

Expanding Art Markets: Prints, Certificates of Authenticity, and Art Licensing

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By Brooke Oliver, Esq. with assistance from Vonda Smith, Esq., Natalie Kwan, and Arjun Gupta

Summary: This paper will explore the issues of authentication, value, and fraud that arise with the sale of fine art prints, and provides working definitions of the often misunderstood types of prints such as etchings, serigraphs, Giclée prints, and other terms used in and around print making and certificates of authenticity. It provides information about numbering of limited edition prints, disclosures that are often required with the sale of such prints, and information about the significance of chop marks and copyright and trademark notices. It includes information and resources about art agents and art licensing.

An increasingly significant aspect of the current art market is art licensing and the sale of limited edition prints, sculptures, and photographs. This however is not a new development antithetical to “fine art.” From its rapid development with the Gutenberg press in the 1450s, the print has always represented not only a means to survive but also access to larger audiences and the importance of style for artists, publishers, and dealers.¹ The earliest master of the woodcut, Albrecht Durer, seized upon the commercially profitable medium of printmaking. In 1498, with his limited edition of “The Apocalypse,” Durer became the first known artist to design, print, and publish his own work.² Prints allowed artists to sell their work to the general public, freeing them from the time and expense constraints imposed by commissions of paintings and altarpieces. Early successful printmakers such as Durer and Martin Schongauer came from goldsmith families belonging to artisan guilds that both designed and manufactured goods for local and cosmopolitan markets.³ Early in his career, Durer worked as an apprentice for the printer Martin Wolgemut who in turn produced woodcut illustrations for the publisher Anton Koberger.⁴ The contractual association between artist and publisher was at the heart of the printmaking enterprise and represents an essential pattern of early licensing. An artist’s designs were brought into the larger market economy supported by printers, publishers and the public that bought their prints.

Rembrandt’s success as an artist in his own time would not have been possible without the aid of his dealer and publisher, Hendrick van Uylenburgh. His fame as a painter was furthered by his etchings published as affordable multiple prints exclusively by Uylenburgh.⁵ A painting such as “The Descent of Christ from the Cross” was reproduced and publicized as an etching of the same title in 1633, helping to establish the artist’s fame as an equal of the great Flemish painter, Peter Paul Rubens.⁶ Rembrandt had invested 1000 guilders and his prodigious talents as an artist in the dealer’s business for the access to buyers and the printing and publication opportunity that Uylenburgh provided.⁷ Two years later, Rembrandt’s marriage to Uylenburgh’s cousin, Saskia, suggests how important the artist’s relationship to the agent was both commercially and socially. While such close familial ties are no longer the norm, the modern licensing agreement represents a marriage of sorts between creative talent and the agents and licensees that harness the commercial power of a global market.

The definition of a print is in a constant state of evolution. It changes with the social and aesthetic needs of a given society, the individual expression of a particular artist, and the state of technology at any given time.⁸ **Whether or not a print is considered an original or merely a reproduction varies largely in relation to the degree to which the original artist was involved in its creation. And, as the artist’s involvement becomes more distant from the actual act of creating the print, the potential for abuse and**

¹ H. W. Janson, *History of Art*, 2nd Ed., 367 (1977).

² Peter and Linda Murray, *Dictionary of Art and Artists*, 6th ed., 123 (1991).

³ *Id.* at 122.

⁴ *Id.*

⁵ Gary Shwartz, *Rembrandt*, 50 (1992).

⁶ *Id.*

⁷ *Id.* at 44.

⁸ Ralph Lerner and Judith Bresler, “*Art Law: The Guide for Collectors, Investors, Dealers, and Artists*”, Volume 1, 2d. Ed. (Practicing Law Institute 1998).

fraud multiplies. Many, many people buy prints in order to fulfill their passion for art, only to find that their purchase is a forgery or a work printed and distributed in the thousands without significant current value and little chance of appreciation (collectable posters notwithstanding).

“Fine prints and sculpture multiples spawn abuse. **As an art form, the multiple beckons the forger; as a process of creation, it tempts the printer, publisher, colorist, foundry worker, artist, and anyone else involved in its production, as well as the dishonest dealer, profferer of tax shelter scams, and greedy (or naïve) buyer.** Art multiples invite commercial abuse for a number of reasons: lack of uniform, industry-wide controls in the production process; lack of art-market consensus about such fundamentals as what constitutes an original print; and lack of state consumer legislation or, in the few states having such legislation, lack of enforcement.”⁹

WHAT CONSTITUTES AN “ORIGINAL” PRINT?

Unlike paintings or drawings, prints exist in multiple examples. Different printmaking processes involve the original artist in the creation of the print to greater or lesser extents, and the print’s collectability and value is sometimes related to the degree and extent of the artist’s direct involvement. Prints may be either: (1) art-making in primary form; or 2) reproductions of original works in another medium produced in limited editions and signed by the artist.¹⁰

Prints that are art making in its primary form generally are made when the artist creates a composition not on paper but on another surface, such as stone, plate or block, creating a master. The artist then inks or puts another form of color onto the master, and then transfers the composition to paper by placing a sheet of paper on a drawn surface and running it through a press, or, depending on the technique, by pressing the paper onto the surface by hand. Numerous “impressions” can be made by printing new pieces of paper in the same way. As a result, very few prints are truly “originals.”¹¹ Printmaking techniques that constitute art-making in its primary form include: relief prints, intaglio prints, lithographs, collagraphs, and screen prints (including serigraphs). Limited edition sculptures of this type are created, for example, by the artist making an original sculpture in wax, and then casting a mold of that sculpture which mold is then used to create a limited number of cast sculptures.

Prints that are reproductions of original works in other mediums are created by photographing the original work of art, then photomechanically or digitally transferring that image onto paper or canvass. Printing techniques of this type include: photomechanical reproductions¹² and digital Giclée prints, also known as Iris prints. The surmoulage¹³ technique is an example of a sculptural reproduction being created from a sculpture in another medium.

The International Fine Print Dealers Association (IFDA)¹⁴ divides prints into seven categories depending on the extent of artist involvement in the creation of the print, from the artist alone preparing the print to a print being made from a reproduction of the artist’s work entirely without the artists’ consent. These are the categories:

⁹ *Id.* at 361.

¹⁰ *Id.* at 362.

¹¹ In some cases, artists do create original screen prints by hand-cutting a color separation, creating screens, choosing colors and making the screen print directly.

¹² The Tamarind Institute at the University of New Mexico in Albuquerque provides authoritative information and publications about prints and printmaking, at <http://tamarind.unm.edu>

¹³ Surmoulage means “casting from a cast,” for example, when an artist creates a bronze and then later to obtain an edition, a mold is created from the bronze and multiples are recast from the bronze. For more information and ethical standards, see www.collegeart.org/caa/ethics/sculpture.html

¹⁴ www.printdealers.com

1. The artist alone prepares and creates the matrix;
2. The artist and collaborator(s) prepare and create the matrix, with the collaborator contributing technical expertise.
3. The artist provides a design to be copied and is critically involved in directing the work but does not work on the matrix; the physical labor is performed by a collaborator.
4. The artist has no meaningful involvement in the matrix production, supplying only the design for faithful reproduction.
5. The artist or the artist's agent authorizes the reproduction of one of the artist's existing works, without involvement in quality control.
6. A reproduction is made without the artist's or agent's permission.
7. A print is made from the primary matrix without the artist's or agent's permission.

WHY ARE CERTIFICATES OF AUTHENTICITY NEEDED?

Since prints and other fine art multiples are created using so many different processes and with greater and lesser degrees of the artist's involvement or even consent, it is very difficult for a consumer or collector to know what type of multiple they are considering for purchase, whether it is authentic, and whether it has been made with the artist's involvement or authorization. Pricing and value, as well as quality, are frequently directly related to the extent of the artist's involvement in creating a given print. Each individual print in an edition is also unique. For example, a New York federal district court has determined that two prints by the same artist and from the same plates are not interchangeable.¹⁵ Additionally, a collector needs to know whether the market will later be flooded with additional copies of the same or a substantially similar print, possibly deflating the value of all the prints in the marketplace.

Certificates of authenticity inform the art buyer about the artist's identity, the extent of the artist's involvement in creating the print, the number of prints made from the same master that are available on the market, the process used to create the print, whether the print is from a limited edition, whether the master plate has been destroyed, and other information relevant to the consumer making an informed choice about the value and price of the print s/he is buying. Several states have passed consumer protection statutes that require art dealers to provide certificates of authenticity along with any sale of a fine art print in and even *into* their state. In some states, these certificates of authenticity are express warranties that the print they accompany is as the certificate states. Because certificates of authenticity constitute express warranties, the artist or publisher are forever bound to the terms on those certificates. This is particularly significant with regard to the total number of fine art multiples in an edition. If the certificates represent that the master has been destroyed and no other editions of a particular work will be created, then no other multiples of the same image, even in different sizes or quality, may ever be issued, even if the piece is a big seller. Determination of the size of the limited edition and other representations about whether the master has been destroyed must be carefully considered. The artist and downstream art dealers must live with those decisions and collectors rely upon them.

STATE LAW ABOUT CERTIFICATES OF AUTHENTICITY

CALIFORNIA LAW

The Sale of Fine Prints Act (the "Farr Act") was passed in 1970 in an effort to enable prospective purchasers to make informed decisions as to the value of a modern print.¹⁶ The Act attempts to aid the consumer in judging a print's uniqueness or scarcity by imposing on the print dealer the burden of disclosure or disclaimer of certain details relevant to the print's value.¹⁷

¹⁵ *Tunick v. Kornfeld*, 838 F. Supp. 848, 851 (S.D.N.Y. 1993).

