

# FÉLIX GONZÁLEZ-TORRES ON CONTRACTS

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Contracts involving the sale or transfer of artworks generally aspire to rationalism. Parties sign them in order to maximize gain and minimize risk. In the art world, the contract is closely associated with a zero-sum mentality that emphasizes the relationship between artists, gallerists, institutions, and other owners as one marked by compromise, if not outright antagonism. In many cases, the very use of contracts implies that no one will get everything he, she, or it wants. When the artist is famous, the contract is a matter of take-it-or-leave-it, and negotiation is not possible. In such a case, the owner is more likely to treat the prospective purchase as a unique good for which no acceptable substitution exists.<sup>1</sup>

The certificates of authenticity and ownership drafted by Félix González-Torres offer a different approach to the contract, defined as “a formally documented arrangement for governing a voluntary exchange relationship in the shadow of the law.”<sup>2</sup>

Some were issued to owners at the time a work was sold or gifted; others were issued later. All are notable for the options they give owners and borrowers of his work. For example, owners and borrowers may extend or contract for the length of the portrait, while the color in which the words are painted are left to owners’ discretion.<sup>3</sup> Likewise, owners can decide whether or not to replenish the candies or paper stacks that comprise works such as González-Torres’s 1990 piece “*Untitled*” (*A Corner of Baci*).<sup>4</sup> Other certificates are less permissive, such as those accompanying González-Torres’s light strings comprised of lightbulbs. These cer-

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<sup>1</sup> Adrian Piper and Hans Haacke successfully used a version of *The Artist’s Reserved Rights Transfer and Sale Agreement* co-authored by exhibition organizer and curator Seth Siegelau and attorney Robert Projansky in 1971; less successful was Bryan Cooke, a Los Angeles artist who sold a work to the Long Beach Art Museum in 1972 using a form modeled after the *Agreement*. The Museum tried to renege on the sale, but Cooke later prevailed.

<sup>2</sup> Mark C. Suchman, *The Contract as Social Artifact*, 37 *LAW & SOC’Y REV.* 91, 94 (2003).

<sup>3</sup> “*Untitled*” (*Portrait of the Cincinnati Art Museum*), 1994, (ARG# GF 1994-9) quoted in Miwon Kwon, *The Becoming of a Work of Art: FGT and a Possibility of Renewal, a Chance to Share, a Fragile Truce*, FÉLIX GONZÁLEZ-TORRES 304 (Julie Ault ed., 2006).

<sup>4</sup> Andrea Rosen, the executor of Félix González-Torres’s estate, recalled that the artist claimed that “if someone chooses to never install a work again, or manifest a manifestable work again, it may not physically exist, but it does exist because it did exist.” Andrea Rosen &

tificates require owners to replace the bulbs that have burned out, and some specify a quantity of light bulbs, as well.<sup>5</sup> Yet, even these certificates allow owners considerable freedom over configuration, to the point where institutions have actually asked the Félix González-Torres Foundation to set rules as to certificate interpretation.<sup>6</sup> By granting certificate holders these options, González-Torres seems to have reallocated, or even sacrificed, some of his authorial rights. This action diverges from the strict rationalism underwriting most written agreements involving the sale of artworks.

His early certificates, issued before 1992, tended to resemble a hybrid of a conventional certificate of authenticity and a set of instructions. At this time, most certificates of authenticity contained only a brief description of the work including its title, year of creation, dimensions, and constituent materials.<sup>7</sup> By far the most important aspect was the artist's signature, which provided proof that the work had been made by the signatory. These certificates resembled, or sometimes were in fact, contracts. González-Torres's earliest certificates also included a signature and a description of the work, with the latter comprised of "instructions for installation." Over time, the certificates became increasingly longer and frequently described in detail the actions an owner must undertake to effectively complete the work. Beginning approximately in late 1994, the certificates were identified as contracts signed by both the owner and the artist (and his estate). Some were issued to owners at the time a work was sold or gifted; others were issued later. Referred to as "agreements," they were signed not only by the artist and his gallery, but by the owner as well. Their length and language more closely resembled contracts than they did conventional certificates of authenticity. More specifically, they delegated to owners the task of entering into other agreements on the work's behalf, namely loan agreements. Certificates drafted after the artist's death include a provision granting the Félix González-Torres Foun-

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Tino Seghal, *Interview*, FÉLIX GONZÁLEZ-TORRES: SPECIFIC OBJECTS WITHOUT SPECIFIC FORM 409 (Andrea Rosen & Elena Filipovic eds., 2016).

<sup>5</sup> See Carol Bove's description of her experience installing "*Untitled*" (*For Stockholm*) (1992). Carol Bove, *Some Notes on Venue 2, Installation 2*, FÉLIX GONZÁLEZ-TORRES: SPECIFIC OBJECTS WITHOUT SPECIFIC FORM 203 (Andrea Rosen & Elena Filipovic eds., 2016); see also Interviews by Tim Rollins with Félix González-Torres, in New York, N.Y. at 8 (Apr. 16, 1993 & June 12, 1993).

