

Brothers in Law: When Conceptual Art Certificates of Authenticity Go Up in Smoke



Charles and Thomas Danziger.

(Kristine Larsen)

Ashley was passionate about Conceptual art, but her pyromaniacal son had a different burning enthusiasm. After the firemen left, our client discovered that the extensive documentation on her collection had gone up in flames. A smoking mad Ashley phoned us with heated questions early the next day.

“Since Conceptual art is all about the idea being expressed in an artwork rather than its physical form, what exactly did my idiot son lose in the blaze?”

The answer, we said, depended on whether she still had the original certificates of authenticity that accompanied the art—the paperwork that validates and sometimes provides instructions on how to build pieces that are often created and easily replicated from commonplace materials.

“The certificates are toast,” she said. “What does that do to the art’s value?”

“From a financial point of view, it more or less extinguishes it,” we answered. Certificates are used to authenticate Conceptual art, so losing a certificate means losing most—if not all—of the art’s value. A collector can still enjoy a work, but probably can’t sell it.

Or get a tax deduction, for that matter. We know of one case where a cultural organization wouldn’t recognize a donor’s contribution of Conceptual artwork for tax purposes because the donor didn’t have the original certificate of authenticity.

“But artists are required to replace certificates, right?” Ashley asked.

Unfortunately, no. Many artists (and their studios) routinely refuse to reissue lost or destroyed certificates. To take just one example, the artist Dan Flavin—who made sculptures out of fluorescent tubes—regarded the original certificate as so integral to his work that he (and his estate, after his death) declined to give collectors duplicate certificates even if there was clear evidence that the work was authentic. And a Dan Flavin artwork without a certificate is basically an expensive reading light.

“But certificates are just pieces of paper,” protested Ashley hotly. “Why can’t Conceptual artists simply issue new ones?”

“For the same reason a sculptor can’t—or won’t—simply make a new cast of a sculpture,” we told her. “For many Conceptual artists, the certificate *is* the work.”

To be fair, many Conceptual artists are rightly concerned about legal repercussions if a lost certificate is found and there are suddenly two original certificates floating around. The extra certificate could allow someone to create an unauthorized second work—a forgery. And the first work would no longer be unique. This is particularly an issue with Conceptual artists like Felix Gonzalez-Torres. He famously observed about his *Untitled (A Corner of Baci)*, 1990, which was composed of a pile of chocolates available for visitors to take and eat, “All these pieces are indestructible because they can be endlessly duplicated.”

“What if I locate copies of the lost certificates?” asked Ashley.

“Better than nothing,” we said, “but savvy buyers—and the major auction houses—typically require the original documents for a sale.” It’s just too easy to make forgeries by photocopying legitimate certificates belonging to authentic works.

“Do you know of any recent legal cases involving lost certificates for Conceptual art?” asked our client. Actually, we did.

In 2012, Puerto Rican art collector Roderic Steinkamp sued Chicago’s Rhona Hoffman Gallery in New York State Supreme Court for \$1.4 million in damages after Hoffman apparently lost the signed certificate of authenticity to artist Sol LeWitt’s *Wall Drawing #448*, which was originally realized in 1985 in a private residence in Cambridge, Massachusetts. In 2008 Steinkamp had consigned and delivered to the gallery a small representation of the work as well as the certificate, which set forth exact instructions about how to create the wall drawing in a different setting. Steinkamp claimed that the gallery had not acted as a proper caretaker of such valuable property.

The gallery reportedly tried to settle the dispute by asking Steinkamp to suggest the lowest amount he would accept as compensation, but the collector refused.

According to the complaint: “The unique nature of Sol LeWitt’s wall drawings renders their accompanying certificates of authenticity critical to the works’ value.” It also points out that every LeWitt certificate reads, “This certification is the signature for the wall drawing and must accompany the wall drawing if it is sold or otherwise transferred.”

Steinkamp sued in New York because he had delivered the piece there. A few weeks after the suit was filed, the parties reached an undisclosed settlement out of court. The gallery’s insurance refused to cover the loss.

“If only there were insurance for this kind of thing,” huffed Ashley.

Actually, though our client had failed to take advantage of it, such insurance does now exist. Just this year, insurance brokerage firm Crystal & Company—a leading adviser to financial institutions and art collectors—teamed up with AIG Private Client Group to offer insurance for Conceptual art pieces that compensates collectors if a certificate is lost or damaged. Executive vice president Jonathan Crystal explains that when he originally asked AIG if certificates were covered, the insurer’s response was “of course.” However, based on his close reading of AIG’s policy, Crystal wasn’t so sure. That ambiguity led his company to add a simple endorsement to policies issued by AIG clearly stating that lost certificates are covered—at no additional cost. As Crystal points out, “When millions of dollars are at stake, people become very granular about contractual policy language.”

We told Ashley that certificates of authenticity are so important for Conceptual art that one of the first questions a buyer of such a piece should ask is whether the seller has a certificate—although in our experience this question often comes as an afterthought. Once a collector has a certificate, it should be stored in as safe a place as a physical artwork would be stored, and not in a loose-leaf binder with one’s business papers, as many people mistakenly do. Collectors should ensure that their heirs also clearly understand the importance of these documents.

Ashley’s next question was a good one. “Do I still own the copyright to the Conceptual works, allowing me to reproduce them? Or did I lose the copyrights in the fire too?”

There may have been no copyright to own, we explained, since Conceptual works are mainly ideas, and under U.S. law, ideas are not copyrightable. Moreover, copyright to the physical manifestation of the ideas—the artworks—would likely have been retained by the artists.

“What about the lost bills of sale for the works?” Ashley asked. “Can I get those replaced?”

The answer was maybe. In our experience, reputable galleries will often replace a lost bill of sale, which serves as both a receipt and evidence of the sale. The bill normally describes the artwork, parties, price, terms of payment, and date and place of sale. The buyer typically keeps the original signed by the artist or seller, while the seller keeps a copy. Some artists’ studios will even issue appraisals of works without certificates even if they won’t reissue the certificates themselves.

We suggested that Ashley check to see if her homeowner’s insurance coverage extended to valuable papers such as bills of sale and other documentation regarding her artwork, as some policies do. Under such coverage, the insurer would pay for the time and effort of having someone reissue the papers and restore the files.

“It seems as though losing a certificate of authenticity is worse than losing a bill of sale,” Ashley observed.

“Correct,” we replied. As Jonathan Crystal put it: “If your wedding license goes up in flames, it doesn’t mean you’re not married, but without your certificate of authenticity, your artwork no longer exists.”

Ashley was so inflamed by her predicament that she asked if we would write a column about lost certificates. Her one request? That it not be a puff piece.

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Some facts have been altered for reasons of client confidentiality or, in some cases, created out of whole cloth. Nothing in this article is intended to provide specific legal advice.

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