¹⁶ *Grogan-Beall v. Ferdinand Roten Galleries, Inc.*, 133 Cal. App. 3d 969, 972 (1982) (upholding the Farr Act but decertifying a class in an action by a purchaser against a gallery for failure to comply with the Act's disclosure-disclaimer provisions)

¹⁷ *Id.*

Under California law, art dealers are required to include a “certificate of authenticity” with the sale, exchange, or consignment of any fine art multiple. A “certificate of authenticity” is a written or printed description of the fine art multiple.¹⁸ A “fine art multiple” or “multiple” means any fine art print, photograph (positive or negative), sculpture cast, collage, or similar art object produced in more than one copy.¹⁹ An “art dealer” means a person who is in the business of dealing, exclusively or nonexclusively, in the sale of fine art multiples.²⁰ An “art dealer” is also a person who by his or her occupation holds himself out as having knowledge or skill peculiar to the fine art multiples being sold.²¹ Under that second part of the definition, an artist or artist’s estate that as a regular business practice sells the artist’s prints would be considered an art dealer and should provide certificates of authenticity along with prints they sell. In California, this applies even if the print is being sold or consigned to another art dealer. For example, an artist or estate-operated atelier that creates the multiples should issue certificates of authenticity to a gallery that will retail the multiples to the public. Where the artist or artist’s estate does not provide that to the gallery, the gallery must do due diligence and issue a certificate of authority.

What information is required on the California Certificate?²²

A sample certificate of authenticity for a fine art multiple is included as Exhibit A. Every certificate must contain the following *exact* statement above the signature of the person who signs the certificate of authenticity:

“This is to certify that all information and the statements contained herein are true and correct.”²³

Every certificate must also contain:

1. The name of the artist
2. Information about any artist’s signature appearing on the multiple, such as whether the artist signed it personally or whether it was stamped by the artist’s estate, or by some other source.
3. A description of the medium or process used in producing the multiple, such as etching, engraving, lithographic, serigraphic, Giclée or a particular method or material used in any photographic developing processes.
4. A statement about any photomechanical, photographic, or surmoulage (for sculpture) process used to create a multiple of an image produced in a different medium, for a purpose other than the creation of the multiple being described, and a statement of the respective mediums.
5. If a photomechanical, photographic, or surmoulage process was used, and the multiple is not signed, a statement about whether the artist authorized or approved in writing creation of the multiple or the edition.
6. Information about whether the artist was deceased at the time the master was made which produced the multiple.

¹⁸ Cal. Civ. Code § 1740 (2003).

¹⁹ Cal. Civ. Code § 1740(a) (2003).

²⁰ Cal. Civ. Code § 1740(g) (2003).

²¹ Cal. Civ. Code § 1740(g) (2003).

²² Cal. Civ. Code §§ 1744 (2003). Less information is required for older prints.

²³ *Id.*

7. Information about whether it is a "posthumous" multiple, that is, where the *master was created during* the life of the artist but the *multiple was produced after* the artist's death.

8. If it is a second or later edition of multiples made from a master that produced a prior limited edition, or if the master for this edition was made from a print or master that was made from a prior multiple, this shall be stated. In addition, the total number of multiples, including proofs, of all other editions produced from that master must be stated.

9. The year, or approximate year, the multiple was produced shall be stated, if the multiple was created after 1949. For multiples produced prior to 1950, the certificate must state the year, approximate year or period when the master was made and when that particular multiple was produced.

10. Information about whether the edition is being offered as a *limited* edition, and if so: (i) the authorized maximum number of signed or numbered impressions, or both, in the edition; (ii) the authorized maximum number of unsigned or unnumbered impressions, or both, in the edition; (iii) the authorized maximum number of artist's, publisher's or other proofs, if any, outside of the regular edition; and (iv) the total size of the edition.

11. Whether or not the master has been destroyed, effaced, altered, defaced, or canceled after the current edition. If for example the master screens have been destroyed, then the atelier cannot make any additional images more of that image

12. If the multiple is part of a limited edition that was printed after January 1, 1983, the statement of the size of the limited edition also constitutes an express warranty that no additional multiples of the same image, including proofs, have been produced in this or in any other limited edition.

See Exhibit B "Certificate of Authenticity Checklist: Compliance with Cal. Civ. Code Sections 1740, 1742, and 1744", attached, for more in-depth explanation of the statutorily required information.

Related Notices under California Law

In addition, in each place of business in California where an art dealer is regularly engaged in sales of multiples, the art dealer must post a legible sign in a conspicuous place that contains the information included in the following passage:

"California law provides for the disclosure in writing of certain information concerning prints, photographs, and sculpture casts. This information is available to you, and you may request to receive it prior to purchase."²⁴

Art dealers that sell in or *into* California must also put consumer protection information on their advertising and publicity any time that publicity solicits a direct sale for a specific multiple. This applies to catalogues, flyers, brochures, websites and other advertising and publicity. Art dealers in other states who sell multiples to people in California via a catalogue or over the Internet must comply with these requirements. To be in compliance, the advertising and promotional material must set out the same information that is included in a certificate of authenticity, and that information must be placed in close proximity to the multiple being described for sale.²⁵

²⁴ Cal. Civ. Code § 1742(b) (2003).

²⁵ *Id.*

In the alternative, advertising may set out the following statutorily prescribed passage. This legal notice may be used only if the art dealer then supplies the required certificate of authenticity to the consumer prior to or with delivery of every multiple sold.

“California law provides for disclosure in writing of information concerning certain fine prints, photographs, and sculptures prior to affecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist's signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the plate which produced the multiple, and the number of multiples in a "limited edition." If a prospective purchaser so requests, the information shall be transmitted to him or her prior to payment, or the placing of an order for a multiple. If payment is made by a purchaser prior to delivery of the multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he or she returns the multiple in the condition in which received, within 30 days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect, the purchaser may be entitled to certain remedies, including refund upon return of the multiple in the condition in which received.”²⁶

A Certificate of Authenticity is an Express Warranty

The art dealer expressly warrants the information provided on a certificate of authenticity.²⁷ Such certificates must be accurate, and providing inaccurate information is a breach of an express warranty.²⁸ In some cases, particularly for older prints or in situations where an estate is publishing prints after the artist's death and faces a history of incomplete record keeping, it may not be possible to state absolutely which year a master or print was created. Other important information about the multiple, such as whether other editions in different sizes or quality have ever been created, may also have been lost in the winds of time. In such cases, an approximation should be made and the issuer of the certificate of authenticity should err on the side of full disclosure. An appropriate disclaimer should be included on the certificate of authenticity. For example, a date can be given as “Approximately 1942,”²⁹ or a statement that no prior editions have been created could be limited by a disclaimer to the effect that the information about such prior editions is based upon the issuer's information and belief. Such disclaimers are effective unless the buyer can establish that the art dealer failed to make reasonable inquires, according to custom and usage of trade, to ascertain the relevant information or that such information could have been ascertained as a result of such reasonable inquires.³⁰

Remedies for Violation: Damages and Injunctive Relief

In California, the noncompliant art dealer can be liable to the purchaser for limited damages and injunctive relief, plus attorneys' fees, expert witness fees, and costs.³¹ Consumers may also seek damages under the California Commercial Code for breach of express warranty³² and are not barred from seeking other legal remedies.³³

Damages available to each purchaser are not particularly high. The dollar amount of damages is based on the purchase price of the print. However, costs and attorneys fees are available in such cases, which can substantially increase the amount of any payout by a non-compliant dealer.³⁴ Treble damages are

²⁶ *Id.*

²⁷ Cal. Civ. Code § 1744.7 (2003), applying to multiples created after 1949. *See also* Cal. Civ. Code §1744(b) with respect to multiples created after January 1, 1983.

²⁸ *Id.*

²⁹ Statutory requirements differ depending upon whether the multiple was created before 1900, between 1900 and 1949, or after 1949. Cal. Civ. Code §1744(a)(9), Cal. Civ. Code §1744(d); Cal. Civ. Code §1744(e).

³⁰ Cal. Civ. Code § 1745(f) (2003).

³¹ Cal. Civ. Code § 1745 (2003).

³² Cal. Civ. Code § 1794 and Cal. U. Com. Code §§ 2711 – 2715.

³³ Cal. Civ. Code § 1745(e) (2003).

³⁴ Cal. Civ. Code § 1745(d) (2003).

available for willful non-compliance, so long as the plaintiff purchaser tenders return of the print.³⁵ The penalty provision's purpose is to "punish and deter" the non-compliant art dealer, not to compensate the plaintiff.³⁶ The dealer is liable to each purchaser who received a non-compliant certificate of authenticity. Where 300 non-compliant certificates of authenticity are issued for an edition of 300, 300 separate purchasers each have a potential claim. The additional available relief of costs, attorneys' fees and expert witness fees increases the dollar value of each potential claim.

In addition to the remedies available to purchasers, the dealer may also be enjoined and face civil penalties from the Attorney General, district attorneys, city attorneys and city prosecutors.³⁷ City or state prosecutors may assess civil penalties of \$1,000 for each violation, although it is unlikely that officials would seek such penalties in the absence of deceptive or fraudulent practices, such as passing off fake works as authentic ones.

NEW YORK LAW

Information Required on the New York Certificate

New York's law contains many features similar to California's. Under New York law, a "certificate of authenticity" means a written statement by an art merchant confirming, approving or attesting to the authorship of a work of fine art or multiple, which is capable of being used to the advantage or disadvantage of some person.³⁸ A certificate of authenticity may be used for both originals and multiples and is required for multiples.³⁹ Each certificate of authenticity must include the following information for the multiple that it describes:⁴⁰

1. The name of the artist;
2. Whether the multiple was signed by the artist, and if not, the source of the artist's name on the multiple (e.g. stamped or estate stamped, on the master, some other source);
3. The medium or process used in producing the multiple;
4. Whether the artist was deceased at the time the master was made;
5. Whether the multiple is a "posthumous" multiple, i.e. a multiple made after the artist's death from a master made while the artist was living;
4. Whether the master is hand-made, or a reproduction of an image produced in another medium;
5. The time when the multiple was reproduced;
6. Whether the master has been used to produce a prior limited edition;
7. Whether the multiple is from a limited edition, and if so, the size of the edition, and the number of trial proofs or other numbered or unnumbered multiples in the same or prior editions; it must also state whether and how they are signed and numbered.

Related Notices under New York Law

Like in California, in each place of business in the state of New York where an art merchant is regularly engaged in sales of multiples, the art merchant shall post in a conspicuous place, a sign which, in legible format, contains the information included in the following passage:

³⁵ Cal. Civ. Code § 1745(b) (2003); *Grogan-Beall*, 133 Cal.App. 3d at 969.

³⁶ *Grogan-Beall*, 133 Cal. App. 3d. at 969.

