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ENACTING ARTISTIC AUTHORSHIP IN CONTEMPORARY ART CONSERVATION: CONTRACTS, INCOMPLETENESS, AND THE POSSIBILITY OF MAKING

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ABSTRACT This paper considers the law and practice of authorship in relation to the conservation of works of contemporary art. Approaching the question of authorship in contemporary art conservation from a practice theory perspective, artistic authorship is framed not as a fixed status, but as an ongoing practice. Focusing on the use of contracts to determine the parameters of care and custodianship of artworks, I propose adopting the view of artists' contracts as social artefacts advocated by legal scholar and art historian Joan Kee. This perspective enables an understanding of the formalised legal structures of artistic authorship that recognises their relational and negotiated nature and opens these structures to 'the possibility of making'.

Introduction

In the field of contemporary art conservation, contracts are often invoked as a potential source of certainty: about the work and its identity, about the artist's intentions, and about the rights and duties of the various parties involved in the work's custodianship and care. This paper both problematises this perception and questions the desirability of this certainty.

A purely legal perspective on contracts fails to fully encompass their use and utility in the context of contemporary art conservation. Framing these legal instruments as social artefacts reflects a more accurate picture of the role of contracts and the value and benefit that contract law offers.[1] According to this view, formal legal agreements are generally incomplete, their terms emerge over time in the context of deeply embedded social relationships. Contracts may be framed as an instrument that conditions the ownership and care of an artwork. This discussion considers how the use of contracts in the conservation of contemporary art operates as a performance of authorship, a claim of authorial status or rights, and the enactment of a particular vision of what authorship of a work entails. This approach recognises the social function of contracts, and their utility as an instrument for the practice of authorship.

Authorship as practice

Artists' authorship interests are crucially important in the field of contemporary art conservation, both as normative legal institutions and as ongoing and negotiated practices. Legal rights associated with authorship (such as copyright law's economic and moral rights) enable artists to exercise a measure of control over the ongoing care and treatment of their works and these rights may also be later exercised by their heirs, estates or foundations.[2] While the identities of author and owner are commonly thought of as questions of absolute, definitive and perhaps legal, status, I argue that these identities are also achieved and maintained through practice. Surveying legal and non-legal accounts

of artistic authorship, it becomes evident that a clear-cut distinction between law and practice is not sustainable. Copyright law gives a normative account of authorship, defining who is and is not an author.[3] Other areas of law, such as contract, are implicated in the performance and enactment of authorship and ownership.

Authorship can be viewed not as a fixed status attained through the act of creation, but as a practice; ongoing, embodied and relational. Practices have been described as 'embodied materially mediated arrays of human activity centrally organised around shared practical understanding'.[4] Adopting Schatzki's characterisation, I use the term the 'practice of authorship' to refer to acts of attribution and credit, permission, consultation, direction and deference. These actions are governed by ideas of authority and control in relation to authorial works and structured by understandings about who counts as an author and the rights and privileges that attach to authorship. The idea of authorship as a created and sustained identity – related to but distinct from the act of creating a work – is well established in the field of literature. The practice of authorship in literature has been explored both within and beyond the text. Within the text, the development of individual and distinctive style[5] and the incorporation of autobiographical elements have been identified as elements of 'authorial performance'.[6] Beyond the text, Adams, for instance, explores how authorship was asserted through the convention of the literary tour in the 19th century.[7]

The practices of authorship identified in this paper entail both the performance of authorship and ownership by the authors themselves, and corresponding, complementary practices on the part of those surrounding the work. The 'achieved identity'[8] of the author depends on both of these elements: 'fashioning oneself and being fashioned by cultural institutions [are] inseparably intertwined'.[9] For the sake of clarity in describing and discussing these aspects of the practice of authorship, I differentiate between the two by adopting the terminology of 'performing authorship' for referring to the embodiment of authorial identity by the author and 'enacting authorship' to denote the practices of others that enact and reinforce that authorial status.

The value of describing artistic authorship as practice lies in its recognition of authorship's flexibility, and amenability to ongoing negotiation. A practice theory approach to authorship has particular value once we move away from established normative accounts of authorship. Orthodox definitions of authorship have been challenged by both contemporary artistic practice and approaches to the conservation of contemporary artworks. Practices of authorship in this field are at the boundary of accepted understandings, and therefore involve the negotiation and mediation of interests. This negotiation is evidenced in uncertainty in questions of authority for conserving contemporary artworks: when does authorship end, and how and by whom are decisions made?[10] Understanding authorship as practice reveals it to be open-textured and ongoing despite its formalisation in laws or legal agreements.

