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SEC No-Action Letter Request

Brian L. Frye
University of Kentucky, brianlfrye@uky.edu

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BRIAN L. FRYE†

Art is all a matter of personality.[1]

I. INTRODUCTION

Art securities are nothing new under the sun. For more than 100 years, private investors and investment companies have created "art investment funds" in order to securitize works of art, often with the intention of selling shares to the public.[2] But I believe this article may be the first work of "securities art." Specifically, this article proposes to create a work of conceptual art that is a security as defined by the Securities Act of 1933 and to sell investments in that security to the public.

This law review article constitutes an offering memorandum for a work of conceptual art titled "SEC No-Action Letter Request." The work consists of the concept of sending a no-action letter request to the United States Securities and Exchange Commission, proposing to sell certificates of ownership of a work of conceptual art titled "SEC No-Action Letter Request" to the general public in an edition of fifty for $10,000 each and asking the SEC to opine on whether the proposed offering as described constitutes a security that must be registered under the 1933 Act.

I believe that the offering described in my SEC no-action letter request constitutes the sale of a security as defined by the securities laws. Accordingly, the SEC should deny my no-action letter request, as I am proposing to sell an unregistered security that is not an exempt offering. I observe that the nature of the work of conceptual art I am proposing to sell is formally indistinguishable from many other works of conceptual art sold by other artists, and the terms on which I am proposing to sell the work are similar to the terms on which artists typically sell conceptual art. As a consequence, many works of conceptual artworks are probably defined as unregistered securities under

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† Spears-Gilbert Professor of Law, University of Kentucky College of Law. Thanks to Guy Rub, James Grimmelman, and Christopher L. Sagers for their helpful comments. Special thanks to Ben Edwards and Jacob Sherkow for helping me materially increase my likelihood of actually violating the securities laws. And thanks to Hallie A. Hamilton for her tireless work bringing this article into print.

1. *French Artists Spur on an American Art*, N.Y. TRIB., October 24, 1915 (quoting Marcel Duchamp).

2. *See generally* Brian L. Frye, *New Art for the People: Art Funds & Financial Technology*, 93 CHI.-KENT L. REV. 113 (2017).

the 1933 Act, and the art market is replete with unwitting violations of the securities laws.

II. REGISTRATION UNDER THE SECURITIES ACT OF 1933

Under the Securities Act of 1933, it is unlawful to use any instrumentality of interstate commerce to offer for sale any unregistered security, unless the security is exempt from registration. [3] Section 2(1) of the 1933 Act defines the term "security" for the purpose of the Act as:

> [A]ny note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[4]

In *SEC v. W.J. Howey Co.*, [5] the Supreme Court interpreted the definition of "security" under the 1933 Act. Howey owned large citrus groves in Florida. It sold real estate contracts on the groves for a fixed price per acre and encouraged the purchasers to lease the land back to itself via a service contract in exchange for a share of the profits. [6] The Supreme Court held that Howey's contracts were "securities," because "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." [7]

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3. Securities Act § 5, 15 U.S.C. § 77e(a) (2012).

4. *Id.* § 77b.

5. 328 U.S. 293 (1946).

6. SEC v. W.J. Howey Co., 328 U.S. 293, 295 (1946). An "acre" of Howey's orchard typically consisted of a row of 48 trees. *Id.* While the buyers were entitled to form a service contract with a third party, Howey discouraged it, and it was practically impossible. *Id*.

7. *W.J. Howey Co.*, 328 U.S. at 298-99.

The Supreme Court determined that Howey was selling a security because its customers weren't really buying an orange orchard; they were buying a share in Howey's profits.[8] According to the Supreme Court, under the 1933 Act, "[f]orm [is] disregarded for substance and emphasis [is] placed upon economic reality."[9] In other words, the definition of "security" for the purpose of federal securities regulation is intentionally broad. "Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." [10] An investment is a "security" if it includes four elements:

1. The investment of money
2. In a common enterprise
3. With the expectation of profits
4. From the efforts of others.[11]

All of the elements of the *Howey* test are construed broadly and inclusively. Element 1, "the investment of money," includes any kind of investment and does not require any monetary consideration.[12] Element 2, "in a common enterprise," includes any kind of commonality among the investors or between the promoter and the investors, in which the investors depend on the decisions of the promoter.[13] Element 3, "with the expectation of profits," includes any method of realizing appreciation on the asset, including selling at a gain in a secondary market.[14] And element 4, "from the effort of others," includes any circumstance in which the promoter creates or supports the market for the asset.[15]

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8. *Id.* at 299-300.
9. *Id*. at 298.
10. Reves v. Ernst & Young, 494 U.S. 56, 61 (1990) (emphasis in original).
11. *W.J. Howey Co.*, 328 U.S. at 301.
12. *See* SEC. & EXCH. COMM'N, RELEASE NO. 81207, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934: THE DAO (2017) ("[D]etermining whether an investment contract exists, the investment of 'money' need not take the form of cash" and "in spite of *Howey*'s reference to an 'investment of money,' it is well established that cash is not the only form of contribution or investment that will create an investment contract").
13. SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 479 (5th Cir. 1974) ("The critical factor is not the similitude or coincidence of investor input, but rather the uniformity of impact of the promoter's decisions."); SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482 n.7 (9th Cir. 1973) ("A common enterprise is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.").
14. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852-53 (1975) (explaining that the securities laws apply whenever a buyer is motivated primarily by the prospect of generating a return on investment).
15. Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230 (2d Cir. 1985) (deciding that an investment was a security because part of its value depended on the efforts of the promoter to generate demand).