³⁷ Cal. Civ. Code § 1745.5 (2003).

³⁸ N.Y. CLS Arts & Cult. Aff. § 11.01 (2003).

³⁹ N.Y. CLS Arts & Cult. Aff. § 15.01 (2003).

⁴⁰ N.Y. CLS Arts & Cult. Aff. § 15.03 (2003).

“Article fifteen of the New York Arts and Cultural Affairs law provides for the disclosure in writing of certain information concerning prints, photographs and sculpture. This information is available in accordance with that law.”⁴¹

Statutory notice must also be placed on catalogues, prospectus, flyer or other written material or advertisements distributed in and into New York in close proximity to the place where the multiple is described.⁴² New York’s disclosure statute requires that the same information as on a certificate of authenticity be included on such advertising.⁴³ In the alternative, a statutory notice similar to California’s may be put on advertising and promotional material in close proximity to the multiple being offered for sale.⁴⁴

Express Warranties⁴⁵

Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant a certificate of authenticity or any similar written instrument it: a) shall be presumed to be part of the basis of the bargain; and b) shall create an express warranty for the material facts stated as of the date of such sale or exchange.⁴⁶ Statements about the identity of the artist must comport with specific guidelines that constitute express warranties.⁴⁷

1. When a certificate of authenticity says that the work is by a named author, without any limiting words, it means unequivocally, that the work is by such named author or has such named authorship;
2. The work is “attributed to a named author”; it means that a work of the period of the author, attributed to him, but not with certainty by him; or
3. The work is of the “school of a named author,” it means that a work of the period of the author, by a pupil or close follower of the author and not the author.

DIFFERENCES AND SIMILARITIES BETWEEN STATE PRINT DISCLOSURE STATUTES⁴⁸

California was the first state to pass a law designed to protect the purchasers of fine art in multiples.⁴⁹ Known as the Farr Act, the law applies to fine prints, photographs, sculpture casts, collage and similar art objects produced in more than one copy.⁵⁰ **New York’s Act**,⁵¹ passed in 1982 and amended in 1991 to extend protection to purchasers of sculpture in multiples, was modeled on the California statute and retains most of its features: written disclosure of similar information with all sales and consignment,⁵² a notification paragraph to be included in all catalog selling multiples,⁵³ a posted notice in the place of business,⁵⁴ and a similar range of civil remedies.⁵⁵

Differences, however, include the fact that unlike California law, in New York injunctions are reserved for the attorney general and civil penalties are limited to \$500.00⁵⁶ Also, New York does not hold

⁴¹ N.Y. CLS Art & Cult. Aff. § 15.01 (2003).

⁴² N.Y. CLS Arts & Cult. Aff. § 15.01(2) (2003).

⁴³ N.Y. CLS Arts & Cult. Aff. § 15.01 (2003).

⁴⁴ *Id.*

⁴⁵ N.Y. CLS Arts & Cult. Aff. § 15.01 (2003).

⁴⁶ N.Y. CLS Arts & Cult. Aff. § 13.01(3) (2003).

⁴⁷ N.Y. CLS Arts & Cult. Aff. § 15.01 (2003).

⁴⁸ Lerner and Bresler, *supra* note 1, at 386 - 389 for discussion comparing statutes of different states on this subject.

⁴⁹ *Id.*

⁵⁰ Cal. Civ. Code § 1740 (2003).

⁵¹ N.Y. Arts & Cult. Aff. Law §§ 15.01-15.19 (2003).

⁵² N.Y. Arts & Cult. Aff. Law § 15.01 (2003).

⁵³ N.Y. Arts & Cult. Aff. Law § 15.01(2) (2003).

⁵⁴ N.Y. Arts & Cult. Aff. Law § 15.01(3) (2003).

⁵⁵ N.Y. Arts & Cult. Aff. Law §§ 15.15 – 15.17 (2003).

⁵⁶ N.Y. Arts & Cult. Aff. Law § 15.17 (2003).

the merchant-dealer to a standard of strict liability. In New York, if an artist sells or consigns a multiple of his or her own creation, the artist is considered a merchant and thus incurs the same liability for his or her misrepresentation, error, or omission.⁵⁷ If the selling art dealer can establish that his liability results from incorrect information which was provided by the consignor, artist or merchant to him in writing and on which the dealer relied, then the dealer, along with the purchaser, may look to the selling artist-merchant for remedies.⁵⁸

Arkansas, Georgia, Hawaii, Illinois, Iowa, Maryland, Michigan, Minnesota, North Carolina, Oregon, and South Carolina have laws protecting consumers in the purchase of art multiples.⁵⁹ Statutes in those states are less rigorous and less inclusive than those in California and New York, although each statute is based on the concept of written disclosure and requires the name of the artist, the year of the printing, the size and the specifications of limited editions, the demise of the plate, whether the work is posthumous, and the name of the workshop where the edition was printed. **New Mexico** does not have statutes directly or indirectly requiring print-disclosure or certificates of authenticity.⁶⁰

A NOTE ON ADDITIONAL DOCUMENTATION & NOTICES

Another common practice is for the art dealer, printer, and/or artist to create a documentation sheet, listing all the pertinent data concerning a published edition of prints. This is a useful historical record and can be a legal document signed by both the artist and the printer, or the publisher in some cases. It indicates exactly how many prints were pulled in every category, the techniques employed in printing, the type and colors of ink that were used, the kind of paper, and the materials used in drawing. The documentation often includes a reproduction of the print.⁶¹ The documentation should be maintained on file by the artist, and the printer or publisher should also retain a copy.

Unfortunately, some art dealers inaccurately tell prospective buyers that reproduction rights are transferred to the purchaser of the fine art multiple. This is not the case. Copyrights are owned and held by the artist unless and until they are transferred, and are not transferred automatically when the multiple or even the original are sold.⁶² Given the inaccuracies often promulgated in the retail market, artists and artists estates who issue certificates of authenticity would be well-served by putting the artist's reservation of copyrights on the certificates. It is not legally required, but it is prudent to make a statement such as "Please note that all copyrights in the work of fine art that this certificate accompanies are reserved to the artist. Reproductions may not be made without permission." Putting the © copyright notice and symbol on the certificate of authenticity is ineffective. All that does is claim copyrights in the certificate of authenticity, not in the multiple itself. The © copyright notice and symbol should be affixed to the multiple itself, on the front or on the reverse. (See discussion in "Chop Marks" section below.)

TERMINOLOGY ON CERTIFICATES OF AUTHENTICITY: PROCESSES, EDITIONS, NUMBERING, & PROOFS

Use of proper terminology on certificates of authenticity, with respect to edition size and number, types of proofs, and the process used to create the described print or multiple, is key to the art dealer's compliance with state disclosure statutes. The following information is a useful reference in determining the proper terminology to be used on certificates of authenticity.

⁵⁷ N.Y. Arts & Cult. Aff. Law § 15.13(2) (2003).

⁵⁸ N.Y. Arts & Cult. Aff. Law § 15.13(5) (2003).

⁵⁹ Ark. Code Ann. §§ 4-73-301-305 (2003); GA. Code Ann. §§ 10-1-430 - 437 (2003); Haw. Rev. Stat. Ann. § 481F - 481F9 (2003); 121 ½ Ill. Comp. Stat. Ann. ¶ 360 (1990); Iowa Code Ann. § 715B (1993); MD. Ann. Code § 14-501 et. Seq. (1990); Mich. Comp. Laws. Ann. § 442.351 et. seq. (1996); Ore. Rev. Stat. Ann. § 399.300 et. seq. (1987); S.C. Code Ann. § 39-16-10 et. seq. (Law Co-op Supp. 1996).

⁶⁰ However, New Mexico does seek to protect the artist's reputation and work with statutes protecting visual or graphic art in "any media" on public buildings and in public view. See N.M. Stat. Ann. § 13-4B-2, See also generally N.M. Stat. Ann. § 13-4B-1.

⁶¹ Donald Saff and Deli Sacilotto, "Printmaking: History and Process," 398 (Thomas Learning, Inc. 1978).

⁶² See for example, 17 U.S.C. 101; 17 U.S.C. 106; 17 U.S.C. 106A, 17 U.S.C. 113;

PRINT-MAKING PROCESSES

One way of categorizing prints is by the printmaking process itself. Printing techniques that constitute art-making in primary form,⁶³ with the artist creating a composition not on paper but on another surface, such as stone, plate or block, inking it, and transferring the composition to paper, include: relief prints, intaglio prints; collagraphs, screen prints, lithographs. Many artists are now creating original works using digital tools, and then printing single or multiple Iris prints as the original output of their creative effort.

PRINT MAKING TECHNIQUES THAT CONSTITUTE ART MAKING IN ITS PRIMARY FORM

Collagraphs⁶⁴

A collagraph is a print created from a collage – that is, a compilation – of an array of materials glued together on a plate that can be metal, cardboard, hardboard, or plastic. A collagraph plate can be printed either as an intaglio plate, a relief plate, or a mixture of the two processes. Collagraphs can be combined with such other techniques as etching and with totally different media, such as screen printing, to produce a mixed media print. Collagraphy most likely originated in the nineteenth century. The assemblage efforts of such artists as Pablo Picasso, George Braque, and Juan Gris in the early twentieth century inspired subsequent novelties in printmaking that placed real objects – such as bits of cloth, silk, burlap, sand, and pieces of tin – on a plate. Collagraphs have become popular with the technological development of new materials such as acrylics, epoxy resins, polyesters, and other plastics.⁶⁵ While some artists look on the new materials as gimmicks, for others they represent endless new possibilities of flexibility.⁶⁶

Intaglio Prints⁶⁷

The term “intaglio” (from the Italian ‘intagliare’, meaning to carve or cut into) encompasses an array of print techniques that are the inverse of the relief processes described below. That is, an image is produced by inking the incised lines and depressions in a plate and then wiping the plate’s surface clean, leaving ink solely in the recessed areas. When damp paper is placed over such a plate and the plate and paper are rolled with substantial pressure through an etching press, the ink remaining in the recessed areas is transferred to the paper, producing a richly inked impression.

Intaglio processes can be divided into two broad categories: those that use acid to create an image on a plate and those that use sharp tools, needles, or power tools to produce the image. Among the best-known techniques involving acid are etching, aquatint, and embossing. The most common processes using tools include engraving, drypoint, and mezzotint.

