates which in their purest form can involve the transfer of documentation without any associated objects and, at times, without even continuing oversight by the artist. Similarly, the common

A. Early Permissive Certificates



In 1970, in an early example of conceptual certification practice, Donald Judd issued Panza a certificate for a work that had not yet been “constructed or realized,” known as *Untitled [Seven plywood boxes: open back]*. The document, now part of the Guggenheim’s Panza collection, is simply entitled, “Certificate.” It “confirm[s]” Panza as the “sole and exclusive owner” of the “work of art described” on the document, and further that Judd personally “sold and/or transferred” him the work. It thereby serves a basic authentication function by confirming a provenance directly from the named artist.²³

But the remaining portion of the one-page certificate says nothing about authenticity or ownership. Rather, it becomes an instrument of instruction

practice of creating works on commission will often involve a contract between artist and buyer. *See, e.g.,* *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988) (describing contract between Richard Serra and the U.S. Government in the famous Titled Arc dispute). In such cases, the artist is generally directly involved in creation and initial delivery of a physical art object, though disputes often arise thereafter. *Id.*

²³ Judd Certificate for *Untitled [Seven plywood boxes, open back]*, [hereinafter JuddCertificate] available at <https://www.guggenheim.org/conservation/the-panza-collection-initiative/donald-judd>.

and control. First, the document offers a hand-drawn sketch plan of the work-to-be-realized.²⁴ In highly technical legal language, it then effectively authorizes Panza (or his successors)

the right to have the work constructed or realized, provided that this is done by reference to and in strict and exact compliance with the Document and all of the details and instructions set forth therein and provided further [that Judd is notified accordingly].²⁵

As detailed below, this language is prototypical of an intellectual property license.²⁶ The putative owner of an intangible legal interest (Judd) is permitting an authorized party (Panza) to use that legal interest. The right is then made expressly subject to various limitations. This has strayed far afield from the realm of retrospective authentication and entered the arena of prospective permission and post-sale control.²⁷

Many other artists working in conceptual and performance-based practices throughout the 1970s were active users of certificates, generally tasking them to serve dual roles as a form of authentication and guide for installation. Sol LeWitt's well-known form of certificate for his wall drawings (referenced above in the Menil Collection dispute) described and illustrated parameters of the work that LeWitt intended for the purchaser to recreate on a wall of the purchaser's choosing.²⁸

Dan Flavin used certificates drawn and typed on graph paper in much the same fashion to both authenticate and inform a purchaser how to recreate his neon light installations.²⁹ Gordon Matta Clark, best known for his dramatic and performative "cuts" of actual buildings, created a "Certificate of Authenticity and Ownership" for a planned cut of his home in 1976.³⁰ That document first "certifies" (in the present tense) "the work

²⁴ The document further cross-references other "construction information" in the possession of Peter Ballantine, a longtime fabricator of Judd's works. *Id.*

²⁵ *Id.* "Document" is a defined term and includes the extrinsic construction information in Ballantine's possession, referenced above.

²⁶ See *infra* Part II(B).

²⁷ In later writings, Judd excoriated Panza for unilaterally recreating and installing the subject works without Judd's involvement. See Judd, *Una stanza*, *supra* n. 1, at 646–47 ("Panza ignored instructions over and over and made my work himself. He never asked about an installation; he just did it. Is it interesting now, or in a century, to see Panza's construction of my work or his version of its installation? It's better that the work doesn't exist than be wrong. It's not made to be wrong.").

²⁸ See, generally, Karol Termination, *supra* n. 1, at 187–90 and Appendix A and B.

²⁹ *In Deed Catalog*, *supra* n. 13, at 20 (Showing certificate for *Untitled (1970)*). Although Flavin's certificates are particularly sparse, even he makes gestures at artistic control by noting: "This is a certificate only. It is not a drawing of mine." *Id.*

³⁰ *Id.* at 37.

described here” as “authentic.” But it then goes on to detail the planned work in the future tense (“the artist home *to be* cut into two foot sections”) and makes clear that the certificate was created “before the completed project date”.³¹

Unlike Judd’s certificate for Panza, neither LeWitt’s, Flavin’s nor Matta Clark’s certificates make express contractual demands on their owners concerning fabrication or performance of the work. Nevertheless, they generally mandate, in some combination, that the certifying document (i) shall itself not be considered the artwork, (ii) may not be reproduced, and/or (iii) must accompany the work if transferred.³²

B. *Later Permissive Certificates (1980s and 90s)*

By the late 1980’s, these early forays by Judd, LeWitt, Matta Clark, Flavin and others crystallized into certifying instruments that purport to control as much as they authenticate and instruct. Felix Gonzalez-Torres, for example, began creating multi-page, legalistic certificates of authenticity for his ephemeral candy spills and paper stacks. He continued this practice throughout the early nineties until his tragically early death in 1996, after which point his estate and subsequent Foundation took over issuing (and reissuing) them for works created during his lifetime.³³

Take Gonzalez-Torres’ *Untitled (1989/90)*, a work consisting of “endless copies” of two of stacks of printed paper, each about 26 inches high.³⁴ The work consists of two stacks of paper printed anew for each exhibition. The text on one stack reads, “Somewhere better than this place.” The other, “Nowhere better than this place.” Gonzalez-Torres’ Estate and Gallery posthumously issued the works’ accompanying “Certificate of Authenticity and Ownership” in 2002 to a buyer that countersigned it like

³¹ *Id.* (emphasis added).

³² See, e.g., Karol, *Termination*, *supra* n. 8, at Appendix B (“This Certification is the signature for the wall drawing and must accompany the wall drawing if it is sold or otherwise transferred.”) and *id.*, at Diagram (“This is a diagram but is not a certificate or a drawing”); Flavin Certificate, *In Deed Catalog*, *supra* n. 13, at 20 (“This is a certificate only. It is not a drawing of mine.”); Matta Clark Certificate, *id.* at 37 (“This document . . . shall at no time be reproduced as a work. . . . Any work . . . shall be considered fake and of no commercial value unless accompanied by this signed document. . . . No duplicates or replacements of this document will be made at any time.”).

³³ See Joan Kee, *Felix Gonzalez-Torres on Contracts*, 26 CORNELL J. L. & PUB. POL’Y 517, 518 (Spring 2017) [hereinafter Kee, *Felix Gonzalez-Torres*]. As Kee explains, Gonzalez-Torres’ own certificate-issuing practices evolved over time with later certificates being issued by his estate after his death.

³⁴ The complete certificate to *Untitled (1989/90)* maybe be found at Appendix A of 26 CORNELL J. L. & PUB. POL’Y (2017) [hereinafter *Untitled (1989/90) Certificate*].

any bilateral contract.³⁵ The certificate expressly grants the new owner the “right to reprint sheets from the stacks at any time for the purposes of recreating or regenerating the stacks.”

The intention of the piece, and the reason why reprinting is so essential to its actualization, is that “third parties may take individual sheets from the stack.”³⁶ In other words, viewers are invited to take away individual sheets from each installation of the work, thus creating a participatory and interactive element of the work.³⁷

Even more so than the Judd certificate, the six single-spaced pages of the ownership document consist of language designed to simultaneously guide and limit the owner’s use and resale of the work. The terms range from technical suggestions (a recommended typeface and font size for the text) to dense and strict restrictions on resale (including, most prominently, a right of first refusal on behalf of the Andrea Rosen Gallery and Felix Gonzalez-Torres Foundation).³⁸ The document goes so far as to purport to restrict non-parties’ (i.e., the museum-going public’s) rights in the take-away copies by asserting that “no one owning a single sheet taken away at an exhibition has the right to reprint, publish or otherwise commercially use the sheet.”³⁹

The primary purpose of issuing these certificates was “to reassure owners who found it difficult to see how an idea could be a unique work of art.”⁴⁰ That is, buyers of conceptual works demanded something palpable that could serve as the locus of value for the piece. Just as Panza, the early conceptual collector, pushed artists to create his certificates, buyers of Gonzalez-Torres works required documentation of their purchases.⁴¹

Despite (or perhaps because of) these restrictions, the right to reproduce

³⁵ A bilateral, as opposed to a unilateral, contract is one in which each party promises a performance to the other. BLACK’S LAW DICTIONARY (10th ed. 2014) (definition of “Contract, Bilateral”).

³⁶ *Untitled (1989/90) Certificate*, *supra* n. 34.

³⁷ To that end, this author took away a pair of sheets from an installation of *Untitled (1989/90)* in Miami, which remain in his office.

³⁸ *Id.*

³⁹ It is difficult to imagine how such a quasi-contractual restriction could be enforced against a visitor that has taken away a sheet of paper, as the certificate is never shown to (let alone signed by) the museum-going public. In fact, the Felix Gonzalez-Torres Foundation refused to allow a certificate to be included in the *In Deed* show, effectively blocking the public from being aware of its terms. *See In Deed Catalog*, *supra* n. 13, at 25 (reprinting email of denial).

⁴⁰ Kee, *Felix Gonzalez-Torres*, *supra* n. 33 at 522–23.

⁴¹ Buskirk, *Public Experience*, *supra* n. 3, at 472 (“the documents that appear in Panza’s files were clearly instigated by the collector rather than by the artist—with Panza wanting evidence of ownership not only for pieces purchased as objects, but far more urgently, for a number acquired in the form of plans for future works.”)

Gonzalez-Torres' paper stacks (in the form of these certificates) have sold at auction for \$770,000⁴² and \$1.65 million,⁴³ respectively, with his equally dematerialized candy piles having sold for ten times that amount.⁴⁴

C. Permissive Certificates after 2000

Certificates with express artist control provisions have all but become an industry custom for artworks with a conceptual or reproducible component in the present day. To take one representative example, Cerith Wyn Evans' *With the advent of Radio Astronomy... (Clear)*, created in 2010, consists of a paragraph of text (73 words long) written by the artist. Like much verbal art, the text is printed in glossy vinyl and affixed to a wall with an adhesive. There is no prescribed dimensions for the piece, however one exhibited version (the work is an edition of 25) was about ½ by 1 ½ meters as mounted.⁴⁵

A collector wishing to purchase a version of *With the advent of Radio Astronomy* from Evans' gallerist, White Cube in London, could attain the piece directly through an online shopping basket from the gallery's website for just over £1,000.⁴⁶ What exactly, though, is the collector attaining for that price? The entire paragraph of text constituting the work is provided on the public website, meaning there is nothing secret about the words themselves. The purchaser receives a CD containing a digital image of the text, as well as "installation instructions," however it is difficult to imagine someone who could not figure out how to print and mount the text on a wall themselves by just looking at the installation shot on the gallery's website.⁴⁷

The true value to the collector of this otherwise easily reproducible work, of course, is the "Certificate of Authenticity" which accompanies the piece.⁴⁸ That document is a quintessential example of certificates in contemporary practice. It satisfies the collector's desire for genuineness in that it clearly and expressly "certifies the authenticity of the above work"

⁴² See Nov. 14, 2012 Sotheby's Auction results listing for *Untitled (Blue Mirror)*, Lot 463, available at: <http://www.sothebys.com/en/auctions/ecatalogue/2012/contemporary-art-day-auction-n08901/lot.463.html>

⁴³ See May 11, 2011 Sotheby's Auction results listing for *Untitled (Aparición)*, Lot 3, available at <http://www.sothebys.com/en/auctions/ecatalogue/2011/contemporary-i-n08744/lot.3.html>.

⁴⁴ See Karol, *Termination*, *supra* n. 8, at 200.

⁴⁵ See White Cube Gallery online listing for *With the advent of Radio Astronomy*, at: http://whitecube.com/shop/editions/cerith_wyn_evans_with_the_advent_of_radio_astronomy_grey/ [hereinafter White Cube Online Listing].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ The certificate for *With the advent of Radio Astronomy . . . (Clear)* may be found at *In Deed Catalog*, *supra* n. 13, at 70 [hereinafter Evans Certificate].

and is signed and dated by the artist himself. In that regard, it mimics traditional fine art warranties of genuineness.⁴⁹

Yet, as with most of the preceding examples, the lion's share of the instrument consists of limiting language that circumscribes the purchaser's rights and serves a double function as instructions. It is thus worth quoting at length as follows:

Requirements for reproduction:

- Polymeric high performance vinyl 9899-90, Clear, thickness 66 microns.
- No minimum or maximum dimensions apply.
- Only to be reproduced using the pdf file supplied at the time of purchase.
- Only one copy of the artwork should be displayed by a single owner at any given time.
- Apart from the scale of the text, there must be no other modifications to the design, which must remain as specified.⁵⁰

In no uncertain terms, the document then goes on to connect its certification function to its control function:

Any reproduction of the above work is only guaranteed to be an authentic work of art by Cerith Wyn Evans when all reproductions requirements listed above have been met and accompanied by this certificate.

Finally, the certificate reserves "all copyright and other intellectual property rights in the work" to the artist.⁵¹

D. The Paradox of Permissive Certificates

The Evans certificate reveals in particularly stark terms the central paradox behind every one of the Permissive Certificates described above. Namely, in the same document through which Evans is giving a present, unconditional warranty of genuineness ("this certifies authenticity of the above work"), he is conditioning future endorsements of the same work on the owner fulfilling certain requirements prospectively.