Of course, there are many different exemptions to registration under the 1933 Act, which are described in Regulation D, among other places.[16] The exemptions are intended primarily to provide limited access to capital markets to small companies that cannot afford the expense of formal SEC registration. But they are narrow and demanding. Among other things, exempt offerings under Regulation D are restricted to "accredited investors," and trading in the exempt securities is strictly limited.[17] Moreover, the issuer of an exempt security bears the burden of proving the exemption. Offering to sell an unregistered security to the general public without proving the transaction is exempt is a violation of the securities laws.

III. THE ART MARKET & CONCEPTUAL ART

The art market is the commercial market for works of fine art, in which sellers and buyers agree to engage in financial transactions in relation to those works. Essentially, the definition of a "work of fine art" is "whatever you can sell in the art market." Historically, the art market focused on the sale of unique physical objects, including paintings, prints, and sculptures, among other things. But more recently, participants in the art market have engaged in financial transactions in relation to other kinds of works. For example, people routinely sell copies of works originally created in a medium that permits unlimited mechanical reproduction, including prints, photographs, motion pictures, videos, and digital images.[18] Typically, these copies are sold in the form of artificially limited "editions." In other words, the artist promises to create only a limited number of copies of the work, and buyers purchase one of those copies, relying on the artist's promise to limit the supply

The market for conceptual art also relies on limited editions and the artist's promise to limit the supply of the work. But there are complications. "Conceptual art" or "conceptualism" is artwork that consists of an idea rather than a physical object. As conceptual artist Sol LeWitt famously observed:

> In conceptual art the idea or concept is the most important aspect of the work. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made

16. 17 C.F.R. § 230.500 (2020).

17. *Id.* § 230.501(a) (defining the term "accredited investor").

18. *Cf.* WALTER BENJAMIN, THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION (Hannah Arendt & Andy Blunden, eds., Harry Zohn trans., Schocken/Random House 1998) (1935).

> beforehand and the execution is a perfunctory affair. The idea becomes a machine that makes the art.[19]

For conceptual artists, the realization of a work of art is immaterial and irrelevant. The work of art exists as soon as the artist conceives it, and the tangible copy of the work is only a record of its execution, not the work itself. For example, according to LeWitt, his wall drawings consisted of the instructions for their creation and the certificate that memorialized their sale, not in any particular execution. Indeed, LeWitt insisted that the actual wall drawings weren't themselves works of authorship at all but were instead only the tangible residue of the actual, underlying conceptual work. If the owner of a Sol LeWitt wall drawing wants to display it in a new location, they must destroy the existing execution of the work and create a new execution in the new location. This obligation created a convenient source of revenue for LeWitt and his employees, who spent a considerable amount of time erasing and executing drawings over and over again.

Typically, the owners of the work were indifferent to the expense. While it was expensive, if the work is worth a fortune, who cares? But occasionally, the metaphysics got awkward. Most amusingly, a Houston homeowner recently discovered that the prior owner of her house had executed his LeWitt wall drawing next to the stairs and "erased" it by covering it with plaster when he sold the house. But the new homeowner realized that she could chip off the plaster and expose the drawing.

The art world was perplexed. Was the unerased work a LeWitt or not? It was executed with LeWitt's permission and to his satisfaction, so it was an authentic LeWitt when it was executed in the house. But the "owner" of the work as designated by LeWitt attempted to destroy that particular execution of the work in order to transfer the work itself. Who decides when a work is a work and when it isn't?[20] When the work is dematerialized into a concept, it's hard to know who owns it, or even what ownership means.

Of course, as always, capitalism will out. Conceptual artists don't let the immateriality of their work stop them from selling it. On the contrary, they stipulate that the work exists only when they endorse it

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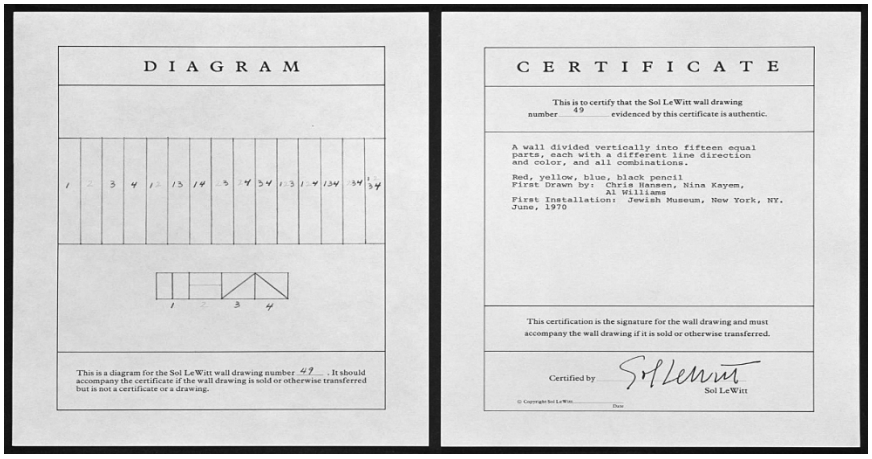
19. Sol LeWitt, *Paragraphs on Conceptual Art*, 5 ARTFORUM, no. 10, Summer 1967, at 79.

20. *See, e.g.*, 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. As the executor of the owner's estate observed, "'Bill Stern intended that the installation of the wall drawing in his house was to be terminated, and that the Menil was to own the wall drawing, with the right to install it whenever and wherever it chooses.'" *Id.*

and sell certificates of endorsement. Accordingly, LeWitt sold certificates purporting to grant an exclusive right to execute a particular LeWitt wall drawing.