Acid-Created Intaglio Prints

Etching

In etching, an acid-proof hard ground asphalt, beeswax, rosin, and a solvent cover a metal plate of zinc, copper, or brass. The artist then scratches lines or textures on the ground, allowing the acid to bite into the plate with sharp definition. The longer the plate remains in the acid, the deeper the lines and the textures in the metal plate become, causing them to print a darker, heavier image. The process of etching originated in the sixteenth century but began to flourish in the seventeenth century with the introduction of copper plate and improvements in its chemical processes.

Aquatint

Often combined with line etching and other methods, aquatint achieves tonal areas in an intaglio plate. First, the surface of the plate is partially covered with tiny particles of rosin that adhere when heated.

⁶³ *Id.* at 361.

⁶⁴ Lerner and Bresler, *supra* note 1, at 366.

⁶⁵ Saff and Sacilotto, *supra* note 52, at 89.

⁶⁶ *Id.*

⁶⁷ Lerner and Bresler, *supra* note 1, at 363.

The acid then bites the open areas around those particles, creating pits in the plate. The longer the plate remains in the acid, the deeper the pits and, therefore, the darker the printed tone. Examples of aquatint prints are found in the works of Spanish artist Francisco de Goya.

Embossing

A plate achieves deeply bitten areas through traditional line etching and long immersion in acid. The plate is then run through the press uninked. The recessed areas of the plate form raised areas in the print.

Tool-Created Intaglio Prints

Engraving

Engraving does not use acid. Rather, a hard steel tool called a burin is pushed into a copper or brass plate to create sharply defined lines. The wider the burin and the deeper it is pushed into the metal, the thicker the line. Tonal areas on the print are developed by engraving parallel and crosshatched lines on the plate. German artist Albrecht Durer was a master of woodcut, engraving, drypoint, and etching.

Drypoint

Unlike the sharply defined line of etching or engraving, drypoint yields a rich, rough line with soft edges. The procedure is to scratch into the plate with a sharp needle, which yields a metal burr that catches and holds the ink when the plate is wiped. Rembrandt created prints by using drypoint in combination with etching to enhance the drama of the interplay of black, white, and gray.

Mezzotint

Mezzotint is a nonacid technique that achieves tonality in a print by repeatedly pressing a curved, serrated tool over the surface of a copper plate to create thousands of tiny indentations. Once the entire plate surface is roughened, the artist uses scrapers and burnishers to shave down the raised areas to a variety of heights that, when inked and wiped, achieve tones through gray to white.

Lithographs⁶⁸

Lithography is unique in that it does not rely on the physical separation of inked and uninked areas to produce an image. Rather, the repellency of grease to water and water to grease is the basis for the lithographic image. On a piece of limestone or fine-grained metal moistened with water, an image is drawn with a greasy crayon or stick, and then is etched with a diluted acidic mixture to fix the drawing to the stone and keep the undrawn areas from receiving the ink. A print is made when a sheet of paper is placed on the inked stone and pressed against it. Masters of the technique in the nineteenth century include the Spanish artist Francisco de Goya and the French satirist Honore Daumier. Numerous great artists subsequently created lithographs, including Edouard Manet, Edgar Degas, Paul Cezanne, Pablo Picasso, Henri Matisse, and Joan Miro.

Relief Prints⁶⁹

Relief printing dates back to at least 4000 B.C., when the Sumerians created impressions in moist clay from carved reliefs of such materials as lapis lazuli and alabaster. Multiple printing became a reality in China some 1300 years ago, when examples of printing on paper and on textiles began to appear. At about the same time in Egypt, wood began to surpass clay and stone as a stamping device.

In relief prints, the image is derived from the surface of the block or plate; the areas of the surface that are not part of the image are cut away, creating the white or nonprinting areas. Usually, the artist works from a block of wood, but other materials, such as linoleum and cardboard, can be used. The relief surface can also be created from an adhesive - such as plastic, wood, liquid steel, or liquid aluminum - that is applied to a support plate and dries to a firm consistency. In all relief prints, the raised surface is covered with ink and

⁶⁸ Lerner and Bresler, *supra* note 1, at 367.

⁶⁹ *Id.* at 362.

paper is applied to that surface. Then, either the back of the paper is rubbed by hand or the paper is run through a press to produce an image.

Woodcut

Woodcuts are one of the best-known and most popular forms of relief printmaking. In the woodcut method, an image is drawn on a wood block, and then the nonimage areas are cut away with sharp tools.⁷⁰ The remaining raised areas are inked, paper is laid on the block, and then the back of the paper is rubbed to pick up the inked image.⁷¹ Variations of the relief process include wood engraving and linoleum block printing (linocut).

Wood Engraving

Wood engraving is done on the end grain of the wood, as opposed to the plank side associated with the woodcut.⁷² Where woodcuts cut away the nonimage, and the lines of the image take ink and show darkly, the opposite is true with wood engraving. Wood engraving is primarily a “white line” approach to relief printing. The graver makes a thin, fine gouge in the wood that remains white as the surface takes ink.⁷³ The image is created by a number of different tools that produce lines of various widths or engrave several parallel lines simultaneously on the block.⁷⁴

Linoleum

Linoleum is made with powdered cork, rosin, and linseed oil, with a burlap backing. Because of its relative softness and the ease with which it can be cut, it has long been popular with school children as an inexpensive and simple material for the making of relief prints.⁷⁵

Screen Prints and Serigraphs⁷⁶

Screen printing (also known as serigraphy) is one of the simplest procedures for achieving multicolor images. A screen print is produced by stretching fabric (such as silk, nylon, polyester, or organdy) over a rectangular frame, blocking out the fabric where unprinted areas will be, and then squeegeeing (a plastic or rubber blade in a handle) out or brushing a color (paint or ink) through the open mesh of the unblocked section of the stretched fabric to produce an image on paper or another surface underneath. Complex screen prints are created with multiple screens, each of which has different sections of the art work blocked out (color separations), and each of which is used with a different single color. The print-in-progress is set to dry after each screen. Different colors are passed through subsequent screens, creating richly textured multi-tone screen prints. Master artists well-known for their use of the medium include Andy Warhol with his soup-can images of 1962, Roy Lichtenstein, Eyvind Earle, and Ester Hernandez.

PRINTS THAT ARE REPRODUCTIONS OF ORIGINAL WORKS CREATED IN ANOTHER MEDIUM

Prints that are reproductions of original works in another medium produced in limited editions and signed by the artist include photomechanical reproductions and Giclée prints.

Photomechanical Reproductions⁷⁷

In prints made with photo mechanical processes, the artist uses neither a plate nor a screen to produce the image. The reproductions are printed images, usually on paper, of a preexisting two-dimensional artwork – for example, an oil painting, watercolor, collage, or a drawing. The basic procedure is to have a professional photographer photograph the preexisting image on large-sized color transparency film, which is

⁷⁰ Saff and Sacilotto, *supra* note 52, at 4.

⁷¹ *Id.*

⁷² *Id.* at 103.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 82.

⁷⁶ Lerner and Bresler, *supra* note 1, at 366.

⁷⁷ Lerner and Bresler, *supra* note 1, at 368.

then removed to a color separation laboratory and mounted into an electronic machine called a laser-scanner. The scanner reads the transparency through its color filters and reproduces the original image onto big films, which the scanner has now broken down into perhaps millions of dots of color that are arranged in rows but that, to the naked eye, bleed into smooth tonal transitions. The films are then sent to the printer's preparation shop, where they are pressed face down against a printing plate that has been coated with a light-sensitive emulsion. Then a powerful light containing ultraviolet radiation is directed over the film, causing the image of the film to be transposed onto the master plate. The master plate is then sponged off and brought to a printing press, which, under the printer's control, produces the photomechanical reproduction on paper that is automatically fed to the press. Offset press printing is an example of a photomechanical type reproduction.

Giclée Prints (A Digital Ink-jet process)

Some mystery has been attached (either by accident or intent) to the term "Giclée,"⁷⁸ frequently pronounced "zhee-clay." Giclée prints are plateless digital reproductions of original artworks, made using high-resolution digital files and specialized ink-jet printers. Photographs of original artworks are scanned using a high resolution scanner to create a digital computer file of the artwork. A Giclée print has an apparent resolution of 1800 dpi, which has a greater color range than serigraphy.⁷⁹ The digital files are worked using graphics software to fine tune the images.⁸⁰ They are then translated into a format usable by digital printers in preparation for the print files.⁸¹ The Iris (a brand name) or Iris-type printer creates images by spraying four million droplets of ink per second through each of its four nozzles.⁸² The printer sprays the tiny droplets of ink onto many types of flat media, including watercolor papers, lightweight art boards, canvas, depending on the final desired aesthetic effect.

The Misidentified Giclée or Iris Print

The terminology used to describe Iris and Giclée prints is fraught with confusion, which can pose problems for the artist or art dealer who is preparing a certificate of authenticity for such a print. In fact, "IRIS" is a brand of high resolution large format color printer, originally manufactured by IRIS Graphics of Bedford, Massachusetts. IRIS technology, which relies on "continuous-flow" ink distribution using drum type printers, is no longer prevalent and is gradually being replaced by "plotter-type" printers from Epson, HP, Canon, and others.⁸³ Nevertheless, even artists creating or selling them often refer to these digital prints as "Iris" prints whether or not an Iris-type printer is used. Giclée is derived from the French *le gicleur*, "to spray."⁸⁴ Initially synonymous with art prints made by IRIS jet printers, "today 'Giclée' has become established with traditional media artists and some photographers" and refers broadly to ink-jet printing.⁸⁵ In terms of permanence, the Giclée print, which uses the standard pigment-based inkjet inks, lasts longer than Iris prints (which rely on dye inks).⁸⁶

The key issue for the art dealer or merchant is to be certain that certificates of authenticity and advertising and promotional materials accurately disclose the process used to create the print being offered.

⁷⁸ The French word "Giclée" translates in English to "spraying ink," or "to spatter."