<sup>6</sup> Rosen states that a primary job of the Félix González-Torres Foundation has been to record the various manifestations of each work. She is adamant, however, that "the case studies are not a recording of what the rules are, even though institutions would like us to do this." Andrea Rosen & Tino Seghal, *Interview*, FÉLIX GONZÁLEZ-TORRES: SPECIFIC OBJECTS WITHOUT SPECIFIC FORM 395 (Andrea Rosen & Elena Filipovic eds., 2016).

<sup>7</sup> On the evolution of the certificates' length and complexity see David Deitcher, *Contradictions and Containment*, FÉLIX GONZÁLEZ-TORRES 321 (Julie Ault ed., 2006).

dation and the Andrea Rosen Gallery “the authority to bond” the buyer to the agreement’s terms.<sup>8</sup>

These longer certificates recalled an alternative, and more specific, definition of contracts famously proposed by legal scholar Stewart Macaulay, one that highlighted contracts as “devices for conducting exchanges.”<sup>9</sup> The length and language of these longer certificates more closely resembled contracts than they did conventional certificates of authenticity. While the language is not technical legal jargon, the diction, syntax, and vocabulary contained in the certificates are studiously neutral and distinctly non-colloquial. The certificates demanded from readers a kind of attention analogous to that commanded by a contract. In particular, the resemblance compels readers to pay close attention to individual words rather than search for a coherent narrative.

I argue that González-Torres’s certificates provide a model for reconsidering how contracts involving the sale or exchange of artworks might work more effectively. His certificates’ language and structure both mirrored and diverged from the wording and organization of most sales contracts, which enhanced their authority by framing owner compliance as optional. González-Torres intended owners to execute his works in particular ways. Yet the certificates often expressed the artist’s intentions as choices owners could make rather than as conditions that had to be fulfilled, or even obligations they were bound to perform. Initially written without the advice of legal counsel, the certificates lack either the clarity or precision expected of contracts generally.<sup>10</sup> Yet these presumptive shortcomings enable the certificates to compel a remarkable level of owner compliance with the artist’s intentions without the acrimony that often accompanied such transactions.

## I. UNCERTAINTY IN DOCUMENTATION

What is a certificate of authenticity? To sellers, it was a glorified bill of sale, a superfluous extra often grudgingly provided to owners to reassure them of the pedigree of their new acquisition. Influential New York gallerist, Andre Emmerich, derided the very idea of the certificate.<sup>11</sup> He stated that a seller’s reputation was sufficient proof of a

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<sup>8</sup> Whether new certificates of authenticity issued for resold González-Torres works will also obligate owners to the David Zwirner Gallery (which since February 2017 co-represents the Félix González-Torres estate) remains to be seen.

<sup>9</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58 (1963).

<sup>10</sup> Recently, certificates have been amended with the advice of outside legal counsel.

<sup>11</sup> Dep. of Andre Emmerich, Greenberg Gallery, Inc. v. Bauman, 817 F. Supp. 167 (D.D.C. 1993) archived in Archives of Am. Art, Smithsonian Inst., Series II, Box 2., 43 (housing records from the Barbara Mathes Gallery pertaining to the Rio Nero lawsuit, 1989-1995,

work's authenticity: "My good name rides with everything I sell."<sup>12</sup> Yet, a certificate could also be a potential source of liability, particularly for owners for whom a certificate of authenticity might appear to have more legal authority than it actually does. They read the certificate as a warranty, there to preserve the economic value of their purchase. To judges, a certificate might be a quasi-affidavit furnished by the seller or merely another piece of evidence concerning the seller's intentions.

To many artists, a certificate of authenticity was yet another reminder of how their works circulated in a market not of their own making or control. As Sol LeWitt remarked in 1974, not long after the dramatic expansion of the contemporary art market in the U.S., the artwork "always ends up in the hands of people who you feel don't think the way you do, or they use art as speculation or as a commodity. It becomes very depressing . . ."<sup>13</sup> For some artists the certificate was part of the cost of doing business; for others, it was an opportunity to determine some of the terms of their works' circulation.

This happened even with conceptual artworks as well as works that could be easily replicated using everyday objects. For such works, the certificate of authenticity was sometimes the only tangible proof establishing their identity or existence.

González-Torres, who saw an affinity between his works and those of his conceptualist predecessors like LeWitt, regarded his certificates in a similar light. He saw himself operating "as part of the market," regarding it as more effective to work within, rather than outside, its structures.<sup>14</sup> Macaulay's more specific definition of contracts helps clarify how González-Torres's certificates operate in this manner. Congruent with Macaulay's definition, many of González-Torres's certificates provide for future anticipated contingencies such as allowing different beads to be used if one brand is unavailable.<sup>15</sup> Likewise, González-Torres often specified the type of candy to be used in a particular work; however, if that brand was not available at the time an owner wished to execute that work a comparable version may be used as long as it meets certain parameters. An owner of "*Untitled*" (*A Corner of Baci*), for example, "may" use candies other than regular size Perugina Baci chocolates if

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referring to the *Greenberg Gallery* case, which turned on determining whether the *Rio Nero* was an authentic work by Alexander Calder).

