Sergio Muñoz Sarmiento

# Primary Structure: Law, Power, Architecture

Artistic originality has only its own self to copy.
—Vladimir Nabokov

## Quotation

In its essence a quotation[1] contains the already said and, perhaps, the said-better. This is the basic structure of the quotation. To quote is to copy, to repeat, to reference, to cite, to monumentalize, to index, to decontextualize, to clone, to violate, and to appropriate—yet not always in good faith. This essay does not intend to be all-inclusive or comprehensive of all architectural and artistic relations to the law. Rather it is in the spirit of critical debate that I explore the legal, theoretical, and historical questions concerning the act of copying within the nascent and complex field of activities that are now related under the practical, theoretical, and speculative spaces of art and law.

For the act of copying to be in relation to the law *and* have artistic purpose and meaning, copying must be inherently upheld by artistic intent. This is not to say that legality and artistic intent are synonymous. There are certainly architectural and artistic practices that are quite rigorous in purpose and meaning and yet outside of the law. To be artistic does not necessarily mean to be lawful. Conversely we have witnessed architectural and artistic projects that are well within the boundaries of law but lack substance and rigor—that is, no critical links to architectural and artistic practices and histories, social purpose, or legal-economic interrogation.

If architects and artists are to produce and engage the aesthetic via practices of copying and appropriation without falling pray to infantile and nihilistic acts of appropriation, they must practice within the discourses of art and architecture, and within the space of law (i.e., there must be intent). To appropriate with complete disregard for the law is to believe that true dissent needs no First Amendment protection. The belief in so-called "outlaw" practices is perfectly commensurate with being an architect or an artist, at least in a historical sense, and I fully endorse this notion. However, to engage in this type of practice one must be ready to succumb to any legal and social repercussions.

A scrutinizing reader might ask, What is an essay about law as doctrine, material, and medium doing in an architectural journal? Yet it is wise to remember that the analysis of property, both tangible and intangible, and its relationship to aesthetic production is not only imperative but fundamental for understanding the relationship of culture to the social, political, economic, and the juridical. Indeed engaging in polemics over aesthetics and its relationship to rights, liberties, duties, and obligations is of the utmost political, economic, and social importance.

If we seek to analyze the dialogue between art and law, it is essential that we focus attention to the *types of questions* we ask and *how we approach* an analysis/answer to these questions. It is my belief that to foster a new and rigorous understanding of contemporary artistic and architectural production, we (artists, architects, legal scholars, curators, critics, and historians) must investigate under the tutelage of a legal mindset and juridical framework: How would a legal practitioner (lawyer, law professor, judge) address and solve this problematic? To fully understand the nascent conundrum of art and law—and to create a new perspective and space from which to create culture—we must approach and assess cultural production through an understanding of legal structures and mechanisms.[2]

This new approach is hardly far-fetched, and neither is it radical or controversial. In fact, art historian Benjamin Buchloh foreshadowed my argument when he highlighted Marcel Duchamp's seminal twentieth-century artistic gesture and its relation to law:

> Beginning with the readymade, the work of art had become the ultimate subject of a legal definition and the result of institutional validation. In the absence of any specifically visual qualities and due to the manifest lack of any (artistic) manual competence as a criterion of distinction, all the traditional criteria of aesthetic judgment—of taste and of connoisseurship—have been programmatically voided. The result of this is that the definition of the aesthetic becomes on the one hand a matter of linguistic convention and on the other the function of both a legal contract and an institutional discourse (a discourse of power rather than taste).[3]

Buchloh cites Duchamp's hiring of a notary to certify that his 1919 subversion of a reproduction of Leonardo da Vinci's *Mona Lisa* (otherwise known as *L.H.O.O.Q)* was *the* authentic and original readymade. Buchloh contends that Duchamp's readymades eviscerated the concepts of authenticity, authorship, and the belief in the autonomy and self-sufficiency of the art object.[4] However, what I argue is that this seemingly innocuous linguistic inscription—the notarization on Duchamp's "Mona Lisa"—did not just do away with traditional studio aesthetics of handmade production. Rather, this linguistic-legal maneuver also reinstated the belief in and market value of authenticity and authorship. The re-emergence of authenticity and authorship would soon be upheld

1 Quotation as defined by *Blacks Law Dictionary*: (17c) 1. A statement or passage that is exactly reproduced, attributed, and cited. 2. The amount stated as a stock's or commodity's current price. - market quotation (1847) The most current price at which a security or commodity trades. 3. A contractor's estimate for a given job.—Sometimes shortened to *quote*. See *Black's Law Dictionary*, 10th edition, 2014.

2 As an apt example, the author recalls a conversation with artist and teacher Michael Asher on the similarities between Asher's post-studio course taught at the California Institute of the Arts and the trial processes in a court of law. Both the author and Asher noted the importance of addressing the making and object of art through endless focused questions based on the Socratic method, with the intent of arriving at clear artistic intent. This conversation transpired around 2005. For an interesting example of the relationship between artistic and legal writing, particularly the synthesis of bare facts with little to no superfluous information, see Michael Asher, *Writings 1973–1983 on Works 1969–1979*, ed. Benjamin H. D. Buchloh (Halifax: Press of the Nova Scotia College of Art and Design, 1983).

3 See Benjamin H. D. Buchloh, "Conceptual Art 1962–1969: From the Aesthetic of Administration to the Critique of Institutions," *October* 55 (Winter 1990): 117.

4 Ibid., 119.

5 Buchloh, "Conceptual Art."

6 In the late 1960s and early '70s.

and legally sanctioned through Conceptual Art practices and eventually by certificates of authenticity. In effect, both Conceptual Art and certificates of authenticity made the art object a simple *lieutenant*.

If, as Buchloh argues, it was conceptual art after the readymade that established "an aesthetic of administrative and legal organization and institutional validation,"[5] we can conclude that by the time conceptual art was well underway[6] the definition of "author" and "art" shifted from the aesthetic to the legal. It was no longer the signature of the artist that authored and authenticated an art object, but rather the legal instrument (e.g., bill of sale, contract, and certificate of authenticity). And thus the definition of art and art "making" in contemporary art shifts from the artist's studio to the legislative chambers;[7] from art criticism and art history to legal briefs and judicial opinions;[8] from art school critiques to law school seminars and Socratic analysis.[9] In essence, if art and architecture are now to be defined and understood by legal and administrative discourses and institutions, so must the definitions of *author, authenticity, originality, copy*, and *appropriation*, among other terms. Ironically, artists are now faced with the daunting task of having to challenge and contest a legal order that artists of the twentieth-century helped put into place.

Yet definitions are not to be seen as enemies of architecture and art, for it is through the understanding of a foreign (and yet ever present) lexicon that individuals can mobilize and immobilize power through force and force through power. If there is a quintessential discourse of power, it is law. And if there is a quintessential manifestation of power, it is architecture.[10] Until we inhabit a different spatial order and social structure, we cultural producers will be forced to read and write contemporary architectural and artistic practices through the prism of the law.[11]

## Part I: Architecture

> It is fine to take from the same well—but not from the same bucket.
> —Zaha Hadid[12]

Influence and inspiration are inevitable. Yet we are currently witnessing an increase in unfettered copying coupled with a desire to protect creative works from unlawful appropriation and exploitation. What leads certain artistic individuals to believe that they can copy without consequence? Why are a growing number of artists increasingly seeking to protect their creative works through legal channels?