But in reality, it's unlikely that LeWitt's certificates actually conveyed any exclusive legal rights at all. LeWitt's wall drawings typically consist of minimal, abstract compositions. While they are beautiful works of art, many of them probably aren't and can't be protected by copyright law. And if a work isn't protected by copyright, anyone can make copies of it, and no one can stop them. So, neither the "owner" of a LeWitt wall drawing nor the DeWitt estate can stop people from executing the drawing. They can only stop people from calling it a LeWitt. Or rather, if someone other than the owner calls an execution of the drawing a LeWitt, the LeWitt estate will disagree.



Sol LeWitt, Wall Drawing Number 49 (1970)

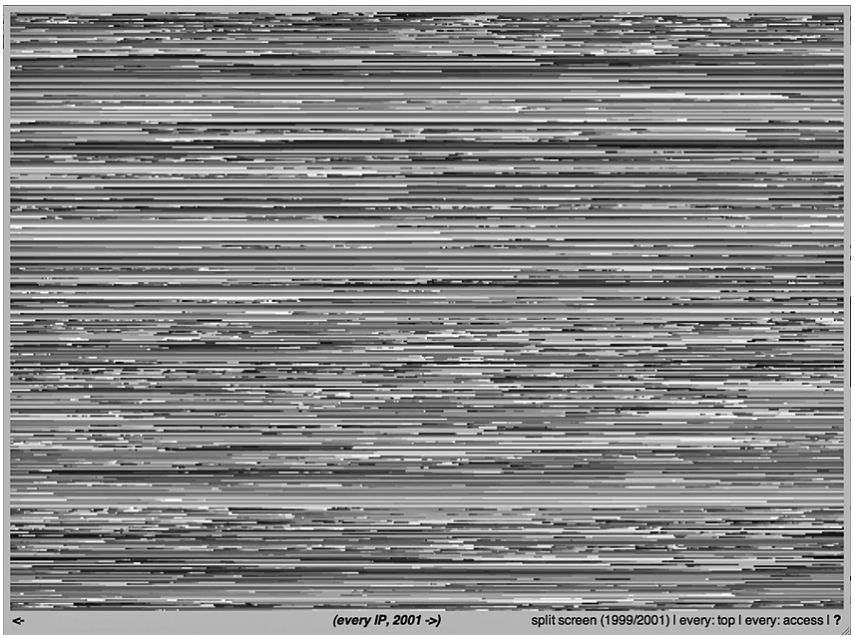
IV. COPYRIGHT IN CONCEPTS

As legal scholars have observed, many works of conceptual art don't include any elements that can be protected by copyright law.[21] The Copyright Act provides that copyright protects only the "original" elements of a work of authorship, which the Supreme Court has inter-

21. *See*, *e.g.*, Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 BYU L. REV. 1147 (2019); *see also* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 342-51 (2018); Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. 1455 (2019). *But see* Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J. L. & ARTS 335 (2016); Peter J. Karol, *Permissive Certificates: Collectors of Art as Collectors of Permissions*, 94 WASH. L. REV. 1175 (2019); Peter J. Karol, *The Threat of Termination in A Dematerialized Art Market*, 64 J. COPYRIGHT SOC'Y U.S.A. 187, 188 (2017).

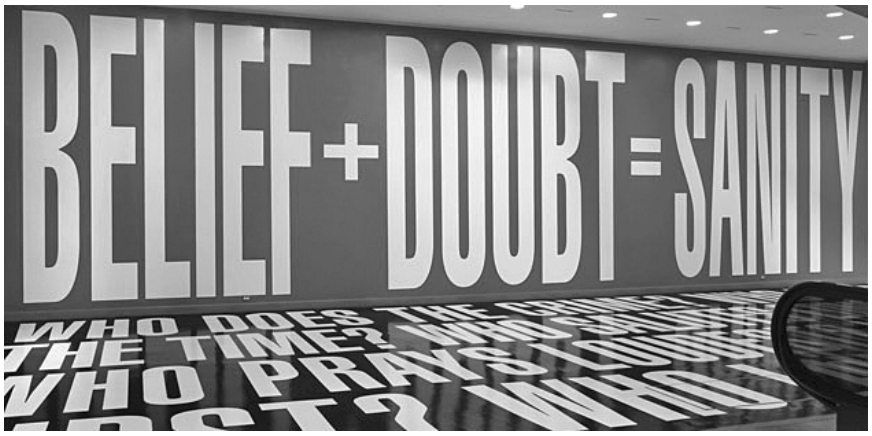
preted to mean those elements that are not copied from a previously-existing work and reflect some degree of "creativity."[22] Moreover, copyright does not and cannot constitutionally protect facts, short phrases, or abstract ideas.[23]

Works of conceptual art often consist entirely of uncopyrightable elements. Some works of conceptual art consist of utilitarian objects presented as art objects. Marcel Duchamp famously referred to this kind of work as a "readymade." Among other things, he presented a urinal titled "Fountain" as a sculptural work. Other works of conceptual art consist of facts about the world. For example, Lisa Jevbratt's work "1:1" consists of a graphical representation of the Internet.[24] Many works of conceptual and minimalist art consist of short phrases or even single words. For example, many of Barbara Kruger's works consist of phrases like "BELIEF+DOUBT=SANITY," and Robert Indiana is best known for works which consist of pictorial and sculptural representations of the word "LOVE." Other works of conceptual art consist of abstract ideas. For example, Yoko Ono created many works that consisted of instructions on how to think about the world. The examples are legion.



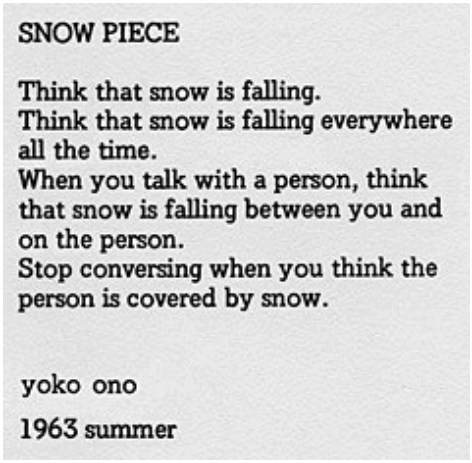
Lisa Jevbratt, *1:1* (1999/2002)

22. *See generally* Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
23. *See generally Feist Publ'ns*, 499 U.S. 340.
24. Lisa Jevbratt, *1:1* (2002), http://128.111.69.4/~jevbratt/1_to_1/index_ng.html.



