

BRONZE SCULPTURES: CASTING AROUND FOR PROTECTION

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I. INTRODUCTION

Since the fine art market is big business,¹ it is not surprising that it is riddled with many forms of questionable practices.² Recognizing the potential for great profits, unethical individuals have been cashing in on the demand for fine art. Bronze sculpture is an important art form which is often produced in multiple editions, thus providing an opportunity for the amoral to produce more pieces than the edition size indicates.³ The unauthorized copies may be created by foundries, artists, dealers, or collectors.⁴

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¹ The scope of the art business may be gleaned from the recent record sale of J.M.W. Turner's painting *Seascape: Folkestone* for \$10,023,200, the highest price ever paid for any painting by any artist at auction. R.W. Apple, *Turner Brings \$10 Million*, N.Y. Times, July 6, 1984, at C22, col. 1. These records are broken quite frequently and may even have been broken by the date of this publication. It is estimated that in New York alone, the volume of art sales reaches \$500 million per year and that the price of art, in general, has multiplied two hundred times since 1950. Comment, *Current Practices and Problems in Combating Illegality in the Art Market*, 12 SETON HALL L. REV. 506 (1982). See also Reif, *Auctions*, N.Y. Times, July 27, 1984, at C17, col. 4 (Sotheby's sales rise to \$548 million a year).

² Forgeries comprise up to ten percent of total art sales. DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973 (1976) [hereinafter cited as DuBoff, *Artful Con*]; see also L. DUBOFF, *THE DESKBOOK OF ART LAW* 385 (1977 & Supp. 1984) [hereinafter cited as DUBOFF, *DESKBOOK*]; Comment, *supra* note 1, at 507; Note, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 STAN. L. REV. 930 (1972).

³ See *infra* notes 11-18 and accompanying text.

⁴ See Woodcock, *Western Art in Bronze, Its Artistry and Its Controversy*, Gateway Heritage, 4 Quarterly Journal of the Missouri Historical Society 2, Fall 1983, at 3, 6; see also Trustman, *Abuses in the Reproduction of Sculpture*, 80 ARTnews 84, 85, (Summer 1981). The pervasiveness of the problem prompted the board of directors of the College Art Association in 1974 to issue a "Statement on Standards for Sculptural Reproductions and Preventative Measures to Combat Unethical Casting in Bronze." In explaining the problem, the board stated:

Dubious practices have been going on since before this century, and while we

In this Article, the various laws available to protect bronze sculpture artists, collectors, and dealers will be presented. Applicable legislation, ranging from trademark⁵ to copyright⁶ to consumer protection,⁷ as well as the common law action for fraud,⁸ will be reviewed to determine the present limits of available protection in the bronze sculpture market. Suggestions will be made on how to fill the gaps in order to afford complete protection to artists, collectors, and dealers. In addition, a draft federal bill is presented which, if enacted, would fill the legal void in the nation's bronze sculpture market.

II. THE PROBLEM AND ITS SCOPE

The art of bronze casting has been performed for thousands of years.⁹ While scientists have only come to fully understand the relationship between alloys and atomic structure in the last fifty years, ancient metallurgists discovered that a durable and hard alloy, called bronze, could be produced by melting two soft metals—copper and tin.¹⁰

Bronze sculpture reproductions can be made in a number of ways. Most reproductions are made from models created by an artist or from existing bronze sculptures.¹¹ The quality of repro-

come late to the problem, indications are that it will get worse if actions are not taken to inhibit, if not prevent, its continuation. The demand for casts of a sculpture by important artists, living and dead, far exceeds the supply, and has multiplied dramatically in recent years. This has led to increased recasting or unauthorized new casting of works.

Board of Directors College Art Assn. News, *A Statement on Standards for Sculptural Reproduction and Preventative Measures to Combat Unethical Casting in Bronze* (Apr. 27, 1974), reprinted in 34 ART J. 44 (1974).

⁵ See *infra* notes 32–109 and accompanying text.

⁶ See *infra* notes 111–91 and accompanying text.

⁷ See *infra* notes 208–45 and accompanying text.

⁸ See *infra* notes 193–207 and accompanying text.

⁹ It is said that the working of bronze reached its finest expression in China, but that it came to China almost certainly from outside the Middle East, where bronze was discovered about 3800 B.C. J. BRONOWSKI, *THE ASCENT OF MAN* 126 (1973); see also C. SMITH, *A HISTORY OF METALLOGRAPHY* (1960). But see DUBOFF, *DESKBOOK*, *supra* note 2, at 97, indicating that there is some evidence that the Bronze Age may have begun instead in Thailand, possibly predating the Middle Eastern period.

¹⁰ The proportions of tin to copper in bronze may range from five to twenty percent; at that proportion bronze is almost three times as hard as copper. J. MARTIN, *ELEMENTARY SCIENCE OF METALS* (1969).

¹¹ Bronzes are made by several different techniques. One technique is the sand casting method, in which the foundry worker presses the artist's model into a flask containing moist sand. This process is repeated once for each side. An armature of fine sand is then formed into a negative mold, containing hollow pipes to vent the gas and air during the pouring process and rods to support the casting while it cools. The two flasks are then clamped together, and the molten bronze is poured into a hole at the top of the mold to form the casting.

Another technique is the lost wax process. The artist's plaster model is first covered

ductions can vary dramatically depending on the piece to be reproduced, the process used, and the expertise of the foundry. Careless finishing, the use of inferior materials, and an overabundance of reproductions can damage both the artist's reputation and his economic interests. Consumers may be duped into paying for something that they are not receiving,¹² and owners of previously authorized copies may discover that the value of their work has been adversely affected. Since the price of bronze sculptures can range from hundreds to tens of thousands of dollars and more, the stakes are high.

An artist may choose to produce an edition of bronze sculptures rather than a solitary sculpture for a number of economic and aesthetic reasons. It makes economic sense to produce an edition of bronzes in light of the tremendous amount of time required to create a unique piece and the comparative ease of multiplying that result through the foundry process. An almost unlimited number of copies can be made from a mold taken from an artist's original model.¹³ An edition of bronze sculptures also increases the public's ability to view and enjoy an artist's work, thus fulfilling an aesthetic objective of the artist.

Nevertheless, sculptors frequently limit the size of the edition to keep the supply down and the price and quality up. Aristide Maillol, for example, was extremely particular about the casting and finishing of his bronzes. He limited his editions to six bronzes for each of his original plaster models. For an edition of twelve, he would create two plasters and have six sculptures cast by the lost wax process and six by the sand cast process.¹⁴ Unfortunately, at the beginning of his career, the artist sold a number

with a thin coating of liquid gelatin; when the gelatin cools, it is lifted from the model, creating a finely detailed negative image of the sculpture. Melted wax is then applied to the inside of the gelatin negative and the gelatin is removed. After the artist corrects or refines the wax form, the wax model is fitted with an armature and vents, covered with an investment mold and clamped with flasks. The flasks are then heated so that the wax melts and runs out of a hole in the bottom of the flask. Next, the hole is closed and molten bronze is poured into the space formerly occupied by the wax. Unlike sand casting, the lost wax process enables the foundry to achieve greater detail and to use the same mold more than once.

Once the piece is cooled and removed from the flask, the object barely resembles the finished piece; some of the most important work remains to be done. Supporting rods, called runners and risers, are sawed off. If the piece has been cast in sections, these are carefully welded together. Extensive grinding and polishing is done, and surface flaws may be drilled out, plugged with a rod of metal, and then carved to the correct shape. The piece is then finished by polishing or by applying the patina, or surface coloring, often by the artist himself.

¹² See Trustman, *supra* note 4, at 87; DuBOFF, *DESKBOOK*, *supra* note 2, at 394.

¹³ See *supra* note 11.

¹⁴ See *id.* for a description of these two methods of bronze casting.

of models to Ambroise Vollard, who recast very large editions using the same plasters until they were worn out. The quality of the reproductions suffered. Maillol was deeply distressed in his later years by these inferior castings.¹⁵

Mass or unauthorized production can also have an effect on value. The number of castings, like the size of a limited edition of prints, is often determinative of value.¹⁶ Once the number of pieces in an edition is disclosed and those pieces and artist's proofs¹⁷ are finished, ethical artists produce no more. The molds traditionally are broken. Unethical artists, however, may not stop with the number represented.¹⁸

Similarly, individuals other than the artists may gain access to artists' molds or models and produce unauthorized castings. When Remington's widow died in 1918, her will provided that all casting of Remington bronzes, with certain exceptions, was to stop and the molds were to be broken. It is believed, however, that the foundry cast a large number of bronzes before the molds were actually destroyed.¹⁹

Unauthorized casting is not limited to those close enough to the artist or his heirs to gain access to an artist's mold or models. An unscrupulous collector may obtain one of the pieces of an edition, produce an unauthorized mold, and commence mass production. Copies made from existing bronzes are called surmoulages. These copies are noticeably different in size and lack some of the detail of sculptures made from an artist's terra

¹⁵ Trustman, *supra* note 4, at 90.

¹⁶ S. HODES, WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW 113-14 (1974).

¹⁷ Although there is presently no universal rule on what the size of an edition should be, the U.S. customs laws have had a convention for some time. Stein, *National Sculpture Societies 48th Annual Exhibition, Equitable Gallery, 1981*, NAT'L SCULPTURE REV. 9 (Summer, 1981). Paragraph 1807 of the Tariff Act of 1930 had provided that the original and not more than two replicas or reproductions were considered free fine art for customs purposes. In *Gregory v. United States*, 32 Cust. Ct. 228 (1954), it was held that only the first two reproductions or replicas in an edition would satisfy this rule. Subsequently in 1962, the customs laws were amended and the number was increased to 10. Tariff Classification Act of 1962, Pub. L. 87-456, 76 Stat. 72 (1962). It appears that this number was selected because Dorothy H. Dudley, then Register of the Museum of Modern Art and Chairman of the American Association of Museums' Committee on Customs, testified that it was customary to make no more than 10 replicas before the mold was destroyed. *Derenberg & Baum, Congress Rehabilitates Modern Art*, 34 N.Y.U. L. REV. 1228, 1250 (1959). Unfortunately, there is no support for this alleged custom. Note that the Canadian amount is 12. *Kelsey v. Minister of Nat'l. Revenue for Customs*, Appeal No. 1987, The Tariff Board (1984).

¹⁸ In fact, in several states the production of further copies by the artist may be unlawful. See CAL. CIV. CODE §§ 1740-1745.5 (West Supp. 1984); N.Y. GEN. BUS. L. § 220a-220i (McKinney Supp. 1984).

¹⁹ M. SHAPIRO, CAST AND RECAST: THE SCULPTURE OF FREDERIC REMINGTON 53-62 (1981).

cotta, plaster, or wax model.²⁰ The recent increase in the popularity of Western art²¹ has induced foundries across the country to mass produce so-called limited edition surmoulages by such artists as Remington and Russell.²² Since the pieces reproduced are in the public domain, the copying is not unlawful.

The late Nelson Rockefeller established a business to sell reproductions of works in his personal collection. Advertised through catalogues, the Nelson Rockefeller Collection produces bronze reproductions of sculptures by a number of well known artists from Rodin to Remington.²³ These reproductions sell for high prices. A California foundry will sell a recast of Remington's *Coming Through the Rye* for \$9,500 while Rockefeller's recast of the same piece sells for \$19,500.²⁴

The Rockefeller Collection is careful to make copies of works which are in the public domain, or it obtains permission from artists or their heirs to make the reproductions. While the copies thus manufactured are properly marked and legally produced, they are still not original works of art, and skillfully done reproductions can fool most lay persons.

The authenticity of a forgery of one of Remington's popular sculptures was an issue in *United States v. Tobin*.²⁵ A statue was stolen from a private home, and the owner, believing she possessed an authentic casting of *The Bronco Buster*, collected \$20,000 in an insurance payment. The sculpture was later recovered. In the subsequent trial of the thieves for conspiring to receive, conceal, store, sell, and dispose of a stolen sculpture, an expert testified that the statue was a forgery. He explained that the foundry stamping was atypical, the stamp identifying the piece as casting Number 93 was too indistinct, the base was half an inch too tall, and the statue was 7/16 of an inch too short. The biggest clue to the forgery was the shape of the horse's ears. Apparently in castings as early as Number 93, the horse's ears were quite small and laid back. The horse's ears on the stolen statue were larger and

²⁰ Trustman, *supra* note 4, at 85. One of the practices condemned by the College Art Association as unethical was that of surmoulaging. College Art Assn. News, *supra* note 4.

²¹ For a good discussion of the definition of "Western art," including the difference between works created during the days of the early West and contemporary works, see P.J. BRODER, *BRONZES OF THE AMERICAN WEST* (1974).

²² Trustman, *supra* note 4, at 85.

²³ Wise, *Use of the Art Reproduction Market by Rockefeller*, IV ART AND THE LAW, Issue 4, at 91 (1979).

²⁴ Trustman, *supra* note 4, at 85.

²⁵ 576 F.2d 687 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978).

stuck out similarly to ears on castings numbered above 260.²⁶

The defendants, on learning of the forgery, tried to turn it to their advantage. They argued that the government was barred from prosecuting them under the statute because the \$5,000 statutory amount²⁷ was not met. The expert, however, testified that in his estimation, the value of the forgery was between \$5,000 and \$7,000. He explained that even though the statue was a forgery, the worth of forgeries increases with their quality. This was an "excellent forgery," he stated, "that could fool many laymen."²⁸ The jury apparently accepted his estimate of value and the defendants were convicted.

Skillfully done reproductions may deceive even the most sophisticated art experts. Norton Simon and the Northwest Museum of Art acquired what they thought were pieces from shop models sculpted by Degas and cast by Palazzola, a famous bronze caster. In reality, these pieces were not authorized castings but surmoulages.²⁹

Some foundries mark their recasts with dates and foundry marks while others do not. Even if the foundries do identify their pieces, often the marks are small and can easily be obscured if the pieces end up in the hands of shady art dealers. A Los Angeles investment banker purchased what he thought was an original Rodin from a Paris dealer. The Rodin was actually a Rockefeller reproduction, and the dealer had simply obscured the identifying mark with brown shoe polish.³⁰

Not only can these surmoulages be passed off in the market place as original works of art, but they can also be advertised in such a way as to mislead the public into believing the sculptures are authorized pieces from the original edition. Consumers are deceived into thinking they are getting something of greater value than what they actually receive.³¹

Thus, there are economic incentives that exist in the bronze sculpture market for those who lack moral integrity. The problem appears to be pervasive, and it is therefore necessary to evaluate the remedies for aggrieved artists and purchasers.