In essence, these legal instruments are simultaneously making the following two statements:

(i) I presently certify that the existing thing described in this document, A, is an artwork by me that is owned by you; and

⁴⁹ See *supra* Part II(A).

⁵⁰ Evans Certificate, *supra* n. 48 (underlying and bolding of headers in original). The certificate elsewhere specifies, among other things, that it is not itself "a work of art and must not be displayed as such" and that it "will . . . not be reissued if lost." *Id.*

⁵¹ *Id.*

(ii) I will in the future certify that the thing to be created pursuant to this document, A', is an artwork by me that is owned by you if and only if my rules for A' are followed.

There is, to be sure, no inherent logical inconsistency in these statements. The two claims are being made with respect to different points in time, one present and the other future. One can approve of an activity now, but disapprove of the way it is being conducted later.

The difficulty, though, as explained in the next Part, is that these sorts of highly conditional guarantees go against the very essence of traditional fine art warranties. Warranties, traditionally conceived, certify that an already existing thing has a set of properties at the time of sale.⁵² They concern actual objects, created at some point in time prior to the issuance of the warranty. The fight is over the accuracy of a set of historic facts concerning their origin.

By contrast, Permissive Certificates purport to warrant authorship of objects to be created and/or events to be performed in the future. Although in almost all cases, the subject "work" is spoken of in the past tense, as having been created by the artist/author prior to the creation of the instrument, the physical manifestations of that work are yet-to-be-realized. This is fundamentally and deeply at tension with the retrospective essence of traditional fine art warranties.

Using Evans' case as an example, the buyer has purchased one of a predetermined twenty-five editions of *With the advent of Radio Astronomy... (Clear)*. And the certificate repeatedly references the work in the past tense, as a thing already in existence. The language and structure of the document is thus far consistent with traditional certifications of fine art as authentic as of the time of sale. But that is where consistency with traditional warranties ends.

In particular, the physical manifestation of that edition of the work- the adhesive vinyl wall text- has not yet been created by the buyer at the time of sale. The buyer, after all, is expressly permitted to reproduce the text for that edition as often as she wishes from the pdf file, so long as there is never more than one copy displayed at the same time. So while the edition is 1 of 25, that particular edition itself can be recreated (by physically reprinting the vinyl letters) an infinite number of times. The edition is, really, 1 of ∞ , with each actualization calling for separate authentication with each future printing.

Much the same can be said for higher value single-edition works, like those of Gonzalez-Torres. There is only ever one *Untitled (1989/1990)*, and it was created by Gonzalez-Torres while he was alive (i.e., in the past).

⁵² See *infra* Part II(A).

That point is made expressly in the certificate.⁵³ It is intentionally a conceptual piece that evolves over time, but remains one “unique” work. To the extent that the genesis of the content of that work predates the act of certification, it is again consistent with traditional warranty practice.⁵⁴ But the warranty collapses prospectively. It is, in effect, purporting to certify the factual accuracy of a thing-to-be-created (two printed stacks of paper) in the future.

To see this, just imagine as a thought experiment a printing for a new exhibition that includes a typo in one of the stacks. Perhaps the paper reads “Somewhere better then [sic] this place.” This is clearly not the work. The error completely alters the meaning of the sentence, rendering it a common homonym error that (if genuine) would convey an entirely different message to a viewer.

But in order to make that determination (that is, in order to deauthenticate this iteration of the work) we need to make a current and new appraisal. This might involve looking to the earlier-created certificate, and comparing its instructions to the current, erroneous stacks. The certificate tells us it is real, and by Gonzalez-Torres, but only if the proper sentence is used.⁵⁵ This is a conditional verification and as such requires someone (gallerist Andrea Rosen, say, or the Gonzalez-Torres Foundation, or some other person designated as an expert) to look at the reprint to vouch for its accuracy (or, in this case, expose its error). Critically, however, this requires a new, present-day recertification of a now-historic object (the stack printed for the current exhibition).

The paradox, then, is that artists are certifying that a work is genuine but because the works are, by definition, reproducible, each and every reproduction necessitates a new appraisal and recertification. In fact, to the extent that the original certificate purports to be able to authenticate a later iteration, it is making a false claim. The latter, to serve a valid warranty function, necessitates some later expert’s recertification.

One might be tempted, at this point, to simply chalk the paradox up to the notoriously elusive nature of conceptual art. It is an entire aesthetic premised on the slipperiness of the idea of a static “artwork,” and might simply be too inherently subversive for traditional legal doctrines to digest.⁵⁶ But there is, in fact, a straightforward and well-developed legal

⁵³ See *Untitled (1989/90) Certificate*, *supra* n. 34 (specifying, “Untitled, 1989/1990 is a unique work of art owned by [the named owners]. . . . The physical manifestation of this work in more than one place at a time does not impugn this works uniqueness since its uniqueness is defined by its ownership, verified by” the certificate).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1 (detailing precise language to be printed on the sheets).

⁵⁶ *C.f.*, Michael J. Madison, *The End of the Work As We Know It*, 19 J. INTELL. PROP. L. 325, 328–29, 350–52 (2012) [hereinafter Madison, *The End of the Work*] (exposing

regime that can make sense of, and justify, this paradox of Permissive Certificates.

II. CERTIFICATES AS LICENSES

This Part argues that the paradox of Permissive Certificates results from their performance of a double function under a single name. These instruments are in fact an amalgam of two highly divergent legal paradigms that have been pressed into service together in one document. Once these two functions are disaggregated, the paradox evaporates.

On the one hand, as their name suggests, they do serve a retrospective authentication function as a warranty. This warranty, however, is narrower than that typically used in fine art transactions. It is a guarantee that the named artist created the aesthetic content of the work. This is related to, but more limited than, the conventional fine art warranty that assures a buyer that the named artist created (or supervised the creation of) a specific and existent tangible object.

The secondary function of these certificates, however, is at once less transparent and more meaningful to buyers of works with a conceptual or otherwise reproducible component. Namely, they provide a conditional set of permissions. Although these can of course vary from work to work, the documents generally may be read to include at least the following core permissions: (i) to make and display reproductions of the physical manifestations of the work; (ii) to perform any acts necessary to realize the piece; and (iii) to associate the artist's name with the future realization of the work and call it genuine.

Before discussing these permissions below, it is important to note at the outset that they are *conditional*. Namely, as discussed immediately after the permissions themselves, should a buyer (or licensee, as it were) of a work not follow rules that are expressly or impliedly stated in the certifying instrument, then the permissions may be withdrawn.

In short, the secondary function of Permissive Certificates is to provide forward looking, but conditional, permissions to create something genuine and associate it with a particular source. And that tracks the essential structure of an intellectual property license.⁵⁷

misfit between the notion of the “work” in conceptual art and U.S. copyright law).

⁵⁷ I am not by any means the first legal commentator to suggest that certificates serve a permissive or license-like function. For prior observations along these lines, see Eduardo M. Peñalver & Sergio Muñoz Sarmiento, *Law in the Work of Felix Gonzalez-Torres*, 26 CORNELL J.L. & PUB. POL'Y 449, 452–53 (2017) (“perhaps under certain circumstances, it is more appropriate to think of the collector of Gonzalez-Torres works as a mere licensee”); Daniel McClean, *Authenticity in Art and Law: A Question of Attribution or Authorization?* in *In Deed Catalog*, *supra* n. 13, at 93 (describing certificates in conceptual art as

A. *Permissive Certificates as Narrow Warranties of Authorship*

Before elaborating on the permissive function of certificates, it is important first to recognize that Permissive Certificates do still perform a traditional authentication function of a sort. This is more limited than that associated with traditional fine art warranties, but as shown below likely still has real legal effect.

Broadly understood, a contractual warranty is simply “a seller’s promise that the thing being sold is as represented or promised.”⁵⁸ Thus, art warranty disputes have long boiled down to case-specific inquiries over what, exactly, the seller promised to the buyer especially with respect to representations over who painted or otherwise created the work.⁵⁹ Given the heavily fact-specific nature of these cases, it is dangerous to generalize about authenticity claims. That said, key art market jurisdictions such as New York have been at pains to lock down the definitions, once and for all, of attributive language typically used in certificates of authenticity.⁶⁰

“authorizing the owner to fulfill the work”); Kee, *Felix Gonzalez-Torres*, *supra* n. 33, at 521 (2017) (observing of Gonzalez-Torres’ early certificates that they “tended to resemble a hybrid of a conventional certificate of authenticity and a set of instructions”). Buskirk also clearly recognizes that these certificates have the power to form contractual bases for artists to control their work. Buskirk, *Private Experience*, *supra* n. 3, at 476.

⁵⁸ BLACK’S LAW DICTIONARY (10th ed. 2014) (definition of “Warranty”).

⁵⁹ For instance, in a classic 19th century case, a jury interpreted a bill of sale containing the language “Four pictures, Views in Venice, Canaletto” to be a warranty of genuineness that the artist Canaletto painted the work, as opposed to a mere expression of opinion. *Power v. Barham*, 111 Eng. Rep. 865 (K.B. 1836) (upholding jury’s determination that bill of sale was a warranty). The court affirmed this verdict, despite an earlier case having come out the opposite way for an analogous attribution in a different catalog. *Id. Compare Jendwine v. Slade*, 170 Eng. Rep. 459 (N.P. 1797) (simply putting the name of an artist opposite a picture in a catalog is a statement of opinion and not a warranty). Modern art warranty cases in the United States remain similarly fact-specific, with parties regularly fighting over the meaning of contractual representations made by sellers. The disputes, however, are typically now channeled through modern statutory frameworks such as the Uniform Commercial Code and various state law art market regulations. *See, e.g.*, UNIF. COMMERCIAL CODE § 2-313(b) (“Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.”); *Christie’s Inc. v. SWCA, Inc.*, 22 Misc. 3d 380, 383, 867 N.Y.S.2d 650, 655–57 (Sup. Ct. 2008) (analyzing complicated set of letter agreements through framework of New York Art and Cultural Affairs Law §13.01). In the sculpture context, disputes can concern later casts from an original authentic mold, or new casts made from earlier casts, known as *surmoulage*. *See Hecker, The Afterlife of Sculptures*, *supra* n. 22 (defining *surmoulage* and related notions); *Christie’s Inc.*, 867 N.Y.S.2d at 653 (whether a description of a Picasso sculpture as a genuine and not *surmoulage* had a reasonable basis in fact was a fact dispute preventing summary judgment over liability for rescinded sale).

⁶⁰ *See generally*, N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney). After first

What, though, can these traditional fine art authenticity laws—created with existent, tangible objects in mind—teach us about the legal effect of a forward-looking Permissive Certificate such as that used by LeWitt, Judd, Evans or Gonzalez-Torres?

Of particular interest for these purposes, New York legislators were acutely aware of the problem of “multiples” in crafting their legislation concerning certificates of authenticity.⁶¹ Although the definition of “multiples” does not expressly encompass creations as difficult to define as text art and Felix Gonzalez-Torres paper stacks, the final catch-all clause (“similar art objects”) seems broad enough safely to cover almost all works existing in more than one copy so long as they have at least some tangible (“object”) component.

What is beyond dispute is that the drafters clearly meant for statements of authorship in certificates of authenticity to apply with equal force to originals as to multiple editioned works.⁶² Critically, where a certificate of authenticity of any type (multiple or original) states that a “work is by a named author or has a named authorship,” this “means unequivocally, that the work is by such named author or has such named authorship.”⁶³ Elsewhere the statute equates being both an artist and an author of a multiple with being the person who is the “creator” of that work.⁶⁴

Putting all this together it is fair to conclude that the New York statute (perhaps one of the most specific of its type in defining the meaning of

tracking the U.C.C. in clarifying generally that “material facts” stated in a certificate of authenticity operate as an “express warranty,” *id.* at § 13.01(1)(b), the New York law goes on to list common attributive language in certificates, and defines the legal meaning of those terms:

- (a) The work is by a named author or has a named authorship, without any limiting words, means unequivocally, that the work is by such named author or has such named authorship;
- (b) The work is “attributed to a named author” means a work of the period of the author, attributed to him, but not with certainty by him; or
- (c) The work is of the “school of a named author” means a work of the period of the author, by a pupil or close follower of the author, but not by the author.

Id. at § 13.01(3).

⁶¹ *Id.* at §11.01(21). Multiples, under the statutory definition are “prints, photographs, positive or negative, sculpture and similar art objects produced in more than one copy” that sell for over a baseline price. *Id.*

⁶² *Id.* at §11.01(6) (“Certificate of authenticity” means a written statement by an art merchant confirming, approving or attesting to the authorship of a work of fine art *or multiple*, which is capable of being used to the advantage or disadvantage of some person.) (emphasis added). The definition of “Certificate of authenticity” expressly covers “multiples,” as do both the definitions of “artist” and “author.” *Id.* at §§11.01(1) and (3). Section 13.05, moreover, generally applies the main warranty provisions (13.01) to multiples.

⁶³ *Id.* at § 13.01(3).

⁶⁴ *Id.* at §§11.01(1) and (3). The definition of “artist” further adds that an artist of a multiple is the person who “conceived or created the image” underlying the work. *Id.*

certificates of authenticity) mandates that where Permissive Certificates name an author, that author must have “created” the underlying work.⁶⁵ The initial authentication function of certificates thus assures buyers that the artist identified in the certificate created the aesthetic content of the work.