Barbara Kruger, *Dialogues* (2019)

Robert Indiana, *LOVE* (1967)


SNOW PIECE

Think that snow is falling.
Think that snow is falling everywhere all the time.
When you talk with a person, think that snow is falling between you and on the person.
Stop conversing when you think the person is covered by snow.

yoko ono

1963 summer

Yoko Ono, *Snow Piece* (1963)

None of these works of conceptual or minimalist art can be protected by copyright to any meaningful degree, because they lack any original elements. As a consequence, anyone can create reproductions of these works without asking permission, and they can attribute their reproduction to the original author if they so choose. After all, it is a truthful statement that they are reproducing the work created by that author. It is no different than reproducing a work that has fallen into the public domain and attributing it to the original author. The Copyright Act permits the reproduction of public domain works with or without attribution.[25]

Obviously, the art world disagrees. Artists routinely purport to grant collectors the exclusive right to create reproductions of works of authorship that clearly are not and cannot be protected by copyright. For example, the Crystal Bridges Museum of American Art recently acquired the work "Untitled (L.A.)," which was created by the artist Felix Gonzales-Torres in 1991. The work consists of about fifty pounds of green candies individually wrapped in cellophane and spread across the floor, which the audience may touch, take, and consume. The work is a poignant reflection on the AIDS crisis and Gonzales-Torres's own death caused by AIDS, but it does not include any copyrightable elements.[26]

25. *Cf.* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (holding that there is no cause of action for "reverse passing off" or plagiarism).

26. Rub, *supra* note 21.

Felix Gonzales-Torres, *Untitled (L.A.)* (1991)

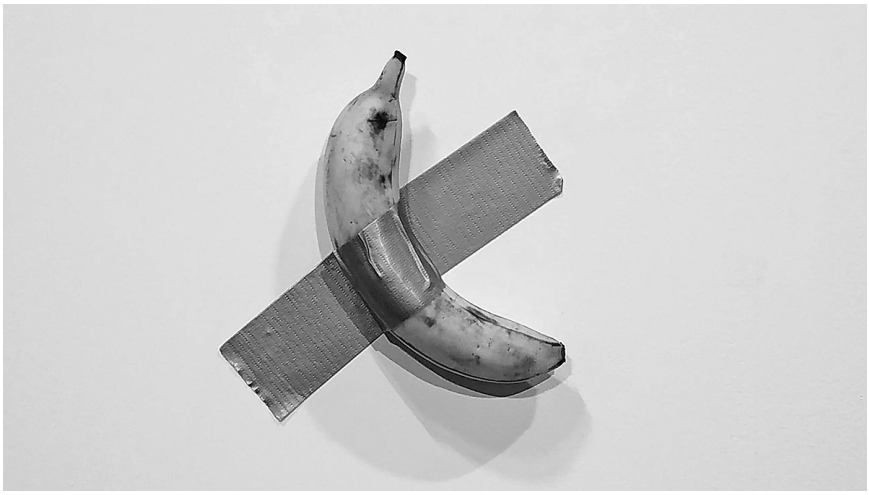
So, what did Crystal Bridges buy? In a sense, nothing. The Gonzales-Torres estate has promised to endorse Crystal Bridges's execution of the work and not to endorse any other executions of the work. But I'm perfectly entitled to reproduce the work without the permission of the estate and truthfully state that I've reproduced the work. And there's nothing they can do about it. The public domain means never having to say you're sorry.

But the art market is *sui generis*. It ignores the law, especially copyright. While the law permits me to reproduce an uncopyrightable work of conceptual art and attribute it to the artist, the art market doesn't care. As far as it's concerned, my execution of the work isn't art, because I don't have the artist's endorsement.

What conceptual artists are really selling is their endorsement. When you buy a LeWitt wall drawing, you aren't buying the right to reproduce that wall drawing. You aren't even buying the right to call it a LeWitt drawing. You're buying the obligation of the LeWitt estate to call it a LeWitt drawing. An unauthorized LeWitt wall drawing is worthless, but an authorized version is priceless. The art market doesn't care about the law. The drawing is only valuable if the market says it is.

This observation was delightfully illustrated by the Italian artist Maurizio Cattelan, who recently made headlines with his work "Comedian," which he exhibited at Art Basel Miami Beach 2019. The work consists of a banana duct taped to the wall. Cattelan sold multiple editions of the work for $120,000 each. The buyers each received a certificate of authenticity granting them permission to realize the

work. Notably, the performance artist David Datuna removed the banana from the wall and ate it, creating a work of performance art. However, as Cattelan observed, the work does not consist of any particular banana or duct tape but rather in his permission to create an authorized version of the work. The banana is consumed; long live the banana.[27]



Maurizio Cattelan, *Comedian* (2019)

V. CONCEPTUAL ART IS ILLEGAL

Artists have long desired to own a residual interest in their works of authorship. Indeed, many countries have created a statutory "*droit de suite*" or "artist's resale royalty right," although the United States has not.[28] In response, American artists have tried to create private resale royalties via contract with limited success.[29] But often, artists are primarily interested in tracking the works they create and maintaining their relationship with their collectors.