²⁶ 576 F.2d at 691.

²⁷ 18 U.S.C. § 2315 (1982).

²⁸ 576 F.2d at 691.

²⁹ Failing, *The Degas Bronzes Degas Never Knew*, 78 ARTnews at 38, 40 (Apr. 1979).

³⁰ Trustman, *supra* note 4, at 87.

³¹ Advertisement for Remington's sculpture, *The Rattlesnake*, MONEY 115 (July 1981).

III. EXISTING LEGAL THEORIES

A. *Artists' Remedies*

1. Section 43(a) of the Lanham Act

Section 43(a) of the Lanham Act is the federal trademark law which prohibits, among other things, the unauthorized commercial exploitation of an individual's reputation as embodied in his works.³² Under the statute, affixing a false designation of origin, description, or representation upon an artist's work is actionable.³³

Section 43(a) has been described by courts and commentators as a "national law of unfair competition,"³⁴ and "new federal statutory tort"³⁵ and a "federal statutory supplement to the related common law torts of unfair competition and misappropriation."³⁶ The Act is the focus of rapid and inconsistent judicial expansion.

Certain activities relating to the advertising and sale of bronze multiples may constitute violations of section 43(a).³⁷ In order to fall within the scope of the Act, a case must involve goods or services,³⁸ a requirement which has been liberally interpreted. For example, in *N.S. Meyer, Inc. v. Ira Green, Inc.*,³⁹ the statute was held to be applicable even though the item copied, a catalogue, was not "goods" itself but rather described goods for

³² 15 U.S.C. § 1125(a) (1982) [hereinafter cited as the Act].

³³ *Id.*

³⁴ Note, *The Lanham Trademark Act, Section 43(a)—A Hidden National Law of Unfair Competition*, 14 WASHBURN L.J. 330, 331 (1975).

³⁵ *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 373 (1st Cir. 1980); *F.E.L. Publications v. National Conference of Catholic Bishops*, 466 F. Supp. 1034, 1034-44 (N.D. Ill. 1978).

³⁶ Comment, *The Monty Python Litigation—Of Moral Right and the Lanham Act*, 125 U. PA. L. REV. 611, 620 (1977).

³⁷ Section 43(a) reads:

Any person who shall affix, apply or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1982).

³⁸ *Id.*

³⁹ 326 F. Supp. 338 (S.D.N.Y. 1971) (preliminary injunction decision).

sale. Publications are also construed as “goods.”⁴⁰

Under section 43(a) there must also be an effect on interstate commerce,⁴¹ another requirement that has been interpreted liberally by the courts. Even if the infringing action is local, the requirement of effect on interstate commerce is satisfied if the infringed goods involved are distributed interstate.⁴² Given this liberal interpretation, bronze sculpture reproductions marketed through mail order catalogues or newspaper ads should be within the Act’s coverage.

To be actionable under section 43(a), a case must involve a false designation of origin, description, or representation of plaintiff’s work.⁴³ Whether a court will find a violation depends on the probable or actual consumer reaction. The test is based on deception or the tendency to deceive and the likelihood of consumer confusion.⁴⁴ Some courts add the requirement that the deception must be material—one that influences the purchasing decision.⁴⁵ An intent to deceive need not be shown.⁴⁶ A plaintiff who can show actual injury as a result of the violation may recover damages.⁴⁷ A showing of potential injury is adequate to obtain an injunction.⁴⁸

The plaintiff need not have a registered trademark in order to bring an action under section 43(a).⁴⁹ Unregistered marks, however, which are not “inherently distinctive” are protected only if they have “secondary meaning.” Secondary meaning occurs when the mark, through publicity and use, has become “as-

⁴⁰ 15 U.S.C. § 1125(a) (1982). See *Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889, 903 (S.D.N.Y. 1966).

⁴¹ *Meyer*, 326 F. Supp. at 338.

⁴² *F.E.L. Publications*, 466 F. Supp. at 104.

⁴³ 15 U.S.C. § 1125(a) (1982).

⁴⁴ *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F. Supp. 980, 990 (S.D.N.Y. 1980); Comment, *Analysis of a Statutory Violation of the Lanham Act § 43(a)*, 29 MERCER L. REV. 1083, 1086 (1978).

⁴⁵ *Skil Corp. v. Rockwell Int’l Corp.*, 375 F. Supp. 777, 781 (N.D. Ill. 1974); *Glenn*, 251 F. Supp. at 904.

⁴⁶ *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1201 (9th Cir. 1979); *John Wright, Inc. v. Casper Corp.*, 419 F. Supp. 292, 325 (E.D. Pa. 1976), *modified sub nom.*, *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 608 (3d Cir. 1978); *Apollo Distrib. Co. v. Apollo Imports, Inc.*, 341 F. Supp. 455, 458 (S.D.N.Y. 1972).

⁴⁷ *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1374-76 (10th Cir. 1977), *cert. dismissed*, 434 U.S. 1052 (1978); *Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107, 1111 (5th Cir. 1976).

⁴⁸ *Sutton Cosmetics, Inc. v. Lander Co.*, 455 F.2d 285 (2d Cir. 1972); Note, *Authors’ and Artists’ Rights in the United States: A Legal Fiction*, 10 HOFSTRA L. REV. 557, 582 (1982).

⁴⁹ *Loctite Corp. v. National Starch and Chem. Corp.*, 516 F. Supp. 190, 216 (S.D.N.Y. 1981); *Apollo Distrib.*, 341 F. Supp. at 458. See also Note, *The Right of Publicity, Section 43(a) of the Lanham Act and Copyright Preemption: Preventing the Unauthorized Commercial Exploitation of Uncopyrighted Works of Art*, 2 CARDOZO ARTS & ENT. L.J. 265, 283-85 (1983).

sociated in the minds of a substantial number of people with a certain type of [product] produced by a particular individual.”⁵⁰

A personal name is not “inherently distinctive” and needs proof of secondary meaning.⁵¹ Yet, an artist’s name can have secondary meaning if there is the requisite consumer association between the name and the artist’s work. The name Picasso, for example, has been accepted as a trademark signature and was afforded protection under section 43(a) in *Visual Artists and Galleries Ass’n v. Various John Does*.⁵² The plaintiff in that suit had a strong argument that the Picasso trademark was valid. Before he died, Picasso and his heirs were involved in a licensing program for goods such as carpeting, eyewear, clocks, art reproductions, posters, scarves, and other goods which were widely distributed throughout the United States. These facts helped establish that the name had acquired a secondary meaning indicating a particular source of manufacture or creation.⁵³ The court recognized that the name Picasso and the famous signature had acquired a secondary meaning and that his heirs had a right to advertise and profit from the use of his name and reputation. The court also enjoined the unauthorized use of a facsimile of the Picasso signature on T-shirts.⁵⁴ There may be a problem meeting this requirement of secondary meaning, however, if an unknown artist were to bring suit.⁵⁵

a. Source or Sponsorship Rule.

Early cases brought under section 43(a) primarily involved direct competitive situations in which the defendant passed off his goods as those of the plaintiff. Section 43(a) has been judicially expanded to cover instances where advertising conveys false impressions or suggestions that goods have the sponsorship, approval, or authorization of a certain person or company when they do not.⁵⁶ Courts have also found that section 43(a) includes cases where a defendant misrepresents his own product as that of the plaintiff.⁵⁷

⁵⁰ *Orion Pictures Co. v. Dell Publishing Co.*, 471 F. Supp. 392, 395 (S.D.N.Y. 1979).

⁵¹ J. MCCARTHY, *TRADEMARKS AND UNFAIR COMPETITION* § 13:2 (Supp. 1982).

⁵² 80 Civ. 4487 (S.D.N.Y. 1980) (temporary restraining and seizure order pending hearing).

⁵³ *The Selling of Picasso: A Look at the Artist’s Rights in Protecting the Reputation of His Name*, VI *ART AND THE LAW*, Issue 3, at 77–78 (1981).

⁵⁴ *Visual Artists*, 80 Civ. 4487.

⁵⁵ Sokolow, *A New Weapon for Artists’ Rights: Section 439(a) [sic] of the Lanham Trademark Act*, V *ART AND THE LAW*, Issue 2, at 32, 34 (1980); Note, *supra* note 48, at 579.

⁵⁶ *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331, 351 (S.D.N.Y. 1968).

⁵⁷ *L’Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649, 650 (3d Cir. 1954).

A classic passing off case is *Vuitton et Fils, S.A. v. Crown Handbags*.⁵⁸ The court found that the defendant's deliberate attempts to copy the appearance of plaintiff's famous brand of expensive handbags by incorporating the distinctive initials and colors used by the original manufacturer while using inferior materials amounted to the use of a false designation of origin. The defendant sold his duplicates at a much lower price, not disclosing the fact that they were counterfeits.

The court stated that "[t]he counterfeit Vuitton bags are by the very nature of their appearance a misrepresentation as to their origin,"⁵⁹ and an average consumer could easily be deceived into thinking she was purchasing a genuine Vuitton bag.

The court held that the Vuitton trademark was a "strong, well-known mark,"⁶⁰ entitled to broad protection. The court not only showed concern for protecting the buying public but also expressed a desire to protect the good will of Vuitton, who over the years had earned a reputation for outstanding quality and craftsmanship.⁶¹

Thus, an artist may be successful in obtaining an injunction or damages where copies of a bronze sculpture are surreptitiously made and are passed off as his works. A hypothetical passing off case involving a surmoulage might arise like this: A recognized and well-known artist authorizes an established, reputable foundry with whom he traditionally works to cast an edition from his model. The reproduction is signed and numbered, and a foundry mark is included on all the finished castings. A second foundry obtains one of the authorized castings and surmoulages it, carefully leaving the signature and foundry mark intact.

The artist suing under section 43(a) would have to prove that because of the signature and foundry mark consumers purchasing these unauthorized surmoulages believed that they were acquiring a bronze which was authorized by the artist, made from his mold, and cast in a particular foundry that historically had worked closely with the artist. Next he would need to prove that this belief influenced the consumers to buy the bronze.

In addition, if the artist could show that he was damaged, for example, by a diversion of sales resulting from the presence of

⁵⁸ 492 F. Supp. 1071 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 577 (2d Cir. 1980).

⁵⁹ 492 F. Supp. at 1077.

⁶⁰ *Id.* at 1075. For a case discussing the requirements for trademark protection, see *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979).

⁶¹ 492 F. Supp. at 1076.

these surmoulages in the market, he should prevail in obtaining an injunction.

However, if the facts are altered slightly, an artist's chances of success decrease dramatically. Suppose the second foundry eradicates the edition numbers and foundry marks and sells the surmoulages for a very low price in comparison to the price charged for the authorized castings. A court might very well conclude that no reasonable consumer could honestly be confused into believing he was getting an "original" piece because of the low price.

A slight alteration of the facts illustrates yet another problem. Assume the hypothetical artist is young, struggling, and virtually unknown. His work is surmoulaged by a second foundry, but this time his signature is removed. In this situation, where the artist's name is not disclosed, the artist must establish that customers are likely to believe they are purchasing that particular artist's work. While a commercially successful artist whose style and works are well-known may be able to prove authorship, the unheralded artist may find this an insurmountable proof problem. Consumers may have purchased the surmoulages because of the intrinsic appeal of the work rather than because of any association between the sculpture and the artist's name or reputation.

Fortunately, a case can be made for a violation of section 43(a) if consumers are likely to believe the copies are authorized, sponsored, or approved by⁶² the creator of the original, and they are not. In *Orion Pictures Co. v. Dell Publishing Co.*,⁶³ the plaintiff movie company obtained an injunction against the defendant who had marketed a novel under the same title as the movie. The movie company alleged that the public had been deceived because the book, by virtue of its title and the inscription "Now a major motion picture," gave the impression that it was an official novelized version of the film. The fact that the defendants deliberately sought a "free ride" on the millions of dollars that the plaintiffs had spent on advertising disturbed the court.

Similarly, in *Geisel v. Poynter Products, Inc.*,⁶⁴ the defendants created three-dimensional dolls based on drawings by Theodor Seuss Geisel (Dr. Seuss) which had been published in a magazine. Although the artist had not sponsored or approved of the

⁶² 15 U.S.C. § 1125(a) (1982).

⁶³ 471 F. Supp. 392 (S.D.N.Y. 1979).

⁶⁴ 295 F. Supp. 331 (S.D.N.Y. 1968).

production of the dolls, the original tags attached to the dolls read "From the Wonderful World of Dr. Seuss." The court stated that "[o]ne cannot attribute to an artist or author a work which the artist or author did not create or which substantially departs from his original work,"⁶⁵ and thus found a violation of section 43(a). However, once the tags were changed to read "Based on Liberty Magazine Illustrations by Dr. Seuss," the court held that the tags were acceptable since they then correctly designated the connection between the artist and the dolls.

The issue of approval or authorization may arise in several ways in cases involving bronze sculptures. Assume that a foundry casts a surmoulage bronze from a legitimate limited edition piece numbered and signed by the artist. Suppose the signature and the edition number of the original bronze are reproduced on the surmoulage. The fact that the bronze is so marked may deceive a purchaser into thinking that the artist authorized and approved the recasting and that it is one of a strictly limited number of castings. The purchaser is therefore confused. If it became public knowledge that more than the limited number of bronzes existed, the artist's integrity could be questioned, resulting in fewer sales of the legitimate pieces. Even if consumers were alerted to the fact that surmoulages for which the artist was in no way responsible were circulating on the market, their desire to buy his work might be chilled due to a fear of purchasing an unauthorized recast bronze. The artist is damaged because his right to restrict an edition of sculpture has been violated, and he has lost or may lose sales as a result.

The issue of approval or authorization is also important where posthumous castings are involved. Whether or not a casting is done posthumously may be relevant to the decision to purchase. Since the deceased artist is not involved in the casting or the finishing of the bronzes, quality often suffers. Posthumous castings of Rodin's works, for example, are considered notoriously uneven in quality.⁶⁶

Falsely advertising that a posthumous casting was authorized and approved by the artist during his lifetime should be actionable. Is a failure to disclose that a piece had been cast posthumously an implicit representation that the piece was authorized by the artist during his lifetime? One foundryman who cast some

⁶⁵ *Id.* at 354.

⁶⁶ Varnedoe, *A Reappraisal of the Rodin Legacy Offers a New Look at the Master*, SMITHSONIAN, July 1981, at 43.

