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4. Telephone conversation with Annetta Moleno, Legislative assistant, Business and Consumer Affairs Comm., Oregon House of Representatives (Sept. 11, 1991).

5. OR. CONST. ART. I, § 8 provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

6. Oregon v. Jackson, 356 P.2d 495 (Or. 1960), *overruled by* Oregon v. Henry, 732 P.2d 9 (Or. 1987).

7. *Id.* at 503.

8. Oregon v. Childs, 447 P.2d 304 (Or. 1968), *cert. denied*, 394 U.S. 931 (1969).

9. *Id.* at 308. However, the court acknowledged that it "could construe the freedom of expression provision of the Oregon Constitution, Art. I, § 8, as providing greater freedom of expression than that of the First Amendment to the U.S. Constitution." *Id.*

10. Roth v. United States, 354 U.S. 476 (1957) (applying national standards to state obscenity prosecutions), *overruled by* Miller v. California, 413 U.S. 15 (1973) (applying state standards to state obscenity prosecutions).

11. Act of July 25, 1973, ch. 699, § 4(2), 1973 Or. Laws 1593: [M]atter is obscene if:

- (a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;
- (b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and
- (c) Taken as a whole, it lacks serious literary, artistic, political or scientific value.

12. See, e.g., Film Follies, Inc. v. Haas, 539 P.2d 669, 672 (Or. Ct. App. 1975), *appeal dismissed*, 426 U.S. 913 (1976). The Oregon Court of Appeals held that article I, § 8, of the Oregon Constitution did not provide broader protection than the First Amendment to the U.S. Constitution. *Id.* See also Oregon v. Tidyman, 568 P.2d 666, 676 (Or. Ct. App. 1976) (ORS § 167.087 held constitutional), Oregon v. Liles, 537 P.2d 1182, 1186 (Or. Ct. App. 1975); (Oregon laws criminalizing dissemination of obscene material upheld as following guidelines set forth by the United States Supreme Court), *cert. denied*, Liles v. Oregon, 425 U.S. 963 (1976); Oregon v. Grauf, 501 P.2d 345, 348 (Or. Ct. App. 1972) (statute criminalizing knowing dissemination of obscene material held constitutional).

13. OR. REV. STAT. § 167.087 (1985), which provides in pertinent part:

- (1) A person commits the crime of disseminating obscene material if the person knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.
- (2) As used in subsection (1) of this section, matter is obscene if:

- (a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;
- (b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and
- (c) Taken as a whole, it lacks serious literary, artistic, political or scientific value.

14. Oregon v. Robertson, 649 P.2d 569 (Or. 1982).

15. *Id.* at 576.

16. Oregon v. Henry, 732 P.2d 9, 11 (Or. 1987), citing Oregon v. Robertson, 649 P.2d 569 (Or. 1982).

17. Oregon v. Robertson, 649 P.2d at 576.

18. Oregon v. Henry, 732 P.2d at 11.

19. Oregon v. Henry, 717 P.2d 189 (Or. Ct. App. 1986), *aff'd*, 732 P.2d 9 (Or. 1987).

20. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

21. *Id.*

22. U.S. CONST. amend. I.

23. OR. CONST. art. I, § 8.

24. 732 P.2d at 11.

25. OR. CONST. art. I, § 8.

26. 732 P.2d at 11.

27. 732 P.2d at 13-14, citing U.S. v. 12,200 Ft. Reels of Film, 413 U.S. 123, 132-133 (1973) (Douglas, J., dissenting).

28. *Id.* at 14.

29. *Id.* at 16.

30. *Id.*

31. Oregon v. Tidyman, 568 P.2d 666 (Or. Ct. App. 1977).

32. 732 P.2d at 17.

33. *Id.* at 18. (emphasis added)

34. *Id.*

35. *Id.*

36. Oregon v. Ray, 733 P.2d 28 (Or. 1987).

37. City of Portland v. Tidyman, 759 P.2d 242 (Or. 1988).

38. 733 P.2d at 31 (Linde, J., concurring).

39. *Id.*

40. H.B. 2666, § 1, 66th Leg., 1991 Oregon.

41. *Id.*

42. Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970).

