

# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## THE LAW AS ART MATERIAL

DANIEL MELLIS

### ABSTRACT

Daniel Mellis is an artist who incorporates the law and legal language into his work. This article discusses four such works:

- I. A postcard that predicts when its copyright will expire.
- II. A performance piece that uses the Visual Artists Rights Act to turn money into Art.
- III. An installation about the fourth amendment on the paper bags at a liquor store.
- IV. A bureaucratic entity that allows people to renounce, not their citizenship, but rather their symbolic attachment in a nation state or empire.

Editor's Note: Daniel Mellis spoke at the October 24, 2014 RIPL symposium, Art Meets Law: The Intersection of Art and Intellectual Property, from an artist's perspective.

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## THE LAW AS ART MATERIAL

DANIEL MELLIS\*

### I. INTRODUCTION

I discuss in this paper four of my artworks that use the law or legal language as a primary source material. This body of work was inspired by earlier uses of the law by artists to control their work in the world and marketplace.

### II. HISTORICAL PRECEDENTS AND INSPIRATION

In the 1960s, contemporary art making took a conceptual turn: Rather than the standard model of an artist creating an object which then could be sold, artists began doing things like: making site specific installations, making work with language, and most importantly for my inspiration, making work that was fabricated by someone other than the artist themselves, and was sold in the form of a certificate that contained instructions for their fabrication and which were not always unambiguous. This change in art making complicated art ownership and so artists were forced to deal with the control of their work more abstractly.<sup>1</sup>

#### *A. Richard Serra*

The perhaps most famous example is Richard Serra's sculpture *Tilted Arc*, created as a site-specific installation for the plaza of the Javits Federal Building in New York in 1981. It was almost immediately unpopular among the employees and others who had to use the plaza. The 120 foot long and 12 foot tall work blocked views and straight paths through the plaza. In 1985, after a public hearing, a panel voted to remove it. And in 1989, after Serra lost several lawsuits it was eventually removed from the plaza. The artist had claimed that the site-specificity of the piece meant that its removal would constitute its destruction and that his agreement with the government had stated that it would be a permanent installation.

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\* © Daniel Mellis 2015. Daniel Mellis makes artist's books and other text based artworks on such topics as the poetry of philosophy, the phenomenology of space, the built environment, and the law. Experimental letterpress and offset printing underpins much of his work. His work has been shown internationally, including at the Gagosian Gallery in New York, and is in many collections nationwide. He received his MFA from Columbia College Chicago and has degrees in Mathematics from the University of Chicago and the Massachusetts Institute of Technology.

<sup>1</sup> See MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* (2003); see also LUCY R. LIPPARD, *SIX YEARS: THE DEMATERIALIZATION OF THE ART OBJECT FROM 1966 TO 1972* (1997).

### *B. Artist's Certificates*

The work of artists such as Donald Judd, Dan Flavin, Sol LeWitt, and Carl Andre present another example of the new legal complexity of art. All often would create work that they did not physically realize. Donald Judd worked with simple and serial forms of metal plate, Dan Flavin with the arrangement of fluorescent bulbs, Sol LeWitt with geometric wall drawings, and Carl Andre with bricks or metal plates placed on the floor. The work was sold in the form of certificates that served both as instructions for the construction of the work, as well as a physical object that can be sold to and by a collector, and which allows a collector or museum to claim to own an original work by the artist.

These innovative practices almost immediately created conflicts between artists and collectors, perhaps most famously between Donald Judd and Giuseppe Panza.<sup>2</sup>

Some of the issues being:

Once an installation was disassembled, could it be recreated elsewhere, or was the certificate only good for one instantiation.

Could an installation exist simultaneously in two places for the purposes of a loan to a museum?

Or would the original installation have to be disassembled before it was reconstructed elsewhere, even if only temporarily?

What kinds of decisions can a collector make with regards to the fabrication of an object or installation? Can the artist change his mind with regards to decisions set forth in a transferred certificate?

The dematerialization and/or separation of conception, sale, and fabrication of these art objects meant that the artists had to pursue their desires for control of the work on a more abstract and administrative level, even to the point of a court of law.

In other words, the law and administrative language start to become associated with artworks, but on a meta or secondary level. They are not involved with their conception but with details of their execution.