B. *Permissive Certificates as Licenses*

The limited retrospective warranty of content creation, however, cannot be all that a buyer of a conceptual work is attaining. As discussed at length above, the owner of Evans’ *With the advent of radio astronomy . . . (Clear)* expects to print anew and exhibit on a wall a paragraph of adhesive vinyl text, and the owner of Gonzalez-Torres’ *Untitled (1989/90)* expects to reprint and allow visitors to take away sheets from two stacks of paper. Giuseppe Panza, for instance, the original purchaser of Judd’s *Untitled [Seven plywood boxes: open back]* fabricated the sculpture described in the certificate some years after he attained it, with little to no supervision by Judd and indeed over the artist’s objections.⁶⁶

This section shows how the essentially prospective function of a Permissive Certificate defines it as, in large part, a non-patent intellectual property license. First, it briefly explains the operation of copyright licenses, showing how they are structured to grant reproduction rights of the sort central to an owner’s realization of conceptual, post-representational and new media works. Second, it explains the interrelationship between authentication and labeling—that is, why the owner of a genuine article generally has the right to truthfully reveal and advertise its source. Finally, using two of the examples described above, it predicts that U.S. courts would likely interpret these documents to create a contractually enforceable copyright license coupled with proof of authenticity sufficient to justify use of the artist’s name in connection with exhibiting and reselling the work.

1. The Basic Structure of Intellectual Property Licenses

⁶⁵ I do not mean to suggest that the New York legislature or judges interpreting these statutes are the final arbiters of what is or is not an authentic artwork. As Laura Heymann reminds us in an extended discussion of authenticity, “judicial pronouncements regarding authenticity can only carry so much weight.” Heymann *Dialogues*, *supra* n. 13, at 48–49. There are many instances where judges have concluded that a work is or is not authentic through legal processes, only to find that the market rejected that conclusion. *Id.* For these purposes, I am only referring to legal (and not market-based) means of authentication.

⁶⁶ See <https://www.guggenheim.org/conservation/the-panza-collection-initiative/donald-judd>. For Judd’s general opposition to Panza’s unsupervised installations of his works, see Judd *Una stanza*, *supra* n. 1.

a. Affirmative Licenses

At core, a license is “a permission . . . to commit some act that would otherwise be unlawful.”⁶⁷ A license effectively operates in a negative capacity, preventing the property owner from enforcing a legal right it would otherwise have. Specific to the intellectual property context, “the licensee is engaging in acts which would infringe . . . but for the permission granted in the license.”⁶⁸

Not surprisingly, then, trademark, copyright and right of publicity licenses are simply permissions to use the grantor’s copyrighted work,⁶⁹ trademark,⁷⁰ and publicity rights,⁷¹ respectively.⁷² Courts will generally recognize such licenses so long as the alleged licensor owns an identifiable trademark, copyright or publicity interest, and a signed, written instrument before the court can be read to grant permission to use that interest “with reasonable clarity.”⁷³

⁶⁷ BLACK’S LAW DICTIONARY (10th ed. 2014) (definition of “license”). As one court summarized it in a copyright case, “The word ‘license,’ means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing.” *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1106 (C.D. Cal. 2007) (quoting *Federal Land Bank of Wichita v. Board of County Com’rs*, 368 U.S. 146, 154, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961)).

⁶⁸ 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:79 (5th ed.)

⁶⁹ 2 PATRY ON COPYRIGHT § 5:118.

⁷⁰ *Bunn-O-Matic Corp. v. Bunn Coffee Serv., Inc.*, 88 F. Supp. 2d 914, 920–21 (C.D. Ill. 2000)

⁷¹ 2 MCCARTHY ON RIGHTS OF PUBLICITY AND PRIVACY § 10:15 (2d ed.)

⁷² U.S. moral rights under VARA cannot be “transferred,” however they may be waived if done so in writing. 17 U.S.C. §106A(e). A waiver, which essentially “permits the author to hold harmless activity that in the absence of a waiver would violate VARA,” operates much like the licenses discussed above. 5 PATRY ON COPYRIGHT § 16:37.

⁷³ *Weinstein Co. v. Smokewood Entm’t Grp., LLC*, 664 F. Supp. 2d 332, 340 (S.D.N.Y. 2009). As one court famously noted with respect to the minimal requirements for a statutory, exclusive copyright license, “It doesn’t have to be the Magna Charta; a one-line pro forma statement will do.” *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990). *See, e.g., Rico Records Distributrs, Inc. v. Ithier*, No. 04 CIV. 9782 (JSR), 2006 WL 846488, at *1 (S.D.N.Y. Mar. 30, 2006) (denying summary judgment where language on checks could amount to exclusive copyright licenses or transfers); *Ticketmaster L.L.C. v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1108 (C.D. Cal. 2007) (identifying license in boilerplate website terms of use agreement that authorized limited copying for personal use). A copyright license agreement, moreover, may omit the terms “copyright” or “exclusive rights.” *Papa’s-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1159 (S.D.N.Y. 1996). As the focus of this article is on written certificates of authenticity, it will assume for these purposes that there is a written instrument that a court can interpret. That said, a non-exclusive copyright license does not even need to be in writing, as it is not considered a transfer of copyright ownership. *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997) (citing *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996)). Whether a court will imply a non-exclusive copyright license is a heavily fact-

This of course assumes that the licensed interest is valid. Under the doctrine of copyright misuse, for instance, a copyright license may not be extended to protect otherwise uncopyrightable ideas.⁷⁴ This raises some concerns with respect to artworks with conceptual content, as a substantial body of scholarship questions the copyrightability of fundamentally conceptual works.⁷⁵ Amy Cohen, for instance, focuses on the idea/expression dichotomy, worrying that its stringent application to conceptual artworks will cause judges to refuse copyright to art lacking “permanent form” thereby making an impermissible artistic value judgement based on outmoded, classical conceptions of art.⁷⁶

dependent question that may include consideration of whether the artist/copyright owner transferred an object (such as an artwork) embodying the copyright. *See, e.g., Corbello v. DeVito*, 777 F.3d 1058, 1067 (9th Cir. 2015). In *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138, 1148 (W.D. Mo. 2010), for instance, the court found that a visual artist granted an implied license to a gallery allowing the gallery to post images to its website for purposes of reselling the artist’s work.

⁷⁴ *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990).

⁷⁵ *See generally*, Zahr K. Said, *Copyright’s Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335 (2016) [hereinafter Said, *Illogical*]; Megan Carpenter & Steven Hetcher, *Function over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221 (2014) [hereinafter Carpenter & Hetcher]; Madison, *The End of the Work*, *supra* n. 56, at 350–52 (critiquing judicial approaches to “dynamic” artworks); Joan Infarinato, Note, *Copyright Protection for Short-Lived Works of Art*, 51 FORDHAM L. REV. 90, 91 (1982) (arguing a few years after the Copyright Act went into effect that courts should interpret the fixation and other requirements to support copyrightability of “short-lived” environmental and site-specific artworks such as Christo’s Running Fence); Glen Cheng, *The Aesthetics of Copyright Adjudication*, 19 UCLA ENT. L. REV. 113, 127 (2012); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 208, 231–32 (1990) [hereinafter Cohen, *Copyright*]; Lori Petruzelli, Comment, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. & POL’Y 115, 123 (1995) [hereinafter Petruzelli, *Copyright Problems*]; Charles Cronin, *Dead on the Vine: Living and Conceptual Art and Vara*, 12 VAND. J. ENT. & TECH. L. 209, 252 (2010); Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354, 360 (1980) (“Conceptual artists, for whom art is the process of creation and for whom the finished product, being merely ancillary, is usually temporary would not meet the fixation requirement.”).

⁷⁶ Cohen, *Copyright*, *supra* n. 75, at 231–32. Working in a more anti-protectionist vein, Lori Petruzilli describes a 1976 Chris Burden performance piece wherein he served espresso drinks to gallery patrons and later sold the cream pitcher relic for \$24,000. Petruzilli, writing shortly after the landmark Feist case was decided, focuses not on any fixation problems with the performance but rather suggests that in such pieces the idea is effectively merged with the expression. This leads her to the “ridiculous” result that if granted a copyright Burden may be able to stop others from serving coffee or even threaten coffee pitcher makers with an infringement action. She concludes that “the Copyright Act should not be changed to accommodate the specific problems posed by post-modern art.”

Zahr Said has argued on alternative grounds that “copyright illogically excludes conceptual art from protection on the basis of fixation,”⁷⁷ i.e., the copyright rule which excludes from coverage any work which is not “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁸ Megan Carpenter and Steven Hetcher similarly apply a sort of equal protection principal for art creation in concluding that fixation doctrine should drop its “transitory duration” exclusion in order to avoid “discriminating against important strains of contemporary art.”⁷⁹

These concerns may be justified for some substantially ideational,⁸⁰ transitory or formless works.⁸¹ As demonstrated by my analysis of two

Petruzzelli, *Copyright Problems*, *supra* n. 75, at 123.

⁷⁷ Said, *Illogical*, *supra* n. 75, at 337.

⁷⁸ *Id.* at 338 (quoting 17 U.S.C. §101 (definition of fixation)).

⁷⁹ Carpenter & Hetcher, *supra* n. 75, at 2227.

⁸⁰ As an example of a substantially ideational work, take for instance Pierre Bismuth’s *Certificate of Authenticity- Ed Ruscha* from 2000. *In Deed Catalog*, *supra* n. 13, at 6. The certificate, signed not by Bismuth but by the conceptual artist Ed Ruscha, consists entirely of a typed sentence stating, “This is to certify that this is not an original work by Ed Ruscha.” It is an arresting piece, challenging us to consider how we “treat the value of signature and the hand versus the overarching idea” as Susan Hapgood and Cornelia Leaf express it. *Id.* at 84. But as essentially a pure “concept” it is almost certainly not copyrightable. 17 U.S.C. §102(b).

⁸¹ Said, for instance, argues that certain recent fixation holdings would likely deny copyright protection to a Gonzalez-Torres candy spill due to its “inherently changing” nature. Said, *Illogical*, *supra* n. 75, at 348 (referencing *Williams Elec. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3d. Cir. 1982)). Said nevertheless advocates for an alternative reading of earlier fixation precedent that she hopes sympathetic courts might use in order to save *Untitled (Portrait of Ross in L.A.)* from losing copyright protection. In Said’s view, “the fact that the viewer’s input has a limited, and predictable, impact on the work constrains the range of possible different versions of the work, and renders it effectively fixed.” *Id.* I agree that this work faces serious copyrightability problems, but for different reasons. Both Said and a reversed lower court opinion she cites fail to discuss a more serious fixation challenge than the fact that the work depletes as visitors take candy away. The bigger problem, in this author’s view, is that the piece has no prescribed form even when first installed in its ideal weight. The dimensions of Gonzalez-Torres’ candy piles are generally left “variable,” meaning that one can place the candy in the shape of a cube or flat rectangle, or, as is more typical, pile the pieces in a corner. *See, e.g.*, *Certificate of Authenticity and Ownership for Untitled (L.A.)* at 1, 2 (noting, “Each manifestation of the work may physically differ according to the owner’s ongoing right to interpret the specific, yet open-ended parameters of the work”) (on file with the author); *Certificate of Authenticity and Ownership for Untitled (Portrait of Dad)*, 1991, *reproduced at* 26 CORNELL J. L. & PUB. POL’Y at Appendix A (2017). The latter certificate does suggest that “the ideal manifestation” of the work is to pour them on the floor where two walls meet (i.e., loosely piled in a corner in the familiar way his work is shown). That is not a requirement, however, and even where followed that method results in candies scattering. *See also Untitled (Portrait of Ross)*, ART INSTITUTE OF CHICAGO,

representative Permissive Certificates below, however, many, if not most, works with some reproducible or conceptual content still contain tightly controlled formal elements that allow the pieces to remain copyrightable.⁸²

Another material feature of most licensing arrangements is that they generally create bilateral contracts in that *both* parties agree to perform acts under the agreement, and failure to perform can lead to a claim for breach of contract.⁸³ Often, for instance, the licensee is required not just to pay royalties or an up-front payment as consideration for the license, but also to use the copyrighted work or mark or name in certain ways but not others.⁸⁴

Critically, uses of licensed rights outside the scope of a copyright license are breaches of the license, and amount to infringements if they are conditions of that license.⁸⁵ The same generally holds for holdover licensees who continue to use the once-licensed works, marks or names after termination of the license (i.e., after termination for breach).⁸⁶

These provisions thus provide a substantial amount of ongoing control

<http://www.artic.edu/aic/collections/artwork/152961> (last visited Nov. 20, 2018) (Art Institute of Chicago listing for *Untitled (Portrait of Ross)* noting “Dimensions vary with installation”). There is thus no predictable range of possible shapes for a candy spill work—and quite intentionally so from Gonzalez-Torres’ perspective. As discussed below, this differs from his paper stack pieces.

⁸² See *infra* Part II(B). I do not have the space here to develop these copyrightability arguments regarding conceptual and minimalist art in detail. I expect to do so in a forthcoming work focused on the subject. The point for these purposes, however, is not to argue that all works captured in Permissive Certificates are copyrightable, particularly given how many different and varied art practices use such certificates, but rather that there is at least a colorable claim of copyrightability in many cases.