43. 39 U.S.C. § 3008 (1988).

44. 397 U.S. at 734.

45. *Id.* at 737.

46. H.B. 2666, § 1, 66th Leg., 1991 Oregon.

47. 732 P.2d at 15.

48. *Id.* at 16.

49. *Id.* at 18.

50. 733 P.2d at 31.

51. 397 U.S. at 741 (Brennan, J., concurring).

52. Ginsberg v. New York, 390 U.S. 629 (1968).

53. Oregon v. Frick, 653 P.2d 553 (Or. Ct. App. 1982) (distribution of obscene printed material to minors on the grounds that the statute "proscribes too much insofar as it proscribes the furnishing of depiction of nudity per se.") *Id.* at 558.; Oregon v. Woodcock, 706 P.2d 1012 (Or. Ct. App. 1985), *rev. denied* 713 P.2d 1059 (Or. 1986) (distribution to minors of printed material which contained socially unacceptable language no matter how incidental the language is to the work as a whole on the grounds that the language was unconstitutionally overbroad and not amenable to a narrowing construction.) *Id.* at 1013-1014..

54. 653 P.2d at 556.

55. 733 P.2d at 31.

56. H.B. 2666, § 2, 66th Leg., 1991 Oregon.

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## New York's Sale of Sculpture Disclosure Law: Art Merchant Beware

### Introduction

On January 1, 1991, significant amendments to New York's Cultural Affairs Law became effective.<sup>1</sup> The amendments, pertaining primarily to Articles 14 and 15 of the law, place various disclosure requirements on art merchants before *and* during the

sale of sculpture priced over \$1500.<sup>2</sup> Legislators, concerned that the recent popularity of collecting art for investment purposes exposed new collectors to exploitive marketing techniques, enacted the Full Disclosure in Sale of Sculpture Law [henceforth “Sculpture Amendment”] to address the sale of “visual art multiples.”<sup>3</sup> Art multiples refer to prints, photographs, sculpture, and similar art objects which are produced in more than one copy;<sup>4</sup> for example, sculpture molds which are capable of casting duplicates of the original work. Art multiples as such possess unique problems for their creators by expanding or restricting the artist’s control of her work, their purchasers by producing apparent originals, thereby enhancing deceptive market practices, and their merchants by exposing complex selling techniques to an increasingly “middle class” consumer.

This update traces the legislative history of the law, and will identify and explain the public policies that shape it. It will also examine the scope of the law’s provisions, and contain an analysis of the burdens placed on artists, art merchants, and consumers alike.

### Background of Original Visual Art Multiples Law

An inquiry into the background of the original Visual Art Multiples Law provides a useful tool in understanding the policy behind New York’s severe pruning of the *caveat emptor* doctrine. The common law of contract and tort provide some limitation to the “buyer beware” rule.<sup>5</sup> New York took further action in 1981 by enacting the Sale of Visual Art in Multiples statute. The law regulates the sales of prints, photographs (positive or negative), and similar art objects produced in more than one copy by placing disclosure burdens on art merchants by enacting the Sale of Visual Art Objects Produced in Multiples statute. The law excluded sculpture.<sup>6</sup>

The law requires that all visual art multiples offered for sale “in, into or from” New York state after January 1, 1982 be accompanied by a “written instrument” containing details such as the name of the artist, the year printed, and whether the piece was approved or authorized by the artist.<sup>7</sup> Less detailed information is required for older multiples, and art merchants have the opportunity to provide disclaimers in specific circumstances.<sup>8</sup> However, any material information supplied on the certificate (e.g. name of the artist) amounts to an express warranty as of the date of the sale.<sup>9</sup>

The overriding policies of regulating art multiples were four fold: alleviating confusion; preventing deceptive merchandising practices; providing a ba-

sis for further consumer self-education; and protecting the public in areas where abuse is not immediately detectable.<sup>10</sup> Hailed as a “giant step forward” in protecting the consumer and artist alike, the statute received approval from the legal community.<sup>11</sup> However, the same legal community expressed some concern that the statute encroached on artistic creativity by burdening the art community with the expense of maintaining records and hiring legal advisers to explain the new law, and introduced alarming levels of government interference with artistic production.<sup>12</sup>