The main arguments in support of unbridled copying and appropriation are anchored in the cultural-historical (art movements and styles such as cubism, collage, Dada, pop art, the Pictures Generation); the sociocultural (a zeitgeist and/or "This is the culture in which we live"); and techno-architectural inventions (the photographic medium, the moving image, video recording such as Betamax recorders, the Internet, and other digital technologies). Reasons given by the *information wants to be free* constituency—what we can call the *free content* lobby—include the fantastical idea that originality and creativity are oppressive fictions, or more precisely capitalist fictions, that must be defied, subverted, and deconstructed at all costs.[13]

The free-content lobby argues that we live in an age where copy-and-paste, screen grabbing, scanning, and downloading are synonymous with jaywalking and selling loosies on a street corner: a sign of the times. Its adherents promote a disturbing and intellectually dishonest belief that nothing is or can be original; that we are all simultaneous authors/creators (albeit dead ones, presumably), constantly taking, mashing, regurgitating, and remashing preexisting, unoriginal, and omnipresent culture. This community also believes that when it comes to defining the concept of *author* we must begin and end with Post-Modernism's whimsical theory that the author is dead—across the board in all disciplines, institutions, and discourses—and thus of course expect that the law's definition and application of author follow suit. Ironically the critical theory and free-content establishments want us to believe that their fictional definition of author is normative. What they fail to reason is that their erasure of authorship is authoritarian in and of itself.

As professor Lionel Bently notes in his review of David Saunders's book *Authorship and Copyright*,[14] "Authorship in copyright is not, even in its historical foundations, equitable with authorship in literature and, therefore, a critique of literary authorship need not necessarily strike at the roots of copyright law."[15] Bently adds that poststructuralist critiques have no necessary implications for copyright law.[16] In fact, Bently continues, even if Roland Barthes was correct in proposing that the author is dead, law does not have to accept this "truth."[17] Just because Barthes proclaims the death of the author does not mean that publishers will "suddenly stop administering their copyrights or paying author royalties."[18] In fact, Bently concludes, if "there is a gap between the legal concept of authorship and the understanding of authorship in literary circles [it] simply does not matter."[19]

7 See, for example, the U.S. Visual Artists Rights Act of 1990, which protects only those works of art that fall under the classic definition of sculpture, painting, drawing, photography, and print. Installation art, site-specific art, performance, mixed-media and video art, and other new genres are not included. This exclusion perpetuates the need for lawyers versed in art and architecture, and for artists and architects to leverage their knowledge through legal structures and argumentation.

8 See, for example, seminal American art law cases such as *Rogers v. Koons*, *Blanch v. Koons*, *Cariou v. Prince*, *Chapman Kelley v. Chicago Park District*, and *Massachusetts Museum of Contemporary Art v. Christoph Büchel* as clear examples of judges acting as art critics. Given the increase of litigation concerning artistic production and consumption, one cannot underestimate the need for legal professionals to understand modern and contemporary art.

9 See, for example, the growing number of art law courses taught in law schools, with the subject matter growing beyond trust and estates and the appropriation of cultural artifacts to discourses of appropriation art and intellectual property, authentication, contractual disputes, artists estates and foundations, free speech, production and reproduction of artworks after an artist's death, property rights, and moral rights.

10 The author is well aware of Michel Foucault and his extensive thoughts on "power" and assumes that the reader is too.

11 This is more true if we choose to think of art as a legitimate business and thus necessarily within the bounds and under the protection of law.

12 See "Seeing Double: What China's Copycat Culture Means for Architecture," *Guardian*, January 7, 2013, accessed November 3, 2014, www.theguardian.com/artanddesign/architecture-design-blog/2013/jan/07/china-copycat-architecture-seeing-double.

13 Eminent American jurist and law professor Richard A. Posner explains: "Notions of genius, of individual creativity, and of authorial celebrity, which inform the condemnation of plagiarism, make the leftist uncomfortable because they seem to celebrate inequality and 'possessive individualism' (that is, capitalism). Debora Halbert, professor at the University of Hawaii at Manoa, asserts that 'for the feminist and postmodernist, appropriation or plagiarism are acts of sedition against an already established mode of knowing, a way of knowing indebted to male creation and property rights.'" See Richard A. Posner, *The Little Book of Plagiarism* (New York: Pantheon Books, 2007), 94–95. For an in-depth treatise on the right to private property, see Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988). I note Waldron's text due to the overwhelming lack of knowledge on the doctrine of property

law by artists, curators, art critics, and art theorists. With the overwhelming trajectory of Marxist thought in liberal art departments and art schools, architects and artists would be well advised to review Waldron's text.

14 Published by Routledge in 1992.

15 See Lionel Bently, "Copyright and the Death of the Author in Literature and Law," *The Modern Law Review* 57 (November 1994): 979, accessed January 18, 2011, http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1994.tb01989.x/pdf.

16 Ibid., 977.

17 Ibid., 982.

18 Bently, "Copyright."

19 Ibid.

20 Jane C. Ginsburg is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia Law School.

21 See Jane C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law," *DePaul Law Review* 52 (Summer 2003): 1063, 1064–65. In this article Ginsburg comments on the lack of academic, judicial, and legislative sources concerning the doctrine of authorship. She further argues that the author is at the heart of copyright and in fact, "refocusing discussion on authors—the constitutional subjects of copyright—should restore a proper perspective on copyright law, as a system designed to advance the public goal of expanding knowledge, by means of stimulating the efforts and imaginations of private creative actors."

22 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use

To put the death of the author silliness to rest, let us note law professor Jane C. Ginsburg's[20] lucid proclamation:

> More recently, however, the claims of authorship, indeed the concept of authorship in copyright law, have encountered considerable skepticism, not to say hostility, and not only from postmodernist literary critics. Many of the latter contend that copyright, or *droit d'auteur*, obsoletely relies on the Romantic figure—or perhaps fiction—of the genius auteur. But we know today, indeed we probably have always known, that this character is neither so virtuosic, nor so individual, as the "Romantic" vision suggests. Artistic merit has never been a prerequisite to copyright (at least not in theory), and authors are not necessarily less creative for being multiple. As a result, the syllogism "the romantic author is dead; copyright is about romantic authorship; copyright must be dead, too" fails.[21]

I do not mean to argue that there are no valid reasons for copying and appropriation in art and architecture. There are—criticism, parody, teaching, scholarship, research, commentary on the underlying work—and they fall squarely within copyright law's fair-use doctrine.[22]

**When the student is ready, the master will appear.**
—Mabel Collins[23]

We can guess correctly that when Thomas Shine first encountered the quote above the last things on his mind were plagiarism and copyright infringement. And surely David Childs never imagined that a former graduate student at the Yale School of Architecture would allege that he copied that student's architectural design when he proposed an architectural design for New York City's 2003 Freedom Tower. But that's exactly what happened. For a quick background, let's rewind to 1999, when Shine was studying architecture at Yale and Childs was a consulting design partner at Skidmore, Owings & Merrill (SOM). For an advanced design studio, Shine conceptualized and created a design proposal for a theoretical monumental high-rise that would be built in Manhattan and used by the media during the 2012 Olympic Games. Shine's design was titled "Olympic Tower" and included another preliminary design, "Shine 99." The facts, according to the New York District Court, are as follows:

> On or about December 9, 1999, Shine presented his designs for Olympic Tower to a jury of experts invited by the Yale School of Architecture to evaluate and critique its students' work. During a 30-minute presentation to the panel, Shine explained his tower's structural design, and displayed different structural and design models (including Shine 99), renderings, floor plans, elevations, sections, a site plan, and a photomontage giving a visual impression of the tower's exterior. Defendant Childs was on the panel, and he praised Olympic Tower during the presentation, as did the other luminaries[24] evaluating Shine's work. When the review was completed, Shine was applauded by the jury and other visitors, which, according to Shine, is "highly unusual" at a student's final review. After the presentation, Childs approached Shine, complimented Shine's color pencil rendering of Olympic Tower, and invited Shine to visit after his graduation.[25]

Clearly Childs was impressed with Shine's architectural designs. In fact he was quoted in *Retrospecta*, Yale School of Architecture's journal of student work,[26] which featured Shine's Olympic Tower, as stating that Shine's design was a "very beautiful shape. You took the skin and developed it around the form—great!"[27]

In summer 2003 World Trade Center developer Larry Silverstein asked Childs to begin working as design architect and project manager for the tallest building at the proposed new site as conceptualized by Daniel Libeskind—the building that would later be called the "Freedom Tower."[28] Childs's design for the skyscraper was completed within six months and was presented to the public at a press conference in Lower Manhattan in mid-December. At this presentation Childs and SOM displayed six large computer-generated images of the Freedom Tower, two scale models, and a computer slide show detailing the design principles, and distrib-

23 Mabel Collins, in *Light on the Path* (London: George Redway, 1886).

24 In addition to Childs and Shine's professor Cesar Pelli, the jury included Yale professor and urban planner Alexander Garvin, architecture writer and critic Paul Goldberger, and Robert A. M. Stern, dean of the Yale School of Architecture.

25 See Shine v. Childs, 382 F.Supp.2d 602, 605 (2005).

26 *Retrospecta* is the annual journal of student work at the Yale School of Architecture. According to the New York District Court, "because Childs is an alumnus of the Yale School of Architecture, he presumably received a copy of this issue of *Retrospecta*. However…Childs denies that he ever saw a copy of the issue referenced by Shine in the Complaint."

27 See Shine v. Childs, 606.

28 Shine v. Childs.

29 Ibid., 606–607.

30 Ibid., 607.

uted a press packet containing six images of the proposed structure.

Shine was not flattered with what he thought to be a clear rip-off of his Olympic Tower design. In fact he was not the only one to notice similarities between his designs and Childs's Freedom Tower.

> According to [Shine's] expert, Yale Professor James Axley, several days after Childs unveiled the design for the Freedom Tower, one of Shine's original models for Olympic Tower "was retrieved from archival storage and placed on the desk of the Dean of the School of Architecture."[29]

Shine filed a copyright infringement lawsuit against Childs and SOM in the Southern District of New York on November 8, 2004, claiming that they copied Olympic Tower and Shine 99 without his permission or authorization, and stating that Childs and SOM distributed and claimed credit for his designs "willfully and with conscious disregard" for his rights on his copyrighted works.[30] Although Childs's original design for the Freedom Tower was eventually scrapped for security reasons, the New York court noted that "because [Childs's] original design for the Freedom Tower remains in the public domain, Shine's infringement claim" remained valid.[31]

**Architectural Works under the United States Copyright Act**

To clarify the issues behind Shine v. Childs, a brief overview of U.S. copyright law related to architectural works is in order.[32] Copyright protection originates in the U.S. Constitution under Article 1, Section 8, Clause 8.[33] Of particular importance is the fact that although copyright statutes have protected literary, musical, and dramatic works; pictorial, graphic, and sculptural works; and compilations and derivative works, the law was silent when it came to protection for architectural works.[34] Although blueprints and models were protected under U.S. copyright law,

> most authorities concluded that plans were not infringed by using them, without the architect's permission, to construct the building they depicted. Moreover, the prevailing view was that an architect's rights did not extend to the actual building derived from his or her plans. A building, as a useful article, could be protected by copyright only to the extent it had artistic features that could be identified separately from, and were capable of existing independently of, the structure's utilitarian aspects.[35]

It was not until 1990, when Congress passed the Architectural Works Copyright Protection Act ("AWCPA") in adherence to the Berne Convention for the Protection of Literary and Artist Works, that copyright laws were updated[36] to provide

> full protection to works of architecture by establishing them as a new category of protectable subject matter … and defining an architectural work as: 'the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.'[37]

It is thought by some[38] that within the nascent doctrine of architecture and copyright, Shine v. Childs is the most important infringement case to date, as it shed light on previously unanswered questions over the scope and meaning of the AWCPA. However, it is not simply the alleged copyright infringement of a student's design that is of concern to us, but also the concept or gesture of quoting—or more specifically, the difference between quoting and plagiarism.

31 The Court also noted, however, that because "the alleged infringing design may never be constructed, Shine's actual damages in this action may be reduced, and he may be unable to show the need for an injunction." Shine v. Childs, 607.

32 Of the five intellectual property protections (copyright, patents, trademark, right of publicity, and trade secrets), copyright is believed to be the most important with respect to architectural works. See Manuel R. Valcarcel IV, "Copyright Issues in Architecture," *Southeast Real Estate Business*, October 2004, accessed December 13, 2014, www.southeastrebusiness.com/articles/OCT04/feature6.html. See also Rashida Y. V. MacMurray, "Trademarks or Copyrights: Which Intellectual Property Right Affords Its Owner the Greatest Protection of Architectural Ingenuity?," *Northwestern Journal of Technology and Intellectual Property* 3 Northwestern Journal of Technology and Intellectual Property Law (2005), accessed December 13, 2014, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1031&context=njtip. Regarding the protection of landmark buildings through intellectual property, see Keri Christ, "Edifice Complex: Protecting Landmark. Buildings as Intellectual Property—A Critique of Available Protections and a Proposal," *The Trademark Reporter* 92 no. 1041 (September–October 2002).

33 "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

34 17 U.S.C. Sec. 102(a)(8)(1990). See David E. Shipley, "The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?," *Journal of Intellectual Property Law* (Fall 2010): 3. "It was well established that plans, blueprints, and models were copyrightable writings under the 1909 Act's category of 'drawings or plastic works of a scientific or technical character,' and then as 'pictorial, graphic, and sculptural works' under the 1976 Act. The scope of an architect's copyright protection was, however, quite limited." See also Xiyin Tang, "Narrativizing the Architectural Copyright Act: Another View of the Cathedral," 21 *Texas Intellectual Property Law Journal* (2013) 33, 34: "Europe had recognized copyrights in architecture for quite some time."

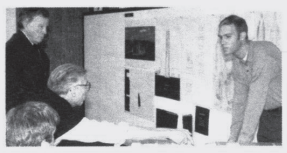
35 See Shipley, "Architectural Works," 5.

36 Copyright scholar William Patry spent a year studying whether to extend copyright protection to architectural works. "The 1990 Architectural Works Copyright Protection Act was the end result [of the study]. It is a statute I have tremendous fondness for, both because it is a subject matter I truly love…, because it was the only non-fast track statute I worked on that never changed once it left the House subcommittee, because it reflected pure policy, and because I lived deeply the history of its passage through battles in the Copyright Office and later in drafting the legislation." See William Patry, "Twisting in the Wind," *The Patry Copyright Blog*, accessed December 14, 2014, http://williampatry.blogspot.com/2005/08/twisting-in-wind.html.