⁸³ BLACK’S LAW DICTIONARY (10th ed. 2014) (definition of “Bilateral Contract”).

⁸⁴ See 2 PATRY ON COPYRIGHT § 5:126 (copyright licensee “may place conditions on the exercise of a license, and any use inconsistent with those conditions or otherwise outside the scope of the license will expose the licensee to an infringement claim”) (collecting cases); *Bunn-O-Matic Corp.*, 88 F. Supp. 2d at 921–22 (use of BUNN trademark in form not authorized by license is a breach and an infringement).

⁸⁵ *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 939 (9th Cir. 2010). A copyright infringement claim based on use outside the scope of the license will hold where (1) the copying is beyond the scope of a license possessed by the defendant, and the source of the copyright owner’s complaint is grounded in a right protected by the Copyright Act, such as unlawful reproduction or distribution. *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1315–16 (Fed. Cir. 2005). In the trademark context, use by a licensee which is outside the scope of the license is both trademark infringement and a breach of contract. 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:30 (5th ed.) (collecting cases).

⁸⁶ See 3 NIMMER ON COPYRIGHT § 10.15 (2018) (“upon rescission, the assignment or license is terminated and the copyright proprietor may hold the former grantee liable as an infringer for subsequent use of the work.”) (collecting cases); 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:30 (5th ed.) (“continued use by an ex-licensee after the license has been terminated is an act of trademark infringement”) (collecting cases).

to the licensor (or artist, in the case of this article). For instance, where a gallery duly attained a license to post a limited set of existing images of an artist's work on its website, the gallery was exposed to claims of infringement when it created and posted its own new images of the same works.⁸⁷ The same principle holds on the trademark side.⁸⁸

The right of publicity raises unique issues in the licensing context, due both to state law variations and its close relationship to the right of privacy (which is often treated as an issue of consent or waiver rather than license).⁸⁹ Nevertheless, in many cases courts appear equally willing to find that a living person permitted the use of his or her name as they are with the license of a corporate trademark.⁹⁰

b. First-sale as an Alternative Framework for Understanding Trademark and Right of Publicity Use Rights

Although, as just described, it is common practice to grant permission to use trademark and publicity rights, courts often eschew a license-based framework when it comes to sales or displays of goods that use or embody another's trademark or name. This is particularly true in the absence of express licensing terms, where courts would rather apply a variation of the first sale doctrine than imply a trademark or right of publicity license. That is because owners of a genuine good do not need permission to call it what

⁸⁷ *Teter*, 723 F. Supp. 2d. at 1150. *See, also*, *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1156 (9th Cir. 2006) *overruled on other grounds by* *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011) (use of licensed architectural plans to build additional homes in a new community exceeded the scope of the license and subjected licensee to claims of copyright infringement); *Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866, 876 (C.D. Cal. 2013) (use of a licensed photograph beyond the six month limit in the license exposed company to claims of copyright infringement).

⁸⁸ *See, e.g.*, *Franchised Stores of New York, Inc. v. Winter*, 394 F.2d 664, 668 (2d Cir. 1968) (authorized trademark licensee held a trademark infringer where he used unlicensed syrups in some of his CARVEL branded-products and sold some non-CARVEL products at CARVEL-branded stores).

⁸⁹ 2 MCCARTHY ON RIGHTS OF PUBLICITY AND PRIVACY § 10:30 (2d ed) (collecting state rules). One obvious limitation with rights of publicity licenses is that many states do not (or previously did not) allow the underlying rights to survive death. *See generally*, Michael Decker, *Goodbye, Norma Jean: Marilyn Monroe and the Right of Publicity's Transformation at Death*, 27 CARDOZO ARTS & ENT. L.J. 243 (2009) (discussing dispute over posthumous survival of Marilyn Monroe's right of publicity).

⁹⁰ This is particularly true in the digital environment. *See, e.g.*, *Pratt v. Everalbum, Inc.*, 283 F. Supp. 3d 664, 668 (N.D. Ill. 2017) (finding under Illinois law that plaintiff consented to use of his name by a smartphone app where the app indicated that it would invite his friends, asked for access to his contacts, and informed him that the messages would be sent "via SMS"); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1214 (N.D. Cal. 2014) (similar holding under California common law right of publicity).

it is, or resell it as such. As one licensing treatise puts it:

As to trademarks, the courts have adopted a strategy tailored to the unique characteristics of trademarks and quite different from the approach taken with patents or copyrights. The courts do not imply a license to use a trademark upon the sale of a tangible item bearing the mark. Rather, they have developed the concept of trademark first sale grounded in an idea of “fair use,” allowing use of a trademark truthfully to identify the source of an item.⁹¹

Under this framework, Tiffany could not use trademark law to stop eBay from advertising genuine Tiffany merchandise and labeling it accurately as Tiffany.⁹² Nor could Mc-Graw Hill, the owner of the registered SPDR trademark for exchange-traded funds prevent an unlicensed option trading exchange from listing and trading genuine SPDR® options on its exchange.⁹³ While a trademark conveys an exclusive right to use the mark, that “right generally does not prevent one who trades a branded product from accurately describing it by its brand name, so long as the trader does not create confusion by implying an affiliation with the owner of the product.”⁹⁴

This trademark first-sale doctrine is, however, subject to an important limitation for these purposes. Namely, it does not apply “when an alleged infringer sells trademarked goods that are materially different than those sold by the trademark owner.”⁹⁵ Thus, it was error for a district court to have dismissed a complaint brought by the owner of a trademark for various audiobooks alleging that its rival was buying, repackaging and reselling those same audiobooks as different editions for a different market. It was plausible that the differences between the editions were material, so the plaintiff’s claims should have been allowed to proceed.⁹⁶

⁹¹ RAYMOND T. NIMMER AND JEFF C. DODD, MODERN LICENSING LAW § 10:32.

⁹² Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 103 (2d Cir. 2010).

⁹³ Dow Jones & Co., Inc. v. Int’l Sec. Exch., Inc., 451 F.3d 295, 308 (2d Cir. 2006).

⁹⁴ *Id.*

⁹⁵ Brilliance Audio, Inc. v. Hights Cross Commc’ns, Inc., 474 F.3d 365, 370 (6th Cir. 2007) (quoting Davidoff & CIE, S.A. v. PLD Int’l Corp., 263 F.3d 1297, 1302 (11th Cir. 2001). *See also* Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc., 982 F.2d 633, 635 (1st Cir. 1992); Original Appalachian Artworks v. Granada Elecs., Inc., 816 F.2d 68, 73 (2d Cir. 1987); Iberia Foods Corp. v. Romeo, 150 F.3d 298, 302–03 (3d Cir. 1998); Martin’s Herend Imports, Inc. v. Diamond & Gem Trading USA, Co., 112 F.3d 1296, 1301–02 (5th Cir. 1997); *see also* Abercrombie & Fitch v. Fashion Shops of Ky., 363 F.Supp.2d 952, 963–65 (S.D. Ohio 2005) (adopting this rule). This materiality standard is judged not from the trademark owner (i.e., artist’s) perspective, but rather from the purchasing public’s (i.e., art buyer’s) perspective, and is judged on a case by case basis. *Id.* (“to be material, a difference must be one that consumers consider relevant to a decision about whether to purchase a product”) (internal quotations omitted).

⁹⁶ *Id.* at 371.

Similarly, a different court allowed an artist to proceed with his claim for trademark infringement against a gallery reselling his genuine works, but only because some evidence suggested that the gallery created the misimpression that it was a favored or authorized dealer when it was not.⁹⁷

Courts will similarly deny right of publicity infringement claims for downstream resales of genuine goods bearing a celebrity's name or image.⁹⁸ For instance, the Eleventh Circuit denied right of publicity claims brought by representatives of a famous athlete and race car driver against a company that bought genuine trading cards bearing their names and images, mounted them to plaques, and resold them without permission.⁹⁹

Finally, whenever discussing trademark and right of publicity doctrine in fine art it is important to spend a moment on the Dastar case.¹⁰⁰ It is difficult, in the U.S., to even mention trademarks in the art context without being met by the suggestion that the now 15-year-old Dastar case somehow acts as a bar or heavy limitation against trademark protection in that space.¹⁰¹ As a substantial swath of scholarship has attempted to show, however, the reach of Dastar is not as great as its fearsome reputation might suggest.¹⁰²

Of immediate relevance to this article, Dastar is generally not

⁹⁷ Teter v. Glass Onion, Inc., 723 F. Supp. 2d 1138, 1156 (W.D. Mo. 2010).

⁹⁸ 2 MCCARTHY ON RIGHTS OF PUBLICITY AND PRIVACY § 7:31 (2d ed) (“The issue is whether a celebrity (or deceased celebrity's successor) who licenses a product is entitled to a royalty upon every downstream resale of that product thereafter. The first sale defense dictates that the answer is ‘no.’”).

⁹⁹ Allison v. Vintage Sports Plaques, 136 F.3d 1443, 1450 (11th Cir. 1998) (holding, “as a matter of law, Vintage merely resells cards that it lawfully obtains”). Akin to the material differences exception in trademark doctrine, the first sale doctrine in right of publicity cases does not apply to bona fide goods that have been repackaged to the point of becoming “separate and distinct” products. *Id.* at 1450.

¹⁰⁰ Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S.Ct. 2041 (2003).

¹⁰¹ To give just one anecdotal example, at a recent conference concerning authenticity in posthumous sculpture at which the author was present, an audience member inquired whether trademarks might play a role in policing posthumous artistic creations. A panelist more or less dismissed the notion with a summary reference to the Dastar case. For an overview of the conference, *see generally: The Afterlife of Sculptures: Posthumous Casts in Scholarship, the Market, and the Law*, available at <https://www.catalogueraisonnie.org/events/2018/5/1/the-afterlife-of-sculptures-posthumous-casts-in-scholarship-the-market-and-the-law>.

¹⁰² For scholarly approaches, *see, e.g.*, Mark P. McKenna, *Dastar's Next Stand*, 19 J. INTEL. PROP. L. 357, 387 (Spring, 2012) (concluding, after thorough analysis of Dastar's highly uncertain legacy, that it should be understood to rule out “confusion that is attributable to the content of a creative work,” but not “trademark protection for all copyrightable works”); Laura Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1432–44 (April, 2005) (distinguishing Dastar-type reverse passing off cases from affirmative passing off cases based on authorship claims).

understood to apply to affirmative passing off or false endorsement claims, wherein one falsely uses an artist's name or trademarks to imply that he or she endorses a work.¹⁰³

And it certainly does not limit artists from attaining U.S. trademark rights in their personal names. In the aforementioned case concerning the painter Lee Teter, the court had no objection to Teter to asserting his own name as a trademark against his former gallery after a change of ownership led to a falling out between the parties.¹⁰⁴ Along these lines, the USPTO expressly allows trademark registrations for artists with respect to use of their names or their pseudonyms on their own original works of art.¹⁰⁵ Dastar should therefore not be understood as to undermine the basic relevance of trademark and right of publicity law to artists.

2. The Exemplary Gonzalez-Torres and Evans Certificates Would Likely be construed as Enforceable Contracts and Express Copyright Licenses that otherwise Insulate an owner from suit under Trademark and Right of Publicity Laws

This section applies U.S contract and non-patent intellectual property law to two certificates described in the first part of this article: the Gonzalez-Torres certificate for *Untitled (1989/90)* and the Evans certificate for *With the advent of Radio Astronomy*. These two works were selected because both certificates are publicly available and produced relatively recently, and they are good examples of works with strong conceptual content that regularly sell at auction (Gonzalez-Torres) and commercial

¹⁰³ See, e.g., *Beastie Boys v. Monster Energy Co.*, 66 F. Supp. 3d 424, 454 (S.D.N.Y. 2014) (“Dastar does not address whether a defendant's unauthorized use of copyrighted works, when occurring in conjunction with the defendant's unauthorized use of protected marks, can support a § 43(a) claim of an implied endorsement.”); *Estate of Barre v. Carter*, 272 F. Supp. 3d 906, 917 n. 80, 944 (E.D. La. 2017) (allowing affirmative claim for false endorsement based on use of “persona” over defendant’s Dastar arguments); *Bach v. Forever Living Prod. U.S., Inc.*, 473 F. Supp. 2d 1110, 1118 (W.D. Wash. 2007) (distinguishing Dastar as inapplicable where artist pursues affirmative trademark infringement claims sounding in false endorsement or affiliation as opposed to plagiarism). Dastar itself concerned a *reverse* passing off claim, wherein the defendant (Dastar) was accused of false designation of origin based on its failure to credit the original author of the work. *Dastar*, 123 S.Ct. at 2046. Trademark claims likely to arise in the context of certificates of authenticity disputes, involving affirmative use of the artist’s name over the artist’s objections, are thus the opposite of those at issue in Dastar.

¹⁰⁴ *Teter*, 723 F. Supp. 2d. at 1154–56.