### Background of Sculpture Disclosure Amendment

Many factors contributed to the need for an amendment to the Sale of Visual Art in Multiples law. The first factor is the increasing popularity of fine art objects, including sculpture, as investment tools by a new, relatively unsophisticated, middle-class consumer.<sup>13</sup> Second, the influx of new marketing and reproduction techniques made the reproduction harder to detect.<sup>14</sup> Third, the increase in litigation and media attention to controversies within the art business brought market abuses to light.<sup>15</sup> Finally, the onslaught of politicization of the art community caused widespread attention.<sup>16</sup>

To address these concerns, a New York state senator introduced a bill in 1987 to amend the Arts & Cultural Affairs Law.<sup>17</sup> The bill attacked market abuses and consumer fraud by requiring disclosure of nine facts for *all* sculpture when an art merchant (or art merchant’s agent) offers to sell, sells, or consigns sculpture in, into, or from New York, unless accompanied by a certificate of authenticity.<sup>18</sup> Notably, the disclosure was mandatory during four time frames: prior to sale or consignment; prior to placing an order for sculpture, if the purchaser so requests; when payment is made prior to or at the time of delivery; and, at an auction or in a catalog or other written instrument available for consultation before any sale.<sup>19</sup> The bill also required additional information for limited edition sculpture, and provided penalties for unauthorized casts.<sup>21</sup>

These provisions aimed to protect a broad range of consumers, as well as artists, by informing prospective buyers of *objective* facts of a sculpture before the purchase is made.<sup>22</sup> The bill, however, was re-committed and revised before it reached its final form in 1990.<sup>23</sup> Included was a curious revision of the sculpture definition clause, discussed below. Passed by a message of necessity on December 21, 1990, the Sculpture Amendment became law the first day of 1991.

## Substance of the Sculpture Amendment

In its amended form, the Sculpture Amendment brings sculpture within the protective measures of the Sale of Visual Art Multiples Law, and imposes unique burdens on foundries not present in the prior legislation.

### Definitions

Sections 1, 2, and 3 of the Sculpture Amendment (section 11.01 of the Arts & Cult. Aff. Law) contain relevant statutory definitions.<sup>24</sup> Notably, sculpture is defined as “a three-dimensional fine art object produced, fabricated or carved in multiple from a mold, model, cast, form or other prototype, other than from glass, sold, offered for sale or consigned in, into or from this state for an amount in excess of fifteen hundred dollars.”<sup>25</sup>

The deliberate exclusion of glass as a sculptural medium appears odd at first glance. The fact that glass is not ‘classically’ considered a sculptural medium should have little impact in light of the public policy’s overriding concerns.<sup>26</sup> Glass objects produced in molds can be just as easily duplicated as their bronze or clay counterparts. Consequently, middle-class consumers would be as equally vulnerable to deception in buying glass “sculpture” as they would in purchasing non-glass forms. The inconsistency is due to the lobbying by Steuben Glass, manufacturers of decorative glass objects headquartered in New York state.<sup>27</sup> Steuben claimed that the statutory requirements were too burdensome, and that Steuben’s works represented a caliber “no one” could replicate.<sup>28</sup> Consequently, the definition places artists, merchants, and buyers of cast glass sculpture completely outside the protections of the statute, thereby diminishing the effectiveness of its policies.

### Scope of the Sculpture Amendment

The provisions of the Sculpture Amendment pertain to all art merchants causing catalogues, prospectuses, flyers, or other written material or advertisement to be distributed in, into, or from New York.<sup>29</sup> These written materials must solicit offers to effect a specific sale.<sup>30</sup> If one can so classify the material in this manner, art merchants must place, in close physical proximity to the multiple’s description, the disclosure information.<sup>31</sup> In lieu of such information, the statute provides a message informing prospective purchasers of their right to disclosure before purchasing. The message is also to be placed in close physical proximity to the solicitation.<sup>32</sup> Moreover, art merchants who “regularly engage” in sales of multiples and who do business in New York must post written, legible

signs in their place of business informing the buyer that New York law provides for disclosure in the writing of certain facts.<sup>33</sup>