⁷⁹ See e.g. www.naivefineart.com/naivegiclèereproductions.html, See also www.picturethisgalleries.com/aboutgiclèe.html

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ E-mail from Harald Johnson, director of Harald Johnson Communications and author of *Mastering Digital Printing: The Photographer's and Artist's Guide to High-Quality Digital Output* (Sept. 5, 2003, 12:03 PST) (copy on file with author), although the current manufacturer of Iris-type printers disagrees. Phone interview on July 23, 2003 with Mike Terlizzi at IT&H, current manufacturer of the leading brand of Iris-type printers. See www.itnh.com/itpages/info/history.html and in a phone interview on July 23, 2003 with Mary Smith at Creo in Massachusetts.

⁸⁴ Harald Johnson, *The True Story of Giclée* <<http://www.dpandi.com/giclee/giclee.html>>. "giclée (zhee-clay) *n.* 1. a type of digital fine-art print. 2. Most often associated with reproductions; a giclée is a multiple print or exact copy of an original work of art that was created by conventional means (painting, drawing, etc.) and then reproduced digitally, typically via inkjet printing. First use in this context by Jack Duganne in 1991, Los Angeles, California."

⁸⁵ *Id.*

⁸⁶ E-mail from Harald Johnson.

Since Giclée and Iris were, at one time, used interchangeably to mean the high-resolution digital output from a particular type of digital printer, the art dealer who makes a distinction in type between Iris and Giclée must disclose the distinction. Moreover, in the event there is any risk the ink used will not survive for a long period of time, or its longevity is uncertain, the artist or art dealer preparing the certificate of authenticity should expressly disclaim any warranty of longevity.

*Authenticity and Giclée Prints; New Techniques*⁸⁷

The traditional fine art world and some artists and collectors have raised concerns about whether a Giclée or other digitally output prints are truly fine art. Certainly, a Giclée is in some way different from a traditional print such as an engraving or a lithograph. A silk screen, engraving, or a lithograph is usually designed to be a work of fine art, with a limited number of handmade impressions, even if it is based on a painting. Every stage in the creation of such prints demands the personal skill, work, and involvement of a human being.

When the Giclée process was introduced, the Giclée process began with a photograph of another artwork, and was designed to be as identical and mechanical a copy as possible. Machines, a scanner, computer and a printer, then turn that digital reproduction into a Giclée print. The machines can be run by the artist or not, and most often were not. It made little difference with regard to the final output. Photography has been the driving force behind most innovation involving refined digital print devices. Printers manufactured by Epson, HP, and Canon were developed in response to the needs of photographers.⁸⁸ The digital printing process raises the question of whether a Giclée print of a painting is different from a downloadable stock photograph of a painting, except in terms of technical resolution and color separation. Although the artist may sign and number the Giclée prints, some question whether that renders it a work of fine art.

Despite such concerns from the traditional fine art world, Giclée prints are gaining increasingly wide acceptance among artists, galleries, museums, and consumers. Many well-known artists, such as Robert Bateman, Andrew and Jamie Wyeth, Robert Rauschenburg and David Hockney are having Giclée reproductions made.⁸⁹ New techniques that constitute hybrids of Giclée's and original art making are evolving. Artists sometimes enhance a Giclée, adding color and the impression of their own hand or brush stroke after it is printed. Artists now are beginning to see computers, scanners, and printers as additional art-creating tools, as legitimate as brushes or silk screens. These artists use digital tools to create original works, integrating historical documents, photographic images, digital reproductions of their own original artwork. These digital files are then printed, and the artist often then paints on the output surface to enhance the final work. Judith F. Baca has pioneered this approach to creating magnificent large scale digital murals. Her innovations have opened opportunities to transnational collaborations among artists across the Internet. Another new innovation is a mix of Giclée and screen print processes, referred to as mixed media Giclée. In that mixed media approach, a screen print is made onto the Giclée rather than onto a blank paper, creating an effect different than when either process is used alone. These technological and methodological innovations lay to rest many concerns about the Giclée and other digital output processes. Such prints are certainly works of fine art.

Moreover, Giclée reproductions are cost effective.⁹⁰ When the screen print process is used with a few key colors pressed onto a Giclée, the final fine art print is much less expensive to produce than when multiple screens are used. For example, a limited edition screen print with a hundred colors might cost \$100,000.00 to produce. A screen print of ten colors over a Giclée would cost substantially less. When the artist "touches" the Giclée print after it is printed, that mixed work tends to sell for a higher price than the Giclée alone. Mass

⁸⁷ See <http://giclée.netfirms.com/authenticity.html>

⁸⁸ E-mail from Harald Johnson.

⁸⁹ *Id.*

⁹⁰ See www.valmoker.com/artistcorner-giclèereproductions.html

production of the image is not necessary, as one print can be ordered in Giclée reproductions.⁹¹ Because the cost of production is less, this method allows collectors to purchase prints less expensively, making limited edition works more widely available and creating a wider art market. This approach can enhance artist's and art dealer's revenues while reducing the cost of production. The value of each print may be less than the value of, for example, a hand-made lithograph, but the increased volume of sales is attractive, particularly in a depressed art market. Value can be preserved by creating limited editions, and not printing any prints beyond the edition size limit. Because the technique is so recently developed, however, it remains unknown how long the prints will survive.

Done well, Giclée prints are hard to distinguish from original artworks, particularly when they are printed on canvass. Certificates of authenticity that disclose the digital Giclée/Iris reproduction and other relevant information as required by statutes inform the consumer about the nature of what they are buying, protecting them against unscrupulous dealers.

POSTHUMOUS PRINTS

An artist may authorize his or her estate to print an edition of the artist's work after the artist's death. In such a case, the estate may apply a posthumous chop mark to each such print but should never affix the artist's signature without a qualifier; as such a work would then be considered a forgery. In California and New York, if the multiple is a "posthumous" multiple, that is, if the master was created during the life of the artist but the multiple was produced after the artist's death, that fact must be stated on the certificate of authenticity.⁹²

EDITION SIZE, SIGNING AND NUMBERING, & CHOP MARKS

EDITION SIZE

Once a master plate is produced to the artist's satisfaction, the size of the edition must be determined. Edition size depends on an array of factors, including the demand for the artist's work, the durability of the block or plate, and the time it takes to print. When an artist is relatively unknown, it is common to pull only a small number of prints; editions of twenty-five to fifty may well be practicable. When an edition of any size is handled by a dealer, the price generally rises as the edition sells out. The edition size includes any sub-editions of every size, medium, and process, unless the artist or publisher expressly reserves the right to create other editions of other sizes or with a different process. If it is stated in the certificate of authenticity that the master has not been destroyed, and that the right to create other editions is expressly reserved, other editions may be created. If it is stated that the screens or other masters have been destroyed and/or that no other editions will be created, then the issuer is held to that warranty, and may not make more prints of the same image. Misapplication of these principles, as well as the creation of large numbers of proofs outside the limited edition, has led to widespread consumer abuse, if not outright fraud.⁹³

EDITION SIGNING AND NUMBERING⁹⁴

When signing an edition of prints, the artist must first examine the prints carefully to make sure that they are satisfactory: any print accepted for signature by the artist must be free of all defects. The printer usually produces prints that exceed the agreed-on edition size by 10 to 15 percent on the reasonable assumption that not all the prints presented to the artist will be found flawless. The flawed prints should be struck through, and marked H.C. or Not for Sale, and destroyed.

The artist customarily signs and numbers a print in pencil. The inscription is generally placed under the image, with the signature on the right, the title in the middle, and the number on the left. The number

⁹¹ *Id.*

⁹² Cal. Civ. Code § 1744(a)(7) (2003); N.Y. CLS Arts & Cult. Aff. § 15.03(4)(a) (2003).

⁹³ Joshua Kaufman, "Print Disclosure Laws Aim to Prevent Abuses", Art Business News, 2002

⁹⁴ *Id.*; see also Saff and Sacilotto, *supra* note 52, at 3.

usually appears as a fraction, with the denominator giving the edition size and the numerator giving the sequential number of the print in hand. For example, the number 7/50 would mean this is the seventh print in an edition with fifty prints in it. Or, the number 1/300 would mean the first print from an edition in which no more than 300 prints were made for sale. However, if all the prints in an edition are produced at the same time, it is virtually impossible for the numerator to reflect the actual printing sequence; once the prints are dried, whether under blotter or under newsprint, they are stacked and shuffled many times before they are signed and numbered. Therefore, the numerator merely indicates a satisfactory impression in the edition.

When an artist signs and numbers a limited-edition print, the artist is affirming to the buyer that there are and can only be as many signed and numbered copies in the edition as is indicated by the denominator. Moreover, if the accompanying certificate of authenticity states that the master has been destroyed, the buyer can rely on the fact that no additional copies from that edition will ever enter the market and dilute the fair market value of that buyer's print. Any subsequent edition – where the certificate of authenticity for the first edition did not warrant that the masters were destroyed, or that no subsequent editions would be created - must show a roman numeral II before the edition number. For example, a print from a second edition from the same master would read: II 7/50. This practice is not widely accepted and tends to lower the value of all the multiples in every edition.

Two examples of edition numbering are as follows:

Edition Record:	31/100 Edition of 100, made from 26 screens 3 Printers Proofs 7 Hors Commerce
Complete Estate Edition:	110

Estate Edition Size:	200
Estate Printers Proof:	5
Estate Hors Commerce:	7
Estate Working Proof:	2
Total Estate Edition:	214
Print Number:	21/200

CHOP MARKS, TRADEMARKS, & COPYRIGHT NOTICES⁹⁵

A chop mark is a printer's, publisher's, or workshop's identification symbol commonly embossed on the lower border of a print, near the artist's signature. Although the location of the mark is always determined by the artist, chop marks are an aid in identifying the origin of a particular print and its makers, and also aid in designating authorized prints. Such a mark is on the print itself so that it cannot be separated from it over time, whereas certificates of authenticity may be lost. On occasion, when an artist is deceased, the artist's estate may be authorized to apply a posthumous chop mark to those prints permitted by the artist to be pulled after the artist's death. The chop mark can also be affixed onto the certificate as further indicia of authenticity, and this approach is gaining increasingly widespread acceptance. Some high-end ateliers have created holographic chop marks to prevent unauthorized copying of the mark onto forged multiples. A chop mark may also be registered as trademark with the U.S. Patent and Trademark Office, further reinforcing the authenticity and recognition of the source of the multiple. The artist's signature may also be registered as a trademark, enhancing the strength and range of legal remedies available to prevent fraud and forgery.