¹⁰⁵ TRADEMARK MANUAL OF EXAMINING PROCEDURE at §1202.09(b), Names of Artists Used on Original Works of Art (2017). As a general rule, personal names may be trademarks where they have developed secondary meaning in the minds of the public. 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 13:1 (5th ed.).

galleries (Evans). Moreover, there is at least a plausible argument for applying U.S. law (in particular, the law of New York State) to their interpretation.¹⁰⁶

a. The *Untitled (1989/90)* and Evans Certificates Are Likely Enforceable as Contracts

As a preliminary formal matter, then both the *Untitled (1989/90)* and Evans Certificates are written documents, signed by the artist (Evans) or his agent (the Gonzalez-Torres estate and gallery). Thus, they should both be formally acceptable for enforcement against the artist or artist's representative.¹⁰⁷

A trickier question is whether the artist could enforce them against the buyer.¹⁰⁸ The Gonzalez-Torres case is relatively easy here as the buyers Rosa and Carlos de la Cruz countersigned the certificate.¹⁰⁹ But there is no

¹⁰⁶ This jurisdiction was chosen primarily for analytic convenience, and because many fine art cases are decided under New York law. With regards to Gonzalez-Torres, the certificate itself was created on Andrea Rosen Gallery letterhead, then a New York gallery with a New York address listed, which is also the location for the The Felix Gonzalez-Torres Foundation that purports to own all of his copyrights. *Untitled (1989/90)* Certificate *supra* n. 34; *and see* <http://felixgonzalez-torresfoundation.org/> (asserting copyright ownership). As for Evans' piece, the certificate was created on White Cube gallery letterhead listing a London address, along with a Canadian affiliate. Evans Certificate, *supra* n. 48. Nevertheless, the gallery sold the work directly online and shipped outside the EU. *See* White Cube Gallery Online Listing, *supra* n. 45. This means that it is plausible that New York law would apply were a hypothetical buyer to reside in New York. *Tarbert Trading, Ltd. v. Comets, Inc.*, 663 F. Supp. 561 (S.D.N.Y. 1987) (applying New York law to breach of contract dispute between English seller and New York buyer for the sale of Kenyan kidney beans).

¹⁰⁷ UNIF. COMMERCIAL CODE § 2-201. For brevity, I am assuming that the U.C.C. applies to these transactions because they are for the sale of "goods" that are movable, existing and identified at the time of sale. UNIF. COMMERCIAL CODE § 2-105 (definition of Goods). That is generally the case for artworks. *Balog v. Center Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1562 (D. Haw. 1990) (paintings, prints and sculpture fall within Uniform Commercial Code's definition of "goods"); *Teter*, 723 F. Supp. 2d at 1150 ("artwork is a 'good,' and the sale of artwork is governed by the UCC"). One could argue that conceptual artworks are neither moveable nor existing as goods at the time of sale, but rather are more in the nature of designs or plans. Courts have held that the UCC does not apply to the sale of designs, technical drawings, and professional advice by licensor. *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244, 253 (W.D. Pa. 1991). Such arguments, however, are beyond the scope of this analysis.

¹⁰⁸ As discussed throughout this article, these documents may be viewed as instruments of artist control, in which case the artist would absolutely want to be able to assert it against the buyer. For this reason, it is advisable that artists start having buyers countersign Permissive Certificates as a matter of course.

¹⁰⁹ *Untitled 1989/90* Certificate, *supra* n. 34, at 6.

signature block for the buyers on the face of the Evans Certificate.¹¹⁰ Thus, counter-enforceability by Evans against a buyer will likely turn on whether the buyers signed an accompanying bill of sale or invoice.¹¹¹

Having a signed writing, however, is not itself conclusive of an enforceable contract. Under New York law, in order to create a binding written contract, “the parties must make a manifestation of mutual assent sufficiently definite to assure that they are truly in agreement with respect to the material terms of their contract.”¹¹² This is known as the “definiteness” requirement, which can be raised to challenge ambiguous writings (such as, arguably, these certificates) that omit or fail to communicate material terms.¹¹³

Both the *Untitled (1989/90)* and Evans Certificates generally contain an extensive number of definitive and sophisticated contractual requirements that easily meet the definiteness standard.¹¹⁴ Neither the *Untitled (1989/90)* nor Evans Certificates, however, say a word about payment or for that matter consideration of any sort.

This same omission of a price term proved fatal to a contract involving a certificate of authenticity in a 2010 decision under New York law.¹¹⁵ In that case, the freestanding certificate failed to address the consideration, licensing rate, or obligations of the parties with respect to the Russian-language videos at issue. Thus, the court refused to validate it as a binding copyright license on its own.¹¹⁶

Despite the similar “certificate” terminology at issue, however, the case is distinguishable from this setting. There, the federal appellate court in New York put great weight on the fact that defendants were attempting to use the Certificate of Authority to extend a prior license that had expired under its own limited terms.¹¹⁷

¹¹⁰ Evans Certificate, *supra* n. 48.

¹¹¹ *See infra*. n. 123

¹¹² Aiello v. Burns Int'l Sec. Servs. Corp., 110 A.D.3d 234, 242, 973 N.Y.S.2d 88, 94 (2013). That is, “there must be a meeting of the minds as to the essential terms of the agreement.” May v. Wilcox, 182 A.D.2d 939, 939, 582 N.Y.S.2d 294, 294 (1992)

¹¹³ Aiello, 973 N.Y.S.2d at 94. That said, courts are reluctant to find contracts indefinite, and will only strike down a contract as indefinite as a “last resort.” *Id.* at 95.

¹¹⁴ *See* Part I(C), *infra*.

¹¹⁵ Close-Up Int'l, Inc. v. Berov, 382 F. App'x 113, 116 (2d Cir. 2010)

¹¹⁶ *Id.* (Affirming grant of summary judgment denying existence of copyright or trademark license where a Certificate of Authority was issued “pursuant to the contract in force between the parties” and that contract had expired on its own terms). In the same (unreported) case, the federal appellate court in New York also concluded that a bare document, which was styled a “Certificate of Authority,” could not by itself alter or extend the terms of a complete, prior license agreement that had expired.

¹¹⁷ *Id.* The (unreported) case should thus be understood only to stand for the proposition that a freestanding Permissive Certificate will not be interpreted to alter or

Art transactions arise in a very different context. Fine art certificates of authenticity rarely exist in isolation and are provided to complement bills of sale and not to challenge them. The silence of the certificates themselves is not reflective of the absence of a price term, but just that the certificate is not an appropriate place to list it.¹¹⁸ Consistent with this notion, under the U.C.C., the price need not appear on the face of the contract because the code recognizes that in many cases “the parties have based their agreement on a price list or catalogue known to both of them.”¹¹⁹

Turning back to the works at issue here, the Evans piece likely easily satisfies this standard. The White Cube gallery website advertised a sales listing, complete with the £1,020 sticker price, exclusive of VAT, contemporaneous with provision of the Evans Certificate.¹²⁰

The *Untitled (1989/90)* Certificate is less definitive, but it states that its terms are “integral conditions to the sale of the work” which suggests the existence of a separate but integrated bill of sale or invoice for the piece.¹²¹ So long as the parties created a bill of sale and rendered payment in connection with executing the *Untitled (1989/90)* Certificate, this objection to its enforceability as a contract is readily overcome.

Finally, it is worth observing that where “it is clear from the language of an agreement that the parties intended to be bound” the court will “endeavor to hold the parties to their bargain.”¹²² Although there is strong evidence of an intent to be bound on the face of the *Untitled (1989/90)* Certificate,¹²³

extend an otherwise integrated and complete prior agreement between the parties.

¹¹⁸ Among other reasons, the certificates are often made public (as with the two discussed here) and private art buyers and sellers often prefer to keep sales prices confidential. See, e.g., THOMPSON, *Stuffed Shark* *supra* n. 13 at 193–94 (describing art world resistance to transparent pricing).

¹¹⁹ UNIF. COMMERCIAL CODE § 2-201. Courts in New York have similarly interpreted bills of sale together with other documents relating to the same fine art transaction to form a single contract if they form part of a single transaction and are designed to effectuate the same purpose must be read together. *Edelman Arts, Inc. v. Art Int'l (UK) Ltd.*, 841 F. Supp. 2d 810, 823 (S.D.N.Y. 2012) (construing contract for sale of fine art by reading bill of sale in connection with related faxes). See also, *Richman v. Brookhaven Servicing Corp.*, 80 Misc. 2d 563, 564, 363 N.Y.S.2d 731, 733 (Dist. Ct. 1975) (it is not essential to the validity of a contract that the consideration be recited therein since it may be implied or proved by parol evidence); 22 N.Y. JUR. 2D CONTRACTS § 59 (consideration may be implied and not expressly stated in instrument)

¹²⁰ See White Cube Online Gallery Listing, *supra* n. 45. Presumably buyers also received an invoice with actual purchase. Whether this was countersigned by the buyer would be important for enforceability by Evans, as discussed above.

¹²¹ See, also, *Kee, Felix Gonzalez-Torres*, *supra* n. 33, at 523 (suggesting that the certificates accompanied a bill of sale or invoice).

¹²² *Id.*

¹²³ The final paragraph before the signature block explicitly requires the buyer’s “agreement to these terms which are integral to the conditions to the sale of the work . . .

intent to bind the buyer is less clear in the Evans case as it lacks a buyer's signature block. Nevertheless, certain terms in the contract so clearly apply only to the buyer (such as "This certificate must accompany the work") that a court might be willing to infer an intent to bind such parties.

Some scholars, in particular Joan Kee, have pushed back on a reading of Gonzalez-Torres certificates of authenticity as properly enforceable contracts.¹²⁴ In questioning their contractual validity, Kee observes that "the certificates often expressed the artist's intentions as choices owners could make rather than as conditions that had to be fulfilled, or even obligations they were bound to perform."¹²⁵ Also problematic for Kee is that they do not "specify or suggest how legal sanctions could be taken to force bearers to fulfill the certificates' terms or to compensate the artist (or his estate) for non-fulfillment of the same."¹²⁶

Neither of these concerns, however, should prevent a court from reading the certificate here as an enforceable contract. It is certainly true that many of the provisions of Gonzalez-Torres certificates intentionally give significant discretion to owners of his works. Gonzalez-Torres left many choices (such as the precise height of the paper stacks in *Untitled (1989/90)*, or the arrangement of his candy spills) to the owners of the pieces. That is a core component of the aesthetic of the work.

There is nothing, however, problematic or unenforceable about giving discretion to one party to a contract. Most enforceable contracts contain wide areas of discretion.¹²⁷ This is especially true in the field of licensing, where licensees often have significant discretion (within controlled parameters) built into their use of the licensed property. To take just one example at random, a standard form contract for the reproduction of sculptures found in a commercial database gives the licensee discretion to choose how many sculptures to reproduce up to a maximum amount, where to sell those works in the world, who to retain to manufacture the copies, and when to commence with production.¹²⁸

and completes the binding nature of this contract." *Untitled (1989/90) Certificate*, *supra* n. 34, at 6.

¹²⁴ Kee *Felix Gonzalez-Torres*, *supra* n. 33, at 521 ("the lack of enforceability may bar González-Torres' certificates from being properly known as contracts").

¹²⁵ *Id.* at 519.

¹²⁶ *Id.* at 521 (referencing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58 (1963)).

¹²⁷ See, e.g., *Howtek, Inc. v. Relisys*, 958 F. Supp. 46, 48 (D.N.H. 1997) ("The fact that an agreement grants a party some degree of discretion in performing does not render the agreement unenforceable"); *Siporin v. Adler*, 364 Mich. 549, 553, 111 N.W.2d 848, 850 (1961) (affirming validity of contract placing payment of an employee bonus entirely at the discretion of the employer).

¹²⁸ 5B AM. JUR. LEGAL FORMS § 72:173 (2d ed.).

Nor is there any requirement that a contract list or even suggest a sanction for failure to comply with its terms. Courts will simply default to standard remedies where the contract is silent.¹²⁹

In short, Kee may be correct in her suggestion that the discretionary nature of Gonzalez-Torres certificates, their silence as to sanction, and their overall imprecision render them ambiguous, coy or even strategically porous contracts.¹³⁰ But that would not stop a court, should for instance there be a dispute between the current owner and the estate, from formally recognizing this signed, dense, document to be a binding agreement and interpreting it as best it can.

b. Gonzalez-Torres' *Untitled (1989/90)* Certificate and the Evans Certificate Are Express Copyright Licenses of Copyrightable Works

Assuming a court were to find that the certificates and any related documents form enforceable contracts, then they would likely also be interpreted to be express, written copyright licenses.

Taking each in turn, Gonzalez-Torres' *Untitled (1989/90)* opens by defining the subject work by title, dimensions, catalogue number and a dense paragraph of text delimiting the content of the work. It then explicitly states that “the owner has the right to reprint sheets” and “the right to manifest the work at any time.”¹³¹

The first clause is an explicit grant of the reproduction right, 17 U.S.C. §106(1), with respect to the printed sheets which make up the physical manifestation of the work. The second clause is slightly more ambiguous as it uses a term, “manifest,” not defined in the Copyright Act. That term, however, when used as a verb, means “to make evident or certain by showing or displaying.”¹³² Under that definition, the second clause tracks the public display right, 17 U.S.C. §106(5).¹³³

A court would therefore likely (and rightly) read this document as a

¹²⁹ See, e.g., U.C.C. § 2-703 (Seller's Remedies in General) and § 2-711 (Buyer's Remedies in General).

¹³⁰ Kee, *Felix Gonzalez-Torres*, *supra* n. 33, at 526–27.

¹³¹ *Untitled (1989/90)* Certificate, *supra* n. 34, at 1.