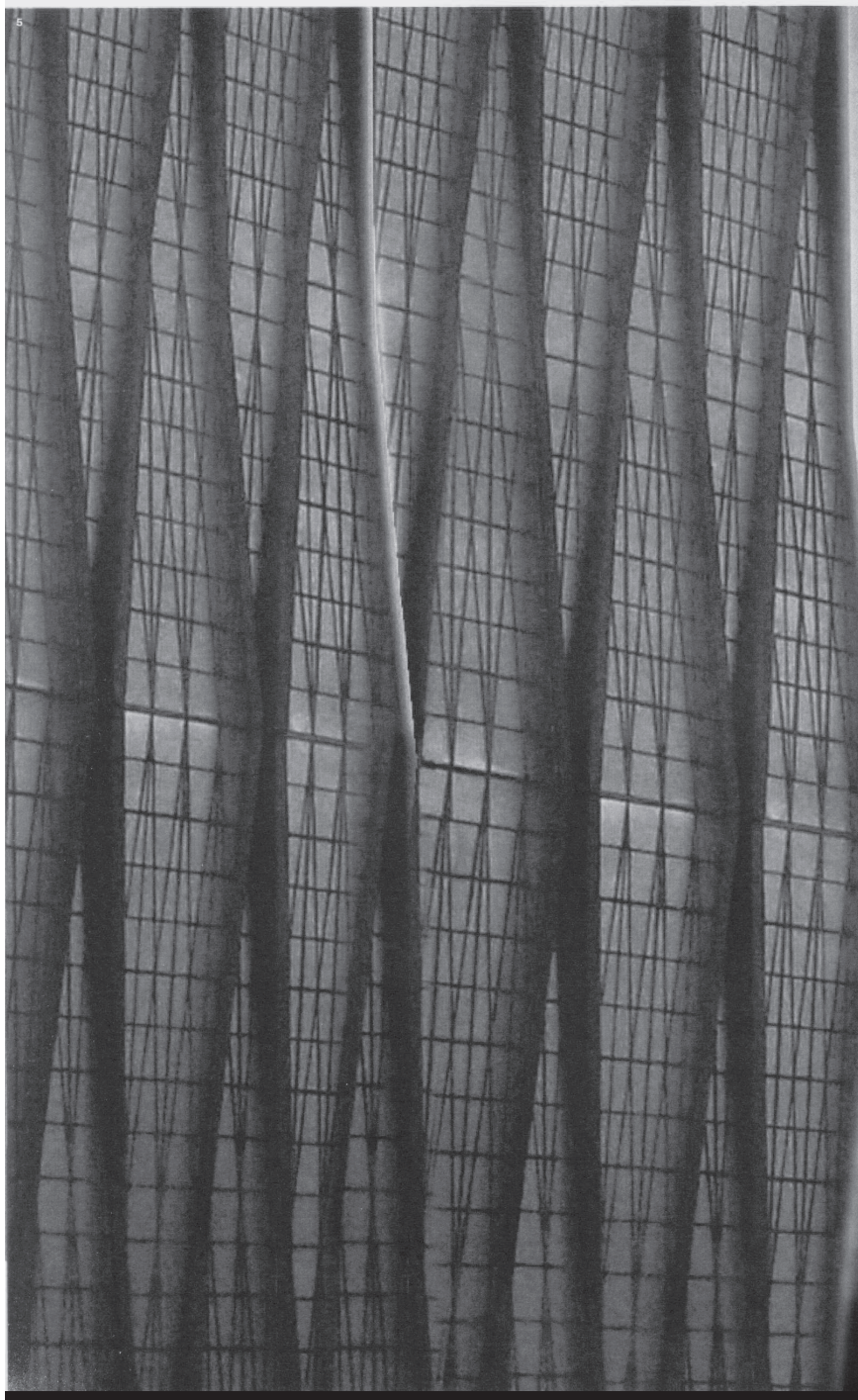
37 See Shipley, "Architectural Works," 5.

38 See Andrew Baum and Britton Payne, "Protecting Architectural Works: Breaking New Ground with Familiar Tools," *Construction Lawyer* 27 (Fall 2007): 23. See also Shipley, "Architectural Works," 6: "Cases like Shine v. Childs are the exception, not the rule."

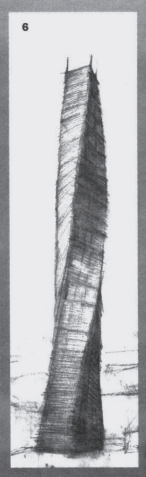
**1-2** Oliver Edmund Freundlich

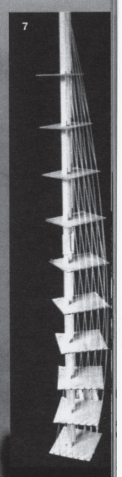


**4** Studio tour, Chicago Architecture, Thomas Adam Shine, Hye-Jin Choi, Samer Bitar, Christopher Scott Herring, Cesar Pelli, Stanley Tigerman **5** Vincent J.Scully, Jr., Alexander Purves, Christopher Scott Herring