<sup>12</sup> *Id.*

<sup>13</sup> Interview by Paul Cummings with Sol LeWitt (Jul. 15, 1974), <https://www.aaa.si.edu/collections/interviews/oral-history-interview-sol-lewitt-12701>.

<sup>14</sup> Rollins, *supra* note 5.

<sup>15</sup> *Id.* at 3.

“these candies are not available.”<sup>16</sup> Unlike Macaulay’s definition, González-Torres’s certificates do not specify or suggest how legal sanctions could be taken to force bearers to fulfill the certificates’ terms or to compensate the artist (or his estate) for non-fulfillment of the same.

While the lack of enforceability may bar González-Torres’s certificates from being properly known as contracts, it nevertheless sheds light on why they constitute a productive alternative to the strongly adversarial mindset underlying many agreements about the ownership of artworks. They contrast directly from the often antagonistic relationship between buyers and sellers, one aggravated by judicial concern over a perceived imbalance of knowledge between the shrewd seller and the relatively naïve buyer. Courts were concerned with correcting what they saw as an imbalance of power between buyers and sellers of artwork. By the late 1980s, some courts even attempted to apply the concept of strict liability to sellers.<sup>17</sup>

At the same time, it was painfully clear to many artists that the law would do little to protect artists as an occupational class. Despite Congress passing the Visual Arts Rights Act (VARA)<sup>18</sup> in 1990, which granted some artists (namely painters and sculptors) certain protections concerning attribution and destruction of their works, courts and legislatures were reluctant, and often unwilling, to make concessions for the specific nature of artworks.<sup>19</sup> The law refused in particular to protect the economic rights of artists unless previously negotiated through contracts.<sup>20</sup> Moreover, cuts in public arts funding and incessant calls for the abolition of government arts administration bodies during the 1980s and early 1990s required artists to be entrepreneurial in what laws they could invoke on behalf of their own interests.<sup>21</sup> Such privatization of culture in turn compelled several artists to turn to contracts in an effort to secure what rights they could.

Yet contracts were hardly a cure-all, as the tempestuous relationship between Donald Judd and Italian collector Giuseppe Panza so amply demonstrated. After buying the plans for fourteen untitled and unrealized works between 1974 and 1975, Panza had several works made according

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<sup>16</sup> ARG #GF 1990-20, *quoted in* Miwon Kwon, *The Becoming of a Work of Art: FGT and a Possibility of Renewal, a Chance to Share, a Fragile Truce*, FÉLIX GONZÁLEZ-TORRES 299 (Julie Ault, ed., 2006).

<sup>17</sup> Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 562 (1988).

<sup>18</sup> 17 U.S.C. § 106A (1990).

<sup>19</sup> For a discussion of the restrictive scope of VARA, see David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985 (2014).

<sup>20</sup> *Id.* at 996.

<sup>21</sup> For a useful discussion of artistic entrepreneurship in the wake of arts funding cuts, see LANE RELYEA, *YOUR EVERYDAY ART WORLD* (2013).

to what he thought were Judd's instructions.<sup>22</sup> The artist angrily disowned the works, claiming that the fabrications did not satisfactorily meet his standards.<sup>23</sup> In a statement published in the April 1990 issue of *Art in America*, Judd all but accused Panza of negligence that he implied was in direct violation of his intentions: "[Panza] thinks my work has no existence beyond the paper in his files and that it can come and go as he pleases and as he designs it; now it can be multiplied as he pleases."<sup>24</sup> In this case, Judd seemed to regard the certificate from the perspective of a transactional lawyer, that is, as a written instrument formalizing an agreement that he believed to have made with Panza. The contract could have added that Judd or his representative had to first approve the recreation before acknowledging the work as his own.

There is no evidence to suggest that González-Torres knew of the Judd-Panza conflict, but tensions between artists, sellers, and buyers had become especially fraught after the dramatic expansion of the contemporary art market during the 1970s and 80s. During this time, the certificates issued by a small, but influential group of artists, many of whom were affiliated with Minimalism and Post-Minimalism, became de facto contracts. Some examples include those signed by Robert Barry and James Turrell for works sold to Italian collector Giuseppe Panza. Barry's was a single page, single-spaced document that included all the classic requirements of a binding contract: an offer, mention of consideration, and an acceptance by both parties of the certificate's terms. Drafted by Panza's attorney Jerald Ordovery, Turrell's was a multi-page contract that looked very much like a boilerplate agreement. But that most contracts generally revolve around how and when its terms can be enforced made sellers reluctant to enter into contracts generally. It may explain the absence from González-Torres's certificates of imperative terms like "must" and "cannot," an omission that is particularly striking given their frequency in other certificates. The certificate for Robert Barry's untitled series of open plywood cubes (1972–1973), for example, contains "shall not" and "shall," words commonly used when one party seeks to impose an obligation on someone else.