Rodin plasters that were never cast in bronze while the artist was alive attempted to make a case for implicit authorization. He explained: " 'When the artist makes a plaster from a *terra cotta*, it's his intention to have it cast.' "67 According to a representative of Sotheby Parke Bernet, however, that may not always be the case: " 'Many of Rodin's plasters were not cast for a reason. . . . They are simply not that good.' "68

An artist may, of course, leave instructions for posthumous castings. Several of Rodin's most famous creations were never cast in bronze during his lifetime. They were cast posthumously by the Rodin Museum pursuant to instructions conferred in his will.⁶⁹ These museum castings are generally considered to be authentic and in keeping with the artist's expressed intentions. They also bring high prices at auctions.⁷⁰

b. Conflicting Policies.

There is an underlying tension about copying which arises from conflicting policies and differing judicial attitudes. Courts have expressed contrasting philosophies as to whether safeguarding healthy competition or upholding commercial morality by means of protecting integrity, commercial expectation, reputation, and good will is the overriding principle to be considered. This conflict reflects the traditional tension between "free" competition and "fair" competition.

Notwithstanding this tension, the judicial response may be very different where a defendant fully and truthfully designates that his copies are copies. In *Societe Comptoir de L'Industrie Cotonniere v. Alexander's Department Stores, Inc.*,⁷¹ the district court found no violation of the Lanham Act where a chain of department stores marketed a line of dresses as "adaptations" of Dior designs. The court stated: "There is nothing false about a statement that a garment is a copy of a Dior model when it is such a copy. . . ."72

The Second Circuit affirmed this decision⁷³ and expounded on the basic philosophy underlying the decision:

The Lanham Act does not prohibit a commercial rival's truth-

⁶⁷ Trustman, *supra* note 4, at 88 (source omitted).

⁶⁸ *Id.* (source omitted).

⁶⁹ Varnedoe, *supra* note 66, at 43.

⁷⁰ Trustman, *supra* note 4, at 88.

⁷¹ 190 F. Supp. 594 (S.D.N.Y. 1961), *aff'd*, 299 F.2d 33 (2d Cir. 1962).

⁷² 190 F. Supp. at 603.

⁷³ 299 F.2d 33.

fully denominating his goods a copy of a design in the public domain, though he uses the name of the designer to do so. Indeed it is difficult to see any other means that might be employed to inform the consuming public of the true origin of the design. . . . The interest of the consumer here in competitive prices of garments using Dior designs without deception as to the origin, is at least as great as the interest of plaintiffs in monopolizing the name.⁷⁴

A similar rationale was reflected in *R.G. Smith v. Chanel, Inc.*⁷⁵ The court, citing *Societe Comptoir*, found no violation of the Lanham Act where a defendant perfume manufacturer advertised his perfume as a duplicate of plaintiff's Chanel No. 5. The court, explaining that: "'A competitor's chief weapon is his ability to represent his product as being equivalent and cheaper,'"⁷⁶ expressed the concern that the practical effect of disallowing this practice would be to grant the company with a more expensive product a monopoly in an unpatented product.

In situations where bronze reproductions are clearly labeled as reproductions, foundries and marketing agents will undoubtedly argue that they are doing the public a favor by making fine art available at reasonable prices. There are, they may argue, people who buy bronzes for mantelpiece decoration and are not concerned with investment value or authenticity. If these buyers are not confused as to what they are purchasing, what harm can there be? One foundry owner explains: "'I sell to younger collectors who want to have a bronze around the house.'"⁷⁷ A Brooklyn foundryman adds: "'These things are so common. There are so many thousands. Everybody knows what they are. It's decorative art.'"⁷⁸

Yet the possibility of public confusion regarding the origin of the piece may give rise to a cause of action for unfair competition. In *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc.*,⁷⁹ the court held that the possibility of visitors to a purchaser's home mistaking the unauthorized copy for the original was sufficient to entitle the counterclaiming defendant to injunctive relief. In *Mastercrafters*, the defendant manufactured a luxury clock with the unique feature of being spring driven by very slight changes in atmospheric temperature. The plaintiff marketed a clock

⁷⁴ *Id.* at 36-37.

⁷⁵ 402 F.2d 562 (9th Cir. 1968).

⁷⁶ *Id.* at 567 (quoting Alexander, *Honesty and Competition: Some Competitive Virtues in the False Naming of Goods*, 39 S. CAL. L. REV. 1, 4 (1966)).

⁷⁷ Trustman, *supra* note 4, at 87 (source omitted).

⁷⁸ *Id.* (source omitted).

⁷⁹ 221 F.2d 464 (2d Cir.), *cert. denied*, 350 U.S. 832 (1955).

which copied the defendant's unpatented design. The plaintiff's clock, however, was electric, with a cord protruding from the back, and had his name on it. It sold for \$30 to \$40 as opposed to the \$175 price for the defendant's clock. The court found that the plaintiff had copied the design of the defendant's clock to attract purchasers who wanted a luxury design clock. These purchasers bought the plaintiff's cheaper clocks to acquire the prestige gained by displaying what visitors at the purchasers' homes would perceive as a prestigious article. The "[p]laintiff's wrong consisted of the fact that such a visitor would be likely to assume that the clock was an Atmos [the defendant's] clock."⁸⁰ The court held that the likelihood of such confusion rendered the plaintiff's conduct actionable because neither the electric cord nor the plaintiff's name was likely to be noticed by a visitor.

c. False Descriptions and Representations.

Fortunately, a case can be made for a violation of section 43(a) even where copies are truthfully designated as copies. The court in *Societe Comptoir* left open the issue of whether a cause of action would exist where the Dior "adaptations" were so poorly made as not to be copies since the plaintiffs had not claimed that this was the case.⁸¹ Similarly, in *R.G. Smith*, the court noted that if the defendant's claims of quality of duplication or equivalency proved to be untrue, section 43(a) would provide a remedy.⁸² On remand, a violation was found.⁸³ A similar result was reached in *Sherrell Perfumers, Inc. v. Revlon, Inc.*⁸⁴ The counterclaiming defendants were found to be entitled to a remedy under section 43(a) where, after calling in a parade of experts, they proved the falsity of equivalency claims. The perfume cases suggest that even if a bronze reproduction is clearly labeled as such, false claims of equivalency may still be actionable.

Proving the equivalency of two perfumes, however, is a different task from comparing an original bronze to a surmoulage. The court in *Sherrell* admitted scientific evidence, including a comparison of gas chromatographs of the two perfumes.⁸⁵ Since two perfumes can be chemically identical, the plaintiff need only

⁸⁰ 221 F.2d at 466. The complainant (defendant asserting a counterclaim) was the importer and distributor of the work in question and not the manufacturer. The court held that the manufacturer was not an indispensable party. *Id.* at 467.

⁸¹ 190 F. Supp. 594, 602 (S.D.N.Y. 1961).

⁸² 402 F.2d at 562, 569 n.25 (9th Cir. 1968).

⁸³ 178 U.S.P.Q. (BNA) 630 (N.D. Cal. 1973).

⁸⁴ 483 F. Supp. 188 (S.D.N.Y. 1980).

⁸⁵ *Id.* at 191-92.

prove that they are not. Such scientific tests alone cannot be relied upon when considering the truth or falsity of equivalency claims for an unauthorized reproduction of bronze sculpture.

While scientific tests may be helpful in showing basic physical differences in a sculpture's size or detail, they are incomplete because they ignore the contribution of the artist himself as an integral part of the value of an original piece of sculpture, as well as the value of editions that he has authorized and approved. As one commentator explains: "Today, the value of a bronze—as a work of art and in the marketplace—depends upon the closeness of the artist's connection with the work itself."⁸⁶ Consider the difference in value between the forgery of Remington's *The Bronco Buster* and the original edition Number 93 as estimated by the expert in *United States v. Tobin*.⁸⁷ Foundries which advertise their surmoulages as identical or equivalent to an "original" Remington sculpture are ignoring the fact that for the surmouillage to be truly identical to an original, it would need to have the same investment value as an original.⁸⁸

A section 43(a) violation may be found for certain other activities. A recent case, *John Wright, Inc. v. Casper Corp.*,⁸⁹ is particularly interesting because it involved a fact situation analogous to potential cases involving bronze multiples. In *Wright*, the plaintiff manufactured authentic reproductions of early American penny banks. Original nineteenth century banks were taken from the *Book of Knowledge* collection and were disassembled to make models for plaintiff's reproductions. The plaintiff's manufacturing process duplicated the hand-cast, sand-mold process used in the foundries of the nineteenth century. This process was closely supervised by the plaintiff, and the replicas were carefully compared to the originals and approved. The plaintiff then sold these banks with a certificate of authenticity.

The defendant, who originally employed a Japanese manufacturing agent, began mass production of penny bank reproductions using the Wright banks as a master model. When his original attempt turned out to be unsuccessful, he moved his manufacturing operations to Taiwan. The manufacturing agent in Taiwan was supplied with original banks from the defendant's

⁸⁶ Trustman, *supra* note 4, at 85.

⁸⁷ 576 F.2d 687, 691 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978). See *supra* notes 25–28.

⁸⁸ In Woodcock, *supra* note 4, the author points out that one of two known castings of Remington's sculpture, *The Norther*, sold at auction for \$715,000.

⁸⁹ 419 F. Supp. 292 (E.D. Pa. 1976).

private collection as well as with some of the Wright banks. The process of reproduction was left entirely in the hands of the Taiwan company. Apparently some, but not all, of the defendant's finished banks were made from molds taken from the Wright banks. The defendant marketed his banks with a "certified affidavit of authenticity" which stated that each bank was "an exact and authentic duplicate reproduction of the original antique" and that "the same techniques, processes and skills were used in making this fine replica." Molds, like the originals, were skillfully made by professional craftsmen and then hand-cast.⁹⁰

While finding it acceptable for the defendant to use the Wright banks for a model, the court found that advertising the reproductions of the Wright banks as exact and authentic reproductions of the originals was a violation of section 43(a). The court also objected to the defendant's use of the term "authentic" in his advertising efforts. It decided that because of John Wright's usage of the term, retailers and private collectors of penny banks had come to expect that when a bank was authentic and accompanied by a "certificate of authenticity," an original antique bank in fact was used to make master match-plates. It was not enough that the reproduction merely resembled the original bank.⁹¹

Analogously, the same court, faced with a bronze sculpture surmoulage case, might require a defendant to show that the casting was made from an artist's original plaster, wax, or terra cotta model rather than from an existing bronze to warrant advertising that a reproduction is authentic.

The court in *Wright* also objected to the defendant's representations about the techniques and processes employed in making the bank replicas. The court stressed the facts that the defendant's banks were inferior in quality and workmanship to those of the plaintiff and that the defendant had no personal knowledge of the manufacturing processes actually employed by the Taiwan company.⁹²

The court also found that the defendant's certified affidavit of authenticity was confusingly similar to the plaintiff's certificate and as a result would tend to deceive the purchasing public. Additionally, the defendant's certificate was allegedly endorsed by Casper's Collectors' Society, an entity that did not exist.⁹³

⁹⁰ *Id.* at 308.

⁹¹ *Id.* at 324-28.

⁹² *Id.* at 306-12.

⁹³ *Id.* at 308-09.

Since many of the foundries surmoulaging bronzes by Western artists advertise in a similar fashion, it would be necessary to determine whether their representations are true in order to maintain a similar cause of action.⁹⁴

d. Artistic Integrity.

The copying cases suggest that an artist may have a cause of action under section 43(a) where unauthorized or inferior reproductions of his work are made or advertised for sale.⁹⁵ Problems exist, however, since the bulk of cases litigated under section 43(a) have involved commercial utilitarian products. In these cases, encouraging competitive prices and ensuring an adequate supply of products are undoubtedly worthy policy goals. Also, courts have emphasized the economic loss suffered by the plaintiffs in most of the cases where violations of section 43(a) have been found. Should these considerations alone control in the realm of fine arts? An artist's standards of quality, integrity, reputation, and intentions are some other interests the law should protect.

Courts have, on occasion, been confronted with cases not involving copying which specifically concerned artists' interests in their reputations and integrity as well as their economic expectations. Artists may find some encouragement in a series of cases which seem to be expanding the scope of protection afforded by section 43(a).

In *Gilliam v. American Broadcasting Cos.*,⁹⁶ "Monty Python," a group of British writers, sued ABC for the unauthorized editing of a television script. The Second Circuit directed the trial court to grant a preliminary injunction against defendant's use of the show, basing its decision primarily on contract and copyright law. However, the appellate court stated alternatively that the mutilating and garbling of the plaintiff's work was actionable as a false representation under section 43(a) and that "[t]o deform his work is to present him to the public as the creator of a work not

⁹⁴ For example, an advertisement for a surmoulage of Remington's *The Rattlesnake*, in the July, 1981 edition of *MONEY* reads in part: "The Rattlesnake was originally cast at the Roman Bronze Works by the lost wax process, which is the identical process used in creating our limited edition. . . . The model for the edition has been approved by the trustees of the Buffalo Bill Historical Center. As each bronze is cast it is carefully inspected by our own experts at Museum Collection Inc. to assure that it meets our exacting standards of quality." Museum Collection Inc.'s advertisement, *The Rattlesnake*, *MONEY* 115 (July 1981).

⁹⁵ See *supra* notes 81-94 and accompanying text.

⁹⁶ 538 F.2d 14 (2d Cir. 1976).

his own, and thus make him subject to criticism for work he has not done."⁹⁷ *Gilliam* has been characterized by some commentators as espousing a philosophy akin to the European doctrine of moral rights—"droit moral."⁹⁸ The moral rights doctrine protects the artist's personal rights in his creation, such as his reputation and integrity, as well as his right to object to mutilation, distortion, or alteration of his work, independent of his economic interests. Judge Gurfein, concurring in the judgment, expressly rejected this view of section 43(a) as an explanation for the decision, arguing that: "[T]he Lanham Act . . . is not a substitute for Droit Moral. . . . The Lanham Act does not deal with artistic integrity. It only goes to misdescription of origin and the like."⁹⁹ As a result, he concluded that a disclaimer, such as "this program has been edited by ABC," would have been an adequate remedy.¹⁰⁰ A disclaimer as suggested by Judge Gurfein, or a brief phrase such as "based on" an artist's work as approved in *Geisel v. Poynter Products, Inc.*,¹⁰¹ may be a small step in accurately designating the distance between an artist and a reproduction of an original piece of his art. Injunctive relief, however, can be much more effective in eliminating consumer confusion and protecting not only an artist's economic and personal interests but also the integrity of his work. The relief actually granted by the *Gilliam* court, preventing the airing of the edited version, is a large step in the right direction.