### *C. The Artist's Reserved Rights Transfer and Sale Agreement*

The Artist's Reserved Rights Transfer and Sale Agreement was another approach to give artists control over their work after it was sold. It was developed by Seth Siegelau, an important dealer of conceptual art, and Robert Projansky, a New York lawyer in 1971.

The agreement reserves various rights for the artist after the sale of the work, including the right to approve of the public display of the work, the right to borrow the

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<sup>2</sup> See Buskirk, *supra* note 1; see also CHRISTOPHER KNIGHT, *ART OF THE FIFTIES, SIXTIES, AND SEVENTIES* (1999).

work for museum exhibitions, the right for the work not be intentionally modified or destroyed, and most importantly subsequent transfers of ownership required the purchaser to have the new owner sign the same agreement and pay the artist 15% of the profits.<sup>3</sup> Not surprisingly, this contract or any other similar agreement has only been used by a handful of artists. Hans Haacke is the most well-known artist who has consistently sold works using the original agreement.<sup>4</sup>

The agreement grew out of an increasing awareness by artists of a powerful and opaque art market whose interests were often antithetical to artists, as well as a growing political awareness by artists of the – to them – morally objectionable ways in which their art was being used. An example of the former is when Robert Scull sold Robert Rauschenberg's *Thaw* in a 1973 auction for \$85,000, having purchased it in 1959 for \$900.<sup>5</sup> Rauschenberg, in attendance at the auction, was not pleased at Scull profiting off his hard work during the intervening period.

### III. WORKS

This use by these artists of the law and legal language to control their work made me interested in the possibility of incorporating it into artworks in a primary way, as a raw material.

#### *A. Copyright Postcard*

The first project was my Copyright Postcard from 2009.<sup>6</sup> This postcard simply predicted when its original expression would enter the public domain in an attempt to make plain just how long our current copyright regime lasts.

It also allowed me to participate in the artistic tradition of the *memento mori*, a work of art that reminds its viewer of their mortality, because I had to predict the probability of my death using an actuarial life table.

It is hard for me to understand what benefit our society receives in exchange for giving an author or artist control of their work for 70 years past their death. Anything I create will more likely than not be still protected in 2125. To complete this project, I registered it with the U.S. Copyright Office.<sup>7</sup>

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<sup>3</sup> ROBERT PROJANSKY & SETH SIEGELAUB, *THE ARTIST'S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT* (1971).

<sup>4</sup> Roberta Smith, *When Artists Seek Royalties on Their Resales*, *THE NEW YORK TIMES*, (May 31, 1987), <http://www.nytimes.com/1987/05/31/arts/when-artists-seek-royalties-on-their-resales.html>; see generally MARIA EICHHORN, *THE ARTIST'S CONTRACT* (Gerti Fietzek ed., 2009); see also ALEXANDER ALBERRO, *CONCEPTUAL ART AND THE POLITICS OF PUBLICITY* (2004).

<sup>5</sup> Patricia Cohen, *Artists File Lawsuits, Seeking Royalties*, *THE NEW YORK TIMES*, (Nov. 1, 2011), <http://www.nytimes.com/2011/11/02/arts/design/artists-file-suit-against-sothebys-christies-and-ebay.html>.

<sup>6</sup> See Appendix, Part A.

<sup>7</sup> Registration No. VA 1-672-722.

### *B. Twenty Dollars*

Twenty Dollars addresses one of the difficulties in using the Artist's Reserved Rights Agreement which attempts to secure permanent property rights with contractual means, a difficult and by no means sure procedure.<sup>8</sup>

I had been thinking of creating works that operated on a similar principle, requiring subsequent purchasers to say do something to the work, or sell it for an exponentially greater amount, but the difficulties in securing these property rights was discouraging.

So when I learned that U.S. law provides artists with permanent property rights in their work via the Visual Artists Rights Act of 1990 (VARA),<sup>9</sup> I decided to incorporate them directly into an artwork.