¹³² MERRIAM-WEBSTER DICTIONARY (definition of “manifest”) at <https://www.merriam-webster.com/dictionary/manifest>.

¹³³ 17 U.S.C. §109(c) already allows an exception to the public display right for owners of lawfully made copies. Accordingly, it is not technically necessary to also license the public display right so long as the art work owner has been given the right to make an authorized copy. Nevertheless, it would be understandable for a licensee to desire such an express permission as an added safeguard. This reading is confirmed by a later provision that gives rules for when “this work is publicly exhibited” by the owner or a borrowing institution. *Untitled (1989/90)* Certificate, *supra* n. 34, at 2.

license by the copyright owner (at the time, the Gonzalez-Torres estate) of the right to reproduce and publicly display *Untitled (1989/90)*.¹³⁴

Much the same can be said for the Evans Certificate. It, too, clearly, permits reproduction of the text artwork when it states, “Only to be reproduced using the pdf file supplied at the time of purchase.”¹³⁵ The reasonable negative inference of that statement is that reproductions using the proper pdf file are allowed. Similarly, the instructions regarding size, scale and thickness of the lettering, all imply a permission on the part of the certificate’s owner to print such letters (so long as they comply with the instructions) in order to realize the work. A court would have to bend over backwards to deny that a purchaser has the right to reproduce at least one version of the artwork at a time.

In much the same vein, the certificate also arguably grants a license for public display. Specifically, it states, “Only one copy of the artwork should be displayed by a single owner at a given time.”¹³⁶ Just as before, the logical inference here is that a single owner has permission to display one copy of the work at a given time.

An additional question in the copyright context concerns exclusivity. Here it seems obvious that the copyright license in the Evans Certificate is meant to be non-exclusive. On its own terms, it is an edition of 25, and the suggestion is that each owner will receive his or her certificate for each respective edition of the work.¹³⁷

The *Untitled (1989/90)* Certificate is a thornier matter when it comes to exclusivity. In favor of finding the license to be exclusive, the certificate repeatedly and consistently refers to the work as being a “unique art work.”¹³⁸ Uniqueness implies exclusivity. The owners of the piece would thus have a strong claim that only they have the right to reproduce the stacks.

On the other hand, the uniqueness of an original artwork is not the same as the uniqueness of the license or right of reproduction. This is a straightforward proposition in the traditional art context, where one can be the only owner of a Jackson Pollock oil painting without being the exclusive licensee allowed to reproduce it.¹³⁹

¹³⁴ This of course assumes the copyrightability of the underlying work. *See below* for a discussion of that issue.

¹³⁵ White Cube Gallery Online Listing, *supra* n. 45. The purchaser attains a pdf file on a CD, containing the text to be used in realizing the artwork. *Id.*

¹³⁶ Evans Certificate, *supra* n. 48.

¹³⁷ Evans Certificate, *supra* n. 48 (this is inherent in the notion that the physical certificate must accompany the work).

¹³⁸ *Untitled (1989/90)* Certificate, *supra* n. 34, at 1. *And see i.d.* at 2 (referring to the “uniqueness” of the work).

¹³⁹ *See* 17 U.S.C. § 202 (ownership of a copyright is distinct from ownership of a

This easy distinction, though, breaks down in a dematerialized work like Gonzalez-Torres' *Untitled (1989/90)*, where the very essence of the unique original is reproducibility. In such a case, what could it mean that Rosa and Carlos de la Cruz are the owners of a "unique art work" other than that they are the only ones with the right to reproduce the paper stacks containing the phrases on them described in the certificate? The work is meant to be created anew with each showing and is depleted over time as visitors take sheets away with them.

Thus, the better reading is that the *Untitled (1989/90)* Certificate in fact creates an exclusive license for the owners to reproduce the work, at least in the narrow context of public exhibition and display.¹⁴⁰

Finally, there remains the question of copyrightability. I contend that both works are more likely than not copyrightable under the Copyright Act. As discussed above, the two primary challenges offered against the copyrightability of artwork with conceptual content is that it is "inherently changing" and thus not "fixed" under Section 102(a), and that such works are fundamentally only a "concept" or "idea" and thus barred by Section 102(b).¹⁴¹ Neither should pose a problem in these cases.

Looking first to Evans' work, the easier of the two to analyze, it is clearly fixed in the form of the pdf of wall text provided with purchase. Although there is some variability with respect to the dimensions of the text, that is true for all copyrightable text-based works such as poems. And apart from the text, per the certificate, the owner may make no other modifications. As for the idea/expression dichotomy, that should pose no problems as well. Again the analogy to poetry is apt. Although Evans is a conceptual artist, and reproducible text art clearly has a conceptual component, it is difficult to imagine a court that would refuse to treat this 73-word paragraph as anything other than protectable expression.¹⁴²

Gonzalez-Torres' *Untitled (1989/90)* may be a tougher case, but is likely still copyrightable. With respect to fixation, it is important to start by distinguishing his stacks from his candy spills. The latter generally consist of hard candies of an "ideal weight" that may be exhibited in whatever physical shape the owner wishes.¹⁴³ The shape then necessarily changes

material copy, including the original copy).

¹⁴⁰ Perhaps one could argue that the exclusivity does not extend, for instance, to the right to reproduce photographs of images of the stacks in books or catalogs. That copyright interest, under this reading, would remain with the estate.

¹⁴¹ See *supra* notes 74–81.

¹⁴² *C.f.* *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 111 S. Ct. 1282, 1288 (1991) (affirming copyrightability of poems even where two poets create the same poem independent of each other).

¹⁴³ See, e.g., Certificate of Authenticity and Ownership for *Untitled (L.A.)* at 1, 2 (noting, "Each manifestation of the work may physically differ according to the owner's

unpredictably as viewers remove the candies throughout the day from the original spill pile (itself of highly variable dimensions).

The subject stack work at issue, however, must be exhibited in the form of two stacks, placed 10 inches apart. Each sheet in the stacks must always contain the precise language defined by Gonzalez-Torres, and the text must be centered on the sheet. Although a particular height of the stacks is not mandated, Gonzalez-Torres prescribes an “ideal” height for the starting point of the stacks. In addition, even more so than with the candy spills, the stacks will reduce in size (as viewers take them away) in a very predictable way—with each sheet removed, the stack gets one sheet-width shorter but retains its rectangular form. This is a dynamic artwork, but one that is dynamic within well-defined parameters. It is not nearly as variable as, for instance, the living wildflower garden that was denied copyright protection on fixation grounds.¹⁴⁴

With respect to idea/expression concerns, again this is a more challenging work for establishing copyrightability than that by Evans, given its near-minimalist aesthetic.¹⁴⁵ It would be a deep misreading of the piece, however, to suggest that Gonzalez-Torres was capturing only an “idea” (such as the idea of art that can be taken away by a viewer) as opposed to giving expression form. As the curator and art historian Nicolas Bourriaud contends of an analogous stack piece, it was not merely

a poster hand-out, but a work endowed with a defined form and a certain density, a work not displaying its construction (or dismantlement) process, but the form of its presence amid an audience.¹⁴⁶

Bourriaud goes on to expand on the role of pairings and dualism in Gonzalez-Torres (the necessary form of two stacks; the relation between stacks and viewer), reflective of his deep commitment to exploring human

ongoing right to interpret the specific, yet open-ended parameters of the work”) (on file with the author); Certificate of Authenticity and Ownership for *Untitled (Portrait of Dad)*, 1991, reproduced at 26 CORNELL J. L. & PUB. POL’Y at Appendix A (2017). The latter certificate does suggest that “the ideal manifestation” of the work is to pour them on the floor where two walls meet (i.e., loosely piled in a corner in the familiar way his work is shown). That is not a requirement, however. Stacks are far more formally defined.

¹⁴⁴ *C.f.* Kelley v. Chicago Park Dist., 635 F.3d 290, 305 (7th Cir. 2011) (artist’s garden installation “not stable or permanent enough to be called ‘fixed’”).

¹⁴⁵ Here, for instance, the piece consists of just 10 words, which makes a poetry analogy more difficult. This would also open the piece up to an attack based on the de minimis doctrine if the work consisted only of text. *C.f.* Copyright Office Circular 33 (“Words and short phrases . . . are uncopyrightable because they contain an insufficient amount of authorship.”). Here, however, text is just one aspect of a much more complete and complex artwork.

¹⁴⁶ BOURRIAUD, *Relational Aesthetics*, *supra* n. 13, at 49.

couples and the brutal loss of his partner to AIDS, and contrasts “the simplicity of the forms used by the artist” with “their tragic and militant content.”¹⁴⁷ Whether we agree with Bourriaud’s “relational aesthetics” or not, the existence of a substantial body of scholarship focused on the expressive choices made by Gonzalez-Torres lends strong credence to its existence as (often haunting) aesthetic expression and not mere idea.

c. The Certificates Evidence the Owners’ Right to Use the Artists’ Names in Connection with Exhibition or Sale of the Genuine Artwork

The owner of *Untitled (1989/90)* or an edition of *With the advent of Radio Astronomy* does not want merely to recreate and display the work. The institutional or private collector will want freedom to inform the world that the work is by Felix Gonzalez-Torres or Cerith Wyn Evans, respectively, particularly when trying to resell or donate it.

In an institutional setting, this would come in the familiar form of a wall text or label providing the artist’s name. In a gallery or auction setting, the name might further appear next to prices or lot descriptions and estimates. Each would surely also want to use the name on collateral materials for the sale or show on the website, traditional poster and print advertising, social media, etc. While a private individual collector might consider overt listings of an artist’s name in his or her home to be garish and in bad taste, as shown at the outset with respect to the Hirst *Bombay Mix* dispute, if and when that individual seeks to sell the work the artist’s name can be worth hundreds of thousands of dollars.

Do, then, the certificates for these works grant such a right to their owners? Indirectly, yes. While the documents might not rise to the level of affirmative trademark or right-of-publicity licenses, by certifying the authenticity of the subject works they effectively immunize the owners from trademark and right of publicity claims so long as the owners do not falsely affiliate themselves with the artist or estate.

When it comes to trademark and right of publicity rights, that is, certificates function slightly differently than with respect to copyright. In the copyright space, as shown above, the certificates grant affirmative copyright rights such as of reproduction or display. They create express copyright licenses. For trademarks and rights of publicity, however, they do not affirmatively authorize the owner/buyer of a work to apply a particular label or use an artist’s name in connection with sale of the work. Instead, they speak in terms of confirming source and authenticity of the piece.

For instance, the Evans Certificate does not license the right to use

¹⁴⁷ *Id.* at 50, 52–53.

Evan's name in connection with sale or exhibition of the work. Instead, it attributes authorship of the piece to Evans,¹⁴⁸ and then conditions its certification of authenticity on the buyer/owner adhering to its terms.¹⁴⁹ Similarly, nowhere in the six pages of text in the *Untitled (1989/90)* Certificate is there any express grant of permission to use Gonzalez-Torres' name. There are, however, numerous and repeated statements that make clear that the work is by Felix Gonzalez-Torres.¹⁵⁰ The entire "contract" (including, presumably its basic certification function) is then integrally conditioned on the buyers following its terms.¹⁵¹ Both works are also, of course, entitled "Certificate of Authenticity."¹⁵²

In other words, with respect to their author-source certification (i.e., trademark and right of publicity) function, these documents operate not by licensing a right to use the artist's name but by conditionally warranting the genuineness of the work as by the artist.

This is best understood not as an affirmative trademark or right of publicity license, but rather as a conditional statement of authenticity.¹⁵³ That, in turn, tracks the narrow first-sale exceptions to trademark and right of publicity claims discussed above.¹⁵⁴ The owner of a genuine thing, like a TIFFANY necklace or Orel Hershiser baseball card, has the right to call it that and resell it under that brand or name.¹⁵⁵

Under this line of cases, the owner of a genuine artwork does not need an affirmative license to list the name of the true artist that created it in connection with its resale or display, or to show an artist's signature or stamp, because neither an artist nor an estate could bring a viable trademark or right of publicity claim to prevent them from doing so.¹⁵⁶ Such a

¹⁴⁸ As with the Gonzalez-Torres' work, Evans' name appears atop the certificate, and he signed it.

¹⁴⁹ *Id.* ("Any reproduction of the above artwork is only guaranteed to be an authentic work of art by Cerith Wyn Evans when all reproduction requirements listed above have been met and accompanied by this certificate.")

¹⁵⁰ Each and every page of the document contains the artist's full name in capital letters at the top, and the first page uses possessive punctuation to state that "Felix Gonzalez-Torres' *Untitled 1989/90* . . . is a unique work owned by Rosa and Carlos de la Cruz." It is also stamped with his signature by the estate. *Id.* at 5 (describing stamp) and 6 (showing signature).

¹⁵¹ *Id.* at 6.

¹⁵² The *Untitled (1989/90)* Certificate adds the phrase "and Ownership" to its title.

¹⁵³ I.e., one that can be revoked if the terms of the certificate are not adhered to.

¹⁵⁴ See *supra* Part II(B)(1)(b). As above, I am here assuming that there had already been a bona-fide first sale of the work in connection with initial provision of the certificate.