In a later case, *Follett v. New American Library, Inc.*,¹⁰² the district court went even further than it had in *Gilliam* and found that section 43(a) alone, independent of contract or copyright law, could not only be used "to vindicate 'the author's personal right to prevent the presentation of his work to the public in a distorted form' . . . but also to protect the public and the artist from misrepresentations of the artist's contribution to a finished work."¹⁰³ The plaintiff Follett, who had merely rewritten and edited a non-fiction work of three other authors, was credited with authorship on the book's cover in large print. His name appeared above the small print pseudonym of the three other au-

⁹⁷ *Id.* at 24 (quoting Roeder, *The Doctrine of Moral Right*, 53 HARV. L. REV. 554, 569 (1940)).

⁹⁸ Maslow, *Droit Moral and Sections 43(a) and 44(i) of the Lanham Act—A Judicial Shell Game?*, 48 GEO. WASH. L. REV. 377, 387 (1980); Sokolow, *supra* note 55, at 34; Note, *supra* note 48, at 571-74; Comment, *supra* note 36.

⁹⁹ 538 F.2d 14, 26-27 (Gurfein, J., concurring).

¹⁰⁰ *Id.*

¹⁰¹ 295 F. Supp. at 353 (S.D.N.Y. 1968).

¹⁰² 497 F. Supp. 304 (S.D.N.Y. 1980).

¹⁰³ *Id.* at 313 (citations omitted) (quoting *Gilliam*, 538 F.2d at 24).

thors. The court ordered an injunction requiring the pseudonym to be listed first and the type size for the two names to be equal.

Though the future judicial course in this area is by no means clear, further integration of the doctrine of *droit moral* into section 43(a) may provide artists with a new and more workable theory under which to proceed.

e. Limitations.

Though an artist, or potentially his heirs, may have a right of action under section 43(a),¹⁰⁴ the lack of a similar right for a consumer is the real weakness of the Lanham Act as a vehicle for control. A broad reading of the language stating that a civil action may be brought by “*any person* who believes that he is or is likely to be damaged”¹⁰⁵ has been rejected by the vast majority of courts. In *Arnesen v. Raymond Lee Organization, Inc.*,¹⁰⁶ the court did grant standing to a class of inventors, as consumers, to bring an action against a patent service for falsely representing their services. Generally, however, courts have held that consumers have no standing to sue.¹⁰⁷

Thus, most actions have been waged by competitors. The more typical judicial response to consumer standing is reflected in *John Wright, Inc. v. Casper Corp.*,¹⁰⁸ where the court stated that “[t]he cause of action belongs to members of the commercial class, *i.e.* competitors. Mere consumers lack standing to sue under 43(a). . . . The competitor/plaintiff is a ‘vicarious avenger’ of the public’s right to be protected against false advertising.”¹⁰⁹

For section 43(a) to be an available remedy for consumer relief from questionable activities, either statutory amendment or

¹⁰⁴ *Columbia Broadcasting System v. Springboard Int’l Records*, 429 F. Supp. 563 (S.D.N.Y. 1976); *see also* *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978).

¹⁰⁵ 15 U.S.C. § 1125(a) (1982) (emphasis added).

¹⁰⁶ 333 F. Supp. 116, 118 (C.D. Cal. 1971).

¹⁰⁷ *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971); *Florida ex. rel. Broward County v. Eli Lilly and Co.*, 329 F. Supp. 364 (S.D. Fla. 1971). Note the *Colligan* court’s extensive reading of the legislative history of § 43(a) in its attempt to formulate its standing rule. 442 F.2d at 689-94.

¹⁰⁸ 419 F. Supp. 292 (E.D. Pa. 1976).

¹⁰⁹ *Id.* at 325 n.18 (citations omitted). *See also* *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 14 (E.D. Pa. 1974) (competitor/plaintiff is vicarious avenger of the public). *But see* *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981) (noted criticism of *Colligan* rule and granted standing to plaintiff although he was not a direct competitor of defendant); *American Home Prods. Corp. v. Johnson and Johnson*, 436 F. Supp. 785, 797 (S.D.N.Y. 1977), *aff’d*, 577 F.2d 160 (2d Cir. 1978) (Lanham Act is not proper vehicle in which to vindicate public’s interest in health and safety; suggesting a narrower view of the *Colligan* rule); *see also* J. McCARTHY, TRADEMARKS, *supra* note 51, at § 27.5 (provides sharp criticism of *Colligan*’s limited standing rule).

further judicial interpretation of the existing language of the Act would be required.

2. Copyright

As previously discussed, the Lanham Act does not protect an artist from the copying of his work by another unless there is a false designation of origin or other false representations or descriptions.¹¹⁰ Copyright law may provide this protection.

Under the 1976 Copyright Act,¹¹¹ copyright protection is extended to "pictorial, graphic, and sculptural works"¹¹² that are "original works of authorship."¹¹³ These provisions undoubtedly cover an original edition of bronzes. The general definitional section of the Act includes prints and art reproductions in the category of "pictorial, graphic and sculptural works."¹¹⁴ The copyright initially vests in the author or creator of the work¹¹⁵ who retains it unless these rights are knowingly transferred in a manner recognized in section 204.¹¹⁶

a. Elements of Infringement.

A copyright has value for an artist because of the exclusive rights inherent in it, and the holder's ability to bring a suit for the infringement of any of those rights.¹¹⁷ A copyright grants its owner the exclusive right to reproduce the work in copies, to prepare derivative works, to distribute copies to the public or display the work publicly, and to authorize others to do so.¹¹⁸ A violation of any of these exclusive rights constitutes an infringement¹¹⁹ and may entitle the copyright owner to a variety of remedies.

The artist, as plaintiff in a copyright infringement suit, must show that he owns a valid copyright in the work and that the defendant copied the work.¹²⁰ The plaintiff has the burden of establishing the validity of his copyright. A copyright certificate,

¹¹⁰ See *supra* notes 81-94 and accompanying text.

¹¹¹ 17 U.S.C. §§ 101-118 (1982) [hereinafter cited as the Act]. The 1976 Act became effective January 1, 1978.

¹¹² *Id.* § 102(a)(5).

¹¹³ *Id.* § 102(a).

¹¹⁴ *Id.* § 101.

¹¹⁵ *Id.* § 201(a).

¹¹⁶ *Id.* § 204.

¹¹⁷ *Id.* §§ 501-510.

¹¹⁸ *Id.* § 106.

¹¹⁹ *Id.* § 501(a).

¹²⁰ See *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 824 (11th Cir. 1982).

however, is *prima facie* evidence of the validity of a copyright.¹²¹

A defendant may introduce evidence in an attempt to establish that the copyright is invalid. He may do this by claiming that the work lacks the requisite "originality" to entitle it to copyright protection. However, when an artist produces a bronze sculpture that is uniquely and distinctively his own, he is unlikely to have much difficulty in establishing the requisite degree of originality that is necessary for copyright protection. As the Second Circuit explained in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*:¹²² "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.'"¹²³

The defendant also may argue that the plaintiff's copyright has been lost through publication without the necessary copyright notice. A plaintiff confronted with this argument may be significantly better off where the 1976 Act applies than he would have been if the 1909 Act were the governing law. This point is demonstrated in *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*¹²⁴ The plaintiff sued the defendant for infringing the plaintiff's copyright covering soft-sculpture dolls. During 1977 and early 1978, the president of the plaintiff corporation and an artist friend, in an attempt to develop a proper prototype doll, made and sold approximately eighty soft-sculpture dolls. One half of these dolls contained a pinned-on copyright notice, and the other half contained no notice at all. A doll design was decided upon in February of 1978. The plaintiffs began producing and selling dolls of that design, and copyright notices were attached to all of these dolls. The notice was pinned on the earlier dolls and sewn on the later dolls. The president of the plaintiff corporation incorporated Original Appalachian Artworks in the fall of 1978 and obtained a copyright certificate in June, 1979.¹²⁵

The defendant, a competing manufacturer of very similar soft-sculpture dolls, argued that the plaintiff's dolls were originally published in 1977 lacking proper copyright notices.

The court explained that under the 1909 Act publication of a work without the proper notice would result in forfeiture of the

¹²¹ 17 U.S.C. § 410(c) (1982).

¹²² 191 F.2d 99 (2d Cir. 1951).

¹²³ *Id.* at 102-03 (footnotes and citations omitted).

¹²⁴ 684 F.2d 821 (11th Cir. 1981).

¹²⁵ *Id.* at 823.

copyright. However, the court noted that the new Act contains a liberal savings provision that may even extend copyright protection where the copyright notice is entirely omitted from a work.¹²⁶ Thus, the major issue in the case became whether the 1978 dolls were merely copies of the 1977 dolls. If they were, the 1909 Act would apply. The court determined, however, that the 1978 dolls were not copies but were new works and applied the savings provisions of section 405(a)(1) of the 1976 Act.¹²⁷ This section provides that a copyright is not lost if a relatively small number of pieces is distributed without the appropriate notices. Unfortunately, the statute does not define what number is considered small enough to satisfy the section.¹²⁸ The House Report that accompanied the bill when it was being considered by Congress is similarly silent on the subject.¹²⁹

The court concluded that since one percent of the plaintiff's total dolls sold up to the time of trial lacked sewn-in notices, the "relatively small number" test of section 405(a)(1) was met.¹³⁰ The plaintiff's copyright was held valid and, despite numerous other arguments, the defendant was found to have infringed the copyright.

¹²⁶ *Id.* at 826.

¹²⁷ *Id.* at 827. Section 405(a) reads as follows:

The omission of the copyright notice . . . from copies . . . publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

- (1) the notice has been omitted from no more than a relatively small number of copies . . . distributed to the public; or
- (2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies . . . that are distributed to the public in the United States after the omission has been discovered; or
- (3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies . . . they bear the prescribed notice.

17 U.S.C. § 405(a) (1982).

¹²⁸ Thus, the courts are left to determine the meaning of this ambiguity. *See, e.g.*, *Synercom Technology, Inc. v. University Computing Co.*, 462 F. Supp. 1003 (N.D. Tex. 1978); *Lopez v. Electrical Rebuilders, Inc.*, 416 F. Supp. 1133 (C.D. Cal. 1976); *Leon B. Rosenblatt Textiles Ltd. v. M. Lowenstein & Sons, Inc.*, 321 F. Supp. 186 (S.D.N.Y. 1970).

¹²⁹ H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976).

¹³⁰ 684 F.2d at 827 (11th Cir. 1982). In *Beacon Looms, Inc. v. Lichtenberg & Co.*, 552 F. Supp. 1305 (S.D.N.Y. 1982), the court addressed the question of whether a deliberate omission of a copyright notice is covered by section 405. After undergoing a lengthy discussion of the statute's legislative history, the court concluded that the deliberate omission of a copyright notice may not invalidate the copyright under section 405(a)(1) when only a small number of copies have been distributed to the public without the copyright notice. The court in this case made it clear that only accidental omissions of the copyright notice can be saved by section 405(a)(2), which allows the copyright owner to make a reasonable effort to cure the omission within a reasonable time after it is discovered.

Had the court believed that one percent of the soft-sculptures in the *Appalachian Artworks* case exceeded the section 405(a)(1) "relatively small number" test, the plaintiff might have relied on section 405(a)(2). Section 405(a)(2) would have required the plaintiff to establish that it had made a good faith attempt to add the appropriate notice to the works distributed within the United States and had complied with the statute's registration requirement within five years from the date the soft-sculptures were published without the notice.¹³¹ Section 405(a)(2) does not require the copyright owner to be successful in placing the notice on the distributed work.¹³² The plaintiff would probably have complied if it had contacted all of its distributors and requested them to assist in placing the copyright legend on the toys.¹³³

Similarly, if the works had been manufactured by someone other than the plaintiff and the manufacturing specifications contained a clause requiring the contractor to place the plaintiff's copyright notice on the toys, then under section 405(a)(3)¹³⁴ the manufacturer's omission would not have affected the plaintiff's copyright.

These new savings provisions may allow an artist to omit a copyright notice and still hold a valid copyright. The statute engages in a form of equitable balancing to handle the situation where innocent parties relying on the lack of notice may unintentionally infringe the copyright. One who is misled by the omission of the statutory notice is characterized as an "innocent infringer." In this situation, the court may choose not to subject the defendant to liability for statutory damages.¹³⁵

L&L White Metal Casting Corp. v. Cornell Metal Specialties

¹³¹ 17 U.S.C. § 405(a)(2) (1982).

¹³² *Id.*

¹³³ *Innovative Concepts in Entertainment, Inc. v. Entertainment Enters., Ltd.*, 476 F. Supp. 457 (E.D.N.Y. 1983).

¹³⁴ 17 U.S.C. § 405(a)(3) (1982).

¹³⁵ *See* § 405(b) which reads as follows:

Any person who innocently infringes a copyright, in reliance upon an authorized copy . . . from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under Section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made . . . if such person proves that he or she was misled by the omission of notice . . . the court may allow or disallow recovery of any of the infringer's profits . . . and may enjoin the continuation of the infringing undertaking or may require, as a condition of permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee.

17 U.S.C. § 405(b) (1982).

Corp.,¹³⁶ decided under the 1909 Act, is particularly interesting in the area of "innocent infringement" since many analogies to potential bronze sculpture reproduction cases can be drawn. The case involved two competing companies who engaged in the design, manufacture, and sale of castings for lamps, furniture, and fixtures. One issue in the case was whether the defendant's infringement of the plaintiff's copyright on its raw castings was innocent.

After the plaintiff, White Metal, had managed to meet the minimal "originality" requirement of copyright law and had succeeded in registering copyrights on fifty percent of its castings, it learned that the defendant was producing castings similar to its copyrighted castings.

The defendant, however, was able to establish that its initial infringement was innocent. It proved that the mold for one of the infringing castings was purchased from another manufacturer and that the defendant was not aware of the plaintiff's copyright on the original casting.

This proof of the defendant's innocence illustrates a situation that might easily occur in a bronze sculpture surmoulaging case. In *White Metal*, the court supported its conclusion that the defendant's infringement was initially innocent with the following facts:

Apparently any copy of a casting will shrink approximately 5/16 of an inch for every foot in the original. A comparison of one of the defendants' castings with plaintiff's corresponding casting clearly indicates "double shrinkage." As there was no evidence that defendants made both copies, it is concluded that this casting was not copied directly from the original and that the initial infringement of this casting was innocent.¹³⁷

The defendant's proof served to establish its innocence but only temporarily. The court took into account the defendant's conduct after it was informed of the litigation and was made aware of the existing situation. The defendant sold one of the infringing castings after its offer to settle was rejected. The court stated that "the defendants lost their cloak of innocence when they continued to sell the castings after they received actual notice of the infringement."¹³⁸

The validity of a copyright is not affected even if there has been

¹³⁶ 353 F. Supp. 1170 (E.D.N.Y. 1972).