Twenty Dollars is a performance piece in which I turn a patron's money into art using VARA.<sup>10</sup> The procedure is this: the patron gives me twenty one-dollar bills and I affix those to the three pieces of paper, handmade from pulped shredded currency, and then give the completed object back. They now have a work of art which they can't take apart and spend without violating my permanent property right for the work not to be destroyed. The three pieces of paper that I supply are a cover with the title, the relevant excerpt from VARA, and an attestation that the work is a sculpture of a recognized stature as defined by the statute, and that the replacement of any element constitutes its destruction. The attestation is signed by a curator or art critic; in the past this has been someone associated with the venue where the performance takes place. The reason that the attestation specifically asserts that the work is a sculpture is because VARA specifically excludes books from the definition of art.<sup>11</sup>

### *C. The Fourth Amendment on Paper (Bags)*

The Fourth Amendment on Paper (Bags) is a public art project; I partner with a local liquor store to put two different stickers on their paper bags. The first sticker simply has the text of the Fourth Amendment and the second sticker, on the reverse side, has instructions for use.<sup>12</sup> These instructions go over the basic protections granted by the Fourth Amendment and their caveats: such as acting drunk would provide probable cause to search inside the bag, and the Terry stop.<sup>13</sup> The first exhibition of the bags was in 2009, and so I also went into some detail about the FISA Amendment Act of 2008, which gave the Federal Government wide latitude to intercept international communications as well as domestic communications whose origins were uncertain. I was really happy how easily this project was integrated into everyday life and how I was able to connect the humble brown paper bag of a street corner drinker with issues of government surveillance. The bags weren't big enough

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<sup>8</sup> See Henry Hansmann & Reinier Kraakman, Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights, 31 J. LEGAL STUD. 373 (2002)

<sup>9</sup> U.S.C.A. § 106A(a).

<sup>10</sup> See Appendix, Part B.

<sup>11</sup> 17 U.S.C. § 100 (2014).

<sup>12</sup> See Appendix, Part C.

<sup>13</sup> See *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 180 (2004).

however, to discuss all of the exceptions to the fourth amendment involving automobiles or drug sniffing dogs.<sup>14</sup>

*D. The National Identity Renunciation Bureau*

Unlike the preceding three projects, The National Identity Renunciation Bureau does not use legal statutes or agreements in a practical way but rather uses legal language to make a more abstract gesture. The Bureau, which exists as a website, but also through the medium of paperwork, gives the public the opportunity to renounce any symbolic attachments to their nation, state, or empire. A potential renunciant fills out an application form, and if approved, receives a National Identity Renunciation Card.<sup>15</sup>

The application asks the potential renunciant for some basic information: their national identities, whether they are in exile, whether they have held any government office, or position in a social or cultural organization, and their reasons for their renunciation. It then asks them to agree to the following:

I recognize that the existence of hereinafter called my nation, is continually maintained by a collective act of belief by its members. Because I no longer wish to participate in any extralegal aspects of that social relation, I hereby withdraw my symbolic membership in my nation.

I therefore willingly and voluntarily renounce and abjure all claims to identity as a member of my nation with regards to culture, language, ethnicity, history, mythological origin, genetic or genealogical kinship, religion, place and all other aspects beyond my legal identity in regards to my nation.

Furthermore, I disclaim all sentiments of pride, loyalty, sympathy, concern, responsibility, shame, guilt and anger in relation to my nation and its members and for any actions of the same howsoever recent or historical, foreign or domestic, beyond what both are due as subsets of humanity.

With this work I was interested in exploring two related ideas: the first was the social construction of a national identity, and the second was the paradox of being proud of the accomplishments of a nation or other group that also committed crimes against humanity or other shameful acts. Can a German be proud of Goethe given the Holocaust? What does it mean to be a proud American given this country's record with the indigenous people of North America and left leaning countries in the 20th century.

In addition to the idea of giving people the option of saying "I just live here", whether they wanted to become a renunciant or not, I think that presenting that as an option is a way to foreground to its audience that their identities are not inevitable but instead are cultural constructions built out of thousands of everyday thoughts and

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<sup>14</sup> Note: Data Mining, Dog Sniffs, And The Fourth Amendment, 128 HARV. L. REV. 691, 693 (2014).

<sup>15</sup> See Appendix, Part D.

actions over their life. Being American or German is not a fact we are born with but an attitude that we are constantly recapitulating.

And so this project was more about raising these issues and questions than about advocating for some utopian goal of a lack of national identity. It is an application process rather than a manifesto; renunciation is not for everyone and that's ok.