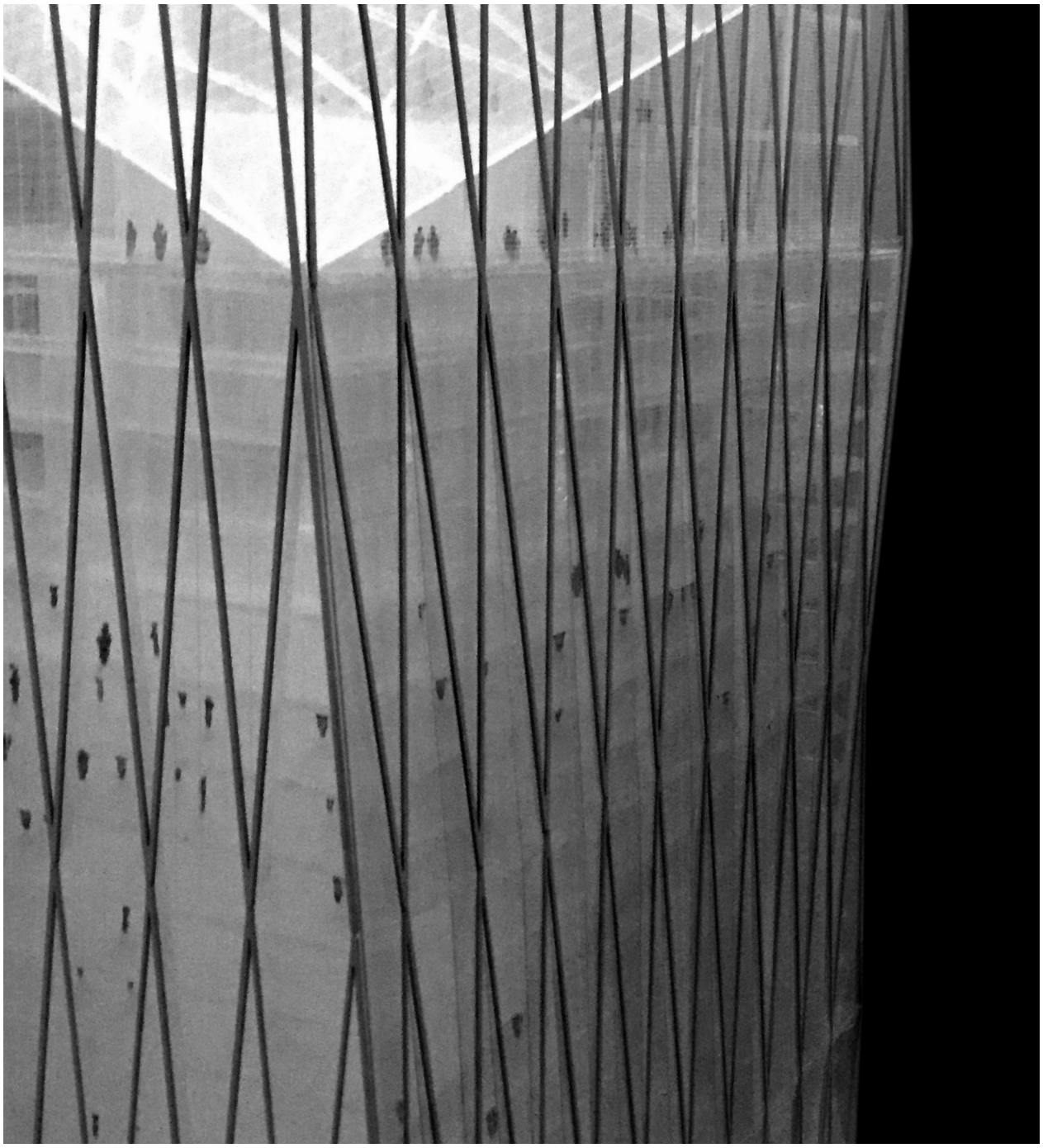


**Thomas Adam Shine:** The building appears as just another tall building as a silhouette from far away in New York City. The form changes depending on the angle as you get closer and closer to the building. Driving down 11th Avenue the building slowly unwinds as you see the facade and the light reflecting off the window mullions. You might see something that may appear as a flame going up slowly. Moving in closer to the building a secondary system takes over which is the skin of the building based on triangulating the form and breaking it down so you get a reading of both the mass of the building and the height. The building starts on the Manhattan grid, with the form generated by a twist shifted off center and then aligned. Rather than having horizontal and vertical bracing, I just crossed the entire building so there are no vertical columns apart from the core in the building – it is all slightly diagonal.
**David M. Childs:** It is a very beautiful shape. You took the skin and developed it around the form – great!
**Alexander D. Garvin:** It is totally different no matter where you are, because of the surface modules, which is oddly contextual.
**Paul Goldberger:** Can you tell us a little about the base and the entrance?
**Thomas Adam Shine:** The idea was to mark the entrance. So you come into the lobby and you see not just the skin of the building, but the solid mass of the building. It is aligned so the three elevator cores, at least on the ground floor, line up with the three entrances of the building so there is a continuous reading through the skin.
**Paul Goldberger:** We have seen a whole lot of buildings that are essentially not entered. Here, not only is there an entrance, but the entrance derives from the themes he is playing with in the façade.





Page from the Yale School of Architecture's *Retrospecta* 1999–2000 showing Shine's Olympic Tower.



Architectural models of the 2003 scheme for the World Trade Center, designed by David Childs with Daniel Libeskind.

comparisons between the two structures in their Reply Memorandum. See Def. Reply Br. at 12, 18, 21, and 24. Although defendants offer these comparisons to point out what they claim are significant differences between the two towers, "[i]t has long been settled that 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.'" Tufenkian, 338 F.3d at 132 (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (L. Hand, J.)). Any lay observer examining the two towers side by side would notice that: (1) each tower has a form that tapers and twists as it rises, (2) each tower has an undulating, textured diamond shaped pattern covering its facade, and (3) the facade's diamond pattern continues to and concludes at the foot of each tower, where one or more half diamond shapes open up and allow for entry. These combination of these elements gives the two towers a similar "total concept and feel" that is immediately apparent even to an untrained judicial eye.

It is possible, even likely, that some ordinary observers might not find the two towers to be substantially similar because, as defendants note, there are differences between the Freedom Tower and Olympic Tower, including, inter alia, the number of sides of each tower that twist (the Freedom Tower's two versus Olympic Tower's four); the direction of each tower's twist (the Freedom Tower twists clockwise and Olympic Tower twists counterclockwise); the shape of each tower's ground floor (the Freedom Tower is a parallelogram and Olympic Tower is a square); and the various contrasting details of each tower's



Excerpt of Court Opinion and Order, Shine v. Childs, 382 F.Supp.2d (2005).

entrance and facade. See Def. Reply Br. at 11-24; see also Warner Bros., Inc. v. Am. Broad. Cos., 654 F.2d 204, 211 (2d Cir. 1981) ("[W]hile 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate,' a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of the plaintiff's.") (quoting Sheldon, 81 F.2d at 56). However, it also is possible that a lay observer, applying the total concept and feel test, might find that the Freedom Tower's twisting shape and undulating diamond-shaped facade make it substantially similar to Olympic Tower, and therefore an improper appropriation of plaintiff's copyrighted artistic expression.

Because reasonable jurors could disagree as to the substantial similarity between Olympic Tower and the Freedom Tower, defendants' motion for summary judgment as to plaintiff's claims regarding Olympic Tower is denied.

## Plagiarism vs. Copyright Infringement

In *The Little Book of Plagiarism*,[39] eminent jurist and scholar Richard A. Posner argues that not all plagiarism is copyright infringement, and not all copyright infringement is plagiarism.[40] Furthermore, Posner adds, plagiarism is not easily defined by the concepts of theft or borrowing,[41] necessitating another key factor: that of concealment.[42]

Yet for Posner adding concealment to the definition of plagiarism is still not enough. In order for there to be plagiarism, Posner continues, the copying must be "deceitful in the sense of misleading the intended readers,"[43] and this deceitful copying must also induce reliance by the same intended readers.[44] In other words, the reader must be induced to act based on the belief that the work she is viewing or reading is original. A good example would be a museum curator (the reader) providing an artist (the plagiarist) an opportunity to exhibit an artwork that the curator believes to be original, but in fact the artist has copied the idea and/or artwork from another creator.

Yet we still do not have an adequate and robust definition of plagiarism. According to Posner, the curator and viewing audience would then have to *care enough* about being deceived about the original author of the idea and/or artwork "that had he [the curator and viewing audience] known he would have acted differently."[45] The ultimate definition of plagiarism, Posner concludes, is "nonconsensual fraudulent copying."[46]

39 Published by Pantheon Press in 2007.

40 Posner, *The Little Book of Plagiarism*, 5.

41 Ibid., 11–12.

42 Ibid., 17.

43 Ibid., 19.

44 Posner, *The Little Book of Plagiarism*.

45 Ibid., 20.

46 Ibid., 33. I want to add that in Posner's other groundbreaking text, *The Economic Structure of Intellectual Property Law*, coauthored with William M. Landes, the authors argue that a "plagiarist and a copyright infringer are both copycats; the difference is that the plagiarist is trying to pass off the copied work as his own while the infringer qua infringer is merely trying to appropriate value generated by property that belongs to someone else." Published by Belknap Press in 2003.