A copyright may be similarly affixed in a place that will not be covered by a mat. When an artist has aesthetic reasons for not wanting a chop or © mark to be on the front of a print, such marks may be wet

⁹⁵ Saff and Sacilotto, *supra* note 52, at 396.

stamped on the reverse. A wet stamp is a commercially made rubber stamp, usually placed along the lower edge of the print.

PROOFS⁹⁶

Proofs are pulled at various stages of the production process. Those pulled in the course of preparing the print are termed working proofs; a pre-designated number of flawless prints pulled simultaneously with the edition prints are either artist's proofs, presentation proofs, or printer's proofs. Any additional prints, flawless or otherwise, pulled simultaneously with the edition prints are called "overs" and should be destroyed. Proofs can be sold but should be labeled as proofs. It is important to be able to distinguish among the different designations of proofs. Most publishers, printers, and artists would not care to have working proofs surface for sale on the open market and should destroy such proofs when no longer needed.

ARTIST'S PROOF

A number of prints, usually equivalent to 10 percent of an edition size, are reserved to the artist. An artist's proof is pulled simultaneously with the edition but is not part of the edition, and is ordinarily labeled "A/P." Increasingly, A/P's are being sold, sometimes before the edition sells out, at a price higher than a regular edition print. The practice of selling A/P's has been used to circumvent the limitations of the initial size of the offering, an abusive practice that is combated by proper use of certificates of authenticity.⁹⁷

BON A TIRER PROOF

French for "good to pull", a bon a tirer (or "right to print") proof is the print that satisfies the artist's aesthetic and technical standards and is used by the printer as a guide against which each print in the edition is compared during the printing of the edition. It becomes the property of the master printer at the end of the run.

CANCELLATION PROOF

To preserve the integrity of the limited edition (although this method of doing so may be questionable), a plate or a block may be defaced with a scratch, hole, or chip once the edition is completed. This indicates that no further prints can be made. Any further prints pulled will bear the cancellation mark. Occasionally, such prints are pulled and sold on the open market. When a plate or a block by a famous artist is selected for such a restrike, the resultant prints can bring substantial prices.

HORS DE COMMERCE

Prints marked "H/C" or "H.C." (*hors de commerce*, French for "outside commerce"), these prints may well be "overs" and should not be sold, although they often are. An unscrupulous print curator can easily erase the penciled "H/C" notation (written where the edition number is usually placed) and write in a salable mark, such as "A/P." Any H/C prints not used as Presentation Proofs should be destroyed or defaced.

PRESENTATION PROOF

A Presentation Proof is equal in quality to those in the edition, but is reserved as a gift, and can be dedicated for a person or an institution. Presentation proofs are *Hors de Commerce* prints, intended not to be sold. A gift print that the artist intends that the recipient be able to sell should come from the regular edition, and bear regular edition numbering. A dedication can be placed on the reverse of the print in such cases.

PRINTER'S PROOF

Printer's proofs are given to the printer by the artist after the edition is completed. They may be for the master printer and/or his collaborator.

PROGRESSIVE PROOFS

⁹⁶ Definitions from both Lerner and Bresler, *supra* note 1, at 370-372, and Saff and Sacilotto, *supra* note 52, at 397.

⁹⁷ Joshua Kaufman, "Print Disclosure Laws Aim to Prevent Abuses", Art Business News, 2002.

These are a series of impressions made for a multicolor print, showing each color separately and in combination with each of the other colors.⁹⁸

RESTRIKE

A Restrike is a proof resulting from the reprinting of a plate that is not in the artist's possession or control. Unfortunately, such proofs can be of superb quality if the plates are not worn or damaged, resulting in the possible sale of illicit copies for a great deal of money.

STATE PROOFS

There may be any number of State Proofs. These involve substantial changes made before final edition is pulled, and often show major stages in the development of the image. The difference between states is sometimes so great that separate editions are pulled from individual state proofs.⁹⁹

TRIAL PROOF

A trial proof is an early working print with experimental changes in, for example, color or wiping to enable the artist or the printmaker to visualize certain effects. It is usually labeled "T/P."

A WORD ABOUT COMPLIANCE WITH PRINT DISCLOSURE LAWS

Non-compliance with state disclosure statutes concerning fine art limited edition prints, photographs, sculptures is widespread. It is likely that the widespread non-compliance with these consumer protection statutes is because the damages available to any individual plaintiff are relatively low, often being based upon the sales price of the multiple. It is also possible that many art dealers are simply inattentive to the detail required by the statutes or unaware of them. Moreover, some art dealers are financially unstable, making them an unattractive target for litigation because of the low likelihood of ever collecting. Higher profile, wealthier art dealers are a riper target for litigation. Generally, a defense of "well, the other guy's certificates don't comply either" is unlikely to prevail. Moreover, when costs and fees are added to the damages potentially available to a plaintiff, the stakes become higher. When those stakes are multiplied by many buyers, and/or by many multiples being offered for sale by the dealer, the exposure that results from noncompliance is significant. The cost and difficulty of compliance is very low. When the cost of compliance is low, and the potential exposure, while not outrageous, is significant, compliance makes good legal and business sense.

LICENSING BASICS

WHAT IS LICENSING?

Licensing is the method by which creative people authorize others to use their creative works, symbols, or brand names on products for a certain period of time in a specific geographic area, usually in exchange for fees or royalties. For example, muralists often grant licenses to filmmakers to include a mural in the background of a scene. Celebrities may license use of their likeness in a commercial or on a product. The profit resulting from licensing property is realized because of copyright law and trademark protection, as well as publicity rights which are protected under some states' laws. The creator or licensor must carefully get the rights to and disclose all third party property embodied or depicted in the work licensed.

For example, a photograph of a mural that depicts a person wearing a Mickey Mouse T-shirt involves several layers of rights:

- the photographer's copyrights in the photograph;

⁹⁸ *Id.*

⁹⁹ Saff and Sacilotto, *supra* note 52, at 397.

- ☑ the muralist's copyrights in the mural painting;
- ☑ the depicted person's publicity rights in the likeness of them; and
- ☑ Disney's trademarked character.

That photograph could not be effectively licensed to a publisher, film maker or product manufacturer unless the photographer can provide not only her own release for use of the photograph, but model and property releases from the muralist, the person wearing the shirt, and Disney. In determining property suitable for licensing, all these factors must be taken into account. The fewer rights involved in a particular work, the easier it will be to license it.

Following is a brief summary of the important rights that are often licensed to others. This is not an exhaustive summary of these areas of law.

Copyrights

The owner of the copyright in an original creative work such as a painting, photograph, musical composition, sound recording, film, or video has the exclusive right under federal copyright law (17 U.S.C. 106):

1. To reproduce the copyrighted work in copies or phonorecords;
2. To prepare derivative works based upon the copyrighted work;
3. To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
4. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Trademarks

Trademarks like company names, logos, signatures, and slogans are protected under the Lanham Act, 15 U.S.C. §1125. Trademark law protects recognized brands when they are used in commerce. The owner of a valid trademark is protected against the use of similar marks on similar goods or services if any consumer confusion as to the source of the goods or services is likely to result. In the United States, first use in commerce confers the benefit of trademark protection to the licensor even though s/he may not have used the mark and the licensee's use helps create secondary meaning for the mark.¹⁰⁰

Publicity Rights

Under the law of many states, no one may use a person's name, voice or likeness for commercial purposes without that person's consent.¹⁰¹ There are generally numerous exceptions for matters of public interest, books, and other mediums, and state law varies on the subject of whether these publicity rights survive the person's death. The import of publicity rights is that if a person's name or likeness or voice is depicted in a work of art or photography, a model or property release from the person is required in order for the artist or photographer to be able to effectively license their artwork.

Advantages of Licensing

¹⁰⁰ 15 U.S.C. § 1055; Jerome Gilson, *Trademark Protection and Practice* § 6.01[3-5] at 6-13 (1998).

¹⁰¹ See for example Cal. Civ. Code §3344 and 3344.1.

Licensing enables an artist to reach a larger potential audience and to reap additional financial rewards from a work of art. The same piece can continue to generate revenues through license fees and royalty payments to the artist, even after the original is sold. For example, muralists have licensed their murals to textbook publishers who reproduce them to illustrate the history depicted in the murals themselves. Other artists have licensed their designs for use on furniture, linens, wine, or a myriad of products.

Licensing also enables a manufacturer (licensee) to increase product sales through the use of a well-known or appealing image on products.¹⁰² In the area of arts and entertainment, licensing enables film makers to include vibrant works of art in films to set the mood or enhance the action on screen, and enables publishers to use existing works of art to illustrate text and book covers. Some licensing relies upon the notion of developing and reinforcing brand loyalty. Licensing transfers brand loyalty from one form/product to another.¹⁰³ For example, as of 2002, “Star Wars” films have generated over \$5 billion in retail sales of licensed product worldwide.¹⁰⁴ Unlike celebrities and publicity rights, art represents a more flexible property type that may be applied to a broader scope of licensing possibilities. The market flexibility of art as a property exists because there is no hard and fast indicia that determine what qualities or type of art increases retail sales in any given product category.

WHO ARE THE PARTIES INVOLVED IN A LICENSING AGREEMENT?

1. The **licensor** (creator) owns intellectual property and grants the license.
2. Often, an **agent** (appointed by the licensor to handle licensing rights/contracts) is used to negotiate the license and market the property available for license. An agent can be an individual with expertise in being an agent, an attorney, and sometimes a company, such as Corbis or Getty, which serve as photographer’s agents.
3. The **licensee** (manufacturer, publisher, filmmaker, etc.) obtains the license and creates a product, publication, film or other item that incorporates the licensed property or some part of it.

The “Worldwide Licensing Resource Directory,” published annually by the Licensing Industry Merchandisers’ Association and A4 Publications Ltd. is a comprehensive guide to licensors, agents, and licensees in the United States and around the world.

WHAT ARE SOME LICENSOR (ARTIST) ISSUES AND CONCERNS?