At the same time, buyers demanded from sellers various proofs or guarantees that their purchases were legitimate. Andrea Rosen, González-Torres's gallerist and the executor of his estate, stated that the certificates were issued to reassure owners who found it difficult to see how an

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<sup>22</sup> MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 37 (2003). For a thoughtful discussion of the Panza-Judd conflict, see *id.* at 34-42.

<sup>23</sup> *Id.* at 38.

<sup>24</sup> Donald Judd, Letter to the Editor, *Artist Disowns 'Copied' Sculpture*, 78 *ART AM.* 33 (April 1990).

idea could be a unique work of art.<sup>25</sup> Indeed, the certificate of authenticity had a special prominence as it was often the only documentation other than the bill of sale or an invoice to document the value of an artwork. For conceptual artworks, or works that could be easily replicated using everyday objects, the certificate of authenticity had even greater import as the only tangible proof establishing the identity or existence of a specific work.<sup>26</sup> Moreover, the certificate of authenticity and/or ownership was one of the few types of written documentation actively desired in a market notorious for its aversion to contracts. In a 1990 essay in *Arts Magazine*, lawyer Tim Cone described the transactional environment of the art world as one that could only work based on “shared visions, trust, and goodwill [rather] than on economic needs.”<sup>27</sup> Without some sense of common purpose, not even “the threat of a lawsuit” will “keep either side from breaking its promises.”<sup>28</sup>

## II. THE REASONABLE CONTRACT

Performance studies scholar Joshua Chambers-Letson has argued that González-Torres’s certificates effectively take on the role of a purchase contract because they suggest the existence of an agreement between the artist (and later, representatives of his estate) and the owner, who both sign the document.<sup>29</sup> He claims that González-Torres’s certificates embody a transformation of the contract from a hidebound instrument of control into “a potential agent of change.”<sup>30</sup> Chambers-Letson is on the right track, but the potential for transformation seems to lie more squarely in how each certificate diminishes the sense of encumbrance that might ordinarily attach to the conditions each certificate specifies are necessary to the proper completion of a work.<sup>31</sup> Where contracts specify that parties fulfill certain requirements as a necessary step in securing a particular benefit, most certificates of González-Torres do not actually require bearers to fulfill particular terms.

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<sup>25</sup> See Anne Cushwa, *Untitled* (A Dissertation for Félix González-Torres) 38 (May 2005) (unpublished Ph.D. dissertation, University of Iowa) (on file with Proquest).

<sup>26</sup> See *id.* at 37.

<sup>27</sup> Timothy Cone, *A Case for Contracts*, 65 *ARTS MAG.* 27, 27 (Nov. 1990).

<sup>28</sup> *Id.*

<sup>29</sup> Joshua Takano Chambers-Letson, *Contracting Justice: The Viral Strategy of Félix González-Torres*, 51 *CRITICISM* 559, 575 (2009).

<sup>30</sup> *Id.*

<sup>31</sup> Contrast the language of González-Torres’s certificates with the Agreement Commissioning Works of Art between Panza and the artist Michael Asher. The Agreement Commissioning Works stipulate that the artist will authenticate the work as his only if Panza’s realization “complies in all respects with the artist’s design.” Agreement Commissioning Works of Art between Panza and the artist Michael Asher, Giuseppe Panza Papers Collection, Series IV, Box 174 (on file with Getty Research Institute, Special Collections).

The majority of González-Torres certificates contain no outright obligations, only conditions whose fulfillment is in fact entirely optional since the work is the idea and not its physical manifestation.<sup>32</sup> Relying heavily on conditional words like “may,” the certificate functions more like an offer than evidence of an already negotiated agreement. “Fortune cookies of other producers may be used provided that the messages they contain are optimistic,” reads the certificate for “*Untitled*” (*Fortune Cookie Corner*), 1990.<sup>33</sup>

Art critic David Deitcher speculates that the phrasing incorporates a standard of reasonableness: it is to account for “the realities of life as it is lived” or for what owners could “realistically be expected to make” by way of financial commitment and time spent on the work.<sup>34</sup> González-Torres’s certificates seem worded to minimize the anxiety experienced by even the most sophisticated owners of earlier instruction-based works. Consider the mad scramble of Paul Maenz, the German dealer who was among the most proactive in commodifying conceptual art, to locate the exact fluorescent tubes he thought were mandatory to execute a legitimate Dan Flavin work: “I can’t use the Flavin unless I have the correct tubes. And unless the whole thing works I can’t sell it.”<sup>35</sup> In contrast, González-Torres often amended or even changed his certificates to accommodate owner concerns.<sup>36</sup> The tone and content of his certificates anticipate what in recent years has been a more overtly relational approach to contract formation based on emphasizing the contract as a commemoration of alliance between contracting parties.