¹³⁷ *Id.* at 1175.

¹³⁸ *Id.*

an innocent infringement. The fact that an infringement was innocent merely reduces the defendant's liability for actual or statutory damages. Other remedies, such as injunctions, are potentially available to the plaintiff.¹³⁹ Similarly, the validity of a copyright is not affected by the unauthorized removal, destruction, or obliteration of the notice from any publicly distributed copies.¹⁴⁰

In *Goldman-Morgen, Inc. v. Dan Brechner & Co.*,¹⁴¹ the court explained that a copyright owner has no duty to police the distribution of pirated works.¹⁴² The plaintiff in *Goldman-Morgen*, owner of the copyright on a novelty coin bank, sued the defendant, a competing manufacturer of coin banks, for infringement. Although the defendant did not design its infringing bank but purchased it off the shelf from a Japanese supplier, the court found that all of the copies of the plaintiff's bank that were sold in the United States carried the proper copyright notice.¹⁴³

The court explained that the appearance of copies of the plaintiff's bank in the Japanese showroom absent copyright notice did not in any way invalidate the plaintiff's copyright. The court stated that: "Plaintiff has done all that it reasonably could to comply with the statute. Plaintiff cannot be charged, as a matter of fact or law, with knowledge that the copyright notice on its bank will be removed by persons unknown to it."¹⁴⁴

Alleged infringers have occasionally argued that the publication of pictures of the copyrighted works in catalogues or magazines forfeited the plaintiff's copyright. This argument fell on deaf ears in *Alfred Bell & Co. v. Catalda Fine Arts*,¹⁴⁵ where the court summarily dismissed any contention that the plaintiff's valid copyright on mezzotint engravings of an old master could be lost by the reproduction of the mezzotints in catalogues.¹⁴⁶

In *Kamar International, Inc. v. Russ Berrie and Co.*,¹⁴⁷ the court held that distributing uncopyrighted pictures of plaintiff's copyrighted stuffed toy animals did not invalidate the copyright. The court explained:

In this case, the catalogue pictures are not copies of what was copyrightable in Kamar's work. That which was original, and

¹³⁹ 17 U.S.C. § 502(a) (1982).

¹⁴⁰ 17 U.S.C. § 405(c) (1982).

¹⁴¹ 411 F. Supp. 382 (S.D.N.Y. 1976).

¹⁴² *Id.* at 390.

¹⁴³ *Id.* at 385.

¹⁴⁴ *Id.* at 390.

¹⁴⁵ 191 F.2d 99 (2d Cir. 1951).

¹⁴⁶ *Id.* at 105.

¹⁴⁷ 657 F.2d 1059 (9th Cir. 1981).

copyrightable was the special texture and design of the stuffed animals. Photographs of the soft sculptures do not give viewers the idea created by the original; nor are the pictures the tangible things, the reproduction of which it is the purpose of the statute to protect. Distributing uncopyrighted pictures of the toys does not, therefore, invalidate Kamar's copyright.¹⁴⁸

Note, however, that in both of these cases the original work was copyrighted. In *Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago*,¹⁴⁹ a maquette of the sculpture was displayed and photographs of it distributed before the copyright was perfected. The sculpture had not yet been made. The court held that the work had entered the public domain as a result of the pre-completion publicity and that any subsequent attempt to obtain copyright protection would be unsuccessful.

After showing that he has a valid copyright in his work, an artist suing for copyright infringement must show that his work has been copied by the defendant. An artist may prove copying directly but this is not always possible. The courts have developed a two-prong test that artists or authors can use to prove copying indirectly: first, the plaintiff must show that the defendant had access to his work; then, he must show that the defendant's work is "substantially similar" to his own.¹⁵⁰ If both prongs of this test are met, the artist raises a presumption of copying which the defendant can only rebut with evidence of independent creation.¹⁵¹

The test for substantial similarity has been given many interpretations. For example, in *Original Appalachian Artworks v. Toy Loft, Inc.*,¹⁵² the court stated that "[s]ubstantial similarity" exists where 'an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'¹⁵³

The Ninth Circuit, however, applies the more complicated test enunciated in *Sid and Marty Krofft Television Products Inc. v. McDonald's Corp.*¹⁵⁴ As restated in *Kamar*,¹⁵⁵ the question of substantial similarity is resolved by applying both an extrinsic test and an intrinsic test. The extrinsic test involves comparing listings and analysis of specific criteria and undertaking analytic dissections. Expert testimony may

¹⁴⁸ *Id.* at 1062.

¹⁴⁹ 320 F. Supp. 1303 (N.D. Ill. 1970).

¹⁵⁰ *Appalachian Artworks*, 684 F.2d at 829 (11th Cir. 1982); *Kamar*, 657 F.2d at 1062 (9th Cir. 1981). See also *Goldman-Morgen*, 411 F. Supp. at 388 (S.D.N.Y. 1976); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62 (3d Cir. 1978).

¹⁵¹ 684 F.2d at 829 (11th Cir. 1982).

¹⁵² *Id.* at 821.

¹⁵³ *Id.* at 829.

¹⁵⁴ 562 F.2d 1157 (9th Cir. 1977).

¹⁵⁵ 657 F.2d at 1059, 1062-63 (9th Cir. 1981).

be allowed. By contrast, expert testimony is inappropriate when applying the intrinsic test. This test is concerned with an ordinary reasonable person's response to the two works.¹⁵⁶

Where proof of access is difficult, very strong proof of similarity may be quite significant. In *Goldman-Morgen*,¹⁵⁷ the court found that the defendant's coin bank was "virtually identical" to the plaintiff's bank and stated that:

The virtual identity between plaintiff's copyrighted work and defendant's accused work is such that 'such similarities are of a kind that can only be explained by copying rather than by coincidence, independent creation or prior common source.' In summary, defendant's work is not only substantially similar, but virtually identical to plaintiff's copyrighted work and access has been shown, or, at least, the inference of access is overwhelming.¹⁵⁸

An artist bringing an infringement suit for the surmouling of one of his copyrighted bronze sculptures and the sale of unauthorized reproductions could introduce evidence of virtually identical design and of shrinkage.

While evidence of double shrinkage was offered to establish innocent infringement in *White Metal*,¹⁵⁹ evidence of single shrinkage could help establish not only that the defendant had access to the plaintiff's work but also that he copied it. Any arguments of independent creation would likely be futile.

In a more difficult case, access can be shown in other ways. In *Custom Decor, Inc. v. Nautical Crafts, Inc.*,¹⁶⁰ the court found that the defendant had sufficient access to the plaintiff's copyrighted duck head sculpture where both parties were exhibitors of fireplace tools at the same trade shows.¹⁶¹ In *Kamar*,¹⁶² the court found access where the plaintiff and defendant, both stuffed toy manufacturers, did business with the same Korean manufacturer.¹⁶³

Slight differences between an original and an infringing work should not preclude a finding of substantial similarity. The test of substantial similarity was met in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*,¹⁶⁴ where the plaintiff sued for infringement of the copy-

¹⁵⁶ *Id.*

¹⁵⁷ 411 F. Supp. 382 (S.D.N.Y. 1976).

¹⁵⁸ *Id.* at 389 (citations omitted).

¹⁵⁹ 353 F. Supp. at 1170 (E.D.N.Y. 1972).

¹⁶⁰ 502 F. Supp. 154 (E.D. Pa. 1980).

¹⁶¹ *Id.* at 157.

¹⁶² 657 F.2d at 1059 (9th Cir. 1981).

¹⁶³ *Id.* at 1062.

¹⁶⁴ 193 F.2d 162 (1st Cir. 1951).

right of its sculptured model of a cocker spaniel. Though the plaintiff's dogs had shorter hair than those of the defendants, the court found that the "long hair on the Woolworth model could readily have been accomplished, and was in fact accomplished, by etching in wavy lines on a plaster model made from one of the plaintiff's plaster statuettes."¹⁶⁵ The fact that the plaintiff's and the defendant's dogs were identical in both proportion and conformation was found "highly, if not conclusively, significant of copying."¹⁶⁶

The altering of a surmoulage of an artist's sculpture is not an unknown practice. Remington created two versions of the *Bronco Buster*. In one version the cowboy has plain leather chaps. In the rarer version the cowboy wears woolly chaps. There are a number of woolly chapped *Bronco Busters* appearing on the market today despite the fact that there were only four authentic casts of the woolly chapped version, three of which are in public institutions.¹⁶⁷ It has been suggested that the majority of the woolly chapped cowboys in circulation are "adapted" recasts from the plain leather chapped version.¹⁶⁸

Similarly, minor differences in works necessitated by the manufacturing process should not preclude a finding of substantial similarity. In *Woolworth*, the court explained that the differences between plaintiff's plaster and ceramic castings were only a result of necessarily different production techniques and were not enough to affect the validity of plaintiff's single copyright covering both versions of the work.¹⁶⁹ The court was concerned about comparing two versions of the plaintiff's work to determine whether its copyright covered both versions. Although the court was not making a comparison between plaintiff's work and the defendant's work in order to determine whether or not they were substantially similar, the same reasoning should apply.

In *Stein v. Rosenthal*,¹⁷⁰ where the defendants hired a person to make a casting of the plaintiff's copyrighted statuettes, the defendant's addition of electrical conduits and mounting stubs to allow use of the statue as a base for a table lamp did not preclude the court from finding substantial similarity and infringement. The court stated: "But for the addition of mounting stubs which adapted them

¹⁶⁵ *Id.* at 165-66.

¹⁶⁶ *Id.* at 166.

¹⁶⁷ Trustman, *supra* note 4, at 87.

¹⁶⁸ *Id.* There are also situations where different materials have been used in the recasting process. In Woodcock, *supra* note 4, the author discusses "hydrostone," or tinted plaster, which has been used to recast Remington's *Changing Outfits*.

¹⁶⁹ 193 F.2d at 164 (1st Cir. 1951).

¹⁷⁰ 103 F. Supp. 227 (S.D. Cal. 1952).

to the lamp manufacturer's use, the infringing copies were identical with the non-utilitarian originals depicted on the registration certificates."¹⁷¹ An unauthorized surmoulage of a copyrighted sculpture will be considered an infringing copy. The copyright owner should therefore be able to take advantage of the remedies afforded by federal law.

b. Remedies.

Once an artist has proved infringement, the 1976 Act provides for a variety of possible remedies including injunctions,¹⁷² impounding and disposition of infringing articles¹⁷³ and receiving damages and profits, including statutory damages¹⁷⁴ and potentially, costs and attorney's fees.¹⁷⁵ Apart from these civil remedies, section 506 provides for penalties for certain criminal offenses.¹⁷⁶

Section 506(d) deals with the removal of a copyright notice.¹⁷⁷ Not only does unauthorized removal of the plaintiff's copyright notice leave the validity of the plaintiff's copyright unaffected, but it also constitutes a criminal offense punishable by a fine of not more than \$2,500 if the removal or obliteration is done with fraudulent intent.¹⁷⁸ Proof of the removal of a copyright notice on a copyrighted work that is then used to make infringing castings may subject a defendant to more than a \$2,500 fine. This behavior may establish the "wilfulness" of infringement for "commercial advantage or private gain" that is required to subject a defendant to up to a \$250,000 penalty or five years imprisonment.¹⁷⁹

Also, under section 505, the court in any civil action has the discretion to allow the full recovery of costs by or against any party and may award attorney's fees to the prevailing party unless another provision in the Act provides otherwise.¹⁸⁰ Deliberate removal of a copyright notice and wilful infringement could supply the impetus necessary to convince a court to exercise this discretion. In *Stein*,¹⁸¹ a case decided under a similar provision in

¹⁷¹ *Id.* at 230.

¹⁷² 17 U.S.C. § 502 (1982).

¹⁷³ *Id.* § 503.

¹⁷⁴ *Id.* § 504.

¹⁷⁵ *Id.* § 505.

¹⁷⁶ *Id.* § 506.

¹⁷⁷ *Id.* § 506(d).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* § 506(a); 18 U.S.C. § 2319 (1982).

¹⁸⁰ 17 U.S.C. § 505 (1982).

¹⁸¹ 103 F. Supp. 227 (S.D. Cal. 1952).

the 1909 Act, the court found that the defendants infringed upon the plaintiff's copyrighted statuettes by using them as lamp bases. The court found that the plaintiff had obtained a copyright on the statuettes and had manufactured table lamps that embraced copies of the copyrighted statues. The court further found that "[d]efendants procured a set at retail [and] . . . caused the removal of the copyright notice and employed third party defendant, Valentino Santi, to make casts of the copyrighted statuettes and placed a substantial order with him for statuettes made from such casts."¹⁸²

Finding that the defendants had "unconscionably invaded plaintiffs' copyright"¹⁸³ and that the "infringement was made in bad faith and that the conduct of the defendants in their infringing actions was unfair,"¹⁸⁴ the court exercised its discretion and awarded attorney's fees to the plaintiff.

Section 506(c) declares that:

Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.¹⁸⁵

In situations where an artist's copyright has expired and no infringement suit is possible, section 506(c) could possibly be used against foundries which recast and market works with inaccurate copyright notices.¹⁸⁶ For example, though Remington's copyright has expired, "many recasts of Remingtons show up on the market with Remington's copyright inscription stamped into the bronze."¹⁸⁷

¹⁸² *Id.* at 230.

¹⁸³ *Id.* at 231.

¹⁸⁴ *Id.* at 232.

¹⁸⁵ 17 U.S.C. § 506(c) (1982).

¹⁸⁶ *Cf.* Trustman, *supra* note 4, at 87.

¹⁸⁷ *Id.* It is not clear whether a surmoulage of work in the public domain will be entitled to copyright protection. Is the act of preparing a mold from an existing bronze sufficiently creative so that the mold maker may obtain a copyright in his work? In *L. Batlin and Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976), the defendant, Snyder, had received a copyright for a plastic Uncle Sam toy savings bank copied from an uncopyrighted model cast iron mechanical bank which was itself a reproduction of the original public domain Uncle Sam bank. The court found that the number of trivial differences or deviations from the defendant's plastic reproduction was not substantial enough to render the work original and copyrightable.