Unique to the Sculpture Amendment are the burdens placed on New York foundries. Each piece of sculpture must possess a clear and distinctive mark which identifies the foundry or other production facility at which the sculpture was made, as well as the year of production.<sup>34</sup> Moreover, any foundry (or person) producing such sculpture must prepare and maintain records containing all the information required by the law. The records must go back 25 years, at a minimum, and must be available for the state Attorney General’s inspection.<sup>35</sup> These two burdens only apply to sculpture produced after January 1, 1991.<sup>36</sup>

### Penalty Provisions

The Sculpture Amendment imposes several penalties for violation of its provisions. Among these penalties are:<sup>37</sup> (a) failure of a foundry to affix its identifying mark (punishable by a fine not to exceed \$5,000); (b) defacing the identifying mark (fine not to exceed \$5,000);<sup>38</sup> (c) failure of a foundry and/or art merchant to maintain written records (subject to a maximum \$500 punishment pursuant to Art. 22(A) secs. 349, 350 of the General Business Law).<sup>39</sup> New York’s Penal Law also addresses criminal sanctions for art fraud where there is an intent to defraud, coupled with an act of altering or making an object look antique, rare, or authentic.<sup>40</sup>

## Impact of the Sculpture Amendment

The Sculpture Amendment will effect art merchants, foundries, and consumers. Businesses selling sculpture will have to accommodate the requirements of the new amendment, such as record-keeping, posting signs, and perhaps a heightened awareness on the part of art merchants in tracking down unauthorized copies. Art merchants can be expected to protest the burdens of maintaining extensive records; indeed, such burdens may deter art merchants from selling art multiples in New York. Several years ago, when New York City began enforcing an ordinance requiring the posting of prices in all sales of art works, art merchants protested vigorously.<sup>41</sup> The protests focused on the sign’s psychological barrier inhibiting the viewer from reacting to the art work on its own merits and a fear that gallery conversation would turn to “rude” comments on prices.<sup>42</sup> To combat these fears, some commentators have devised “checklists” to simplify the disclosure process. One commentator, for instance, created a comprehensive checklist after New York enacted its first visual

art multiples law.<sup>43</sup> Such a checklist could be easily adapted for the current Sculpture Law.

The ultimate impact of the Sculpture Amendment will be on the art-buying public at large, and the ability of artists to control their creations. One of the more optimistic goals of the Amendment is to ignite public awareness that valuation of an art work depends on more than aesthetic (subjective) factors. This goal has more relevance, however, when art is viewed as a "good" investment.

Artists and their estates now will have a better chance of preventing misrepresentation of their work during the "sales puffing" stage of a purchase. On the other hand, artists may view the Sculpture Amendment as an alarming encroachment by the state. How comfortable artists feel about this remains to be seen. The impact of the Sculpture Amendment will be analyzed by the Attorney General on or before January 1, 1993, pursuant to section 14.08 of the statute.<sup>44</sup> At that time, the ultimate benefits derived from such legislation will be better understood.

### Conclusion

Effective January 1, 1991, New York's Full Disclosure in Sale of Sculpture Law will regulate the relationship between art merchants and consumers during the sale of sculpture. Art merchants will possess a significant burden of disclosure in the sale of sculpture priced over \$1500, thus eliminating any reasonable vestige of the common law *caveat emptor* doctrine as it pertains to art sale. ☐

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1. N.Y. ARTS & CULT. AFF. LAW, §§ 14.05, 14.06, 14.07, 14.08, 15.01, 15.10, 15.17 (Consol. 1991).

2. *Id.*

3. *Id.* at § 15.01.

4. 1990 N.Y. Laws 940, to be codified at § 11.01-20.

5. See 13 SAMUEL WILLISTON & WALTER H.E. JAEGER, WILLISTON ON CONTRACTS §§ 1538, 1557 (3rd ed. 1970); 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 559, 608-611 (1960). Both treatises allow contract rescission when parties to a sale are under a misconception of a material aspect of the object of sale (e.g., identity of artist). Of course, the common law tort of misrepresentation also provides an action for damages when a seller materially misrepresented or concealed salient facts regarding an art work. See also Carl D. Lobell, *Representing Artists, Collectors and Dealers: Bus. Relationships* (Practising Law Inst. 1988).