But as Tim Rollins observed, González-Torres’s works were not “completely arbitrary or intuitive.”<sup>37</sup> The detailed instructions, length, and specificity of conditions given strongly imply that the artist wished at least some compliance from owners. By giving options, especially for matters from which one might expect some direction or instruction, the certificates emphasize that the act of fulfilling a González-Torres certificate is voluntary. This may in fact be why González-Torres’ certificates

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<sup>32</sup> A striking exception is “*Untitled*” (1991), consisting of a wooden box whose contents the owner has agreed never to display in public. Whether this condition was written into the certificate accompanying the work is unknown, but nevertheless conspicuous in the context of the artist’s other certificates. Cited in Elena Filipovic, *Specific Objects Without Specific Form*, FÉLIX GONZÁLEZ-TORRES: SPECIFIC OBJECTS WITHOUT SPECIFIC FORM 17 (Andrea Rosen & Elena Filipovic, eds., 2016).

<sup>33</sup> Deitcher, *supra* note 7, at 323.

<sup>34</sup> See David Deitcher, *Contradictions and Containment*, FÉLIX GONZÁLEZ-TORRES: CATALOGUE RAISONNÉ 107 (Ostfildern-Ruit: Cantz, 1997).

<sup>35</sup> Letter from Paul Maenz to Joseph Kosuth (Mar. 2, 1977) (on file with the Getty Research Institute).

<sup>36</sup> Anne Jennifer Cushwa, *Untitled* (A Dissertation for Félix González-Torres) 48 (May 2005) (unpublished Ph.D. dissertation, University of Iowa) (on file with the School of Art & Art History, University of Iowa).

<sup>37</sup> Rollins, *supra* note 5.

have been so scrupulously honored: not because the owner was afraid of what might happen if the terms were left unfulfilled, but because completing the work was so explicitly a function of choice.

Yet making choices was not without risk or consequence. Consider “*Untitled*” (for *Parkett*), an editioned work that González-Torres conceived for the journal *Parkett* and offered for sale in 1994.<sup>38</sup> Owners received sheets of paper and a certificate indicating that they could “complete” the work by attaching the sheets to a wall to form a giant billboard. Removing the sheets, however, meant the work’s permanent and irrevocable destruction. Such a claim reduces the chances that an owner might regard a deinstalled work as a mutilated, but still salvageable commodity. Owners may thus choose to complete the work, knowing that to do so would likely mean the permanent destruction of his or her investment, unless the building containing the walls to which the work was attached was also being sold and the certificate accompanying the work also changed hands. If the owner chooses not to attach the sheets, she may recoup (and see a profit) on her initial investment, but the work remains incomplete. Only the right to make and display a completed González-Torres would be sold. The effect differed from a comparable work, Kay Rosen’s 1995 wall painting *Leak*, which consisted of two words (“Floor” and “Roof”) painted directly on a wall.<sup>39</sup> Rosen specified that if the work’s location or ownership change, the present work should be painted over and a new work recreated “to the best of the owner’s ability.”<sup>40</sup>

Furthermore, it was unclear just how closely owners were expected to abide by the terms of González-Torres’ certificates. Despite being characterized as “utilitarian,” the language of the certificates often fails to adhere to the kind of precision required for legally binding contracts to work efficiently.<sup>41</sup> The language vacillates between precision and vagueness. One certificate for an early billboard piece grants the owners the “exclusive right to reproduce the billboard[s] in public as often as they like, at what ever [sic] scale they like, at however many locations they choose.”<sup>42</sup> The wording of the certificate avoids a common mistake in

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<sup>38</sup> Parkett Art, Artists’ Documents and Archive, <http://www.parkettart.com/archive/39-archive-González.html> (last visited Mar. 14, 2017).

<sup>39</sup> Kay Rosen, This is to Certify (unpublished manuscript) (*accompanying* Kay Rosen, *Leak* (1998)).

<sup>40</sup> *Id.*

<sup>41</sup> See David Deitcher, *Contradictions and Containment*, FÉLIX GONZÁLEZ-TORRES: CATALOGUE RAISONNÉ 107 (Ostfildern-Ruit: Cantz, 1997).

<sup>42</sup> Andrea Rosen, “Untitled” (The Neverending Portrait), in [I: Text] FÉLIX GONZÁLEZ-TORRES, 44, 48 (Dietmar Elger, ed., 1997) (quoting “Certificates of Authenticity/ Ownership that accompany [Félix González-Torres billboards]”).

contract drafting whereby “exclusive” and “sole” are used interchangeably; the former gives only one owner the right.

After González-Torres’s death, the word “utmost” started to appear in certificates issued by the Andrea Rosen Gallery with regard to the owner’s right to lend González-Torres’s work. Specifically, owners must exercise “utmost discretion” in choosing when and if to lend the work. The provision was added to replace an earlier term introduced in 1994 in which owners had to secure the express written permission of the artist if they wanted to lend his works elsewhere. Given this history, “utmost” may suggest that owners have a duty to act primarily in the artist’s interests even if it infringes on an owner’s presumptive right to freely use his or her property. When González-Torres’s portrait “Untitled” was sold jointly to the San Francisco Museum of Modern Art and the Art Institute of Chicago in 2002, the certificate issued by the Félix González-Torres Foundation strikingly characterized the owner as “the caretaker he [González-Torres] entrusted with this work’s evolution.”<sup>43</sup> But who in fact determines whether an owner has properly discharged his, her, or its caretaking duties? As seen by the wide exhibition of González-Torres works, “utmost discretion” in practice simply refers to “reasonable” discretion.