## Copyright Infringement

Under U.S. copyright law, in order for Shine to prevail in a copyright infringement claim he would have to prove ownership of a valid copyright and the copying of the original elements of his work. The U.S. District Court for the Southern District of New York acknowledged that Shine's copyright registration certificates were compelling and valid evidence of a copyright. For the copying element of infringement Shine had to prove that Childs had access to his design and that there was substantial similarity between his and Childs's design. Because Childs evaluated Shine's designs at Yale, he had to concede that he had access to Shine's design. Therefore the only remaining issue was whether the designs were substantially similar.

To decide the question of substantial similarity, the court debated how to compare and contrast the similarities and differences between the two designs. The court considered whether to apply the *separability* test[47] or the *total concept and feel* test, finding that the latter was "appropriate for architectural works because the AWCPA protects the 'overall form' of architectural designs in addition to their individual copyrightable elements."[48] The New York court found that using the total concept and feel test, "courts have taken care to identify 'precisely the particular aesthetic decisions—original to the plaintiff and copied by the defendant—that might be thought to make the designs similar in the aggregate.'"[49]

Applying the total concept and feel test, the New York trial court first found that although the design of Shine 99 was arguably protectable and original,[50] the idea of a twisting tower with a rectangular base and parallel sides was not unique and that there was no evidence to suggest that Childs would have thought of the idea only by viewing Shine 99. The court further found that Shine's own expert could not find similarities between Shine 99 and Freedom Tower substantial enough to warrant comment.[51]

However, as to Shine's Olympic Tower, the court did find that

> a lay observer, applying the total concept and feel test,[52] might find that [Childs's] Freedom Tower's twisting shape and undulating diamond-shaped facade made it substantially similar to [Shine's] Olympic Tower, and therefore an improper appropriation of [Shine's] copyrighted expression.[53]

The court noted:

> Any lay observer examining the two towers side by side would notice that: (1) each tower has a form that tapers and twists as it rises, (2) each tower has an undulating, textured diamond-shaped pattern covering its facade, and (3) the facade's diamond pattern continues to and concludes at the foot of each tower, where one or more half diamond shapes open up and allow for entry. The combination of these elements gives the two towers a similar 'total concept and feel' that is immediately apparent even to an untrained judicial eye.[54]

Interestingly the court also observed that it would be

> possible, even likely, that some ordinary observers might not find the two towers to be substantially similar because, as the defendants note, there are differences between the Freedom Tower and Olympic Tower, including, inter alia, the number of sides of each tower that twist (the Freedom Tower's two versus Olympic Tower's four); the direction of each tower's twist (the Freedom Tower twists clockwise and Olympic Tower twists counterclockwise); the shape of each tower's ground floor (the Freedom Tower is a parallelogram and Olympic Tower is a square); and the various contrasting details of each tower's entrance and facade.[55]

Given the possibility of different legal outcomes, the court allowed the case to proceed on the question of whether Childs's Freedom Tower design infringed Shine's Olympic Tower design, declining to allow the same question in regard to Shine's Shine 99 design. Unfortunately the case was settled in June 2006,[56] so we were left without a legal analysis and conclusion as to whether Childs infringed Shine's copyrighted Olympic Tower architectural design.

## Plagiarism or Inspiration

Legal analysis aside, given the mentor-student relationship between Childs and Shine, the question of whether Childs plagiarized Shine's architectural designs is equally as important. Thus if we apply Posner's definition of plagiarism to that issue, would Childs's actions meet the requirements for plagiarism? As previously noted, one finding of the New York District Court was that a lay observer might find Childs's design to be substantially similar to Shine's. Given this judicial finding, it would not be far-fetched to conclude that Childs copied Shine's designs. Given that Childs did not credit Shine for the design, we can say that Childs also concealed his copying, therefore arguably leading developer Silverstein to believe Childs's designs were original. We can then say that these factors led to Silverstein's decision to award Childs the coveted status of architect and project manager for the tallest building at the proposed new World Trade Center site. The only remaining variable is the question of whether Silverstein would have cared enough about the concealment—whether he would have consented to fraudulent copying.

Remember that the New York court also found that it would be possible, even likely, that some ordinary observers might not find the two towers to be substantially similar. Given this scenario, our previous plagiarism analysis is turned on its head. Accusations of plagiarism quickly turn into acknowledgments of inspiration, and inspiration is certainly not an ethical or legal wrong. Furthermore, and given the power imbalance between Childs and Shine, a plagiarism allegation against Childs would most likely have earned Childs a slap on the wrist or, at best, a public shaming. So what other recourse, other than plagiarism, did Shine have to address his alleged injuries? It is here that we must highlight the increasing leveraging of law by cultural producers in order to alleviate perceived or actual wrongdoings, while keeping in mind that the appropriation and quoting of law and juridical structures by artists as both form and content has not always taken place in a court of law.[57] In the paragraphs that follow I highlight two artists whose artistic architectural projects engage the spatial and architectonic implications of the law. These two projects claim, create, and destroy spaces not unlike the practice of architecture or the law, and yet not necessarily successfully.

## Part II: Law as Medium[58]

Not all architectural and artistic projects that appropriate law—as medium, content, subject matter, or physical manifestation—are aesthetically and intellectually rigorous. Nevertheless there are cultural gestures (some of them labeled *art projects*) that successfully analyze the law's fiction and force—with its attendant and real spatial and political consequences—without disregarding aesthetics. Artists such as Hito Steyerl, Christian Marclay, Mike Kelley, Felix Gonzalez-Torres, and Soda_Jerk[59] critically appropriate content as well as legal instruments, and through their laserlike focus examine legal-economic and legal-historical relationships related to the travel industry, gun rights, the ideological and pedagogical dissemination of American history, certificates of authenticity and conceptual art, and intellectual property.

Yet there are some art projects that appropriate law in a purely symbolic manner, and thus regrettably do not engage or incorporate the force and structures of law. In brief, these projects privilege aesthetics and the commodification of art at the disservice of analyzing the relationship between artistic and legal fictions, thus perpetuating a superficial and pedestrian understanding of law. These projects—art as art—do not help us to better understand the chameleonic and amorphous nomenclature otherwise known as law.

A clear example of this symbolic approach is Carey Young's *Declared Void II* (2013). According to the artist's press release, this project

> consists of a large-scale legal text in black vinyl with a wall drawing which delineates a corner of the gallery. The text

47 See Shine v. Childs, 613. "If the court were to follow the ["separability test"]... and separate out only those 'kernels' of expression that would qualify as original, that, as our [Second] Circuit has held, 'would result in almost nothing being copyrightable because original works broken down into their composite parts would usually be little more than basic unprotectable elements like letters, colors, and symbols.'" Brackets added.

48 Ibid., 614.

49 Ibid., 613.

50 Ibid., 610.

51 Ibid., 612.

52 Shine v. Childs.

53 Ibid., 615–16. Brackets added.

54 Ibid., 615.

55 Shine v. Childs.

56 See Andrew Mangino, "Freedom Tower Suit Resolved," *Yale Daily News*, accessed January 3, 2015, http://yaledailynews.com/blog/2006/09/26/freedom-tower-suit-resolved.