6. In 1981, the statute was consolidated with New York's General Business Law Article 12-H.

7. For an excellent summary of the prior law, as well as a comparison with California legislation, see Susan Hobart, *A Giant Step Forward - New York Legislation on Sales of Fine Art Multiples*, 7 COLUM.-VLA J.L. & ARTS 261 (1983).

8. *Id.*

9. *Id.* at 263. The law also required that "due regard" should be given to the "terminology used and the meaning accorded such terminology by the customs and usage of the trade at the time

and in the locality where the sale or exchange took place." N.Y. ARTS & CULT. AFF. LAW § 13.01 (Consol. 1991).

10. Hobart, *supra* note 7, at 271.

11. *Id.*

12. *Id.*

13. *The Art World And The Law: Forum Committee On The Entertainment & Sports Industries*, pp. 37-40 (American Bar Assoc. 1987), (contains 64-87 Op. N.Y. Att'y Gen. in support of the Sculpture Amendment). Also of concern was the perception of New York City as capital of the art market in the Western Hemisphere, possessing the most prestigious auction houses, galleries and the most art collectors in the United States. Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM & MARY L. REV. 501 (1988).

14. Carl D. Lobell, *Representing Artists, Collectors and Dealers: Bus. Relationships* (Practising Law Inst. 1988).

15. In the past years, litigation between auction houses, consignors and buyers has gained widespread media attention. For example, in *Cristallina v. Christie, Manson & Woods Int'l*, a New York court held as viable a cause of action against an auction house for alleged breach of contract, negligence, and breach of fiduciary duty for withholding information materially affecting a cosignor's interest. 502 N.Y.S.2d 165 (N.Y. App. Div. 1986). Another suit occurred in the case of *Weisz v. Parke-Bernet Galleries, Inc.* Here, the plaintiffs brought a breach of express warranty action against the gallery. Plaintiffs asserted that the counterfeiters they bought were listed in the gallery's catalogue as being original works of another artist. 351 N.Y.S.2d 911 (N.Y. App. Div. 1974).

16. Carl D. Lobell, *Representing Artists, Collectors and Dealers: Bus. Relationships* (Practising Law Inst. 1988). An example of the politicization of art exists in the NEA/obscenity controversy as propounded by politician Jesse Helms.

17. N.Y. Senate Bill 4698-A, introduced April 6, 1987, 1987-1988 Regular Session.

18. *Id.* at § 16.03-1. The information, to be provided in writing, was: artist name; sculpture title; name, if known, of foundry which (or person who) cast, fabricated or carved the sculpture; the medium; dimensions of sculpture; year sculpture cast, fabricated or carved; number of sculpture casts; whether artist is deceased when sculpture produced; and whether sculpture is authorized by artist or the estate, heir or other legal representative.

19. *Id.* at § 16.01-2.

20. *Id.* at § 16.03-2. Such information consisted of: (a) whether and how the sculpture and the edition is numbered; (b) the size of proposed editions and size of prior editions of same sculpture, regardless of color or material used; (c) whether additional sculpture casts have been produced in excess of edition's stated size; and (d) whether artist has stated in writing a limitation on number of additional sculpture casts to be produced in excess of the stated edition size.

21. *Id.* at §§ 16.06, 16.07, 16.09.

22. 64-87 Op. N.Y. Att'y Gen. (in support of the Sculpture Amendment), *supra* note 13.

23. N.Y. CONST. art. 3, § 14 (1987) provides for enactment of a bill when its final printing has been on each legislator's desk three days prior to passage. The provision also allows passage as a message of necessity, when the bill need not be on the desks three days prior, where the governor has certified, under her hand and the state seal, facts which in her opinion necessitate immediate vote thereon. N.Y. CONST. art. III, § 14 (1987). See *Joslin v. Regan*, 422 N.Y.S.2d 662 (N.Y. 1979).

24. N.Y. ARTS & CULT. AFF. LAW § 11.01 (McKinney 1990).

25. *Id.* at § 11.01-2(18).

26. The dictionary meaning of sculpture is: (n) the art or practice of shaping figures or designs in the round or in relief, as by chiseling marble, modeling clay, or casting in metal; (v) to