Several sentences, on the other hand, are so pointedly imprecise as to seem almost intentional. A common statement in many certificates, “this certificate is necessary to define ownership,” reads almost as a non-sequitur; here “establish” should replace “define.” If protection of González-Torres’s intention was in fact the certificates’ primary aim, several points could have been more strongly or specifically worded. For example, instead of “if this exact candy is not available, a similar candy may be used,” it could be “a candy of similar color, size, and weight can be used if the candy identified above is not available.” A standard phrase—“the physical manifestation of this work in more than one place at a time does not impugn this work’s uniqueness”—is unclear due to the improper use of “impugn.” A verb meaning “to doubt” or “attack,” the word is most often used in legal contexts to assess witness credibility or in cases involving defamation. “Undermine” or “negate” would be more appropriate. Moreover, “impugn” sounds strangely out of place in relation to the certificates’ plain language. It seems almost as if the artist or his representatives were attempting to have the certificate sound more authoritative, or to at least imbue it with the air of a legally binding contract.

The looseness of the language comes across as intentional and even strategic. For example, the certificate for “Untitled” (Fortune Cookie

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<sup>43</sup> Kwon, *supra* note 3, at 308 (quoting the certificate for “Untitled,” 1989 (ARG-#GF 1989-20), 4).

Corner) indicates that other messages can be used provided they are “optimistic.”<sup>44</sup> The use of “optimistic,” a word indicating affect, seems to compromise the specificity of its message. The semantic porosity of González-Torres’s certificates underscores how open the documents were to subsequent interpretation. Rosen observes how González-Torres determined the size of his works based on “standards.”<sup>45</sup> There may have been no one “right size” of paper, for example, but certain factors, such as the proportions of the display venue did affect how González-Torres himself determined the formal appearance of the work.<sup>46</sup> The adherence to “standards” is reflected in the prominence and consistency with which the word “ideal” appears throughout González-Torres’s certificates. The Foundation has stated that the ideal height of a paper stack work is a dimension “that is negotiated each time the work is exhibited.”<sup>47</sup>

But “ideal” also resonates with the reasonableness standard often used to determine the lawfulness of a person’s behavior. A particular height or configuration need not be followed to the letter, but there is an intimation that certificate bearers should be reasonable in deciding how high paper stacks should be or where candies are placed. An ideal height for the paper stacks is prescribed (the actual height of the original installation), but the owner, in theory, is free to choose any height, a freedom that could hypothetically lead him or her to erect a stack so tall as to make it impossible for some viewers to take individual sheets. In this case, would the paper stack still be considered a González-Torres per the certificate declaration that “a part of the intention of the work is that third parties may take individual sheets of paper from the stack”?<sup>48</sup>

In using the term “ideal” rather than more standard terms like “required” or “mandatory,” González-Torres addressed what might be the most crucial aspect of any contract: the likelihood of its enforcement. He appeared to move away from the restorative models inherent in contracts, whereby the non-fulfillment of one term would result in the compensation of the injured party or punishment of the errant party. Indeed, the point of the certificates may have been to set up a framework different from the one espoused by the law. It is a bit different from how film and video works are sold; a phenomenon that emerged in the 1990s, it specifically involved collectors signing purchase agreements that detailed very

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<sup>44</sup> Deitcher, *supra* note 7, at 323.

<sup>45</sup> Andrea Rosen, “Untitled” (The Neverending Portrait), in [I: Text] FÉLIX GONZÁLEZ-TORRES, 44, 48, 49 (Dietmar Elger, ed., 1997) (quoting “Certificates of Authenticity / Ownership that accompany [Félix González-Torres billboards]”).

<sup>46</sup> *Id.*

<sup>47</sup> Email from Emilie Keldie to Joan Kee, the author (28 September 2015) (on file with author).

<sup>48</sup> A comparable certificate is that issued for “Untitled” (*Memorial Day Weekend*), 1989. See Deitcher, *supra* note 7, at 322.

clearly how the works would be shown.<sup>49</sup> But where the obligations associated with the purchase of film and video works were largely to ensure the quality of the image, thereby casting film and video as themselves fixed objects, many González-Torres works are meant to be given away with their initial presentation taking any number of forms.<sup>50</sup>

From a liability perspective, the looseness of the certificates' wording accommodated the concern some institutional owners were likely to have about their own responsibilities. Museums, for example, represent a type of owner characterized by keen aversion to all forms of legal liability as well as correspondingly high levels of vigilance in safeguarding the tangible property it owns.<sup>51</sup> Uncertain language helps ensure that deviations from the certificates' terms are less likely to trigger anxiety over whether such changes would be seen as actionable violations. In order to put the relationship before the transaction, then, the language of the certificates had to contain enough uncertainty so that deviations would not necessarily be regarded as violations of the agreement.