#### IV. CONCLUSION

I'd like to thank Amy Taylor, the organizer of the RIPL symposium where a version of this talk was first presented, as well as the editors of RIPL, Matthew Lammers and Andrew Manson, for broadening their scope beyond closely reasoned legal arguments to include my artistic practice. And finally I'm dedicating this paper to the memory of Shane Davis, the lawyer who advised me on many of these projects, and who passed away not long afterward at an upsettingly young age.



## APPENDIX

*A. Copyright Postcard*

This original work of expression  
will remain under copyright in:

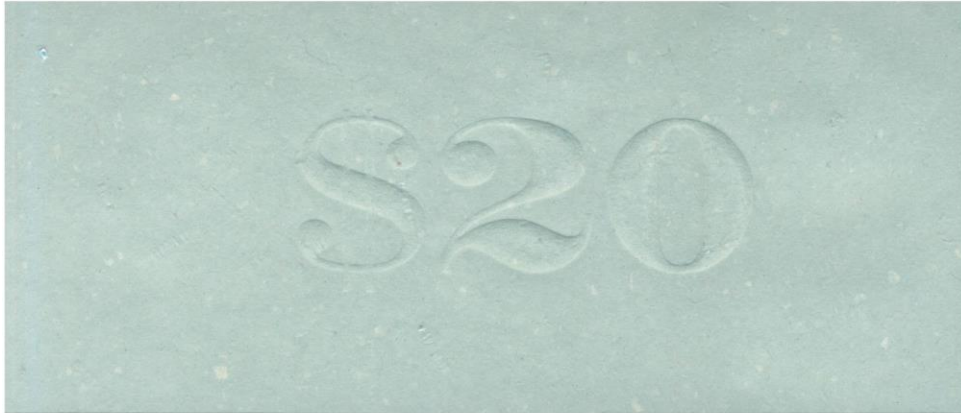
2079 with 100% probability.

2100 with 95% probability.

2125 with 64% probability.

2150 with 1% probability.

*B. Twenty Dollars*



**U.S. CODE, TITLE 17, CHAPTER 1, §106A**

**THE AUTHOR OF A WORK OF VISUAL ART SHALL HAVE THE RIGHT:**

**TO PREVENT ANY INTENTIONAL DISTORTION, MUTILATION, OR OTHER MODIFICATION OF THAT WORK WHICH WOULD BE PREJUDICIAL TO HIS OR HER HONOR OR REPUTATION, AND ANY INTENTIONAL DISTORTION, MUTILATION, OR MODIFICATION OF THAT WORK IS A VIOLATION OF THAT RIGHT.**

**TO PREVENT ANY DESTRUCTION OF A WORK OF RECOGNIZED STATURE, AND ANY INTENTIONAL OR GROSSLY NEGLIGENT DESTRUCTION OF THAT WORK IS A VIOLATION OF THAT RIGHT.**

**I ATTEST THAT THIS OBJECT IS A SCULPTURE OF RECOGNIZED STATURE AS DEFINED BY THE VISUAL ARTISTS RIGHTS ACT AND THAT THE REMOVAL OR REPLACEMENT OF ANY ELEMENT CONSTITUTES ITS DESTRUCTION.**