Arguably, any contractual agreement that creates a residual interest in a work of art or purports to sell a fractional interest in a work

27. Caroline Elbaor, *Buyers of Maurizio Cattelan's $120,000 Banana Defend the Work as 'the Unicorn of the Art World,' Comparing It to Warhol's Soup Cans*, ARTNET NEWS (Dec. 10, 2019), https://news.artnet.com/art-world/maurizio-cattelan-banana-collector-1728009.

28. *See generally* Liliane de Pierredon-Fawcett, *The Droit de Suite in Literary and Artistic Property* (Louise-Martin Valiquette trans., 1991). *But see* Guy Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L. J. F. 1 (2014); Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237 (2017).

29. *See*, *e.g.*, Christopher G. Bradley & Brian L. Frye, *Art in the Age of Contractual Negotiation*, 107 KY. L. J. 547 (2018).

of art could be an "investment contract" and therefore a security under the Securities Act of 1933.[30] But the Supreme Court has instructed us to interpret the 1933 Act in light of substance, not form, and to focus on the "economic reality" of the transaction.[31] So presumably, we should look to the purpose of those contracts rather than their form in order to determine whether or not they should be regulated as securities.

In the case of the Artist's Contract, created by Seth Siegelaub and Robert Projansky, and similar efforts to use contracts to impose otherwise unlawful servitudes on personal property, the regulatory concern is arguably mitigated by unenforceability. Trying and failing to create a security is probably not a crime.[32] But more sophisticated approaches present more difficult questions. For example, Christopher Bradley has proposed the use of nested LLCs to create an actually enforceable version of the "Artist's Contract."[33] Should such a transaction be regulated as a security if the purpose of the transaction is to advance interests unrelated to those implicated by the securities laws?

Even if not every contract for the sale of art is an investment contract, at least some of them are. For example, an Arizona court held that an agreement to invest in an "art master," or the right to reproduce a limited-edition print of an artwork, was an "investment contract" and therefore a security.[34] By contrast, courts have held that agreements to purchase a particular copy of a work of authorship are not securities.[35]

As always, whether an agreement is an "investment contract" under the 1933 Act depends on the substance of the transaction. If the buyer primarily intends to consume, it's not a security. If the buyer primarily intends to profit, it is. Buying the right to use an apartment isn't a security, even though you hope it goes up in value, but buying the right to a percentage of the income produced by an apartment complex probably would be a security.[36] In other words, if you are buying a particular thing, you are not investing in a security, but if

30. *See*, *e.g.*, Christopher G. Bradley, *Artworks as Business Entities: Sculpting Property Rights by Private Agreement*, 94 TULANE L. REV. 247 (2020).

31. United Hous. Found., Inc. v. Forman, 421 U.S. 837, 848 (1975).

32. *See*, *e.g.*, Bradley & Frye, *supra* note 29.

33. Bradley, *supra* note 30.

34. Daggett v. Jackie Fine Arts, Inc., 733 P.2d 1142, 1148-51 (Ariz. Ct. App. 1986).

35. *See*, *e.g.*, Dahl v. English, 578 F. Supp. 17, 20 (N.D. Ill. 1983); Mechigian v. Art Capital Corp., 612 F. Supp. 1421, 1427-28 (S.D.N.Y. 1985); Faircloth v. Jackie Fine Arts, Inc., 682 F. Supp. 837, 845 (D.S.C. 1988), aff'd in part, rev'd in part sub nom. Faircloth v. Finesod, 938 F.2d 513 (4th Cir. 1991).

36. *United Hous. Found.*, 421 U.S. at 851-52.

you are buying the right to profit from the use of a thing, you probably are.

Accordingly, it seems quite obvious that the sale of a certificate of ownership of a work of conceptual art will often be a security, as defined by the 1933 Act and the *Howey* test.[37] After all, what is a certificate of ownership, if not an investment contract? The artist offers the buyer nothing but the right to a fraction of the profits generated by an artist's celebrity. In other words, an investor in a work of conceptual art is really investing in the artist and the artist's commitment to promote the work in question.

But I will break it down in detail. When an artist sells a certificate of ownership of a work of conceptual art, they are purporting to sell an exclusive right in that work of conceptual art, as well as the right to sell that exclusive right in the future. But ownership of a work of conceptual art is nothing. Anyone can reproduce a work of conceptual art and attribute it to the artist without the artist's permission. In reality, the artist is actually promising to endorse certain reproductions created by certificate owners and not to endorse reproductions created by non-certificate owners. Or rather, and more to the point, the artist is promising to endorse the sale of the work by certificate owners and not to endorse the sale of the work by non-certificate owners.

A certificate of ownership is tantamount to a stock certificate, representing a fractional ownership of the goodwill associated with an artist. Essentially, the collector is buying a little bit of an artist's celebrity. As the fame of the artist increases, so too does the value of the artist's endorsement. In other words, the collector is investing in the artist in the belief that the artist will become increasingly popular. If they're right, they profit. If they are wrong, they write off a bad investment.

Accordingly, it should be obvious that the sale of certificates purporting to convey fractional ownership of a work of conceptual art often violates the 1933 Act. Selling a certificate purporting to convey ownership in an uncopyrightable idea, based on a promise to endorse the buyer's ownership of the idea but not anyone else's, is quite literally selling an investment in a common enterprise with the expectation of profits from the efforts of others. Essentially, the artist is asking the collector to buy an interest in the artist's celebrity in the hope that the artist's celebrity will increase and the investment will become more valuable.

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37. *But see* Peter J. Karol, *Permissive Certificates: Collectors of Art as Collectors of Permissions*, 94 WASH. L. REV. 1175 (2019) (arguing that conceptual art certificates convey a property interest).