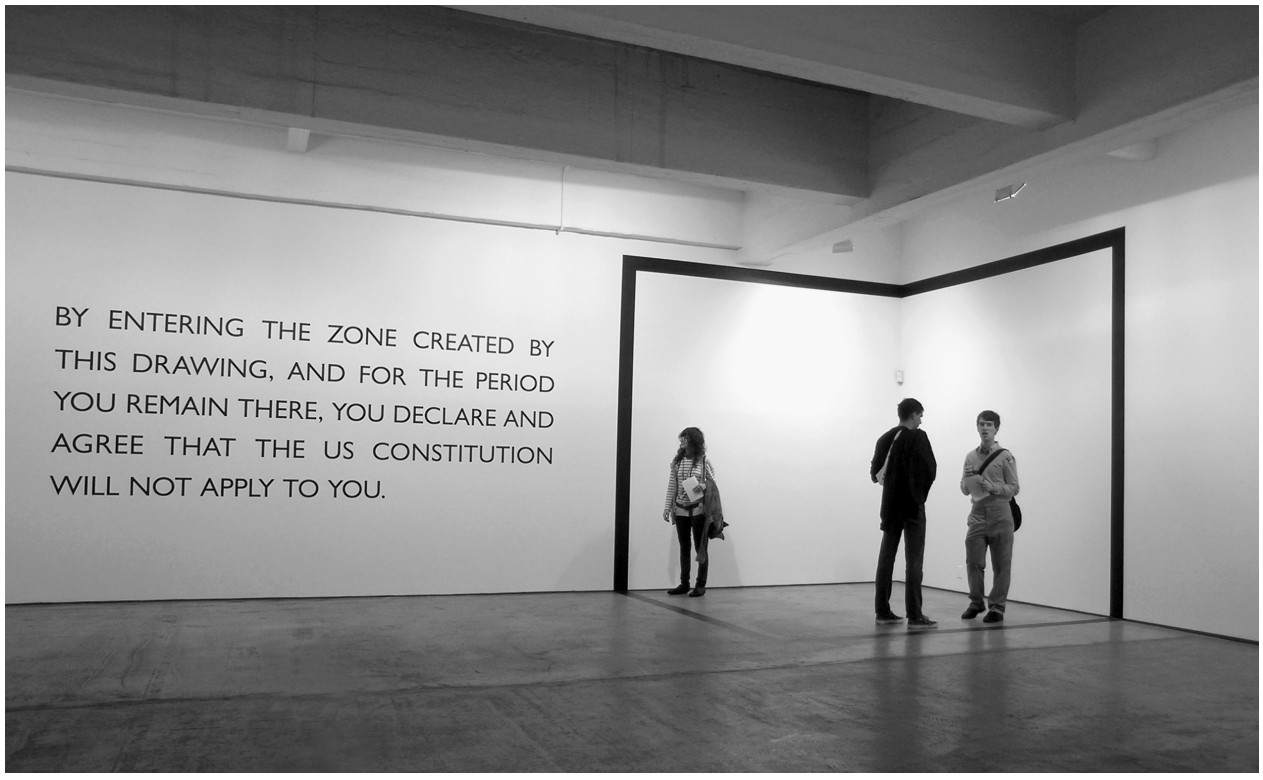
57 Artists have engaged and employed law in its physical manifestations (e.g., legal instruments otherwise known as contracts[78]) in order to refer back to the conditions that make art possible. These artists use written agreements as a medium, some more successfully than others. The unsuccessful ones tend to use the contract or legal instruments in symbolic form. But there are also artists such as Michael Asher, Hans Haacke, Adrian Piper, Felix Gonzalez-Torres, and Daniel Buren, who understand that it is not enough to simply pretend to use a contract or its structure for purely aesthetic or poetic reasons, or to simply index a functional structure in a nonfunctional manner. These artists keep the functional aspects of contractual agreements in conjunction with law's operative and forceful nature. Seth Siegelaub and Robert Projansky's seminal and groundbreaking artists' rights agreement of 1971, "The Artists Reserved Rights and Transfer Sale Agreement," is also indicative of the law's influence on the interpretation of art, artistic movements, and practices.

58 I align the term/concept "medium" here with Rosalind E. Krauss's notion of medium as defined in her seminal texts, *A Voyage on the North Sea: Art in the Age of the Post-Medium Condition* (London: Thames & Hudson, 2000), Reinventing the Medium, Critical Inquiry Vol. 25, No. 2, "Angelus Novus": Perspectives on Walter Benjamin (Winter, 1999), pp. 289–305, and Under Blue Cup, MIT Press, 2011.

59 Soda_Jerk (aka sisters Dan and Dominique Angeloro) is an Australian art collective based in New York.

60 See *Carey Young: Legal Fictions*, accessed February 20, 2016, www.careyyoung.com/carey-young-legal-fictions.

61 Volumes of legal scholarship have addressed the issues and difficulty of granting constitutional waivers. See Michael E. Tigar, "Foreword: Waiver of Constitutional Rights:




Carey Young, *Declared Void,* 2005, Vinyl drawing and text, Dimensions variable, 133 x 133 inches (337.8 x 337.8 cm) as installed. Vinyl band: 6 inches (15.2 cm); letters: 6 ¼ inches (15.8 cm) high.

takes the form of a contract in which American citizenship is offered to the viewer in return for the viewer entering the performative "platform" created by the work. While clearly a fictional proposition, the piece offers a contractual agreement with the artist in which the viewer can enter and share the artist's hallucinatory proposition. Developed from an ongoing interest in legal "black holes," in which law is used to create zones with unclear legal status and rights, the piece conflates the aesthetics of minimalism and conceptual art with ideas of migrancy and offers a potent political provocation.[60]

Take also Young's *Declared Void* from 2005, where the artist informs viewers that they will waive their U.S. Constitutional rights by stepping into a cubic space delineated by a thick black vinyl line applied to the walls and floor. Alongside the wall, Young adds the following text: "BY ENTERING THE ZONE CREATED BY THIS DRAWING, AND FOR THE PERIOD YOU REMAIN THERE, YOU DECLARE AND AGREE THAT THE US CONSTITUTION WILL NOT APPLY TO YOU." This quaint metaphor[61] pales in comparison to the ongoing situation endured by numerous alleged terrorists and enemy combatants at the Guantanamo Bay detention camp. Young was quite aware of this very real legal heterotopia.[62] As writer Brian Sholis notes, "In fact, while crafting the piece Young sought legal advice on how best to *re-create* the 'gray area' of the detainee prison at Guantánamo Bay."[63] Lawyer-curator Daniel McClean supported this artistic gesture by arguing, "A legal fiction, Young's work asks where legal territories apply and where laws and human rights are enforceable, a particularly pressing question in the context of Guantanamo Bay, where the U.S. Constitution was deemed by officials of the U.S. state not to apply in the torture of Al-Qaeda suspects."[64] Young's simplistic project is eclipsed only by McClean's willful ignorance masked as art criticism. Young's recreation, appropriation, and quotation did not comprise a legal fiction but rather a more

Disquiet in the Citadel," *Harvard Law Review* 84 (November 1970), accessed November 6, 2014, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5874&context=-faculty_scholarship. Citing Johnson v. Zerbst, Tigar explains that for a waiver to be effective it must be an "intentional relinquishment or abandonment of a known right." He adds, "Whether the Court in fact has been willing to validate mythical consents and whether the image of the 'free man' is grounded in demonstrable reality remain to be seen." However, Tigar argues that "there may be some procedural incidents of the criminal process which the accused cannot waive. The Supreme Court has said that the right to jury trial, for example, is a right not only of the accused, but of the government, and that it would not be unconstitutional to require the government's and the court's concurrence in a waiver." See also Maurita Elaine Horn, "Confessional Stipulations: Protecting Waiver of Constitutional Rights," *University of Chicago Law Review* 61 (Winter 1994), citing Johnson v. Zerbst: "Although *Johnson* concerned the waiver of the Sixth Amendment right to counsel, it has been subsequently interpreted to apply to a defendant's constitutional rights generally. Also, *Johnson* creates a presumption against waiver. 'Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights.' The trial court should clearly determine that the defendant has made a valid waiver, and 'it would be fitting and appropriate for that determination to appear upon the record."