### III. TOWARDS POST-OWNERSHIP?

Probing further, the freedoms of choice contained in a González-Torres certificate evoke what might be called the frictional nature of owners' ethical lives. This was especially well articulated in his certificate for "*Untitled*" (*For Parkett*), a work conceived for the journal *Parkett* in 1994.<sup>52</sup> Offered for sale by the magazine in an edition of eighty-four, it consisted of eight silkscreened sheets of paper and a certificate indicating that "the work is not complete until installed."<sup>53</sup> As seen by the work's installation in various iterations of the traveling exhibition

<sup>49</sup> Erika Balsom, *Original Copies: How Film and Video Became Art Objects*, 53 *CINEMA J.* 99, 110 (2013) (noting that the sale of a limited-edition film or video includes both a certificate of authenticity and a contract specifying the owner's rights to exhibition and display).

<sup>50</sup> As Robert Storr writes, buying a work "legally committed the purchaser to passing along the very thing he or she had just acquired." While the certificates were not contracts by legal definition, Storr points out that the intention was for owners to cultivate a mindset of surrender rather than possession. See *When This You See Remember Me*, FÉLIX GONZÁLEZ-TORRES 16 (Julie Ault ed. 2006).

<sup>51</sup> One is reminded of how the Hirshhorn Museum made sure that the lightbulbs used in their González-Torres retrospective had to be remade to adhere to national safety codes. Memorandum from Kathy Watt to Amada Cruz (Jan. 11, 1993) (on file with the Smithsonian Institution Archives). Similar was Cruz's decision to make "Placebo 2" smaller in her proposal for the U.S. Pavilion at the 1995 Venice Biennale so that visitors could more easily access emergency exits per safety regulations. Letter from Amada Cruz to Félix González-Torres (Feb. 22, 1994) (on file with the Smithsonian Institution Archives).

<sup>52</sup> MUSEUM OF MODERN ART, <https://www.moma.org/collection/works/61173?locale=EN> (last visited Mar. 14, 2017).

<sup>53</sup> See LIVE AUCTIONEERS, [https://new.liveauctioneers.com/item/10605828\\_Félix-González-torresuntitled-for-parkett](https://new.liveauctioneers.com/item/10605828_Félix-González-torresuntitled-for-parkett); PHILLIPS AUCTION HOUSE, <https://www.phillips.com/detail/FÉLIX-GONZÁLEZ-TORRES/NY030210/292> (last visited Mar. 14, 2017).

“200 Artworks – 25 Years, Artists’ Editions for Parkett,” completion was interpreted to mean attaching the sheets to a wall to form a giant billboard.<sup>54</sup> It would follow then, that removing the sheets resulted in the work’s permanent and irrevocable destruction since the sheets were irreplaceable. Hypothetically, owners installing the work do so knowing that it will likely mean the permanent destruction of his or her investment.<sup>55</sup> It is of course possible to imagine that the completed work could continue to “live” if the building containing the walls to which the work was attached was also being sold and the certificate for the work transferred to a new owner. If the owner chooses not to attach the sheets, she may recoup (and see a profit) on her initial investment, but the work remains incomplete. Only the right to make and display a completed González-Torres would be sold.

The certificate for the *Parkett* edition is unique among González-Torres’s certificates in how it so explicitly pits two different values against one another. One concerns the protection of the work’s economic value as defined by an owner physically possessing the certificate affirming its existence and authorizing its creation. The other concerns the most valuable use of resources, in this case, the sheets comprising the billboard. At stake is how owners externalize what they see as ownership; here they must choose between redeeming the financial investment they made in buying the work and the unquantifiable pleasure or satisfaction that comes with being able to complete it. For very wealthy collectors for whom the market value of the work is relatively modest (recent auction records suggest that it would be in the neighborhood of \$10,000), the question is less pressing. The situation may be different for other owners, especially those who first bought the edition when it was priced at less than a thousand dollars and for whom the *Parkett* editions represent an accessible way of collecting works by well-known artists at a reasonable price.

For a collector, fulfilling the terms of a González-Torres certificate is a particularly compelling way of signaling one’s identity because it suggests that he or she is more than a self-interested hoarder, a speculator or profiteer. The example of “*Untitled*” (*For Parkett*) suggests the possibility of a kind of post-ownership, in which the relationship between the artwork and the potential (or in this case imminent) owner is not primarily determined by the latter’s efforts to claim absolute legal title to the former. In such a context, ownership is most fully expressed when the

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<sup>54</sup> For some examples see Parkett Art, <http://www.parkettart.com/archive/39-archive-gonzalez.html> (last visited Mar. 14, 2017). See also FÉLIX GONZÁLEZ-TORRES 195 (Julie Ault ed., 2006).

<sup>55</sup> One of the few documented examples is the installation of the work at the former Long’s Bookstore near Ohio State University in Columbus, Ohio. Initially owned by Byrne, the work was gifted to his Skylark Foundation, and then to the University.

property is freely shared with others. Admittedly, such recognition is more likely when the artwork is relatively less valuable in economic terms and when there is a strong possibility of reaping other forms of gain, such as public acclaim for one's philanthropic benevolence.