Contracts in contemporary art conservation

In the conservation of contemporary art, contracts form an aspect of authorial practice. The contract is a mechanism through which different accounts of authorship are performed and enacted. It may be effectively used to articulate the expectations of artists and the obligations of collectors. The use of contracts as a mechanism for ensuring the rights of artists over their work even after it has been sold was pioneered by curator Seth Siegelaub working with lawyer Robert Projansky. In 1971, they drafted *The Artist's Reserved Rights Transfer and Sale Agreement* in response to concerns expressed by the Art Workers' Coalition (AWC).[11] The AWC, an activist group, advocated for a critical reassessment of the position of the artist, and redress of injustices in the power relations of the art world, especially in respect of the authority and control artists had over their own works once they had been sold. The Coalition's agenda sparked thinking about the extent of control artists ought to have over the conservation of their work. Siegelaub stated:

> We have done this for no recompense, for just the pleasure and challenge of the problem, feeling that should there be a question about artists' rights in reference to their work, the artist is more right than anyone else.[12]

The document demonstrates a commitment to ensuring consultation and control over alterations and conservation. It provides that the artist must be consulted in the event their work requires repair (Article 10), that the collector obtain the artist's consent prior to the exhibition of the work (Article 7), and the collector not intentionally modify, alter, or destroy the work (Article 9). While the contract did not become widely used, many artists have utilised contracts in similar ways: to assert control over their works and to articulate a political stance regarding the position of artists in their dealings with collectors and institutions.

In contemporary artistic practice, regimes of contract and certification facilitate the ownership and transfer of works, and validate authenticity and originality.[13] Owing to the diverse forms they take, these documents have variable legal status: some may be legally binding agreements, others merely notes or instructions.[14] Installation instructions, display specifications and artist's communications do not necessarily carry legal weight. They may, however, acquire contractual force where they are incorporated into contracts such as acquisition agreements or copyright licences.

Contracts facilitate the acquisition of artworks in various ways, enabling different models of ownership. Siegelaub and Projansky's *Agreement* is an acquisition contract that provides for the transfer of ownership of the work, with the artist retaining a set of rights pertaining to the work. This document was also a political statement, claiming through contract a set of rights that were not available to artists in copyright law.[15]

Contracts such as the *Agreement* also enabled the commodification and acquisition of works of conceptual art. As Lippard and Buchloh have demonstrated, certificates of authenticity and contracts facilitated the commodification of the 'dematerialised object' of conceptual art.[16] In relation to conceptual artworks and works with delegated realisation, certificates of authenticity have an uncertain legal status: they may or may not be contracts. Whether a certificate or set of instructions amounts to a contract depends on the specifics of each case. In Martha Buskirk's analysis of works in the Panza collection, she notes that Panza and Donald Judd signed 'contract-like certificates'.[17] Daniel McClean distinguishes between contracts and certificates, describing the latter as quasi-legal.[18] Joan Kee's analysis of the practices of Felix Gonzalez Torres concludes that the uncertain language in his certificates renders the possibility of their enforcement unlikely.[19] Peter Karol, on the other hand, focusing on the works of Judd and LeWitt, argues that in certain circumstances certificates may function as an implied licence and are, therefore, legally enforceable.[20]

Contracts play a crucial role in the acquisition and display of time-based media works, which are often acquired by licence. For these works, as well as the work's components, what is generally being acquired is the right to publicly display the work and to reproduce it as necessary. The Matters in Media Art copyright licence template, for instance, includes provisions that authorise the museum to 'screen or publicly perform the work' (Article 2.6) and to 'make copies and migrate the new media to new formats for the purposes of preservation" (Article 2.5).[21] This contractual authorisation is essential to the museum's ability to acquire, care for and display time-based media works.

In this sphere, contracts operate as a technology of ownership, providing a mechanism through which slippery works can become transferable and acquirable. Recently, the artist Cameron Rowland has used contracts as a tool to subvert this logic of ownership. Rowland designates some of his works as available only on a rental basis for a monthly payment and specified duration; 'asserting temporally finite possession rather than permanent ownership'.[22] Rowland's approach complicates the established dynamic of alienation and acquisition in the relationship between artist and collector. It draws the dependencies of the work – the conditions of its production and the terms of its exchange – into the work itself.[23] Several of Rowland's works have been 'acquired' on rental terms by the Museum of Modern Art in New York. These acquisitions require close implication between the artist and the institution – the work may only be loaned if the artist approves, and the contract automatically renews every five years unless either party wishes to terminate it.[24] Rowland's use of contracts reveals the political and relational – as well as the legal – instrumentalities of these legal forms.