¹⁵⁵ *Id.*

¹⁵⁶ The owner may not, however, otherwise falsely suggestion a connection to the artist or estate beyond the mere authenticity of the work. *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 102–03 (2d Cir. 2010) ("a defendant may lawfully use a plaintiff's trademark where doing so is necessary to describe the plaintiff's product and does not imply a false

question, moreover, will likely not turn on whether there was a license but rather on whether the certificate is valid and the work materially unchanged from that described in the certificate.¹⁵⁷

In sum, the trademark and right of publicity function of certificates is not to license the use of the artist's name, but rather to evidence the work's genuineness and thereby insulate a bona fide owner from trademark or right of publicity claims.¹⁵⁸

III. IMPLICATIONS

Why does it matter whether Permissive Certificates are contractually binding licenses and guarantees of source? Such a conclusion would have at least two sets of implications. First, from an on-the-ground perspective, it would establish Permissive Certificates as a powerful, practical and market-accepted tool for artist control. A Permissive Certificate could be wielded to enforce strict compliance with the rules in the certificate through the threat of legal sanction where moral rights doctrines fail. Or, more potently, it could provide a tool for the artist or successor to prevent resale or even revoke the original sale entirely. Second, considered more abstractly, this conclusion would further position the certificate of authenticity as the locus of value for reproducible artworks at a moment when reproducibility is increasingly at the heart of artistic practice. Collectors of art will become collectors of permissions. Each is discussed in turn below.

A. *Permissive Certificates as a Tool for Artist Control*

This section argues, descriptively, that Permissive Certificates are poised to become a legal tool for artist control—one more useful to artists and their estates, perhaps, than U.S. moral rights legislation. First it briefly reviews the avenues for artist control under current U.S. law. Next, it shows how Permissive Certificates allow for private controls through contractual restriction and scope limitations. It then turns to resale restriction and

affiliation or endorsement by the plaintiff of the defendant.") (emphasis added).

¹⁵⁷ See *supra* Part II(B)(1)(b).

¹⁵⁸ One might attempt to distinguish the first sale cases by pointing to the fact the certified artworks at issue here (by definition) have not yet been completely realized at the moment of sale. As discussed in Part I(D), the authentication function is operating prospectively. That is different from a Tiffany necklace, which was created and stamped TIFFANY once and for all by Tiffany prior to the first sale. Nevertheless, the point of the first sale doctrine with respect to source authentication is that once the work has been authenticated, the buyer has a right to tell the world its source. This would appear to hold regardless of whether the artist chose to authenticate the piece in advance on spec rather than after fabrication, so long as it has not been materially altered. See *supra* n. 95.

termination, arguing that through Permissive Certificates an artist or artist estate might deprive a collector of the ability to sell or show an artwork in his or her collection.

1. The Problem of Artist Control and U.S. Moral Rights Law

Once an artist sells a traditional artwork in the United States, that artist has few means of controlling what the new owner does with it. Copyright law allows the artist to prevent reproductions of the work,¹⁵⁹ but the first sale doctrine and exceptions to the public display right in Section 109 mean that there is little the artist can do through copyright law to prevent resale or display of it.¹⁶⁰ The circumscribed moral rights provisions contained in the Visual Artists Rights Act prevent mutilations, distortions, destructions and other modifications of some unique and limited edition artworks in some cases,¹⁶¹ and allow visual artists to disclaim authorship in others,¹⁶² but those provisions are gap-ridden and have not proved themselves to be a fertile source of artist control.¹⁶³

To name just a few limitations, for post-1990 works VARA protections die with the artist,¹⁶⁴ its most potent provisions apply only to works of “recognized stature,”¹⁶⁵ it exempts negligent conservation and exhibition decisions,¹⁶⁶ and it covers only traditional, copyrightable “works of visual

¹⁵⁹ 17 U.S.C. §106(1).

¹⁶⁰ 17 U.S.C. §§109(a) and (c).

¹⁶¹ 17 U.S.C. §106A(a)(2) and (3).

¹⁶² 17 U.S.C. §106A(a)(1).

¹⁶³ It is beyond the scope of this paper to address gaps in U.S. moral rights law in any depth. Other scholars, however, have given this issue substantial attention. *See, e.g.*, Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1 (1997) (assessing weaknesses in VARA through review of early case law); Roberta Rosenthal Kwall, “*Author-Stories: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*,” 75 S. CAL. L. REV. 1, 22 (2001) (noting, “Many articles have lamented the absence of adequate moral rights protection in the United States” and collecting same); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 300 (2004); Rebecca Stuart, *A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards*, 47 SANTA CLARA L. REV. 645, 646 (2007) (observing, “The American legal system places a lower value on the works of visual artists than foreign legal systems by failing to provide protection for the moral rights of all artists.”); 3 NIMMER ON COPYRIGHT § 8D.02 (2018) (acknowledging, the “scope [of US moral rights] is limited even within the realm of visual arts”); Robert C. Bird, *Moral Rights: Diagnosis and Rehabilitation*, 46 AM. BUS. L.J. 407, 408 (2009).

¹⁶⁴ 17 U.S.C. §106A(d)(1).

¹⁶⁵ 17 U.S.C. §106(A)(a)(3)(B).

¹⁶⁶ 17 U.S.C. §106(A)(c)(2).

art.”¹⁶⁷ This latter limitation is particularly problematic for works captured in Permissive Certificates, which are generally not traditional, unique art objects. Nor does the U.S. allow an artist to prevent or profit from resale of the artist’s work through a *droit de suite*.¹⁶⁸ State law protections, for their part, form an irregular patchwork are largely preempted by VARA with respect to visual art.¹⁶⁹

There is far from an academic consensus that VARA protections should be increased, with prominent scholars having indicated their opposition to moral rights legislation.¹⁷⁰ I do not mean to take sides in that dispute here. It remains nevertheless clear that artists regularly do in fact attempt to control their works after sale.¹⁷¹ Indeed, artists have attempted to overcome VARA limitations through the development, for instance, of form contracts designed to give the artist downstream control of sold artworks.¹⁷² In part due to market rejection of their onerous terms, however, these agreements (in contrast to Permissive Certificates generally) have never been widely adopted.¹⁷³

2. Artist Control by Contractual/License Restriction

¹⁶⁷ 17 U.S.C §106(A)(a)(limiting to works of visual art); §101 (defining work of visual art to exclude, inter alia, non-copyrightable, audiovisual, works in editions of more than 200 copies).

¹⁶⁸ See U.S. Copyright Office, *Resale Royalties: An Updated Analysis*, 6 (2013) available at <https://www.copyright.gov/docs/resaleroyalty/usco-resaleroyalty.pdf>. (describing history of failed attempts to pass a resale royalty in the U.S.). California’s state resale royalty law has been substantially narrowed by court decisions. See, e.g., *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1322 (9th Cir. 2015) (holding act unconstitutional as applied to sales outside of California).

¹⁶⁹ 17 U.S.C. § 301(f)(1). To be sure, when VARA does apply, it can be quite a power tool. See, e.g., *Cohen v. G&M Realty L.P.*, No. 13-CV-05612(FB)(RLM), 2018 WL 851374, at *20 (E.D.N.Y. Feb. 12, 2018) (affirming \$6.75 million VARA judgment for willful destruction of aerosol art).

¹⁷⁰ See, e.g., Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 265 (2009) (arguing that “moral rights laws endanger art in the name of protecting it”).

¹⁷¹ See, e.g., Karol, *Termination*, *supra* n. 8, at 212–13 (discussing same).

¹⁷² The most well-known of these is the Artist’s Reserved Rights Transfer and Sale Agreement developed by Robert Projansky and Seth Siegelau in 1973. *In Deed Catalog*, *supra* n. 13, at 51 (reprinting same). Among other things, it grants artists “ongoing control over the exhibition, reproduction, and maintenance of their work, as well as a 15% resale royalty.” Buskirk, *Public Experience*, *supra* n. 3, at 476 (describing same).

¹⁷³ *Id.* Some have argued for a more trademark-centric approach to moral rights, particularly for contemporary artists. See, e.g., Xiyin Tang, Note, *The Artist As Brand: Toward A Trademark Conception of Moral Rights*, 122 YALE L.J. 218, 230 (2012). This conception is consistent approaching Permissive Certificates as licenses.

a. Enforcement of Contract Terms

The most immediate manner through which artists could use Permissive Certificates as a form of control over the uses to which buyers put their art would be to enforce their terms as binding contract restrictions.¹⁷⁴

Imagine, for instance, that a purchaser of one of the 25 editions of Cerith Wyn Evan's *With the advent of Radio Astronomy* decides to create two copies of the work so that she can keep one at her home while she loans another copy to a traveling exhibition. This is technically easy to accomplish, as the buyer possesses a CD and can print as much vinyl text as she wishes.

This is, however, arguably a violation of the clause reading, "Only one copy of the artwork should be displayed by a single owner at a single time."¹⁷⁵ Were the certificate enforceable as a contract, then Evans could demand that a court enforce the provision by enjoining the buyer's efforts.

A similar argument could be made should the buyer use a slightly different font type from that prescribed by the pdf file, thereby contravening the requirement, "Apart from the scale of the text, there must be no other modifications to the design." In such a case, the contract here could be used to prevent modifications.

The Gonzalez-Torres case is slightly different. As Kee emphasizes, many of the instructional guidelines in the *Untitled (1989/90)* certificate are simply recommendations, as shown by repeated use of the terms like "may" and "ideally".¹⁷⁶ Nevertheless, other requirements in the certificates are quite definitive. For instance, the phrases "Somewhere better than this place" and "Nowhere better than this place" that must appear on the two stacks of sheets are not subject to any discretion. Similarly, "the stacks must be exhibited with the printed side of the sheet on view."

For these core requirements, the Foundation could have a viable contract claim against a buyer who (for instance) uses the term "then" instead of "than" in the text, or who insists on showing the printed side down to be contrarian.

Importantly, in both cases, the contract claims are essentially providing

¹⁷⁴ This would require, of course, that the certificates be enforceable as contracts. At a minimum, this would usually require a countersignature by the buyer. *See supra* Part II(B)(2)(a).

¹⁷⁵ The buyer might try to counter that the term "should" is discretionary, not obligatory. A court would likely reject this as a matter of contract interpretation, given that the work is also clearly indicated to be 1 of an edition of 25, and other clauses requiring the (unique) certificate to remain with the work.

¹⁷⁶ For instance, "If this exact paper [75 lb. white offset by Georgia Pacific] is not available, a similar paper may be used," or the "text is ideally reproduced at this size." *Untitled (1989/90) Certificate, supra* n. 34, at 1.

the equivalent of a moral right of integrity where a VARA claim would itself face challenges.¹⁷⁷

b. Reproductions of the Artworks Outside the Scope Permitted by the Certificates is a Copyright Infringement

In addition to, and arguably more potent than the foregoing contract-based claims, such actions would arguably be outside the scope of the license and thereby amount to copyright infringement.¹⁷⁸

Understood as a copyright license, the buyer of Evans' work is permitted to reproduce one and only one copy of the work at a given time. Reproducing two copies (one for home use, and one for a traveling exhibition) is materially outside of the scope of the license, just as the homebuilder who uses an architect's plans for additional, unpermitted houses.¹⁷⁹

Similarly, Gonzalez-Torres' contract contains clear, strong restrictions on resale, a contractually permissible type of restraint on alienation. In particular, the Foundation must be given a right of first refusal.¹⁸⁰ Should the current owners attempt to sell the piece without first offering it to the Foundation, in violation of that provision, it would surely be a breach of contract like the others discussed above.

More importantly, however, any reproductions made by the successor would likely be unauthorized and thus considered outside the scope of the copyright license and an act of copyright infringement.

The existence of copyright infringement claims strongly improves the artist's position. In addition to bringing in powerful copyright remedies in

¹⁷⁷ Among other problems, it is not clear in Evans' case that a font change would "be prejudicial to his [] honor or reputation" or that text art is even a "work of visual art" to begin with. See 17 U.S.C. §106A(2) and (3)(B) and §101 (only a painting, drawing, print, sculpture or photograph may be a "work of visual art"). As mentioned earlier, Gonzalez-Torres' works face copyrightability problems. See, e.g., Said, *Illogical*, *supra* n. 75, at 348 (offering arguments to support copyrightability of Gonzalez-Torres' candy spills in face of likely fixation challenges under current law).

¹⁷⁸ See *supra* Part II(B)(1)(a).

¹⁷⁹ *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1156 (9th Cir. 2006) *overruled on other grounds by* *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011). As the Federal Circuit put it, "As an example, consider a license in which the copyright owner grants a person the right to make one and only one copy of a book Obviously, a licensee who made a hundred copies of the book would be liable for copyright infringement because the copying would violate the Copyright Act's prohibition on reproduction and would exceed the scope of the license." *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1316 (Fed. Cir. 2005)

¹⁸⁰ See *Untitled (1989/90)*, *supra* n. 13, at 3–4.

certain cases (including statutory damages and attorney's fees),¹⁸¹ a copyright infringement claim does not necessitate the existence of an enforceable, written contract. Indeed, should the buyers deny the enforceability of the certificate as a contract, then arguably they are themselves denying their status as licensees of the reproduction right, and have effectively admitted themselves to be infringers.

c. Material variations from the Certificate voids the Authentication and Subjects the Owner to Potential Trademark and Rights of Publicity Claims

As detailed above, an artist in the U.S. cannot rely on traditional trademark or right of publicity law to prevent an owner from accurately representing the piece to be by that artist for purposes of display or resale.¹⁸² The signed certificate of authenticity definitively evidences the accuracy of the attribution. This assumes, however, that the artwork does not materially differ from that described in the certificate. If an artist can demonstrate that the work shown differs materially from the original than it will no longer be insulated from trademark and right of publicity claims, respectively.¹⁸³

A starting place for any such analysis should be the parameters set by the certificate itself. In Evans' case, for instance, the certificate explicitly conditions its guarantee of authenticity on "all reproduction requirements listed above hav[ing] been met". The same prohibited font alteration that could provide Evans with a claim for breach of contract or copyright infringement could thus potentially support (if deemed material) a claim for trademark or right of publicity infringement.¹⁸⁴

So to with respect to the definitive requirements in Gonzales-Torres' works. A change to the core phrase in the text, for instance, would almost certainly be a material alteration that voids the certificate and exposes the owner to a trademark and right of publicity suit.