1. Maintaining the integrity of the property in its licensed use.
2. Securing property and model releases for all people and third party property depicted.
3. Preventing dilution of key trademarks and licensing opportunities.
4. Determining proper scope and duration of a license so as to maximize license value.
5. Obtaining the most appropriate and beneficial terms in the licensing contract.
6. Obtaining the most profitable licensing fee from the Licensee.
7. Avoiding conflicting or overlapping licenses (e.g. don’t license to two computer manufacturers in violation of limited exclusivity in that industry; don’t license art on ties to two different tie manufacturers).
8. Counterfeiting and Piracy. Establishing a policy regarding enforcement actions counterfeiting and infringing use of work.

WHAT ARE SOME LICENSEE ISSUES AND CONCERNS?

1. Different properties have different considerations regarding the degree of potential success each might have in increasing commercial sales.
2. Securing a broad enough scope of licensed rights so that the licensee does not have to go back to the licensor for additional rights later, while securing a scope limited enough to make the license affordable.

¹⁰² Holly Driscoll, Ed., *The Beginner’s Guide to Licensing*, 8, 4th Edition (2002).

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 10.

3. Counterfeiting and Piracy. The licensee must be aware of a licensor's policy on the infringing use of a property in order to protect interests of the licensee.

TYPES OF LICENSING AGREEMENTS

Agency Contract

Provides the terms between an artist and the agent designated to license the artist's creative work. Typical provisions include:

1. Identification of parties and their roles.
2. Commission for services (Normally 15% to 35%) and on what commission is paid.
3. License pricing, who receives payments and audit provisions.
4. Shipping operations and costs, and insurance costs and responsibilities.
5. Provision regarding who pays for and the extent of promotional and advertising materials.
6. Assignment of obligations.
7. Termination clause.
8. Miscellaneous provisions (e.g. applicable of law, conflict resolution clause, counterparts, integration, severance).

Art Reproductions

An agreement to license artwork for the purpose of creating multiple copies in specified or unlimited edition size(s).

Artwork for use in product line(s)

An agreement to license artwork for use by a manufacturer in the development and sale of one or more product lines subject to specific duration and geographic use.

Artwork for incorporation in audiovisual media

An agreement allowing a licensee to use artwork in an audiovisual work (film, video) subject to specific use restrictions.

ANATOMY OF A LICENSING AGREEMENT

A licensing agreement is a contract between the licensor and the licensee that defines the rights, scope, and royalties concerning the use(s) of a particular property by a manufacturer, publisher, film maker, or other end-users.¹⁰⁵ The licensee signs an agreement with the licensor (sometime with the help of an agent to include artwork or a trademark to their product, publication, film, etc.

A **non-exclusive** license enables the licensee to grant rights to use a particular property to more than one licensee, thus allowing each to use the property in separate markets and product areas. Some licenses allow for exclusivity in one product area, but no or nonexclusive use in others. An **exclusive** license grants those rights to one and only one user and to none others, and even the artist cannot use the licensed art for self-promotional purposes unless that right is specifically reserved.

The licensee agrees to pay licensor a flat fee (in advance or in installments) for the licensed use and/or a royalty rate based on the sales of that product. The rate depends upon the product, its sales value and volume. A standard exclusive art licensing agreement for use of art on a product line is typically effective for

¹⁰⁵ *Id.* at 11.

2-3 years¹⁰⁶, and in some cases as short as six months to a year. A nonexclusive license to use art in a film may be much longer, and the initial fee and royalty generally include other uses such as the film's release on video, DVD, and pay-per-view. The standard royalty rate (paid out of net sales by Licensee to Licensor) for art licenses ranges from 5%-8%.¹⁰⁷ Flat fees vary significantly depending on the use and medium.¹⁰⁸

Agreement Provisions

1. Describe the nature/medium of the product and its use of the property.
For example:
 - Film - (feature or independent), television, and video.
 - Books, catalogues, or magazines
 - Software, CD-ROMs or CDs
 - Advertising campaigns
 - Merchandise or clothing
 - Web design
 - Describe any online presence involving the product and the property.
2. Specify any potential future uses.
3. Specify the geographic restrictions on the use of the property.
4. Specify the duration of the license in time.
5. State whether the agreement is exclusive or non-exclusive.
6. State whether the entire work or a part of the work will be used.
7. Describe the type of organization or entity using the property. Is it a commercial enterprise or a non-profit organization?
8. Determine the royalties and/or guaranteed flat license fee structure according to guidelines such as:
 - What are the licensee's gross revenues (if any) from the use/product expected to be?
 - Where will the work be used?
 - What is the scope of the rights licensed?
 - Industry standards and pricing guidelines.¹⁰⁹
9. Determine the merchandising structure: How many copies of the product will be manufactured?
10. Specify the shipping operations and the insurance costs and responsibilities.
11. Describe the potential promotional and advertising uses of the property.
12. Where appropriate (e.g. in film), determine whether credit shall be given to the licensor.
13. Provide "style guide" or quality control measures that must be met as a contractual obligation.
14. Provide for the right to audit the licensee's financial records relevant to the license agreement.
15. Include an indemnity clause that will indemnify the licensor for any liability against the work and its use.
16. Provide a termination clause detailing grounds for terminating the agreement and be certain that the obligation to pay royalties survives termination.
17. Describe the dispute resolution process in the event of a conflict between the parties.

LICENSING IN GLOBAL MARKETS

There are a number of additional legal and cultural considerations involved when the licensor looks to license property in markets outside the United States. In the global context, legal issues are not limited to copyright law as covered by the Berne Convention. The provisions of a licensing agreement may also be

¹⁰⁶ *Id.* at 72.

¹⁰⁷ *Id.* See also Gregory J. Battersby and Charles W. Grimes, *Licensing Royalty Rates*, (Aspen Law and Business, 2004) an annual single-volume reference to product categories and the royalty rate range for licensed properties in each product category.

¹⁰⁸ See for example Patricia McKiernan, Ed. *Graphic Artists Guild Handbook: Pricing and Ethical Guidelines*, 11th Edition, (2003).

¹⁰⁹ *Id.*

influenced by foreign laws concerning antitrust, technology export, and tax laws.¹¹⁰ In the U.S., the Justice Department's Guidelines on International Operations and Licensing of Intellectual Property apply antitrust statutes codified in the Sherman Act and the Federal Trade Commission Act to licensing outside the United States.¹¹¹ The laws regarding the export of technology may also affect the international licensor involved in technology transfer.¹¹² Technology export laws are especially relevant with regard to the current state of heightened security and transactions involving foreign nationals working for U.S. companies abroad.

International or "cultural" markets are highly diversified and use various modes of marketing and distribution and require different degrees of investment.¹¹³ Marketing strategies and the rate of market growth are also factors that will affect the type of agreement that is negotiated. Economic infrastructures such as the way retailers acquire licensed products may also affect the form of the agreement and the overall licensing strategy. Moreover, the size and consumer power of certain audiences may change from one country to the next. Perhaps most importantly, international licensing is also driven by cultural and linguistic issues and their affect on how art is received and its power to increase sales. Finally, the issue of counterfeiting and piracy remains problematic in certain foreign markets. Enforcement of licensing protections and its effect on illegal exploitation of licensed products varies from one country to the next.¹¹⁴

ART LICENSING SPECIFICALLY

"Art is, without doubt, one of the fastest growing sectors of the licensing industry. Traditional fine art, contemporary computer graphics, three-dimensional designs, theme-specific art, native art and many more individual categories form the backbone of the **\$12 billion** art licensing business. Manufacturers and retailers, wary of the risks involved in entertainment licensing, are increasingly turning to art and design properties."

- Art Buyer Magazine, A4 Publications Ltd.¹¹⁵

LICENSING REVENUE SHARE

Artwork is always subject to copyright protection and may also be subject to trademark protection where a particular design or illustration has become associated with a particular product. As the largest category of the licensing industry, trademarks and brands constitute 25 % of licensing sales; artwork, as a specific class of property, constitutes 9 %, and general entertainment and character properties comprise 20 % of total sales.¹¹⁶ In 2002, the licensing industry had retail sales of approximately \$71.5 billion.¹¹⁷ Thus, there is considerable potential for profit from retail sales involving trademarks, brands, and art licensing.

Trademark licensing offers licensors "enhanced brand awareness, increased trademark protection, and a new revenue stream."¹¹⁸ Licensees benefit from the instant consumer recognition that a trademark confers upon their product.¹¹⁹ Statistics from the U.S. Patent and Trademark Office show that for the 2003 fiscal year,

¹¹⁰ See the online paper "International Licensing – Structuring Deals Worldwide" at:

<http://www.ladas.com/IPProperty/Licensing/InternationalIPLicensing/>

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, World Intellectual Property Organization website: <http://www.wipo.int/copyright/en/index.html>.

¹¹⁴ Nicolas S. Gikas, *International Licensing of Intellectual Property: The Promise and the Peril*, 1 J. TECH. L. & POL'Y 6, 1, 44-50 (1996).

¹¹⁵ <http://www.a4publications.com/>

¹¹⁶ McKiernan, *supra* note 108, at 106..

¹¹⁷ *Id.*

¹¹⁸ Seth M. Siegel & Marla Gross, *Overview -- The Business and Legal Fundamentals of Licensing*, Understanding the Intellectual Property License, Vol. 496, 37 (1997).

¹¹⁹ Anne S. Jordan, *The Business and Legal Fundamentals of Licensing*, Understanding the Intellectual Property License, Vol. 496, 651 (1997).

“a record number of trademarks were registered” with the office receiving a total of “218,596 trademark applications, including 267,218 classes for registration.”¹²⁰

WHY IS ART LICENSING DESIRABLE FOR THE LICENSEE OR MANUFACTURER?

Artwork enables and expands property mixes. As an original source for a property, artwork may be combined with other property areas such as: apparel, accessories, automotive, books, computers, DVDs, videos, electronics, film, food/snacks/beverages, gifts/collectibles, beauty/cosmetics, health/fitness, jewelry, sporting goods, stationary, toys, travel gear.

Artwork allows targeting of niche markets by providing images and forms tailored to a specific audience. In this context, licensing artwork provides one of the most strategic methods of product application. At the heart of this process is the capacity for artwork to appeal to the niche market in a direct and immediate manner. Because artwork holds considerable potential for diversity in licensing, the licensor should explore all the possible product lines that may be reached by the property.