The following discussion contemplates both documents that would be considered enforceable contracts, as well as quasi-legal instruments, such as notices. Both kinds of documents may be considered an exercise of authorship. Contracts are used by artists to define the work and its parameters, as well as to stipulate conditions for its conservation and custodianship. These agreements perform various functions: defining the work; stipulating conditions for fabrication and replacement; providing instructions for installation and display; establishing a relationship between the artist and collector; requiring that artists, their representatives or heirs be consulted in decision making; and setting out the consequences of derogating from the terms of the agreement.

These uses of the technology of the contract show that it can be framed as an aspect of authorial practice. Artists' contracts are a tool to renegotiate the cultural orthodoxies of authorship. They enable claims of particular authorial rights: a way of enacting a particular version of what it means to be the author of a work. McClean explains this function of contracts, drawing on J.L. Austin's notion of performative speech:

> Legal promises are special instances of … the 'performative' (speech acts which act upon the world rather than describe it) governed by the potential coercion of legal sanctions for their breach, for example, damages and enforced performance.[25]

Framing contracts as authorial gesture shows their utility in the practice of authorship, claiming through this action what being author of an artwork means. This may be control over the work's installation and exhibition or otherwise stipulating conditions of the work's stewardship. Contracts are an aspect of authorial practice: a tool for artists to specify the kind of control and authority they feel they ought to have over their works after they have been sold.

Contracts and certainty: sanction and score

As the above discussion demonstrates, contracts represent an opportunity and a forum in which the identity of the work and parameters of its display and care may be determined and detailed. They offer clarity, consideration and discussion of issues that may not have otherwise been contemplated. Contracts seem to offer a particular value in conservation: a moment of certainty. Used in the process of acquisition, they represent an opportunity to set the terms as to precisely what is being acquired and to specify or inform the strategy for the work's care. Speaking at the *Body of Work* symposium in New York, art historian and attorney Virginia Rutledge noted:

> It's been fascinating to see how gallerists and dealers use the contract to supplement and sometimes help, like a good prenup, an artist or the foundation tease out with the collector or ultimate steward of the work *what the work is*.[26]

Rutledge's description of the role of contracts echoes that of Fernando Domínguez Rubio, for whom contracts are 'technologies of description',[27] which operate to specify:

> the particular relationships of property, authorship, and authenticity whereby the artwork acquires its boundaries and identity.[28]

This task – teasing out a definition of the work and determining its contingencies and parameters – is central to the conservation of contemporary art. Contracts provide an opportunity to do this is in a clear way in a form that carries legal weight and can be referred to with certainty.

Locating contracts and their use within the theoretical framework of contemporary art conservation, they may be read in various ways, including as a mechanism for 'tethering'[29] or an artefact of 'scripting'[30] the work. Contracts can also be viewed as both sanction – an expression of the artist's intent – and score of a work of contemporary art. While the artist's intent is a central guiding consideration in conservation theory, its practical application poses some difficulties.[31] To apprehend the intended boundaries and features of an artwork, philosopher Sherri Irvin advocates relying on the artist's sanction, rather than adopting an intentionalist methodology. The artist's sanction, Irvin explains, is established through explicit and implicit actions and communications. She compares her notion of the artist's sanction to a contract, noting:

> In a way, a sanction is like a contract: both are established by making certain statements and/or performing certain acts under appropriate conditions.[32]

Irvin references contracts to underscore her argument that artistic intention must be communicated in order to acquire the status of sanction. Exploring this further, it is clear that the artist's sanction is not only like a contract – contracts also form part of the corpus of communications that make up the artist's sanction. A contract, while a document of agreement, is also a forum for the artist to describe and define the work, to determine its essential parameters and the conditions for its care. It is an overt, deliberate communication that specifies the nature of the work.