People are nonplussed by the observation that ownership of an edition of conceptual art can be a security only because it reduces the concept of a security to a pure abstraction. Artists ask collectors to invest in nothing, in the hope that others will want to purchase that nothing in the future. When I described the sale of conceptual art certificates to my colleague Biff Campbell, a prominent securities law scholar, and asked him whether what I described was a security, he furrowed his brow and responded, "Why would anyone ever buy such a thing?"[38] Ours not to reason why, ours but to buy and buy.

Of course, in practice the SEC is vanishingly unlikely to find that selling certificates of ownership in a work of conceptual art is the sale of an unregistered security. The *Howey* test identifies four factors used to determine whether an investment is a "security" under the 1933 Act. But there is a fifth, "shadow factor." The SEC also asks, *sotto voce*, "Is this the kind of thing we typically regulate as a security?"[39] While conceptual art appears to satisfy all four factors of the *Howey* test, it surely fails the fifth, unspoken factor. For example, even though "SEC No-Action Letter Request" may literally be a security, it doesn't "look like" one. And the SEC doesn't like being played for a fool.

VI. SECURITIES ART & ITS DISCONTENTS

While some legal scholars and attorneys are skeptical of my observation that the sale of certificates of ownership in works of conceptual art often constitutes the sale of an unregistered security, I find their arguments unconvincing.[40] For example, Joan Kee argued that collectors are investing in works of conceptual art for "personal use," not in order to turn a profit. But collectors receive nothing in exchange for their purchase other than the right to potentially turn a profit based on the artist's endorsement. John Berton objected that many investors in conceptual art may not expect to actually receive a profit. But surely the potential for profit is enough. Amy Goldrich claimed that "collectors buying high-concept artworks are more likely buying for 'hedonic purposes,' or, in legal terms, are acting as hobbyists rather than investors."[41] I will confess that I would be reluctant

38. Among other things, Campbell has observed that syndicated interests in horses can be securities. *See generally* Rutheford B. Campbell, Jr., *Stallion Syndicates as Securities*, 70 KY. L. J. 1131 (1982) (discussing the construction and operation of syndicates as strategies to avoid the creation of securities).

39. I owe this observation and the term "shadow factor" to Ben Edwards.

40. Brian Boucher, *Some People Think Cattelan's Banana Is Genius. This Law Professor Thinks It's Illegal*, ARTNET NEWS (Dec. 13, 2019), https://news.artnet.com/art-world/cattelan-banana-basel-illegal-1732932.

41. *Id*. (paraphrasing Goldrich).

to tell the SEC that my client was not selling unregistered securities merely because the buyers were hobbyists.

In a similar vein, Matt Levine observed:

> I don't think that any of that is true. (The purchaser might invest money primarily for an aesthetic experience, not for profit; the value of the artwork does not depend on the future efforts of the artist, and might in fact be enhanced by the artist's early death, but instead depends on social acceptance of the art as art; there is no "common enterprise" because no future efforts are required, etc.)[42]

I don't think any of that is true. Nobody invests $120,000 in a work of art unless they expect to turn a profit somehow. And the art world certainly seems to think that Cattelan's collectors made a good investment. Maybe they didn't! But I don't see how it matters. If they were giving Cattelan money in the hope of making a profit based on his efforts to promote himself, they were buying a security, for better or worse.

But I strongly endorse his more metaphysical reflections on the issue:

> Still! There is a basic element of truth to it, which is that:
>
> 1. people buy lots of different intangible things hoping that they will increase in price;
> 2. some of them are securities and some of them aren't; and
> 3. even experienced lawyers can be unsure which is which.
>
> In particular lots of cryptocurrency tokens are arguably securities and arguably not. In fact some meaningful number of cryptocurrency tokens are *also conceptual art*, and if you are buying them it is not clear whether you are speculating on a currency, or speculating on a security, or speculating on art, or just paying for an aesthetic experience.
>
> Also it is a pleasing artifact of financial capitalism to think, like, "art is a subset of securities law." Why not! "Everything is securities fraud," I often say, but I mean "everything" in a narrow sense, something like "all bad behavior by a public company is also securities fraud." But what if *everything* is securities fraud? What if all of human culture is just an "investment in a common enterprise with the expectation of profits from the efforts of others," which is almost the famous Howey definition of a "security" in U.S. law? What if every time we interact, hoping to get something out of it, hoping to make our lives better through our shared humanity, we

42. Matt Levine, *It's Hard to Get Rid of the IPO*, MONEY STUFF (Dec. 13, 2019), https://www.bloomberg.com/opinion/articles/2019-12-13/it-s-hard-to-get-rid-of-the-ipo.

> are participating in an unregistered offering of securities? Seems reasonable really.[43]

It should go without saying that I agree with Kee's observation, "I very much doubt that any court would deem conceptual art as illegal," and I very much appreciate her praise: "That said, I like the provocation Brian is putting forward as it has us think more deeply about art's imbrication with capital via the law." [44] But I would observe that the fact that it is embarrassing that something satisfies the definition of a security is irrelevant to whether it does satisfy the definition of security, at least in theory. I am confident that the SEC is unlikely to establish a conceptual art division in the near future (I volunteer!), but maybe we should ask whether our definition - or maybe our concept? - of a security would benefit from further reflection.

VII. TROLLING THE SEC

Of course, some works of conceptual art are more obviously unregistered securities than others. Accordingly, I have created a work of conceptual art designed to prove that the sale of conceptual art is a violation of the securities laws.

The work I have created is titled "SEC No-Action Letter Request." It consists of the concept of sending a no-action letter request to the SEC, proposing to sell certificates of ownership of a work of conceptual art titled "SEC No-Action Letter Request" to the general public in an edition of fifty for $10,000 each, and asking the SEC to opine on whether the proposed offering as described constitutes a security that must be registered under the 1933 Act. I believe that what I propose is obviously a violation of the securities laws and expect the SEC to deny my request, assuming the SEC humors me by considering my request in the first place.