Licensing art is not subject to many of the rules and regulations that can apply to other property areas. For example, licenses involving athletic endorsements must comply with either amateur or professional sports regulations imposed by their organization's bylaws.¹²¹ Such licenses may also fall under group licensing programs and collective bargaining requirements such as those administered by major league players associations.¹²² In the case of sports endorsements, certain product areas such as tobacco and alcohol may not be endorsed.¹²³

PREPARATION AND IMPLEMENTATION IN THE LICENSING PROCESS

Preparation

1. Learn about the licensing process from relevant industry publications, other licensors and licensees, and from trade organizations and industry events.
2. Establish an identity that will serve a specific market niche. Prepare to respond to questions regarding the application of the property to product lines.
3. Licensing is a marketing function, position the property in a way that is consistent with what the market is buying – understand what value the property has to offer the market segment is being targeted.
4. Secure legal protection for the property prior to entering into any negotiation. Register artwork with the Copyright Office or trademark any potential trade names with the United States Patent and Trademark Office.

Implementation of a licensing program

1. Decide whether the scope of the licensing project will require an agent.
2. Through studying the niche market for the property, target specific prospective licensor manufacturers or industries.
3. Be specific in compliance with licensing industry standards when drafting the licensing agreement:
 - Be specific and detailed in offering property descriptions of specific works or collections of works.
 - Be specific in listing product types intended for the licensed property.
 - Secure a reasonable guarantee (i.e. the minimum royalty payment) based on consultations with the licensee regarding projected sales.
 - Secure an advance paid against future royalty revenues.

¹²⁰ http://www.uspto.gov/web/offices/com/annual/2003/040202_trademarkperf.html

¹²¹ Pamela R. Lester, *Marketing the Athlete: Endorsement Contracts*, A.B.A.-A.L.I. ENT., ARTS, SPORTS LAW § 23.01 § 23.03 (2001).

¹²² *Id.* at § 23.03(3).

¹²³ *Id.* at § 23.03(4).

- Be specific in negotiating and establishing the geographic scope of the license agreement.
- Establish which license channels (distribution venues) the licensee has in place.

WEB RESOURCES: WE DO NOT ENDORSE ANY PRIVATE COMPANIES CITED HERE, JUST SUGGEST THEM AS USEFUL RESOURCES.

Glossary of licensing terms

<http://www.beanstalk.com/licensing/licensing101/glossary.html#glossary>

Investigating the copyright status of a work of visual art

If there is no discernable copyright notice, then a search using the LOCIS (Library of Congress Information System) database on the Copyright Office website is useful for fast and advanced searches. A detailed explanation of how to do that can be found at: <http://www.copyright.gov/circs/circ22.pdf>

Alternatively, a request to determine the copyright status of a work may be filed with:

Library of Congress
 Copyright Office
 Reference and Bibliography Section, LM-451
 101 Independence Avenue, S.E.
 Washington, D.C. 20559-6000
 Phone: (202) 707-6850
 Fax: (202) 252-3485

See <http://www.copyright.gov/circs/circ22.pdf> for details regarding what information the office requires in order to conduct their search.

“Art Resource” is an online service that specifically acts as a clearinghouse for *works of visual art*. Art Resource maintains a large art stock archive and employs a staff of art historians who will conduct searches upon request. Art Resource is online at: <http://www.artres.com/c/htm/Home.aspx>

The “Copyright Clearinghouse” is an online resource that licenses *text* reproduction and distribution in print and electronic media. Copyright Clearinghouse manages almost 2 million works and handles the rights for thousands of authors and newspapers. Find it at: <https://www.copyright.com/default.asp>

Investigating whether a mark is a registered trademark

Go to the United States Patent and Trademark Office website and use their search engine:

<http://www.uspto.gov/main/trademarks.htm> Examples of Licensors (from Worldwide Licensing Resource Directory 2000 Lima/A4 Publications)

A) *Artists Rights Society*

<http://www.arsny.com/index.html>

Artists Rights Society is a copyright, licensing, and monitoring organization for visual artists in the United States. Founded in 1986, ARS represents the intellectual property rights interests of over 30,000 visual artists and estates of visual artists from around the world. ARS provides services for its own members as well as those of [CISAC](#) (Confédération Internationale des Sociétés d’Auteurs et Compositeurs), a French organization that oversees international copyright collecting societies in all media including the visual arts.

B) *Corbis*

A primary licensor of photography, as well as some illustration and art, for personal, editorial, and commercial use. www.corbis.com

C) The iSpot

The iSpot is becoming widely recognized as the world's premier illustration Internet site, where people can license stock and other illustrations. www.theispot.com

Examples of licensee directories with listings of manufacturers and product areas

A) Advanstar

<http://www.advanstarlists.com/advanstarlists/>

Advanstar is a source for mail, email, and telemarketing lists, not a source of art. Advanstar specializes in specific groups of industries and professions.

B) License Magazine

<http://www.licensemag.com/licensemag/>

License Magazine is a journal providing licensee lists and industry information. License Magazine is the journal for the trade conference Licensing 2004 International.

C) Licensing Industry Merchandiser's Association (LIMA)

LIMA has a great introduction to licensing, and reference materials about licensees, licensors, and agents. LIMA also has scheduled dates of upcoming licensing industry trade shows. www.licensing.org

Pricing and fee information

A) Patricia McKiernan, Ed. *Graphic Artists Guild Handbook: Pricing and Ethical Guidelines*, 11th Edition, (2003).

Offers information on fees, salaries, trade practices, and detailed pricing surveys.

B) Gregory J. Battersby and Charles W. Grimes, *Licensing Royalty Rates*, (Aspen Law and Business, 2004). Reference guide to product categories and the royalty rate range for licensed properties in each category.

THE LICENSING PROCESS: ART, AGENTS, AND THE LICENSEE

As noted earlier, art licensing provides access to a broad range of markets and product categories. Not limited to manufacturing, art licensing is a major part of the advertising industry in television, print and online contexts; art also plays an important role in institutional annual reports, corporate presentations and publications. Indeed, artwork frequently appears as a promotional component and is readily transferable from one media to another. Consequently, the broad range of licensing issues and possibilities presents increasingly complex licensing challenges to the licensor or property owner. The potential artist licensor, as the creative source of artwork or other properties, may seek licensing opportunities, but lacks the time, resources, or know-how to handle the various aspects of the licensing project themselves. In such cases, the services of an agent are invaluable to negotiating a fair and profitable licensing agreement. Many agents specialize in particular product areas or property types and have often have access to a network of potential licensees.

Stock photo agencies such as Corbis, Veer, and Getty Images are three of the primary providers of visual image properties for both commercial and non-commercial needs. Corbis licenses primarily photographic images for use in all media for educational and entertainment purposes, product promotion, and brand support.¹²⁴ Getty Images provides photography and artwork to communications professionals such as ad

¹²⁴ See the Corbis website at: <http://www.corbis.com/corporate/overview/overview.asp>

agencies, newspapers, magazines and web designers. Getty enables users to gain access to a large database that is divided into “rights-managed” and “royalty-free” image categories.¹²⁵ Both Corbis and Getty Images allow users to browse and obtain an image for their specific needs online. The immediacy and ease by which licensees can access artwork through the Internet suggests that, in an era of digital communications, licensing artwork is especially amenable to the digital format and global marketplace.

PRELIMINARY RESEARCH AND DEVELOPMENT WORK¹²⁶

The licensee or agent:

1. Determines the property’s strengths and weaknesses, and defines a target market (to compare the new property with others already in the market).
2. Acquires knowledge of relevant manufacturers and retail buyers.
3. Advises the licensor on product development to make it sellable.
4. Works with the licensor to develop a marketing plan for the product.
5. Helps establish and ensure proper legal protection is in place regarding copyright or trademark registration.
6. Targets preliminary and secondary product areas for the property (E.g. Children’s market – toys, apparel).
7. Finds key manufacturers and licensees within each product area.
8. Ascertains the manufacturers’/licensees’ production and distribution capabilities, business reputation, etc.

SELLING THE PROPERTY¹²⁷

The licensee or agent:

1. Helps coordinate publicity for the product (under appropriate licensing circumstances).
2. Ascertains how the manufacturer’s plan fits in with licensor’s plan (where there is interest in property).
3. Works with a lawyer to draft a licensing agreement (contract).
4. Establishes production guidelines regarding the property – Prepares a ‘style guide’ for the licensee according to the licensor’s plan for the property.
5. Ensures that the manufacturer’s product line and packaging comply with the licensee’s ‘style guide.’
6. Helps establish an anti-infringement policy for presentation to the licensor.
7. Handles the royalties statements and retail sales income obtained by the licensor.

HOW TO FIND AN AGENT

Consult a Licensing Directory

1. The EPM Licensing Business Handbook <http://www.epmcom.com/html/licensing.html>
2. The LIMA Resource Directory (Licensing Industry Merchandiser’s Association) <http://www.licensing.org/>.
3. The Worldwide Licensing Directory Published by A4 Publications Ltd.: <http://www.a4publications.com>

Consult Industry/Trade Magazines

1. A4 Publications: Publishers of “Art Buyer” a bi-annual magazine devoted to art licensing.
2. The Licensing Journal by *Gregory J. Battersby* Editor, *Charles W. Grimes* Editor – Aspen Publishers – 10 issues per year.

¹²⁵ See the Getty Images website at: <http://www.corbis.com/corporate/overview/overview.asp>

¹²⁶ Driscoll, *supra* note 103, at 13-15.

¹²⁷ *Id.*

3. The Licensing Letter – A bi-monthly periodical published by EPM Communications Inc.

Speak to property owners who hold similar types of properties

1. Establish whether the property is a primary one in a small business or one of many in a large business.
2. Learn which agents perform best with specific types of properties or specialized product areas.

Speak to manufacturers and retailers in the product area(s) of interest

1. By attending trade shows, industry conferences, or simply contacting and speaking with product manufacturers and retailers, a licensor can learn which agents and licensees are appropriate partners for the development and use of their particular property.
2. Speaking to manufacturers and retailers will also give the potential licensor a better understanding of the needs and customary business practice that governs their targeted product area(s).

Brooke Oliver is a nationally recognized art and intellectual property lawyer based in San Francisco, California, representing artists, activists, and entrepreneurs. Please see www.50Balmy.com.