

Satisfaction Guaranteed: Brothers in Law on Commissioning a Work of Art



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(Keziban Barry)

We received the penned note from Miranda at the end of a punishing day. It was just two sentences long, but it raised a slew of legal issues and a few other concerns. “I am about to commission a sculpture of my husband, Carlo, for a 10-year anniversary,” she wrote. “Anything I should consider?” We didn’t know Miranda but were happy to assist.

Miranda stopped by the next day, trailing a hulking personal assistant wearing a blindingly white track suit. She got right down to business. “Do I need an agreement with the sculptor?” she asked.

“Yes, and preferably in writing,” we advised. “It should include the basic terms, including a description of the sculpture, size, medium, price, and completion date.”

“What if Carlo doesn’t like the finished work?” she asked. “He’s a man of particular taste—with real conviction.”

We suggested that the contract should specify that the sculptor perform to her husband’s “satisfaction.” According to the reasoning in the landmark 1940 Illinois case *Wolff v. Smith*, a client’s satisfaction is subjective and need not be reasonable: “In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not.”

“Carlo doesn’t feel comfortable in court,” noted Miranda.

We proposed an alternate approach: The parties could agree on a simple approval process. For instance, they could decide that if Carlo in his reasonable judgment is unsatisfied with the sculpture’s artistic design before it is fabricated, he can detail his objections and allow the sculptor a reasonable period of time to modify the design. The artist would then advise in writing when the design changes were made, and if Carlo still didn’t like the proposed design he could terminate the agreement.

“In that case, would we still have to pay?” asked Miranda.

“That depends on what you have negotiated,” we explained. “Some artists insist on a provision stating that they will be entitled to fees for work performed and will be reimbursed costs and expenses incurred to the termination date. Other artists want a set ‘kill fee’ if a project is canceled through no fault of their own.

“My husband is very familiar with kill fees,” mused Miranda. “How can we ensure that the bust arrives in time for our anniversary?”

One approach, we explained, was to insert a “time is of the essence” clause to make on-time delivery imperative. If the delivery were delayed, the artist would incur a stiff penalty. Of course, the artist might want to balance that against a “force majeure” provision that exempts her from penalty for delays that result from causes beyond her control.

“But if the artist doesn’t perform at all, can’t Carlo *force* her to make the sculpture?” Miranda’s meaning was inescapable—and we were growing increasingly nervous.

The answer to this question is no. He cannot force the artist to complete the work, at least not under U.S. law.

That’s not the law everywhere. For instance, in a June 2015 ruling that shocked the art world because of its implications regarding artistic freedom, a Dutch court ruled that the artist [Danh Vo](#) had to create a “large and impressive” installation for the collector Bert Kreuk within a year, for which Kreuk was to pay up to \$350,000, to fulfill the artist’s agreement to make a new work for Kreuk’s collection. According to the court order, if Vo did not comply, he faced daily fines of \$11,000, capped at about \$380,000. Vo appealed and the case was later [settled in an appeals court](#).

“Once we own the bust of my husband, could the artist make more copies of it for sale to others?” queried Miranda. “And could we make and sell copies of it? Carlo can be a very persuasive salesman.”

“Initially, only the creator of the piece can claim a copyright in it, which includes the right to make and sell copies,” we explained. “Of course, you may purchase the actual copyright from the artist, which would be separate from purchasing the physical piece itself.”

However, we pointed out, savvy artists typically insist on retaining their copyright. In such cases, the parties might opt for a compromise. For example, the artist might keep the copyright while agreeing not to re-create the same piece she made for Carlo without his prior consent. And better-known artists sometimes insist on the right to re-create the same piece sold to a particular client if the copy is for a museum or other cultural organization, or if it is for the artist’s own collection.

The copyright issue got Miranda thinking imaginatively. “What if we made a copy and the artist never found out?”

We warned her that this was a risky proposition. To take just one cautionary example, in 2014, California real estate magnate Igor Olenicoff was ordered by a federal court to pay \$450,000 in damages to artist Don Wakefield for making unauthorized copies of Wakefield’s large stone sculptures to adorn Olenicoff’s properties.

“What are the artist’s rights if the sculpture is damaged after we buy it?” asked Miranda cheerfully. “Carlo’s friends sometimes have meetings at the house, and disagreements can be a bit rough.”

We explained that under a federal law known as the Visual Artists Rights Act of 1990, an artist has, among other rights, the right of integrity, which bars intentional distortion, mutilation, or other modification of a work if that distortion is likely to harm the artist’s reputation, and prohibits the destruction of any work of recognized stature. However, unlike in most of Europe, where moral rights are inalienable and cannot be waived, artists in the United States can waive their moral rights in writing, which is precisely what we suggested in Miranda’s case.

“What exactly is included in the purchase price?” asked Miranda. “For instance, do we get to own the original sketches of the piece?”

“That’s another point of negotiation,” we replied. Some sculptors require that their entire work product—meaning any and all sketches, notes, models, and other preparatory work—remain the property of the artist whether or not the sculpture is fabricated.

“The parties would also need to decide whether the purchase price includes the cost of the materials, shipping, fabrication, installation, and insurance of the work,” we continued.

“Anything else that should go into the agreement?”

“The artist’s representations and warranties,” we explained. “She should state that, upon completion, the bust will be unique and original and not violate any copyright or infringe on the rights of anyone else. She should also confirm that she has not made other commitments or undertaken any engagements that will prevent her from completing the bust in a timely fashion in accordance with the agreement.”

“What if she breaks those promises?” asked Miranda. “Do we get to break her legs?”

We sensed that Miranda was not kidding, and our anxiety ratcheted up again. Instead of her inflicting bodily harm, we suggested drafting a provision stating that if the artist breaches her representations and warranties, she must indemnify Miranda for all liability and expenses, including reasonable legal fees, resulting from the breach.

We added that when we represent artists, we usually try to cap this potential liability by saying that the indemnification can’t exceed the fee actually received by the artist.

Miranda ended our meeting with a friendly warning: “I hope you guys covered all the bases. Carlo already spent 10 years in the pen, and they never did find his last lawyers.”

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

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