The certificate poses a singular test for an owner living in a transactional culture that holds economic self-interest as paramount. It parses the idea of "should" into further questions regarding the correctness and appropriateness of a decision. It is not incorrect to pursue either path; that is, it is contractually acceptable to either complete or not complete the work. Many choose not to "complete" the work as seen by the works offered and sold occasionally at auction.<sup>56</sup> And what happens when, as in the case of the work's installation at Ohio State University in 2015, the work is installed but there is no accompanying certificate? In that particular instance, the sheets were purchased at auction but no certificate accompanied the sale.<sup>57</sup>

But if one admits that ownership also means acknowledging membership in a particular community of interests, it has us ask if the immediately rational choice (preservation of exchange value) is really the optimal choice. Belonging to a particular community of interests (or what González-Torres would have called a "community of concern"), means recognizing the role public access plays in his work. "I need the public to complete the work" was a favorite quote of his, usually made in reference to the replenishable candy piles or paper stacks. In this case, the "public" suggests another incentive for completing the work: the opportunity to create the greatest good for the largest number of people. When installed, "*Untitled*" (*For Parkett*) becomes a work many people could easily see and enjoy. Indeed, when the collector Blake Byrne gifted his edition of "*Untitled*" (*For Parkett*) to Ohio State University, the building formerly housing the landmark bookstore Long's was cho-

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<sup>56</sup> At the January 2012 Phillips auction in New York, the sale price of the work was estimated to fall between USD 8000 and 12000; at the February 2013 Phillips auction in London, the work sold for GBP 6250 and at the September 2013 Christies auction in London for GBP 6000. In these auctions, the work was offered as a set of prints and not as an installed billboard. See, for instance, LIVE AUCTIONEERS, [https://new.liveauctioneers.com/item/10605828\\_Félix-González-torresuntitled-for-parkett](https://new.liveauctioneers.com/item/10605828_Félix-González-torresuntitled-for-parkett) (last visited Mar. 14, 2017) and PHILLIPS AUCTION HOUSE, <https://www.phillips.com/detail/FÉLIX-GONZÁLEZ-TORRES/NY030210/292> (last visited Mar. 14, 2017).

<sup>57</sup> Blake Byrne had acquired an edition of "*Untitled*" (*For Parkett*) at auction; his foundation (the Skylark Foundation) unsuccessfully attempted to acquire the certificate. Eventually a copy of the certificate was provided by *Parkett*. The lack of a certificate seemed to have no bearing on the care with which the work was installed at Ohio State University; even the destruction was meticulously recorded. Email from Barbara Schwan to Joan Kee (Sep. 29, 2015) (on file with author).

sen because it was not only available, but “visible daily to students, faculty and community.”<sup>58</sup>

The certificate for the *Parkett* edition serves a rejoinder to the context of economic self-interest validated as rational thinking. It offers owners a chance to think outside the limitations of economics as a barometer of valuable action. As legal scholar Richard Posner has pointed out, economics cannot tell us whether one choice is more ethically or socially valuable than another.<sup>59</sup> The certificate for the *Parkett* edition entrusts that decision to owners like Byrne, therefore suggesting how ownership was something to be earned via the quality of one’s choices rather than merely acquired with money and some luck.

Over time, the process of manifesting González-Torres’s works creates social connections that produce their own sense of moral obligation. It is a kind of obligation that has owners internalize how González-Torres himself might have negotiated the challenges posed by working a particular set of spatial and material variables. The result is the production of a type of empathy that permits owners to regard themselves as collaborators or even as co-authors rather than as purchasers or owners. In doing this, González-Torres might have been responding to what the gallerist Paul Maenz described to the artist Joseph Kosuth in 1977 as the “gap between people who like art and people who do art.”<sup>60</sup> By recasting the fulfillment of terms as a personal, and even emotional matter, González-Torres seemed intent on erasing that distance as much as possible.<sup>61</sup>

Thus, if the certificates of González-Torres resemble contracts, they do so in order to suggest a different approach to contract, one that looks to the underlying relationship such documents seek to uphold rather than enforcing specific, yet imperfect terms used in the course of transaction. Their main objective is not to identify and punish instances of noncompliance, but rather to improve the chances that an agreement’s general terms will be upheld. They did so by transforming the act of purchase into a pledge to commit to a distinctly non-pecuniary relationship. In sum, the certificates of Félix González-Torres ask to be read in ways that have us imagine action beyond the official and unofficial laws now governing the relationships created by the sale of an artwork—relationships formed in the names of commerce and love both.

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<sup>58</sup> Barbara Schwan, email to Joan Kee, the author (Sep. 8, 2015) (on file with author). The building was slated for demolition together with the billboard.

<sup>59</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1973).

<sup>60</sup> Letter from Paul Maenz to Joseph Kosuth (Feb. 10, 1977) (on file with the Getty Research Institute).

<sup>61</sup> *See id.*

