

Art Consignment

HB 2708

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From
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Bill Approved by Oregon Law Commission
at the Meeting November 29, 2010

I. Introductory Statement

This proposed bill modifies provisions in ORS 359.205 to ORS 359.250, regarding rights, duties, and remedies associated with the consignment of art. The Oregon Law Commission is established to conduct a continuous substantive law revision program, which includes recommending corrections to defects in the law. ORS 173.315(1). House Bill 2708 serves to correct three identified issues, as well as bring the language into conformity with Legislative Counsel's Form and Style Manual for Legislative Measures. First, the Commission seeks to address an issue regarding creditors of consignees so as to properly protect (but not overprotect) the rights of those who consign artwork. Second, the Commission seeks to correct inconsistent and confusing use of the terms "artist" and "consignor" throughout the statute. Third, the Commission seeks to address an issue of federal preemption as it relates to an artist's public display rights.

II. History of the Project

Commissioner Dom Vetri, Professor Emeritus at University of Oregon Law School, noticed a potential mistake in the Oregon law while reviewing a reported case out of New York, *Zucker v. Hirschl & Adler Galleries, Inc.*, 170 Misc.2d 426, 648 N.Y.S.2d 521 (1996). Commissioner Vetri contacted Wendy Johnson, General Counsel for the Oregon Law Commission. Wendy Johnson in consultation with Commissioner Vetri and Professor Vincent Chiappetta of Willamette University College of Law addressed the issues within the statute and drafted revising language, in consultation with Legislative Counsel. The proposed language was then submitted to, and approved by, the Oregon Law Commission on November 29, 2010.

III. Statement of the Problem

Issue of Creditors:

In *Zucker v. Hirschl & Adler Galleries, Inc.*, 170 Misc.2d 426 (1996), the New York court interpreted New York's art law statutes, but in doing so, also reviewed the law of other states. The opinion indicated that of the twenty-two other states that have statutes designed to protect an artist's consigned work from creditors' claims, twenty-one specifically restricted the scope of that protection to guard against claims of the consignee's or art dealer's creditors. With respect to the one state, Oregon, whose statute appears to protect an artist's works against the artist's own creditors, the New York opinion noted that it appears that the statute may suffer from a clerical error. *Id.* As currently written ORS 359.210(b) reads "the work of fine art, or the artist's portions of the proceeds from the sale of such work, shall not be subject to the claims of a creditor or consignee." This language leads to the unintended consequence that art on

consignment is immune from both claims by a creditor against an artist and claims by the consignee against an artist.

Inconsistency in Terms:

The use of the term “artist” and “consignor” are used interchangeably throughout the art consignment statute series. This causes confusion when attempting to determine the application of the statute. The inconsistency in terms also causes potential issues because “artists” are not the only individuals who may enter into an art consignment agreement. Due to these inconsistencies, certain provisions do not extend the same protections to “consignors” as are enjoyed by “artists.” Thus, throughout ORS 359.210 to 359.255 the term “artist” should be replaced with the proffered term of “consignor.”

In addition, the term “consignor” is mistakenly used in ORS 359.210(3), where the correct term is “consignee.” ORS 359.210(2) creates a duty owed by the “consignee” to the “consignor.” The following subsection, ORS 359.210(3), allows a remedy for an “artist” against a “consignor” if the “consignor” breaches the duty specified in subsection (2). This is clear error. The purpose of ORS 359.210(3) is to allow a “consignor” a remedy against the “consignee”.

Preemption:

In working to revise the series of art statutes, Commissioner Vetri also discovered that ORS 359.220(2) is superfluous because it is preempted by the Copyright Act of 1976 and its amendments. This provision of the ORS addresses the rights of an artist to be credited as the artist of a work of fine art when it is on display. This provision is problematic because all legal or equitable rights that are equivalent to any of the rights within the general scope of copyright are governed exclusively by federal copyright law. 17 U.S.C § 301(a) (1976).

