



Casting a Version

When making or selling editioned sculptures, disclosure is key

By Thomas and Charles Danziger

AT A CHARITY GOLF EVENT not too long ago, Thomas met the superstar athlete Wolf (not his real animal name) just after he had run into some problems. You know the story.

As it happened, Wolf served on a New York foundation dedicated to the recently deceased sculptor Katz (not his real German name) and had a simple legal question: Could the financially troubled foundation sell Katz's cat sculptures from an edition that was still in the process of being cast at the time of his death—and if so, what disclosures did it need to make? But simple legal questions are often like golf swings: The more one thinks about them, the more difficult they become.

The basic rule in New York in this area is that foundations and others must comply with Section 15.10 of the New York Arts and Cultural Affairs Law, which was enacted to protect purchasers of sculptures. The law makes it illegal to consign or sell any sculpture produced on or after January 1, 1991, and valued at \$1,500 or more without disclosing in writing certain important information, such as the name of the foundry or person that produced the work; the year it was made; the number of casts produced; and whether the piece is authorized by the artist, or his or her estate, heirs, or other legal representatives.

For such a sculpture from a limited edition, additional information must be disclosed, including whether and how it and the edition are numbered, the size of the proposed or previous editions of the same sculpture, and whether the artist intends to produce additional casts. The law makes the required disclosure an express warranty by the seller.

So the easy response to Wolf's question was that, although no legal prohibition on the sale of posthumous casts of sculptures exists, the foundation had to abide by the section of the statute requiring that "if the purported artist was deceased at the time the sculpture was produced, this shall be stated."

Similar disclosure requirements appear in the Standards and Guidelines code (which lacks the force of law) issued in 1973 by the College Art Association and endorsed by the Association of Art Museum Directors: "All posthumous casting or reproduction of an artist's work must be clearly identified by information supplied when possible on the work of art itself, as well as on all invoices, bills of sale, catalogues, and advertising. This information should include the actual date of the new cast, the name of the foundry, the size of the edition, and whether or not the work is a *surmoulage* [one bronze made from another and not original art] or of a different scale than the original."

Approximately 20 states besides New York have laws concerning multiples—usually applying to both prints and sculptures, as well as other types of art—that typically require disclosure to buyers of similar information in addition to value, authenticity, and rarity. Failure to make these disclosures can land the seller in hot water.

In the 1978 L.A. Superior Court case *Factor v. Stella*, for instance, the artist Frank Stella was sued for breach of duty to purchasers because he had sold a work without disclosing that similar paintings existed. According to the trial court, "an artist has a duty to a purchaser of his work to inform the purchaser of the existence of a duplicate work which would materially affect the value or marketability of the purchased work." However, the court found that Stella's silence should not result in damages, since there was no evidence that (*continued on page 122*)

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

Brothers in Law

(continued from page 89) the plaintiff's painting would have brought a lower auction price if the existence of the other versions had been disclosed. It also noted that the other versions were different enough from the plaintiff's that they hadn't "materially affected" its value.

Posthumous castings may, in fact, be quite desirable and even enhance an artist's legacy. Auguste Rodin was keenly aware of this benefit and specifically instructed the Rodin Museum in France to cast his plasters in bronze posthumously, which it does to this day.

The more interesting question in Wolf's case was whether the fact that the cat sculptures were already being cast when Katz died made any difference to our analysis, especially since several pieces from the same edition were completed before his death. In our view, a court would interpret the law to require disclosure of posthumous casts from an edition even if the sculpture was created before the artist died.

Wolf then asked whether the foundation could produce Katz's cats in cast iron—a metal different from the one the artist intended. Doing so might be an alliterative catastrophe but was not illegal. It would, though, violate the section of the Standards and Guidelines code stating that "all unauthorized . . . transfers into new materials, unless specifically condoned by the artist, . . . should be considered inauthentic or counterfeit."

"How about posthumously signing the sculptures or embossing them with a stamp authorized by the estate?" asked Wolf. We thought the signature sounded like forgery, but the estate stamp was appropriate.

Wolf's next question: Could the foundation stop a New York gallery from selling cheap replicas of Katz's cats? Apparently the artist had sold copyrights to some sculptures during his lifetime to this dealer.

If the gallery made unauthorized replicas of sculptures in which the foundation owned the copyright, the gallery would be guilty of copyright infringement. Collectors who bought such replicas could not sue it under the Copyright Act, because that law is for the benefit only of artists and their heirs and assignees. However, the foundation could bring the gallery to court. Of course, if the gallery had lawfully acquired the copyright, the foundation would have little recourse.

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"Couldn't we still make a claim against the gallery based on moral rights?" cried Wolf, referring to a legal concept that originated in France and that permits artists to protect the integrity of their work. "The shoddy replicas damage Katz's reputation!" The answer was no. Unlike in France, where they are perpetual, moral rights in the U.S.—incorporated into the Visual Artists Rights Act of 1990—expire with the artist, so there was no legal remedy available under this theory.

"Could collectors who buy these copies from the gallery compel our foundation to authenticate them?" Wolf wondered. Again the answer was no. In the 2009 case *Thome v. Alexander & Louisa Calder Foundation*, a New York appellate court refused to force the foundation to authenticate theatrical stage sets that were designed by the artist but completed just a few months after his death in 1976. The court was not persuaded by the fact that he had reviewed and approved the completed plans for the set, holding that the foundation only had to "consider" requests for authentication.

We advise any purchaser of a sculpture produced in multiples to request detailed documentation from the seller. This is especially important with sculptures because they normally do not bear the fraction commonly seen on prints, whose numerator indicates the number of the copy and whose denominator indicates the size of the total edition. Buyers who are unsure if an edition is limited should do some basic due diligence, including even contacting the foundry that manufactured the sculpture to confirm that it is authentic. For the sculptors themselves, our advice is to leave clear written records about whether, how, and by whom they want their sculptures to be reproduced after they are gone.

As for Wolf and his floundering, foundering foundation, in the area of posthumous sculptures it's almost always safer to reveal more information to buyers than less. That's simply par for the course. ☐

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