3. Termination

As I have explored at length elsewhere, another major implication of

¹⁸¹ See 17 U.S.C. §§504(c) and 505.

¹⁸² *Supra* Part II(B)(1)(b),

¹⁸³ *Id.*

¹⁸⁴ One wrinkle here is that the case law suggests materiality is determined from the perspective of the purchasing public, which would here likely be buyers of contemporary art. See *supra* n. 95. Art buyers, however, would likely look to the certificate to guide their own views of materiality, thereby leading to the same result.

recognizing Permissive Certificates as copyright licenses is that they become subject to statutory copyright termination in the U.S. after 35 years.¹⁸⁵ This allows an artist or estate to terminate, for free, any copyright licenses (or assignments) the artist granted during his or her lifetime regardless of whether the contract allowed for such termination or not.¹⁸⁶

As shown above, once a copyright license has been terminated further reproductions are acts of copyright infringement.¹⁸⁷ Thus, the putative “owner” of a Felix Gonzalez-Torres paper stack piece is at risk for claims of copyright infringement by his Foundation should that owner try to realize the piece for exhibition post-termination.¹⁸⁸ The same would hold for bona fide purchasers of an edition of Evans’ *With the advent of Radio Astronomy*. That owner would be at risk of an infringement claim should she reprint a new set of vinyl wall text for a new exhibition from the authorized pdf in her possession after termination. This is true regardless of whether either Permissive Certificate appears on its face to be a perpetual grant.

In short, if Permissive Certificates are recognized as copyright licenses, then they become no more than 35 year leases that the artist or the artist’s successor may or may not choose to tolerate after that time.¹⁸⁹

4. Limits on Transferability

a. Contractual Restraints

Licenses can and often do contain contractual restraints on assignment or sublicense.¹⁹⁰ These are generally enforced by courts according to their own terms, but construed narrowly.¹⁹¹ Attempts to transfer such a non-assignable license are void, and render the attempted transferee at risk for copyright infringement claims should it attempt to use the licensed

¹⁸⁵ Karol, *Termination*, *supra* n. 8 *passim*.

¹⁸⁶ 17 U.S.C. §203(a).

¹⁸⁷ *See supra* n. 87.

¹⁸⁸ This assumes, of course, that the work is copyrightable. *See* Part II(B)(2)(b). The Foundation purports to “hold[] the copyright in and to all works by Gonzalez-Torres.” http://felixgonzalez-torresfoundation.org/?page_id=56.

¹⁸⁹ The same termination problems would arise under contract law, in the event of a material breach of the contract/certificate by the artwork owner. A material breach would entitle the artist to rescind the contract and copyright license, rendering subsequent reproductions acts of infringement. 3 NIMMER ON COPYRIGHT § 10.15 (2018).

¹⁹⁰ *See, e.g.*, MILGRIM ON LICENSING § 15.13 (2018) (“Typically, the licensor’s preference is that its licensee not have the right to sublicense.”)

¹⁹¹ *Traicoff v. Digital Media, Inc.*, 439 F. Supp. 2d 872, 879 (S.D. Ind. 2006) (“parties may include an anti-assignment provision in the contract, prohibiting (1) the assignment of rights, (2) the assignment of duties, or (3) both. But, careful detail must be given to the language of such provision.”)

copyright interest.¹⁹²

A surprisingly large percentage of the *Untitled (1989/90)* Certificate—more than half of the six pages—is taken up by restrictions on transfer. The license is clearly assignable on its face for purposes of “loans to exhibitions.”¹⁹³ The owners may also clearly “resell the work” in which case the Foundation will issue a new certificate in the name of the new owners—the functional equivalent of an assignment of the original owner’s rights on resale.¹⁹⁴

Nevertheless, the right to assign is heavily circumscribed. Most seriously, the Foundation is granted a right of first refusal to purchase the work should the current owners attempt to sell it.¹⁹⁵ Even where the Foundation chooses not to acquire the work, it is still a necessary party to a resale transaction because of the detailed provisions governing reissuance of the certificate.¹⁹⁶

The Evans Certificate license is more ambiguous as to resale, although it, too, would likely be interpreted to allow for transfer. In particular, although it nowhere affirmatively grants the right to assign the reproduction right, it does state, “This certificate must accompany the work through all transfer of ownership” and will not be reissued if lost.¹⁹⁷ The logical inference of this statement is that transfer of the license is permitted, so long as the original document is itself passed to the successor.

It is possible that some clauses in certificates that purport to limit resale would be preempted by the Copyright Act’s first sale doctrine, which permits one who has acquired ownership of a lawfully made copy (such as an artwork) to dispose of that copy without the permission of the copyright owner.¹⁹⁸ As a general matter, however, first sale cases apply to sales of a copy of the work at issue, and are not applicable to pure licensing transactions.¹⁹⁹ Permissive Certificates such as those used by Felix

¹⁹² See, e.g., *Sapiano v. Millenium Entm't, LLC*, No. CV 12-8122 PSG (MAN), 2013 WL 12120262, at *9 (C.D. Cal. Nov. 14, 2013) (allowing plaintiff to move ahead with copyright infringement claims against a party that was not a proper transferee of an exclusive copyright license).

¹⁹³ *Untitled (1989/90)* Certificate, *supra* n. 34, at 1 (“the owner has the right to assign this assignable right”).

¹⁹⁴ *Id.* at 2.

¹⁹⁵ *Id.* at 3–4.

¹⁹⁶ *Id.*

¹⁹⁷ Evans Certificate, *supra* n. 48.

¹⁹⁸ 17 U.S.C. § 109(a); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1177 (9th Cir. 2011).

¹⁹⁹ *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 146–47 (1998) (“[B]ecause the protection afforded by § 109(a) is available only to the ‘owner’ of a lawfully made copy ..., the first sale doctrine would not provide a defense to ... any nonowner such as a bailee, a licensee, a consignee, or one whose possession of the copy

Gonzalez-Torres generally operate as pure licenses by providing permissions without transferring existing copies. As such, they are arguably outside the scope of the first sale doctrine.

That said, one can imagine cases (for instance, that involving Damien Hirst's *Bombay Mix* discussed at the outset) where a Permissive Certificate accompanies transfer of an actual copy of the work itself. In those cases, under U.S. law, one could argue that the purchaser/owner's first sale rights under Section 109(a) trump any attempt by the copyright owner to limit resale of *that* copy in the certificate.²⁰⁰

b. Background Legal Restraints on Transfer

In the absence of express permission to transfer an exclusive license, the Copyright Act "does not allow a copyright licensee to transfer its rights under an exclusive license, without the consent of the original licensor."²⁰¹ A similar rule holds for nonexclusive licensees.²⁰²

Contrary to the two examples just discussed, many if not most Permissive Certificates are silent on the subject of transfer. In such a case, acquirers of such documents by resale or auction are at serious risk for claims of copyright infringement should they attempt to realize works detailed therein without the consent of the artist. This has the potential to be a huge cloud on the title of very high value acquisitions.

B. *Collectors of Art as Collectors of Permissions*

Where traditional certificates of authenticity add value by confirming artist attributions, Permissive Certificates go further by authorizing realization of the underlying artwork. As I hope to have thus far demonstrated, they do so not just through the custom and sanction of the art world, but with the weight of enforceable law behind them. This lends them an importance and value, for artworks with reproducible components, far beyond mere retrospective authentication. They are keys that unlock the works themselves.

It should come as no surprise, then, that in disputes like those

was unlawful.?).

²⁰⁰ I anticipate treating this issue in further depth in later works.

²⁰¹ *Gardner v. Nike, Inc.*, 279 F.3d 774, 780 (9th Cir. 2002). Some lower courts have disagreed with this holding, yet it remains the law in the Ninth Circuit. *See, e.g.*, *Traicoff v. Digital Media, Inc.*, 439 F. Supp. 2d 872, 877 (S.D. Ind. 2006) ("This court also finds the reasoning in *Gardner* to be unpersuasive.")

²⁰² 2 PATRY ON COPYRIGHT § 5:127 (Since a nonexclusive licensee is not a copyright owner, it may not, absent express authorization, transfer the license, nor may it, absent authorization, sublicense.)

concerning the Menil Collection/LeWitt we see a strong focus on the certificate as such, even where actual authorship of the wall is not in dispute. Permissive Certificates are, and will increasingly continue to be, the locus of value for works with conceptual or reproducible content.

Stepping back further, perhaps the most theoretical implication of recognizing certificates of authenticity as certificates of permission is also the most meaningful. Namely, collectors of art (both institutional and private) are poised to become collectors of permissions: repositories of legal rights rather than archives of objects.

As artists increasingly turn to dematerialized and reproducible art practices, collections like that of Giuseppe Panza—as much an archive of signed documents and related ephemera as one of objects—will move from the periphery to the mainstream.

We should expect to see evermore museums replicating the Guggenheim's multimillion-dollar Panza Collection Initiative. Those other museums, too, will want and seek to understand the rights they have been granted and restrictions by which they have been limited with respect to Permissive Certificates in their collections.

This practice of “invest[ing] in paper” as opposed to displaying realized artworks was, to be sure, the subject of Judd's deep scorn.²⁰³ The artist dismissively described the collector of his certificates in unrelentingly mercantile terms:

sales, purchases and sales: quantity, are exactly what he wants to think about. . . . He really wants to talk about his investment in art . . . but must be restrained for appearances, and must whitewash investment for both himself and the public with idealistic platitudes.

Judd went so far as to compare Panza to Thersites in the Iliad in that “nothing stops him or shames him.”²⁰⁴

Underlying the strength of Judd's hostility to the practice of collecting permissions, however, is a recognition of its commercial viability, seductiveness to collectors (private and institutional), and likely longevity.

It will become ever more common to visit the Guggenheim, Whitney, MoMA, or to make a pilgrimage to Crystal Bridges in Arkansas (the purchaser, not long ago, of *Untitled (L.A.)* for \$7.67 million), not to admire the world's one copy of *Demoiselles D'Avignon*, but because only that institution will have the legal right to spill candies and call them a Gonzalez-Torres, or to 3D-print an authentic Josh Kline installation from a file.

²⁰³ Judd, *Una stanza*, *supra* n. 1, at 643.

²⁰⁴ *Id.* at 631. In part due to Judd's denunciation of Panza's recreations, the Guggenheim will not fabricate certain Judd certificates in its collection, despite its relatively clear legal right to do so. GROVER, *Authenticity*, *supra* n. 13, at 168.

It is not difficult to imagine a paradigm shift in the future such that the very notion of authenticity will merge with that of permission. Future authenticity disputes, like current copyright and trademark litigations, will center around whether an artist truly authorized or executed the legal instrument, or the scope of any such permission, rather than whether the artist's hand in fact touched the object at issue. The aura of the artist's hand will be that of a signature and not a brushstroke.

In such an era, value will inhere in the museum's possession of an unassailable intellectual property right rather than an unassailable Vermeer.

CONCLUSION

Permissive Certificates, created by conceptual artists both to meet and challenge the commercial pressures of art markets, have fascinated art historians for some time. Such documents, essentially instructions for art generation, force us to confront fundamental ontological questions on the nature of art, the relationship between artist, collector and viewer, and the influence of money and acquisitiveness on art creation.

As this article has attempted to show, however, they are also legal instruments. In their controlled allocation of rights to realize artworks, they create limited, often exclusive, copyright licenses. In many cases, they form enforceable contracts, placing duties and restrictions on collectors far more potent than those found in moral rights legislation. In their authorization of attribution, they negate source-based challenges to the owner's use of the artist's name or brand in connection with display or resale of the underlying works. As much as they are a grant of artistic permission, they are also an assertion of artist control.

Permissive Certificates are also very valuable, from a simple market perspective. Some sell for millions of dollars at auction, despite being nothing more than rights on paper. By that I do not mean to suggest that such acquisitions or valuations are misguided. Felix Gonzalez-Torres is one of the great artists of the last few decades, and his spills and stacks are conceptual masterworks. Rather, I mean only to show how closely this art category parallels the tech sector of our economy, where companies are valued for their intangible IP assets over all else. In both cases, the value is in the legal rights, yet the value is real.

As new media artists continue to embrace reproducibility through 3D-printed, digitally rendered, performance-based art practices and the like, Permissive Certificates are positioned to become more central to art acquisition and control. The great private collections and museums of the future will become vaults for contracts as much as objects, essentially repositories of permissions.