Similarly, in *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980), the plaintiff had used three of the defendant's wind-up plastic toy figures modeled after the Disney characters, Mickey Mouse, Donald Duck, and Pluto as models for its own toys. The court found that the defendant's toys lacked the requisite degree of originality to

The new copyright law and the sculptor's careful compliance with its registration and notice requirements will likely protect contemporary sculptors from the surmoulaging and selling of their works during the statutory period of protection.¹⁸⁸ However, the law does not provide a complete remedy for the various problems occurring because of the prevalence of unethical bronze casting.

One problem is the limited duration of copyright protection. Additionally, the copyright protection granted by the Act is for the benefit of artists and authors and their assignees and heirs. Consumers cannot sue under the Act; they benefit from the Act only indirectly. A consumer cannot even realize indirect benefits unless artists take advantage of the rights granted them under the statute.¹⁸⁹

Unfortunately, the copyright law will not protect a consumer against an artist's production of more pieces than the edition size indicates. Nor will copyright law protect a consumer from an artist's introduction of another edition.

The Copyright Act, like the Lanham Act, is primarily designed to protect an artist's economic interests. Only indirectly does it offer some limited protection of artistic reputation.¹⁹⁰ Unlike the Lanham Act, nothing in the Copyright Act protects an artist against false attribution.¹⁹¹ The copyright law alone, therefore, is inadequate to deal with the myriad of problems which result from many of the questionable practices prevalent in the bronze sculpture market.

B. *Consumer Remedies*

Consumers, as well as artists, are entitled to protection from victimization through the marketing of unauthorized bronze castings. Trademark and copyright law may provide some indirect

grant them protection under the copyright laws because they reflected "no independent creation, no distinguishable variation from preexisting works, nothing recognizably the author's own contribution that sets Tomy's figures apart from the prototypical Mickey, Donald and Pluto. . . ." *Id.* at 910. See also *Cynthia Designs, Inc. v. Robert Zental, Inc.*, 416 F. Supp. 510 (S.D.N.Y. 1976) (holding that a rendition of a work in the public domain may be entitled to copyright protection provided that the new piece displays some creative authorship).

¹⁸⁸ This period for works created after January 1, 1978 is now the life of the artist plus 50 years. 17 U.S.C. § 302 (1982). There are different durational rules for works already under statutory protection, for works created after the effective date of the new Act, for works made for hire, for anonymous and pseudonymous works, and for unpublished works that are already in existence on January 1, 1978.

¹⁸⁹ See Note, *supra* note 34, at 333-35.

¹⁹⁰ Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490 (1979).

¹⁹¹ *Id.* at 1495.

protection to consumers, assuming that artists use these laws to keep unauthorized copies of their works off the market.¹⁹² Suppose, however, that the artist is responsible for the problem or that there is no artist available to bring suit as in a posthumous surmoulaging case where unauthorized copies of a sculpture are sold as originals. The law, if it is to have any effect on the prevalence of unethical casting and selling of bronzes, must allow consumers to sue directly for abuses. If consumers are able to rescind purchases, or better yet, to recover damages where they have been misled in purchasing bronze reproductions, some questionable practices in casting might be deterred. Strong decisions in favor of aggrieved consumers could discourage some of the practices frequently occurring in the art market today.

1. Fraud, Misrepresentation and Deceit

State common law actions for misrepresentation or fraud may offer consumers some relief. In a tort action, however, the plaintiff must prove the critical element of scienter, *i.e.* intent on the part of the defendant to deceive.¹⁹³ The defendant can refute any allegations that he harbored an intent to deceive by arguing that he was ignorant of the falsity of his representations and justifiably believed them to be true.

Some convincing factors that tend to show that an art purchaser was intentionally deceived by an art merchant were discussed in *Plimpton v. Friedberg*.¹⁹⁴ *Plimpton* involved the sale of "a wonderful Gainsborough," a "wonderful Reynolds, genuine of course," and a "genuine Romney," to the plaintiff, Jenny Plimpton, "an old lady nearly seventy-five years of age, during her stay in Atlantic City."¹⁹⁵ The plaintiff brought an action for deceit. The trial judge directed a verdict for the defendant, holding that although false representations had been made, the evidence did not establish that the defendant knew the representations were untrue.¹⁹⁶

On appeal the court reversed and set out the following as constituting the elements of an action for deceit: (1) That the defendant made some representation to the plaintiff meaning that she should act upon it; (2) that such representation was false and that the defendant, when he made it, knew it to be false; and

¹⁹² See *supra* notes 104-16 and accompanying text.

¹⁹³ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 105 at 685-86 (4th ed. 1971).

¹⁹⁴ 110 N.J.L. 427, 166 A. 295 (1933).

¹⁹⁵ *Id.* at 429, 431, 166 A. at 296-97.

¹⁹⁶ *Id.* at 428, 166 A. at 296.

(3) that the plaintiff, believing such representation to be true, acted upon it and was thereby injured.¹⁹⁷

The court found that representations had clearly been made. According to the court, “[w]hen holding the paintings out for sale, [defendant] did not say that they were ‘attributed’ or ‘assigned’ to or ‘said to be by’ this or that artist. He made positive statements of genuineness.”¹⁹⁸ The defendant gave the plaintiff

formal documents purporting to be signed by Boardwalk Art Gallerie, Inc., not then in existence, . . . certifying to the authenticity and purported history of the several paintings, giving detailed data. The Reynolds certificate was entitled ‘Portrait of Lady Bancroft Burton by Sir Joshua Reynolds,’ and asserts that ‘this picture was retained for many years at the family seat, Seaton Hall Thorne near Doncaster, but unfortunately had to be sold with furniture and effects owing to financial difficulties.’ This and more about the Reynolds; and to, like effect the Gainsborough and the Romney certificates.¹⁹⁹

The court also had little difficulty in determining that these representations were false. An art expert testified that the: “[C]ommercial value of the three paintings at the time of the sale was from five hundred to one thousand dollars, that none of the paintings were genuine, and that they had little artistic merit.”²⁰⁰ Mrs. Plimpton paid \$18,000 for the alleged Romney and \$8,200 for the Gainsborough and the Reynolds. There was little doubt that she believed the representations, acted upon them, and was injured as a result.

The real issue in this case was whether the defendant had actual knowledge of the falsity of his representations or whether he had made the representations without any knowledge as to their truth or falsity and had coupled the representations with some express or implied affirmation that they were known to be true to his personal knowledge.²⁰¹

The court concluded that the case should have gone to the jury on this issue, and therefore the directed verdict was in error. The court’s conclusion was adduced from the facts that the defendant had paid only \$3,500 for the “Romney” he sold to Mrs. Plimpton for \$18,000, the defendant was an experienced art dealer, and not

¹⁹⁷ *Id.* at 428–29, 166 A. at 297.

¹⁹⁸ *Id.* at 430, 166 A. at 296–97.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 428–29, 166 A. at 296–97.

one but all three of the pictures were grossly misrepresented.²⁰²

The court explained that “[t]here is a background of lights and shadows more consistent with clever illusiveness than with frank business dealing.”²⁰³ The court questioned the credibility of the defendant’s defense:

[Defendant] said that he believed the pictures were authentic, and that in so believing he relied upon the assurance of the consignor, Barclay, communicated to him through [defendant’s wife]. But did he? Had he really received an assurance from Barclay at the time of sale? . . . Did he ever charge Barclay with having deceived him? Were his subsequent actions those of a man who had been grossly deceived to the point of wronging an old lady? What of the detail and the strange execution of the certificates?²⁰⁴

The plaintiff’s advanced age, her inexperience, and the fact that she was cheated out of a large sum of money undoubtedly helped to convince the court that she should have her day in court.

Purchasers of surmoulded bronzes, however, may not be able to rely on such sympathetic fact situations. If the sellers are not experts and if the purchasers are not totally inexperienced, the results could be very different. Whether the seller knowingly made a false representation or had merely expressed a good faith but erroneous opinion on authenticity poses some difficult questions.

If consumers have not spent a large sum in purchasing a surmoulded bronze, will they be willing to bring a tort action? Where intent is very difficult to prove, a misrepresentation action may not be worthwhile unless a large amount of money is involved.

What if a failure to disclose relevant facts, as opposed to an affirmative misstatement of fact, misled a consumer into purchasing a bronze reproduction? Certainly, where a sculpture is marked or represented as one of a limited edition, but in fact the edition is unlimited, these markings or representations may amount to affirmative misstatements of fact. What about a situation where an artist correctly designates a piece as one of a limited edition but later introduces a second edition of the same sculpture with identical markings?

*Factor v. Stella*²⁰⁵ suggests that an artist in such a situation may have a duty of disclosure. The case involved the confusion arising

²⁰² *Id.* at 431–32, 166 A. at 296–97.

²⁰³ *Id.* at 431, 166 A. at 297.

²⁰⁴ *Id.* at 432, 166 A. at 297.

²⁰⁵ California Superior Court, No. C-58832 (Nov. 2, 1979).

from the existence of three versions of a Frank Stella oil painting. The three versions were independently created by the artist and were in no sense identical. The court held that an artist "has a duty to a purchaser of his work to inform the purchaser of the existence of a duplicate work that would materially alter the value or marketability of the purchased work."²⁰⁶

The court determined that no damages resulted from the artist's silence under the circumstances since there was no credible evidence that the plaintiff's painting would have brought a lower price at auction if the existence of the other versions had been disclosed prior to the auction. The court also explained that since the other two versions of the paintings were different enough from the plaintiff's version, neither "materially affected the value" of the plaintiff's version.²⁰⁷

A broader reading of the case, however, raises some interesting issues. The imposition of a duty on an artist to disclose relevant factors that may affect the value of a piece makes artistic integrity not only a moral responsibility but also a legal obligation. An unethical artist whose failure to disclose is discovered is subject not only to the loss of his reputation but also to possible punishment; the threat of a blow to his pocketbook might trigger his conscience.

2. Unfair or Deceptive Acts or Practices

Today, many wrongs that amount to common law fraud are governed by the Federal Trade Commission Act (FTC Act)²⁰⁸ and its state legislative counterparts. The key provision of the FTC Act, section 45, declares unlawful "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce. . . ."²⁰⁹

State statutes governing unfair or deceptive acts or practices are referred to as "Baby FTC Acts." By the early 1980's, every state had adopted some form of this legislation.²¹⁰ The majority contains language identical or substantially similar to section 45 of the FTC Act.²¹¹ A substantial number of state statutes item-

²⁰⁶ *Id.* Judgment by Judge Jack T. Ryburn, Feb. 15, 1979.

²⁰⁷ *Id.* Findings of Fact and Conclusions of Law.

²⁰⁸ 15 U.S.C. §§ 41-77 (1982) [hereinafter cited as the FTC Act].

²⁰⁹ *Id.* § 45.

²¹⁰ S.C. OPPENHEIM, G. WESTON, P. MAGGS & R. SCHECHTER, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION* 699 (1983) [hereinafter cited as OPPENHEIM & WESTON].

²¹¹ Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 531 (1980).

izes deceptive practices that are considered unlawful, with or without a provision designed also to encompass deceptive practices that are not listed. Most of these statutes are based on the Uniform Deceptive Trade Practices Act²¹² or the Uniform Consumer Sales Practices Act.²¹³

Purchasers of unauthorized bronze sculptures may seek a remedy under some of these statutes. The FTC Act does not provide a private right of action to consumers,²¹⁴ but forty-four states do provide consumers with a private remedy, forty-two by statute and two by judicial construction.²¹⁵ These statutes allow recovery of actual damages, or in some cases, statutory damages. Most allow the purchaser to rescind the transaction and provide for attorney's fees to the prevailing consumer.²¹⁶

The FTC Act is still important to purchasers, however, because more than twenty state statutes specifically direct the state courts to consider the federal statute or decisions in the federal courts under the FTC Act. Even in the absence of such specific language, state courts frequently refer to the federal law in construing Baby FTC Acts.²¹⁷

In order to recover under a Baby FTC statute, most state courts follow federal law and hold that the consumer must show that the defendant's "act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception."²¹⁸ This is an easy standard to meet, designed to protect "the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions."²¹⁹

For the purchaser of a bronze sculpture, several different forms of deception are potentially actionable. One possible situation is when an edition is advertised as a "limited edition" of a

²¹² UNIF. DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 35 (1978) (Commissioner's Prefatory Note on Deceptive Trade Practices (1966 Act)).

²¹³ UNIF. CONSUMER SALES PRACTICES ACT, 7A U.L.A. 1 (1978) (Commissioner's Prefatory Note on Consumer Sales Practices Act)).

²¹⁴ See *Carlson v. Coca Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973), and cases cited therein.

²¹⁵ OPPENHEIM & WESTON, *supra* note 210, at 699-700. The states that provide a private right of action by judicial construction are Arizona and Delaware. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 1119 (1974) (en banc); *Young v. Joyce*, 351 A.2d 857 (Del. Super. Ct. 1975). The states that provide a private right of action by legislation are listed in Leaffer & Lipson, *supra* note 211, at 560-64.

²¹⁶ Leaffer & Lipson, *supra* note 211, at 560-64.

²¹⁷ *Id.* at 533-34.

²¹⁸ See *id.* at 535 and cases cited at 535-36 n.87.

²¹⁹ *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273, 372 N.E.2d 17, 19, 401 N.Y.S.2d 182, 184 (1977).

specified number of pieces, but in fact the edition size is exceeded by the artist or foundry. The FTC has held that falsely advertising that "supplies are limited" is a deceptive act in the case of a number of commercial goods.²²⁰

Baby FTC Acts may also provide a remedy where a surmou- lage is labeled with the identifying mark of the foundry or the signature of the artist who made the original piece. Here, how- ever, as under section 43(a) of the Lanham Act, proof of second- ary meaning is necessary for the protection of an unregistered mark.²²¹ Without some association of the trade name or mark in the minds of consumers with the true source of the goods, confu- sion is unlikely.²²² This may prove an insurmountable obstacle to many foundries and lesser-known artists, since they may not be known outside a small circle of experts.

Where a surmou- lage is advertised as an original, the adver- tising amounts to passing off and may be actionable. Passing off occurs when a defendant induces purchasers to buy his product by creating the impression that the product was made by the plaintiff. The Deceptive Trade Practices Act expressly prohibits passing off as well as any act which "causes a likelihood of confu- sion or of misunderstanding as to the source, sponsorship . . . of goods or services."²²³ The Consumer Sales Practices Act like- wise prohibits sellers from representing that the subject of a con- sumer transaction has a sponsorship, approval, or affiliation it does not have.²²⁴ The prohibition against passing off is a broader concept than trademark infringement and encompasses situations involving a likelihood of confusion when the whole ap- pearance of the product, not just its trademark, is considered.²²⁵

Thus, in *FTC v. Orient Music Roll Co.*,²²⁶ the defendant corpo- ration engaged in an unfair method of competition when it purchased piano rolls manufactured and sold by a competitor from which it made and sold duplicates. The corporation was thus able to avoid the greater part of the cost of producing the rolls, thereby securing an undue advantage over competitors by appropriating the results of the complainants' time, efforts, and

²²⁰ See 2 TRADE REG. REP. (CCH) ¶ 7855.20 (1982).