The contract may also be viewed as a score. Recent conservation literature has drawn on the philosophy of music and extended the theories of Nelson Goodman and Stephen Davies to inform concepts of authenticity and identity of time-based media installations, and of the conservation object more generally.[33] Performance and time-based media works are now frequently described in allographic terms. In a similar vein, legal scholar Shane Burke has applied Goodman's thinking to the regimes of authentication and certification that govern and structure the ownership and stewardship of dematerialised works.[34] Where a contract contains textual instructions for the installation of a work, he argues, it may be considered part of the work's score. The specificity of the instructions and the binding nature of the contract work to enable and reveal a 'dichotomic tension' between the work's delegated realisation and the artist's desire to exercise control over the process of creation.[35]

Whether approached as sanction or score, contracts appear to offer certainty in the task of conservation. They fit readily within conservation's theoretical framework, and their formality and enforceability lend them additional weight and indicate their terms have been carefully considered. This certainty, while a valuable tool for conservators, may prove problematic. Writing about the use of contracts in commissioning artworks, McClean is somewhat apprehensive of their limiting effect. He notes that contracts may:

> [transform] artistic collaborations, which should be open-ended, into less flexible demarcated arrangements in which the production of art comes to resemble other forms of commodity production.[36]

Applying this perspective to the conservation of contemporary artworks, similar issues of inelasticity arise. The certainty that contracts represent also entails a degree of fixity. If we accept that artistic intent does not inhere in a single fixed idea, but is an accretive process, a document that sets out work-defining features or significant properties in legally binding terms risks the work's stagnation. Defining the work at a particular point in time risks the ossification of works intended to evolve and unfold; those that propose a concept of artistic authorship not necessarily predicated on control over the work's final form. The rigidity of contracts may not allow these works to live as intended, thereby creating a tension between how a work *must* be seen and how it *ought* to be seen.[37]

Incompleteness and the possibility of making

How might this risk of ossification be overcome? A possible approach is to rethink the orthodox understanding of what a contract is and does, focusing less on the contract as document and more on the contractual relationship that underpins it. This enables a view of contracts as incomplete. Sociologist Saskia Sassen has offered some thoughts on evolving ideas of what it means for a collecting institution to own a work of art. She suggested that her concept of the 'incompletely theorised contract', developed in relation to citizenship, might be extended and applied to the questions and uncertainties surrounding what it means to collect and care for works of contemporary art.[38] Re-evaluating the rigidity of the legal structures of authorship and ownership, and recognising incompleteness permits even formalised institutions, such as contracts, to incorporate and accommodate elasticity and change. Incompleteness enables more distributed environments where multiple makers and actors can participate. It allows for theorising, narrating and what Sassen terms 'the possibility of making' – scope for actors to engage with one another in the absence of established rules, thereby extending the domains of making and mediation.[39]

Applying the notion of incompleteness to the artist's contract, the incompleteness Sassen describes does not undermine the definite inclusion and exclusion of contractual terms and stipulations. She explains:

> The incompleteness that concerns me here is of a specific sort. It does not pertain to what is left out knowingly, and perhaps necessarily, in the process of formalizing, and which can become highly visible through this excluding. Rather, the kind of incompleteness that concerns me is integral to the condition of being formalized. It is rendered invisible by the fact itself of full formalization.[40]

Contracts retain their ability to legally define the work and its properties and set terms for its care. But they also have the ability to evolve together with the relationship they formalise. Terms and conditions can be revisited and amended, and situations will arise which the contract does not contemplate. In other words, the terms of the contract are not fully determinative of the relationship.

While this approach appears to run counter to orthodox views of contracts, a socio-legal theoretical perspective accommodates this reading. According to this view, legal agreements are generally incomplete, their terms emerge over time in the context of deeply embedded social relationships. Contracts should therefore be understood as ongoing negotiations rather than final, definitive statements. They have both practical legal value and social, relational value. Contractual provisions can act as both legal technologies and symbols or meaningful gestures. Mark Suchman describes contract regimes as 'communities of discourse' – contractual provisions are therefore understood within the meaning invested in them by a particular community.[41] Sassen's notion of incompleteness enables a view of all contracts as generally incomplete, not wholly determinative of the terms of a relationship and as such amenable to making.

This view of contracts aligns with the contractual practices of various contemporary artists, who have used contracts and other regimes of registration and certification primarily to establish and set the terms of the relationship between the collector and the artist. In her analysis of the certificates of Felix Gonzalez Torres, legal scholar and art historian Joan Kee argues that their imprecision was intentional, the result of a commitment to 'put the relationship before the transaction'.[42] This aligns with how Andrea Rosen, president of the Felix Gonzalez-Torres Foundation, describes the foundation's approach to monitoring different installations of the artist's *Light Strings*. Rosen cited Gonzalez Torres's desire to avoid imposing a narrative upon the works as the reason for not including definite instructions or compiling a catalogue of installation variations for the light strings. But she noted that this did not mean there was no 'wrong' way to install the works. There are both rules and flexibility, and the way to maintain a balance between the two without the work stagnating was for the foundation to establish a dialogue with collectors. Contracts and certificates help establish and ensure this ongoing dialogic relationship.