In order to increase the likelihood of my proposal violating the securities laws, I stipulate that I will use the proceeds from the sale of editions of "SEC No-Action Letter Request" to increase the value of the work by promoting it. A securities transaction is typically adjacent to the capital markets and moves funds from investors into the economy.[45] Accordingly, I will attend art fairs where I can discuss the importance of the work, entertain art critics in order to encourage them to review the work, and purchase advertisements in art-related publications. In other words, I will use investments in "SEC No-Ac-

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43. *Id.* (emphasis in original).

44. Boucher, *supra* note 40.

45. *See* Benjamin P. Edwards, *Conflicts and Capital Allocation*, 78 OHIO ST. L. J. 181 (2017).

tion Letter Request" to increase my fame and thereby increase the value of the work.

This marketing proposal should ensure that "SEC No-Action Letter Request" is a security under the 1933 Act. Any sale of the work establishes its value, and I propose to increase its value by generating interest in additional purchases of the work. But I am not greedy. I will also offer this amazing opportunity to my colleagues. Any law professor may offer to sell editions of "SEC No-Action Letter Request" on commission, in exchange for half of the proceeds of any sale.[46]

Because I believe my proposal is illegal, I am offering the fifty certificates of ownership for free to the first fifty people to email me at *brianlfrye@gmail.com* and request one.

Let there be rejoicing.

ADDENDUM:

After writing this article, I produced 200 editions of "SEC No-Action Letter Request," which I distributed to the public. When the SEC failed to respond to my no-action letter request, I filed a FOIA request.[47] The SEC responded by invoking the deliberative process privilege and refusing to produce any documents in response to my request.[48] I didn't appeal, because it seemed likely futile.

In any case, I think the baffling emergence of the market for nonfungible tokens or "NFTs" nominally associated with works of art, suggests that my observations in this article sound in reality, as incredible as it might seem.[49] If an NFT isn't a security, what is it? The SEC has not yet spoken. Once bitten, twice shy?

46. Indeed, at least one edition of "SEC No-Action Letter Request" has been sold on the secondary market. See letter from Jacob S. Sherkow to Agnes Callard, February 10, 2020, attached as Appendix C.

47. See letter from SEC to Brian L. Frye, November 16, 2020 (acknowledging FOIA request).

48. See letter from SEC to Brian L. Frye, March 10, 2021.

49. See generally Brian L. Frye, NFTs & the Death of Art in *Posthumous Art, Law and the Art Market* (Sharon Hecker & Peter Karol, forthcoming).

Appendix A
SEC No-Action Letter Request

15 U.S.C. § 77bqrP]Brian L. Frye
145 Woodland Avenue
Lexington, KY 40502

Office of Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

January 1, 2020

Re: Conceptual Artwork Titled "SEC No-Action Letter Request"

Dear Commissioners,

I propose to offer for sale to the general public multiple editions of a work of conceptual art titled "SEC No-Action Letter Request." The work consists of my submission of a no-action letter request to the SEC, asking the SEC to agree that my proposal to sell the work to the public does not constitute the sale of an unregistered security and to agree that the SEC will not recommend any enforcement action in connection with the sales I propose.

Specifically, I propose to sell certificates of ownership of the work "SEC No-Action Letter Request" to the general public in an edition of 50 for $10,000 each. I will promote this work and encourage people to buy it. The owners of the work will be able to sell their certificates to anyone who is interested in buying them. I will, of course, issue new certificates if the originals are lost, damaged, or destroyed. The investment conveyed is not the certificate itself, but the fractional ownership in the work conveyed to the purchaser.

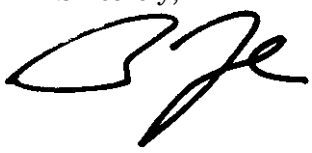
I will use the proceeds from the sale of "SEC No-Action Letter Request" to increase the value of the work by promoting it. Among other things, I will attend art fairs where I can discuss the importance of the work, entertain art critics in order to encourage them to review the work, and purchase advertisements in art-related publications. I will also allow any law professor to sell editions of "SEC No-Action Letter Request" on commission, in exchange for half of the proceeds of any sale.

In my opinion, "SEC No-Action Letter Request" is obviously a "security" under the Securities Act of 1933 and the *Howey* test. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). I am proposing to sell to the

general public an investment in an enterprise that I will promote and cause to increase in value. It plainly satisfies every requirement for being a security and must be registered.

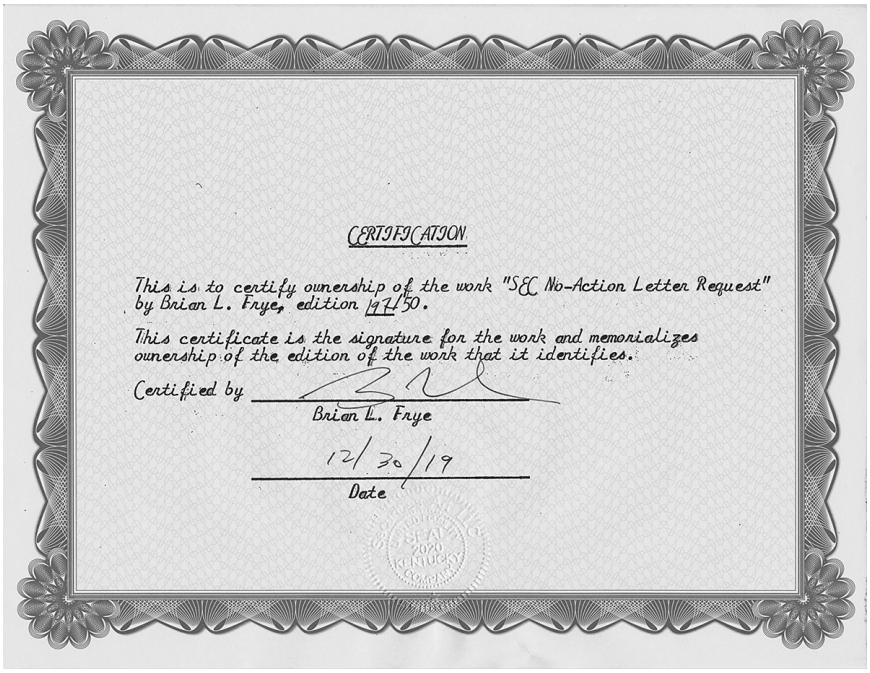
Accordingly, you should deny my request for a no-action letter, because I am proposing to sell an unregistered security.