²²¹ See *supra* note 50 and accompanying text.

²²² See, e.g., *Pep Boys, Inc. v. FTC*, 122 F.2d 158 (3d Cir. 1941); *FTC v. Real Prods. Corp.*, 90 F.2d 617 (2d Cir. 1937).

²²³ DECEPTIVE TRADE PRACTICES ACT §§ 2(a)(1), 2(a)(2), 7A U.L.A. 48.

²²⁴ CONSUMER SALES PRACTICES ACT §§ 3(b)(1), 3(b)(9), 7 U.L.A. 6-7.

²²⁵ *National Football League Properties, Inc. v. Consumer Enters.*, 26 Ill. App. 3d 814, 327 N.E.2d 242, *cert. denied*, 423 U.S. 1018 (1975).

²²⁶ 2 F.T.C. 176 (1919).

expense. Similarly, in *Sound Alike Music Corp.*,²²⁷ a record company was found to have engaged in a deceptive practice when it misrepresented that tapes of hit songs were recorded by the original artist. The tapes contained the names or likenesses of the original artists or depicted drawings similar to those appearing on the album of the original recording. The FTC ordered the company to cease and desist from the practice and also required the company to conspicuously disclose that "This is Not An Original Artist Recording."²²⁸

Passing off also led to an FTC complaint where marketers of arts and crafts merchandise in the Pacific Northwest misrepresented that their products were handmade in Alaska by Eskimos, Aleuts, and Native Americans from other tribes.²²⁹ The articles were actually made in Oregon, Washington, Hong Kong, Taiwan, and Japan and were often only partially handmade and crafted by non-Alaskan Native Americans. The complaints alleged that the appearance of the products, combined with the materials, labels, and signatures used created a likelihood of confusion and led consumers to believe that the craft items had actually been made by Alaskan natives.

Labels which would clearly and conspicuously disclose the true origin of the articles and the use of machinery in their production were required to be attached to proposed orders. The orders also barred the utilization of the name "Nuguruk" or any other name which has the tendency to mislead prospective purchasers.

The difficulty in applying this case to bronze sculptures is that the misrepresentation occasioned by a surmouflage is far more subtle. When a surmouflage is made from an original Remington sculpture, for example, the copy is in fact a sculpture made in the style and manner of Remington. Any falsehood stems from the fact that Remington did not specifically authorize the piece, not from the fact that it has no connection with Remington at all. It is necessary to show that consumers are likely to understand the designation "Remington" as an attribution of authority by the named artist to make the bronze, rather than as a designation of the style or appearance of the piece, in order to show that the surmouflage has a tendency to deceive. Such proof

²²⁷ 87 F.T.C. 1242 (1976).

²²⁸ *Id.* See also *Magnetic Video Corp.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,006.

²²⁹ *Leonard F. Porter, Inc.* [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,540.

goes much further than the proof necessary to show a likelihood of confusion in the case of the Alaskan crafts articles, where the misrepresentation was that the articles were originally handmade by Alaskan natives.

Further, where a bronze is labeled as a reproduction, no misrepresentation is present so long as the reproduction is basically faithful to the original. A surmoulage is, after all, a copy of an original bronze, albeit an unauthorized copy. Even if the reproduction is not a true copy, it may not be actionable. For some time the FTC prohibited companies from advertising silver plates patterned after the old English Sheffield plate as "Sheffield reproductions" because, unlike the copies, a Sheffield plate consisted of a copper base with a welded silver coating.²³⁰ Finally, in 1952, the FTC approved calling the copies "Sheffield design reproductions," provided that "made in the U.S.A." was used to clarify any inaccurate implication that the product actually came from Sheffield, England.²³¹

Thus, the Baby FTC Acts offer little hope of relief for the defrauded purchaser. To be sure, there are some potential arguments a purchaser may make, but there is little authority supporting his right to relief.

3. Express Warranties Under the Uniform Commercial Code

The express warranty provisions of the Uniform Commercial Code (UCC) provide another potential consumer remedy.²³² An express warranty is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. . . ."²³³

Section 2-313(2) states:

It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation

²³⁰ See, e.g., *Sheffield Silver Co. v. FTC*, 98 F.2d 676 (2d Cir. 1938).

²³¹ See *In re Sheffield Silver Co.*, 49 F.T.C. 354 (1952).

²³² Unless otherwise stated, all references to the Uniform Commercial Code (UCC) will be to the 1978 official text with comments.

A consumer may also want to consider the implied warranty sections of the UCC. For a good discussion, see DuBOFF, *DESKBOOK*, *supra* note 2, at 457-64. See also DuBOFF, *Artful Con*, *supra* note 2; Comment, *Consumer Protection Legislation in the Sale of Original Prints: A Proposal for Michigan*, 57 U. DET. J. URB. L. 55, 68-73 (1979); Note, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409 (1972).

²³³ U.C.C. § 2-313(1)(a).

of the goods does not create a warranty.²³⁴

Thus, while intent is irrelevant in an express warranty action under the UCC,²³⁵ the problem of establishing that a seller has expressed a warranty, an "affirmation of fact or promise,"²³⁶ rather than his opinion, remains. Two early English cases suggest that, in the art world, only the creator can be counted on to authenticate the work.²³⁷ Any statements to the effect that the work is by a particular artist, when made by an art dealer who cannot trace the work back to its creation, are merely statements of opinion. These cases point out that the older a work is the greater the likelihood that any statements by dealers will be opinions rather than warranties.

Thus, a consumer may be well advised to request documentation when purchasing a bronze sculpture. If the documents purport to trace the sculpture back to the artist himself, as the certificate for "Reynolds" did in *Plimpton v. Friedberg*,²³⁸ a court may be more inclined to see this language as expressing an affirmation of fact rather than an opinion.

A bronze purchaser may likewise rely on section 2-313(1)(b), which provides:

Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.²³⁹

Yet, some real problems could confront a bronze purchaser choosing to rely on this provision. The lack of any common understanding as to what meaning some terms commonly used in the art market convey gives rise to many problems. There is a lack of uniformity in definitions for such terms as "original" and "authentic" when applied to fine prints and bronze sculptures.²⁴⁰ What does the term "Remington sculpture" mean? A piece actually executed by Remington? A piece conceived by him but completed by another? A sculpture taken from a Remington mold? A casting authorized by Remington? A sculpture done in the style of Remington? Can this include a surmoulage?

Suppose that the plaintiff has established that the defendant

²³⁴ U.C.C. § 2-313(2).

²³⁵ See generally U.C.C. §§ 2-313 to -315.

²³⁶ U.C.C. § 2-313(1)(a).

²³⁷ *Power v. Barham*, 4 Ad. & E. 473, 111 Eng. Rep. 865 (1836); *Jendwine v. Slade*, 2 Esp. 572, 170 Eng. Rep. 459 (1797).

²³⁸ 110 N.J.L. 427, 166 A. 295 (1933).

²³⁹ U.C.C. § 2-313(1)(b).

²⁴⁰ Hodes, *Wanted: Art Legislation for Illinois*, 57 ILL. B.J. 218 (1968); Comment, *supra* note 1, at 566; Comment, *supra* note 232, at 55-57.

made a false affirmation of fact or provided an erroneous description of the goods. Once he has established that some sort of warranty has been made, he has the additional burden of proving that the warranty was made part of the basis of the bargain.²⁴¹ Although the precise contours of this requirement are not well established, many courts suggest that it contemplates a reliance component.²⁴² If the buyer and the seller have differing opinions on the authenticity of a work, then no warranty is created, and the buyer must rely on the validity of his own opinion. In this situation, authenticity would not be part of the basis of the bargain.²⁴³

This series of arguments that a defendant can raise in a warranty action may discourage a consumer from relying on the UCC or may prevent him from winning even if he does attempt an action for breach of express warranty. These "escape hatches"²⁴⁴ have been addressed in a number of recent commentaries that advocate the adoption of more particularized legislation.²⁴⁵

4. Art Legislation

Some states have adopted legislation that dramatically increases the amount of protection afforded to art purchasers.²⁴⁶ In *Dawson v. Malina*,²⁴⁷ the court discussed a specific provision of the New York General Business Law that deals with warranties in the sale of fine arts. The plaintiff, certain that he had been cheated in his purchase of eleven Oriental art objects, sued an art dealer, relying on both section 2-313 of the UCC, as enacted in New York,²⁴⁸ and section 219-c of the New York General Busi-

²⁴¹ U.C.C. § 2-313 and comments.

²⁴² Murray, "Basis of the Bargain": *Transcending Classical Concepts*, 66 MINN. L. REV. 283 (1982).

²⁴³ DUBOFF, DESKBOOK, *supra* note 2 at 450.

²⁴⁴ Hodes, *supra* note 240, at 221.

²⁴⁵ See *supra* note 240.

²⁴⁶ See MICH. COMP. LAWS ANN. §§ 442.311-315, 442.321-325 (West Supp. 1984) (MICH. STAT. ANN. § 19.410(11) (Callaghan 1975)); N.Y. ARTS & CULTURAL AFFAIRS LAW §§ 13.01, -0.3, -0.5, -21 (McKinney 1984). An attempt to introduce similar legislation in Illinois was unsuccessful. Hodes, *supra* note 240, at 219. See also DUBOFF, DESKBOOK, *supra* note 2, at 465 for other forms of art legislation.

²⁴⁷ 463 F. Supp. 461 (S.D.N.Y. 1978).

²⁴⁸ N.Y. U.C.C. § 2-313 (McKinney 1984) reads as follows:

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain

ness Law.²⁴⁹

The court explained that any benefit that the plaintiff might derive from his reliance on the UCC was embraced by the New York art legislation: "Indeed, Section 219-c was enacted at least in part to eliminate questions as to whether an art dealer's representations with respect to the authorship of a particular work of art were to be considered an affirmation of a fact . . . or merely the expression of the dealer's opinion. . . ." ²⁵⁰

The defendant had provided the plaintiff with letters and other documents describing each piece and attributing them to certain periods. The plaintiff believed that the pieces did not measure up to their descriptions. His burden was lessened by the statutory presumption that statements as to authenticity are part of the basis of the bargain and by the statutory attempt to eliminate the seller's arguments that he merely expressed his opinion.

The *Dawson* court, faced with a new statute, was forced to adopt a standard to determine whether the Oriental pieces matched the descriptions given by the defendant.

The court conceded that "the process of attributing any of the works of art involved here to a particular period of Chinese antiquity is by its very nature an inexact science" and "to a sub-

creates an express warranty that the whole of the goods shall conform to the sample or model.

- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

²⁴⁹ Section 219-c, in pertinent part, reads as follows:

Any provision in any other law to the contrary notwithstanding: 1. 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 written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis of the bargain and (ii) shall create an express warranty of the authenticity of such authorship as of the date of such sale or exchange. Such warranty shall not be negated or limited because the seller in the written instrument did not use formal words such as "warrant" or "guarantee" or because he did not have a specific intention or authorization to make a warranty or because any statement relevant to authorship is, or purports to be, or is capable of being merely the seller's opinion. 2. In construing the degree of authenticity of authorship warranted as aforesaid, due regard shall be given to the terminology used in describing such authorship and the meaning accorded to such terminology by the customs and usage of the trade at the time and in the locality where the sale or exchange took place.

N.Y. GEN. BUS. LAW § 219-c (McKinney Supp. 1983) *repealed by* 1983 N.Y. Laws C.876, § 5 (subject matter is now covered by N.Y. ARTS & CULTURAL AFFAIRS LAW § 13.03 (McKinney 1984)).

²⁵⁰ 463 F. Supp. at 465 n.3 (S.D.N.Y. 1978 n.250).

stantial extent a subjective judgement. . . ."²⁵¹ The test adopted was whether the person making these representations had a reasonable basis in fact at the time they were made. This "reasonable basis in fact" standard was measured by the expert testimony offered at trial and placed the burden of proof on the plaintiff.²⁵²

The defendant had warranted in his bills of sale and other documentation that the works were from particular periods. A series of experts testified, and the court found that the attributions of a jade lotus bowl and a vase to the Chien Lung period were proper. As to a large blue ceramic vase, the jade peach tree carving, and a jade pilgrim vase, the plaintiff sustained his burden of proving that the attributions made were without a reasonable basis in fact. The plaintiff was able to rescind his purchase of these pieces and get his money back with interest accruing from the date of purchase.

The statute has been criticized on a number of grounds;²⁵³ however, the fact that New York has adopted legislation to deal with specific problems that consumers face in the art market is commendable.

Fortunately, more and more states are enacting specialized art laws.²⁵⁴ While most current legislation deals explicitly with fine prints, the New York statute is broader in scope and covers other forms of art multiples or reproductions.

Section 220-a of the New York General Business Law defines "visual art multiples" as "prints, photographs (positive or negative) and similar art objects produced in more than one copy and sold. . . ."²⁵⁵ Bronze sculptures might be included in the catch-all phrase "and similar art objects," though it appears that language specifically dealing with cast sculpture was deleted from the bill before it was enacted into law.²⁵⁶

²⁵¹ *Id.* at 467.

²⁵² *Id.*

²⁵³ Comment, *supra* note 232; Comment, *supra* note 1, at 559.

²⁵⁴ DuBOFF, *DESKBOOK*, *supra* note 2, at 465.

²⁵⁵ N.Y. GEN. BUS. LAW § 220-a (McKinney Supp. 1983) *repealed* by N.Y. Laws C.876, § 5 (subject matter is now covered by N.Y. ARTS & CULTURAL AFFAIRS LAW § 15.01-2 (McKinney 1984)).

²⁵⁶ "An early study draft formulated in 1979 addressed prints only. By the time public hearings were conducted by the Attorney General of New York in the Fall of 1980, however, it was anticipated that sculpture, as well as photography would be included, and subsequent drafts included these areas. The inclusion continued and was solidified over the course of an extended period of study and discussion until a time in late spring of 1981. At that point a discussion among industry legislative and Attorney General's representatives, questions were raised as to the appropriateness of some of the terminology

California was the first state to have enacted a law specifically dealing with bronze sculptures. The California law now expressly includes "any sculpture . . . cast . . . or similar art object produced in more than one copy" in its definition of Fine Art Multiple.²⁵⁷ This broadened scope of coverage was adopted by the California legislature in 1983 as an amendment to the California fine print legislation.