IV. Objective of the Proposal (Section Analysis)

Section 1-8: (Term “artist” replaced by “Consignor”)

ORS 359.200 to 359.255 sets out rights, duties, and remedies with regards to art consignment. However, as currently written, these rights, duties and remedies apply only between an artist and the consignee. Throughout this bill the term “artist” is replaced by the term “consignor.” When solely using the term “artist,” the statutes only apply to the creator of a work of fine art or, if the artist is deceased, the artist’s personal representative, heirs or legatees. ORS 359.200(2). Alternatively, using the term “consignor” includes an artist or any person who delivers a work of fine art to an art dealer for the purpose of sale or exhibition, or both, to the public on a commission or fee or other basis of compensation. ORS 359.200(5). The term “consignor” is the better term as it appropriately includes an “artist” as well as other individuals who may typically enter into an art consignment agreement.

Section 1:

The only substantive changes recommended to ORS 359.205 can be found in section 1(1) of this bill. The bill recommends replacing the phrase “work of the artist’s own creation” with the term “fine art”. The phrase “artist’s own creation” does not provide sufficient insight into what may or may not be covered by this statute. Instead, referencing the term “fine art,” as used in the same series, will provide a clear definition in the statute and remove any ambiguity as to the scope of the art consignment statute series.¹

Section 2:

ORS 359.210 presently switches back and forth between the term “artist” and “consignor.” In addition, subsection (1) of the provision erroneously states that when fine art is consigned, the fine art itself or the artist’s proceeds from its sale are not subject to the claims of a creditor **or** consignor. The language of the bill would fix both problems. Specifically, the bill changes the provision to mean that the fine art on consignment or the consignor’s proceeds from its sale would not be subject to claims of creditor **of the** consignee.

Subsection (3) seeks to clarify other confusing language. The language addresses a consignee’s failure to properly record sales information and provide the information to an artist as required by (2). The proposed amendments clarify that the injunction would order the consignee to disclose the information to a consignor, rather than provide an injunction to prohibit the conduct of failing to disclose.

Section 3:

This section of the bill repeals ORS 359.220(2). This section as currently written addresses issues which are covered by federal copyright law which makes any inclusion of the current language unnecessary. The public display right of an artist is one of the exclusive rights under the Copyright Act of 1976. 17 U.S.C §106(5). The prefatory language of ORS 359.220(2), authorizing an art dealer to display a work publicly under certain conditions, is beyond the state's

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359.200 Definitions for ORS 359.200 to 359.255

(6) “Fine art” means:

(a) An original work of visual art such as a painting, sculpture, drawing, mosaic or photograph;

(b) A work of calligraphy;

(c) A work of original graphic art such as an etching, lithograph, offset print, silk screen or other work of similar nature;

(d) A craft work in materials including but not limited to clay, textile, fiber, wood, metal, plastic, glass or similar materials; or

(e) A work in mixed media such as a collage or any combination of the art media described in this subsection. [1981 c.410 §1; 1985 c.830 §1]

power. State law in this area is preempted where the state law either purports to protect the same rights granted by federal copyright or protects the same subject matter as federal copyright law. 17 U.S.C § 301(a).

Section 4-8:

These sections do not contain any substantive modifications. Any additions or deletions are a result of previously-mentioned changes to the use of the terms “artist” and “consignor”, as well as modification to comply with Legislative Counsel’s Form and Style Manual.

Section 9:

Section 9 is an emergency clause section which will allow the new bill to go into effect upon passage. Because of the unintended consequences of these statutes as currently written it is important to retain an emergency clause rather than wait until January 2012 as an effective date.

V. Conclusion

HB 2708 should be adopted in order to clarify and improve the law surrounding art consignment. After consultation with professors in the area of Art Law and Copyright Law, the Oregon Law Commission recommends this bill to correct errors in existing statutes, while at the same time revising the language to alleviate foreseeable problems that could arise under the statutes as currently written. The proposed language serves to address and correct the three issues that were raised in review of these statutes. First, the bill corrects the error as to the rights of creditors of parties in an art consignment agreement. Second, this bill makes uniform the use of the term “consignor” to make an unequivocal statement as to who may enjoy the rights, duties, and remedies under an art consignment agreement. Finally, this bill repeals provisions preempted by federal law.