62 For a definition of *heterotopia*, see Michel Foucault, "Of Other Spaces," *Diacritics* 16 (Spring 1986): 22–27.

63 See Brian Sholis, "Carey Young," Artforum.com, accessed November 6, 2014, http://artforum.com/picks/id=24394&view=print. Italics mine.

64 See Daniel McClean, "The Artist's Contract/From the Contract of Aesthetics to the Aesthetics of the Contract," *Mousse* no. 25 (June 2010), accessed February 20, 2016, http://mousse magazine.it/articolo.mm?id=607.

65 These are only three of many rights granted under the U.S. Constitution and the Bill of Rights.

66 For a clear exposé on Guantanamo Bay and its implications on due process, see Marc D. Falkoff's "Litigation and Delay at Guantanamo Bay," *New York City Law Review* 10 (Summer 2007): "Some day the prison will be closed and the term 'Guantánamo' will be reduced to little more than a cultural signifier, evoking the same kind of national shame that we feel upon hearing about Fred Korematsu and our Japanese American internment camps in World War II." For a wonderful analysis on post 9/11 suspension of law, see Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

gratuitous fiction, make-believe—without force, consequence, or import.

In *Declared Void II,* viewers are asked to pretend that they have been granted the highly-coveted U.S. citizenship within an art gallery space by the waiving of a magic wand and the drafting of a quasi-legal instrument (otherwise known as a contract). In *Declared Void,* Young's viewers—in New York's Chelsea arts district no less—are asked to imagine what it would be like to lose their constitutional rights—freedom of expression, the right to be secure against unreasonable searches and seizures, and the right to be protected against cruel and unusual punishment[65]—presumably while making dinner reservations via OpenTable and taking selfies on their iPhones. Clearly the architectural and legal differences between an art gallery and prison are not obvious to all, as is the fact that prisoners at Guantanamo Bay are not voluntarily waiving any of their civil and human rights.

No one within Young's art project will actually experience the schizophrenic physical, emotional, and psychological traumas experienced by detainees at Guantanamo Bay. Young's viewers will not exist in a state of legal limbo—stateless, homeless, lawless.[66] In short, Young's audience will not experience the asphyxiating force of law.

**I didn't want to be told what to do.**
—Gordon Matta-Clark[67]

And yet there are art projects that successfully engage the law as medium with the intent to ask probing questions rather than provide moral claims. Take for instance Gordon Matta-Clark's 1975 sculptural-architectural project *Day's End*, installed—or perhaps deinstalled—on New York City's Pier 52. Much has been written about how Matta-Clark's breaking into closed-off city property led to his outlaw-fugitive status. But to my knowledge little has been written about the relationship between Matta-Clark's violent act and property law as well as the history of property contestation in the United States. Although volumes could be written about this relationship, here I will highlight two seminal texts that are key to analyzing the concepts of appropriation and intent in relation to *Day's End* and its appropriation of law: the fundamental property law case in the United States from 1823, Johnson v. M'Intosh,[68] and the law review article, "Property Outlaws,"[69] by legal scholars Eduardo Moises Peñalver and Sonia K. Katyal.

To Matta-Clark—and to his attorney—the artistic reasons for breaking into city property to carry out a sculptural project were key. Matta-Clark's attorney, advising him on the importance of an artistic statement—i.e., artistic intent—writes, "The statement should generalize about what you did and avoid descriptions, but you should amplify the artistic (in)tensions [sic] and relate it to your theories about art and this kind of art."[70] Equally important was Matta-Clark's conceptualization of this "trespass" as appropriation: "I simply appropriated the pier by keeping my crew of henchmen boarding and barbwiring up all the alternative entrances except for the front door in which I substituted my own lock and bolt."[71] Matta-Clark's intent was to create an overriding property right by aestheticizing a debased and abandoned structure.

If in the midst of this state of affairs it would seem within the rights of an artist or any other person for that matter to enter such a premises with a desire to improve the property, to transform the structure in the midst of its ugly criminal state into a place of interest, fascination, and value.[72]

These same reasons were held paramount in Johnson v. M'Intosh: the need to put property occupied and used by Native American to so-called better use. Like the settlers need to create a fictional legal construct to override preexisting definitions of *property* and *property rights*, Matta-Clark employs the tools of a colonizer to discover unused property and question current property laws and property use. Peñalver and Katyal argue that the violation of property laws by outlaws can enhance the social order. In their view "the apparent stability and order that property law provides owe much to the destabilizing role of the lawbreaker, who occasionally forces shifts of entitlements and laws."[73] Matta-Clark's appropriation of private property—embodied by precision, focus, intent, and specificity—questions the ethical and moral dimensions of better use in an unauthorized taking of property.

67 See Corinne Diserens, ed., *Gordon Matta-Clark* (New York: Phaidon Press, 2003), 179.

68 Johnson v. M'Intosh (21 U.S. 543) granted Indian land to U.S. settlers under the court's ruling that the settlers be granted property rights due to their "discovery" of "untitled" land.

69 Eduardo Moises Peñalver and Sonia K. Katyal, "Property Outlaws," 155 *University of Pennsylvania Law Review* 1095 (2007).

70 See Diserens, ed., *Gordon Matta-Clark*, 8.

71 Ibid., 12–13.

72 Ibid., 12.

73 Peñalver and Katyal, "Property Outlaws," 1098.

Gordon Matta-Clark,
*Day's End (Pier 52)*, 1975.

**Conclusion**

Power dynamics have never been more palpable. Although power structures and imbalances have historically been present, it is not until now that we are fully experiencing the materialization and exploitation of law to build new power structures and reinforce old ones. We are no longer simply witnessing the traditional power battles between corporations or corporations against individuals but also the birth of creative individual against creative individual.

The logical outcomes of this new manifestation are power oppositions between artist and artist, architect and architect. Given the late-twentieth-century rise in the use and appropriation of law and juridical structures by artists, it is only natural that architects and artists of all classifications leverage the bodies of law—and all their amalgamated linguistic and physical complexities—to empower themselves and their immediate constituencies. Perhaps the question is not that of obtaining a simple resolution to a dialectic between author and plagiarist or original and copy. Rather, our use and interrogation of law should be a tool for exposing the systems that create and perpetuate the powers that shape our built environment. This is not to say that law is our only hope. But neither is culture. It is only through quotation—with intent—of one through the other that we will begin to transform our spaces and languages into new and more inhabitable structures and modes of existence.