Conclusion

Grounded by a practice theory approach to authorship, I suggest that orthodox views of contracts, when applied to the conservation of works of contemporary art, present an incomplete account of what it means to be both an author and owner of a work. Ideas of contractual certainty are often predicated on a fixed and determinist notion of the work. In the context of contemporary art conservation, to imbue contractual documents with finality – with completeness – fails to recognise the ongoing nature of artistic authorship.

A relational perspective on contracts offers a way to overcome a preoccupation with this logic of completeness. This lens reveals contracts to be one instance, one artefact of an ongoing process. It is a recognition that the practice of authorship and the relationship of artist to custodian continues and evolves beyond the contract moment. Adopting a view of contracts as artefacts of authorial practice reveals them to be more elastic and, therefore, able to accommodate the changes that stem from the performance and enactment of authorship that informs the ongoing making of the work. This allows authorship to be recast as open, ongoing and negotiated: authorship as practice. This relational perspective on contracts does not discount their legal instrumentality and ability to set clear and fixed rules regarding the stewardship of an artwork. It proposes that they can also be mutable, that they are not fixed, flat and lifeless documents, and suggests that there is value in a more nuanced understanding of the role and function of contracts in contemporary art conservation discourse.

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Notes

1. Suchman 2003.
2. Works of contemporary art often present complex questions of legal authorship, incorporating the creative labour of artists, collaborators, studio assistants, fabricators and performers among others. A full exploration of this complexity is beyond the scope of this article, but has been considered to some extent in copyright literature. See for example Bently and Biron 2014; Chused 2019.
3. This is determined by the scope of copyright subject matter, defined by national legislatures.
4. Schatzki 2001: 11.
5. Bennett 2005; Woodmansee 1994.
6. Longolius 2016.
7. Adams 2014.

8. I borrow the term 'achieved identity' from Greenblatt's well-known examination of 'the role of human autonomy in the construction of identity': Greenblatt 1980.
9. Greenblatt 1980: 256.
10. Sommermeyer 2011; Giebeler and Heydenreich 2016; Wielocha 2016.
11. Siegelaub 2016; van Haaften Schick 2018.
12. Siegelaub 2016: 144.
13. See generally: Buchloh 1990; Buskirk 2012; McClean 2010.
14. While the definition of contract is a conceptual matter on which national legal systems differ, a contract may generally be described as an agreement intended to be legally binding (Beale et al. 2010: 44–58; Peel and Treitel 2007, paras. 1–001).
15. For a detailed analysis of Siegelaub and Projansky's Agreement, see: van Haften Schick 2018.
16. Lippard 1997; Buchloh 1990.
17. Buskirk 2017.
18. McClean 2014: 95.
19. Kee 2017: 521.
20. Karol 2018: 5.
21. 'Acquiring Media Art', Matters in Media Art 2015. Available at: http://mattersinmediaart.org/acquiring-time-based-media-art.html (accessed 17 May 2021).
22. Stone 2018: 104.
23. Birkett and Rowland 2015.
24. Stone 2018: 108.
25. McClean 2010.
26. Rutledge 2018. Lydiate makes a similar point regarding the use of contracts for works of performance art: Lydiate and McClean 2011, 42–3.
27. Domínguez Rubio 2020: 121.
28. Domínguez Rubio 2020: 91.
29. Fiske 2009; Laurenson and Van Saaze 2014.
30. Noël de Tilly 2011.
31. Dykstra 1996; Gordon and Hermens 2013; Wharton 2015.
32. Irvin 2005: 321.
33. Laurenson 2005; 2006; Rinehart 2003, 2007; Phillips 2015.
34. Burke 2018.
35. Burke 2018: 160.
36. McClean 2007: 265.
37. Langhoff 2009.
38. Sassen applies the concept of the incompletely theorised contract primarily to the institution of citizenship: see Sassen 2007.
39. Ibid.
40. Sassen 2009: 232.
41. Suchman 2003.
42. Kee 2017: 528. There is some disagreement as to whether Gonzalez Torres's certificates are in fact legally binding contracts. See also Karol 2018.

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Biography

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