Sincerely,



Brian L. Frye

Appendix B
Certificate of Ownership
"SEC No-Action Letter Request"



CERTIFICATION

This is to certify ownership of the work "SEC No-Action Letter Request" by Brian L. Frye, edition 1 of 1/50.

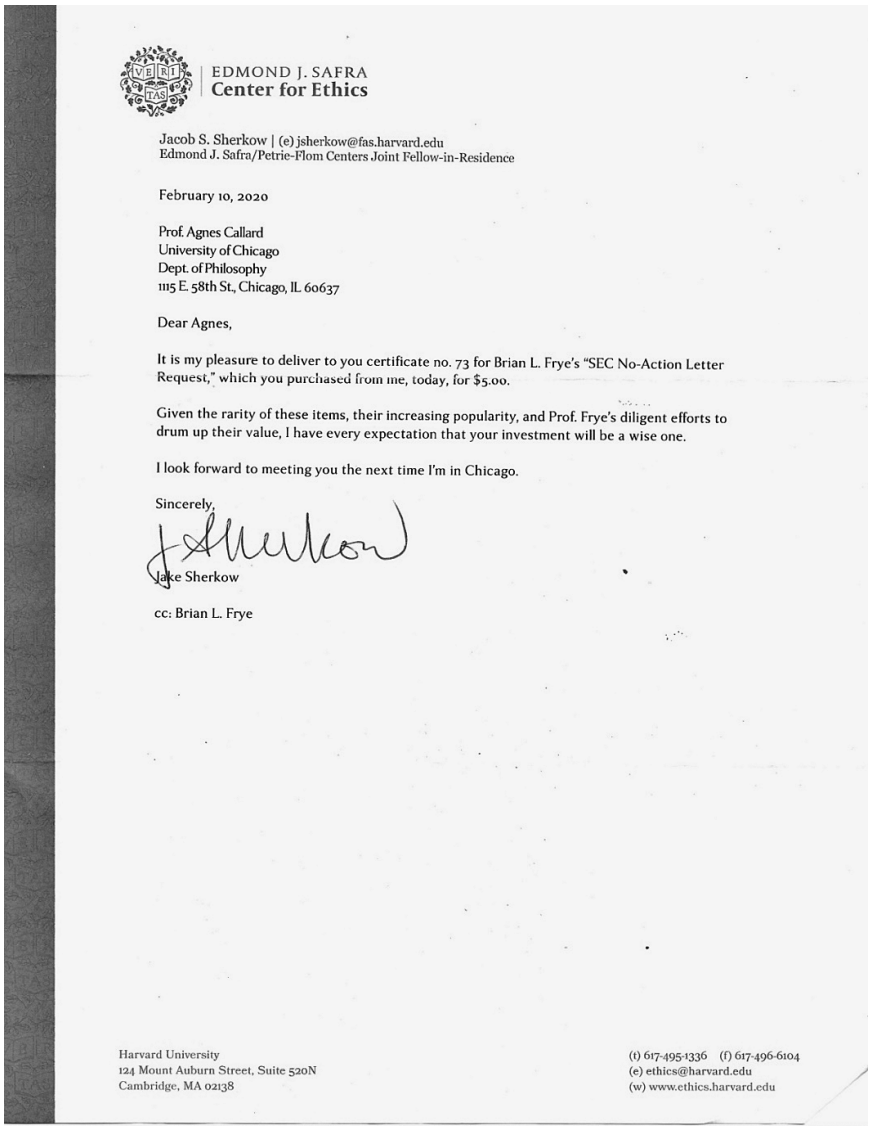
This certificate is the signature for the work and memorializes ownership of the edition of the work that it identifies.

Certified by _____
Brian L. Frye

12/30/19
Date

SEAL 2020 KENTUCKY

Appendix C
Letter Memorializing Sale of SEC No-Action Letter Request No. 73



EDMOND J. SAFRA
Center for Ethics

Jacob S. Sherkow | (e) jsherkow@fas.harvard.edu
Edmond J. Safra/Petrie-Flom Centers Joint Fellow-in-Residence

February 10, 2020

Prof. Agnes Callard
University of Chicago
Dept. of Philosophy
1115 E. 58th St., Chicago, IL 60637

Dear Agnes,

It is my pleasure to deliver to you certificate no. 73 for Brian L. Frye's "SEC No-Action Letter Request," which you purchased from me, today, for $5.00.

Given the rarity of these items, their increasing popularity, and Prof. Frye's diligent efforts to drum up their value, I have every expectation that your investment will be a wise one.

I look forward to meeting you the next time I'm in Chicago.

Sincerely,

Jake Sherkow

cc: Brian L. Frye

Harvard University
124 Mount Auburn Street, Suite 520N
Cambridge, MA 02138

(t) 617-495-1336 (f) 617-496-6104
(e) ethics@harvard.edu
(w) www.ethics.harvard.edu