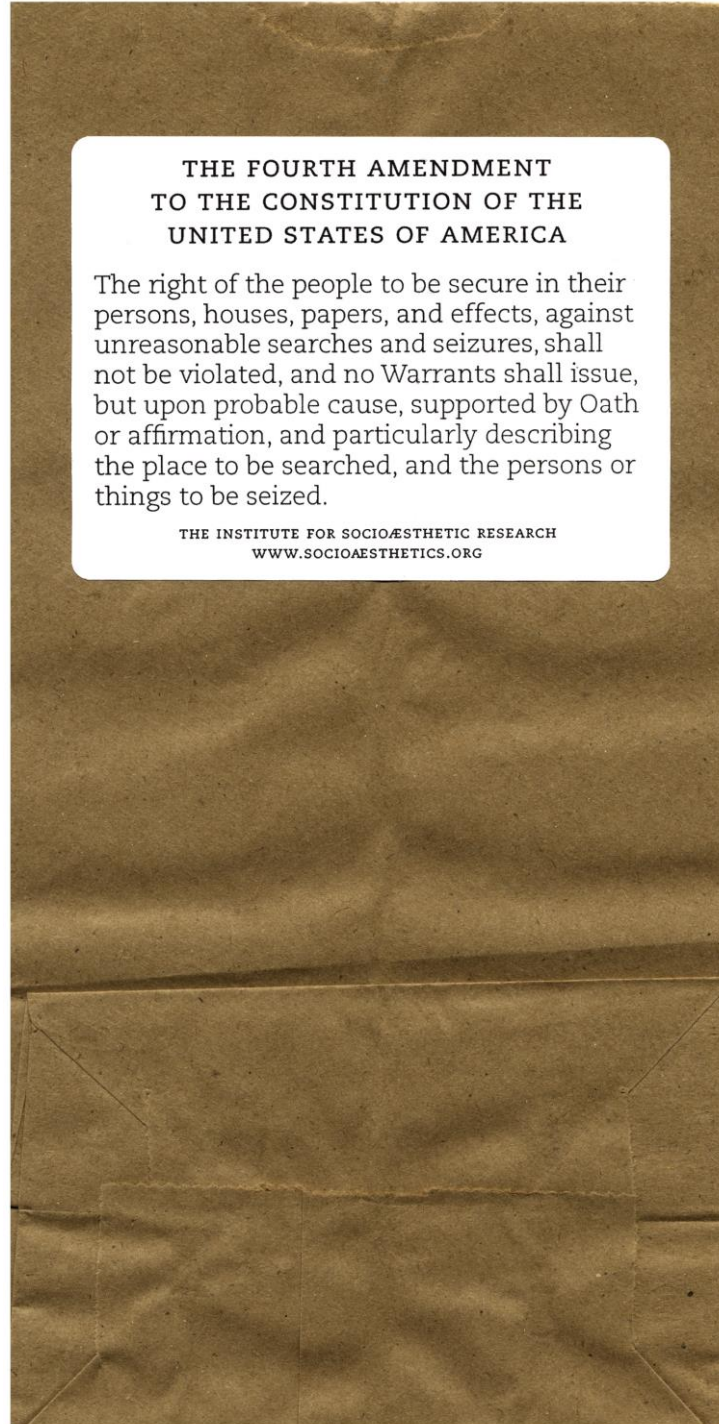
**NAME** Cheri Reif Naselli, MFA

**TITLE** V.P. of Grants, ARC Gallery

**SIGNATURE** Cheri Reif Naselli

**DATE** 1-9-09

*C. The Fourth Amendment on Paper (Bags)*





**THE FOURTH AMENDMENT:  
INSTRUCTIONS FOR USE**

NO POLICE OFFICER may search you, your house, your papers, or your brown paper bags (such as this one) without a warrant and probable cause.

FURTHERMORE, they may not stop, detain or arrest you, or seize your possessions, such as this paper bag and its contents, without a warrant and probable cause.

**SOME EXCEPTIONS APPLY:**

A SEARCH THAT does not violate a reasonable expectation of privacy is not protected by the Fourth Amendment. A transparent bag does not give privacy to its contents.

ACTING DRUNK or smelling of alcohol would provide probable cause to search this paper bag. The Fourth Amendment does not grant the right to drink alcoholic beverages in public.



IF A POLICE OFFICER has a specific reason that they can put into words for believing that you are involved in criminal activity, they may briefly detain you. If they believe that they or others are at risk, they may frisk you to search for weapons. They may not detain you or pull over your car merely because of your race.

UNTIL the FISA Amendment Act of 2008 is amended/repealed/declared unconstitutional, the government can monitor vast amounts of international communications with little judicial approval or oversight. Unlike in the past, under FISA (the Foreign Intelligence Surveillance Act), it does not have to identify its targets or places of surveillance or show that its targets are foreign agents, engaged in criminal activity or connected with terrorism. The government can intercept purely domestic communications when the origin of the communication is uncertain. It can retain the information it obtains, even information about U.S. citizens, without meaningful controls.





*D. The National Identity Renunciation Bureau*

National Identity Renunciation Card	
No. X000	
Given Names Norman M.	
Surname Edian	
Sex Male	Gender Male
Height 5'6"	Eye Color Brown
Weight 145	Hair Color Brown
Other Features	
Place of Birth San Diego, CA, USA	
Date of Birth 11/23/74	
Occupation Salesman	Citizenship USA
Permanent Residence 5046 S. Greenwood Ave. Chicago, IL 60615	
Issuing Authority  Chicago Office	
Date of Issue 4/18/09	
Date of Expiration 4/18/19	