Section 1744 of the California statute requires full disclosure in the sale of certain visual art objects produced in multiples.²⁵⁸ To combat some common problems, the statute requires a number of disclosures including details on the artist's contribution, the reproduction process, and information on editions. Section 1744.7 of the law provides that these disclosures create express warranties and are part of the basis of the bargain.²⁵⁹ The California statute requires that any disclaimer by an art merchant be stated "specifically and categorically" with respect to every detail of which knowledge is disclaimed.²⁶⁰

If an art dealer fails to make disclosures or if his warranties are breached, a purchaser may rescind the sale and get his money back with interest. In addition, if a purchaser can show a wilful violation, the statute provides for treble damages.²⁶¹ Furthermore, a successful plaintiff may be entitled to recover his litigation costs, attorney's fees, and expert witness fees. These costs, however, may be awarded to the successful defendant if the court finds that the action was brought in bad faith.²⁶²

Although this represents a heroic attempt to extend nonillusory protection to art consumers, it still contains certain weaknesses.²⁶³ Do the remedies provided offer enough deterrence to violators?²⁶⁴ A surmoulded edition of 1000 bronzes, for example, could result in hefty profits. Out of 1000 purchasers, how

for sculpture multiples. As a result bronze sculptures were omitted from the bill as enacted."

Letter from Gustave Harrow, Associate Professor of Law at New York Law School, to Leonard D. DuBoff (March 6, 1984).

²⁵⁷ See CAL. CIV. CODE §§ 1740-1745.5 (West 1984). For some inexplicable reason, the California legislature did not change this statute's title, "Sale of Fine Prints," to reflect the law's broadened scope.

²⁵⁸ *Id.* § 1744.

²⁵⁹ *Id.* § 1744.7.

²⁶⁰ *Id.* § 1742(d).

²⁶¹ *Id.* §§ 1745(a) and (b).

²⁶² *Id.* § 1745(d).

²⁶³ Comment, *supra* note 232.

²⁶⁴ See Woodcock, *supra* note 4, at 7, wherein the author points out that a surmouldage of Remington's *The Norther* in an edition size of 1000-1500 could gross several million dollars.

many might be expected to realize that they have not received the genuine article? Of these consumers, how many are likely to bring suit? Even if several purchasers manage to recover treble damages, would this be enough to convince an unethical caster to cease such a profitable venture?

In addition, an art dealer may provide the required disclosures and contemporaneously make oral warranties. Under the statutes, the express warranty liability only arises out of the representations made in writing.²⁶⁵

Perhaps the most serious defect in the California law and in all state legislation is that they are territorially limited. Consumers in most states receive no similar protection.²⁶⁶

IV. CONCLUSION

There is a need for federal legislation designed specifically to deal with the various unethical practices in bronze casting that frequently take place in the art market today. Artists may use both section 43(a) of the Lanham Act and the copyright law for protection but, as discussed above, existing consumer remedies are ill-suited to the problem of unauthorized bronze reproductions. Both artists and consumers should be protected. Available remedies should have enough bite to deter future violators and to compensate those aggrieved by past violations.

Since bronze foundries are reluctant to voluntarily consider the ethical obligations they owe the public, the artist, and art itself, legislation mandating ethical behavior is necessary. Only in this way can significant reform be accomplished.

The draft bill which follows represents an attempt to overcome the problems which have been discussed throughout this article. If this law is adopted by the federal legislature, then consumers should have the kind of meaningful protection necessary to a flourishing national sculpture market. This legislation will also benefit artists since consumer protection is likely to allay purchaser fears and stimulate more activity in the bronze sculpture market.

²⁶⁵ CAL. CIV. CODE § 1742(d) (West 1984); N.Y. GEN. BUS. LAW § 220-g (McKinney Supp. 1983) *repealed by* N.Y. Laws C.876, § 5 (subject matter is now covered by N.Y. ARTS & CULTURAL AFFAIRS LAW § 15.13 (McKinney 1984)).

²⁶⁶ DuBOFF, DESKBOOK, *supra* note 2, at 465.

V. PROPOSED DRAFT FOR THE FEDERAL REGULATION OF THE
ADVERTISING AND SALE OF SCULPTURE

Section 1. Definitions.

For the purposes of this Act:

- (1) "Artist" means the person or persons who conceived and executed the master "model."
- (2) "Edition" means one or more castings from the same "model," all of which are the same image.
- (3) "Limited Edition" means an "edition" that is held out to be limited to a maximum number of castings.
- (4) "Model" means the original image conceived and executed by the "artist" and from which an "edition" is cast. It shall also include any molds used in the casting process.
- (5) "Original" means a sculpture cast from a "model" conceived and executed by an "artist," during his lifetime, and that was authorized and approved by him.
- (6) "Reproduction" and "Copy" mean any sculpture which is not an "original" sculpture as defined by this Act.
- (7) A "wilful" violation is one committed with knowledge, or with reason to know, that information provided is not accurate.

COMMENTARY

This Act provides a number of definitions in an attempt to establish uniformity of understanding as to what meaning certain terms commonly used convey. These definitions are also intended to educate art purchasers who may be unaware that conflicting definitions exist in the marketplace.

The definition of "artist" reflects the fact that some works are created by individuals and others are created through the collaborative efforts of two or more persons.

The definition of "original" is adapted from the 1981 National Sculpture Society definitions relevant to bronze casting. The requirement that the artist authorize and approve the castings is an addition to that definition.

The definition of "model" requires that the "artist" both conceived and executed the "model." If a model has been conceived by one person and has been executed by another, any casting made from that model would fall into the definition of a "reproduction" or "copy."

Section 2. Applicability of the Act.

This Act applies to all sculptures sold, or offered for sale, after the effective date of this Act.

COMMENTARY

The Act and its disclosure requirements are made applicable to sales and offers to sell that occur after the effective date of the Act. This language was chosen so that sales and resales that occur after the effective date of sculptures that were cast before the effective date will be subject to the provisions of this Act.

Offers to sell are included in the statutory coverage. The Act contemplates a cause of action for potential purchasers as well as for actual purchasers. This expanded range of potential plaintiffs is intended to encourage effective policing of advertising practices. The fact that the Act can be invoked prior to an actual sale is a preventative measure. Because preventative measures can be taken early on, actual injury may be avoided, and the seller's potential liability may be reduced.

Section 3. Disclosure statements required.

- (1) Any person who sells a sculpture, at wholesale or retail, shall furnish the purchaser with a written certificate, invoice, or receipt for the purchase price which clearly and conspicuously discloses and expressly warrants all of the information required by Section 5 of this Act.
- (2) The disclosure requirements of Section 5 are imposed on individuals who use catalogues, magazines, newspapers, circular offerings and any other form of advertising which are knowingly published or distributed for the purpose of advertising sculptures.
- (3) The seller may describe a sculpture as a "reproduction" or "copy," but in doing so, he must state in writing that the sculpture is a "reproduction" or "copy" and not an "original" as defined by this Act. If the seller so describes a sculpture, he need not furnish the other information required by Section 5.

COMMENTARY

The disclosure requirements apply to advertising and offerings to sell as well as to writings evidencing an actual sale. This language is included in an attempt to ensure that any representa-

tions or disclosures made prior to an actual sale are subject to the disclosure and violation provisions.

The seller is allowed to describe a sculpture as a "reproduction" or "copy"; however, he is required to explain in writing that the sculpture is not an "original" as defined in this Act. This is intended to draw the potential purchaser's attention to the actual nature of the sculpture and alert him to the existence of the Act and the protection afforded by it.

Section 4. Disclaimers.

- (1) The seller may disclaim knowledge of any item required to be disclosed by Section 5 of this Act; however, any disclaimer must be in writing and shall be clear and conspicuous. Any disclaimer shall specifically refer to the item required to be disclosed.
- (2) Any disclaimer is ineffective if the purchaser can establish that the seller knew, or had reason to know of such information, or that the seller could have obtained such information through reasonable inquiry.
- (3) Any disclaimer found to be ineffective under Subsection (2) of this Section shall be considered a violation of Section 7, Subsection (1) of this Act.

COMMENTARY

A seller may disclaim knowledge only if he is justifiably ignorant of the items required to be disclosed. If the seller knows, has reason to know, or could easily determine the truth regarding the items required to be disclosed, he will not be immunized from liability by claiming lack of knowledge. If, for example, a seller buys a sculpture at a price so low that any possibility of its being an "original" is unlikely and refrains from questioning his seller on any issue of "originality," he may have reason to know that the sculpture is not an "original." If reason to know or failure to make reasonable inquiries is established, the seller who has resold the sculpture for a profit and has disclaimed knowledge of "originality" will nevertheless be liable under Section 7, Subsection (1) of the Act.

Where the seller has disclaimed, however, the burden is on the buyer to establish that the seller negligently failed to determine the truth or that he made a disclaimer knowing, or with reason to know, the truth as to such facts.

Section 5. Items Required To Be Disclosed.

The following information about a sculpture shall be furnished as provided in Section 3 and as defined in Section 1 of this Act:

- (1) The name of the "artist" and the year the sculpture was cast; if the artist is deceased then disclosure of this fact and the year of the artist's death.
- (2) The name of the foundry, if any, where the sculpture was cast or manufactured.
- (3) Whether the sculpture is an "original," a "reproduction" or a "copy."
- (4) Whether the "edition" is being offered as a "limited edition" and if so:
 - (a) the authorized maximum number of castings in the "edition";
 - (b) whether such castings are numbered or unnumbered;
 - (c) whether such castings are signed by the "artist" and, if so, in what manner the signature was affixed to the castings;
 - (d) the total size of the "edition";
 - (e) the authorized number of artist's or other proofs, if any, outside the "limited edition."
- (5) Whether the "model" was destroyed, effaced or altered after the current limited "edition" was completed.
- (6) If there were any earlier editions or whether there are any later "editions" contemplated from the same "model" and the total size of all other "editions."
- (7) Whether the "edition" is a posthumous "edition" and, if so, whether the "model" has been reworked, adapted, or altered.

COMMENTARY

This Section lists a variety of factors which influence the value of a piece of sculpture in the marketplace. Disclosure of these factors is designed to inform the purchaser of facts that may be relevant to his decision to purchase. Disclosure of these factors is also designed to force sellers of sculpture to provide potential purchasers with accurate and truthful information about particular pieces of sculpture.

Disclosure of the information in Subsections (1) and (7) is designed to prevent abuses occurring after an artist's death. Subsections (4) and (6) prevent abuses occurring from subse-

quent or spurious editions. Subsection (5) makes a purchaser aware of the possibility or probability of a subsequent edition. Subsection (3) forces an accurate designation of the piece as an original, copy, or reproduction. Subsection (2) identifies the source of the piece. All of these facts, when disclosed, will provide the purchaser with enough information to know what he is purchasing.

Section 6. Statute of Limitations.

No action may be commenced under this Act unless it is filed within three years of the date of sale, or within two years of the date the plaintiff discovered or reasonably should have discovered his claim, whichever period is longer.

COMMENTARY

The purpose of limiting the time within which an action may be commenced under this Act is to impose some responsibility on purchasers or potential purchasers to exercise a reasonable degree of care in determining the adequacy of the seller's disclosure. In the event of a misstatement by the seller the purchaser's or potential purchaser's cause of action would still be viable for two years after a reasonable person would have discovered the violation of this Act. The liability of an innocent seller who violates the Act is limited in Section 8, Subsection (1) of the Act.

Section 7. Violations

A person who sells or offers to sell a sculpture is in violation of this Act if he:

- (1) fails to provide the information required by this Act to be disclosed, or
- (2) provides false information, either orally or in writing.

COMMENTARY

A seller violates the Act by failing to provide the required information or by providing false information. This Section is worded so as to make the providing of false information a violation of the Act, whether or not the Act requires it to be disclosed and whether the false information is oral or written.

This Section utilizes a theory of strict liability. Knowledge is irrelevant in determining whether or not there has been a viola-

tion. The remedies provided, however, differentiate between innocent and wilful violations.

One who is rendered liable for violating the Act because he has, in good faith, supplied incorrect information which had been previously supplied to him may recover against his seller for the violation. The Act is not intended to inhibit mere sales talk. While it is difficult to distinguish between statements of fact and "puffing" or opinion, the courts have made this distinction in interpreting New York General Business Law §§ 219-b to 219-e.²⁶⁷ The growing body of case law which is developing to interpret this distinction and the Michigan statute cited in footnote 246 above may be used to aid in distinguishing between facts and opinions.

Section 8. Remedies.

- (1) Upon the purchaser's tender of the sculpture back to the seller, the seller shall be liable to the purchaser for the purchase price plus interest from the date of sale at the rate of 9% per annum or the legal rate of interest in the state in which the action is brought, whichever rate is higher. At the court's discretion, the purchaser may also recover costs, reasonable attorney's fees and reasonable expert witness fees.
- (2) If such violation is wilful, the seller shall be liable to a purchaser or potential purchaser for treble damages or \$1,000, whichever amount is greater. Damages for the purposes of this section shall mean the difference between the purchase price of the sculpture and the value it had as accepted. The value of the sculpture as accepted can be determined by the price received upon prompt sale or by the testimony of experts. A purchaser or potential purchaser shall recover costs, reasonable attorney's fees and reasonable expert witness fees.
 - (a) With respect to a violation of Section 7, Subsection (2), a violation is "wilful" if the seller had knowledge or reason to know that such information was false.
- (3) The provisions in this Act are in addition to any other existing legal or equitable remedies.

COMMENTARY

Under Subsection (1) of this Section, an innocent seller of a

²⁶⁷ See *supra* note 246.

sculpture who was unaware of the disclosure requirements or who was deceived into believing that certain information regarding the sculpture was true when in fact it was not will be liable to the purchaser for the return of the purchase price and interest from the date of the tender of the sculpture. He may be liable for costs, attorney's fees, and witness fees. Such a seller will be able to avoid extensive liability by an early settlement of the dispute. This could be accomplished by the seller agreeing to return the purchase price at once, or by the seller agreeing to provide the required information and the buyer's agreement to dismiss the suit and validate the sale.

Subsection (1) applies only to actual purchasers. Potential purchasers are required to establish a wilful violation of the Act in order to recover. Potential purchasers are allowed to sue under the Act in order to ensure more effective policing of violations. This purpose is best served by immunizing a relatively innocent seller from liability to persons who have not purchased from or been damaged by him. Effective deterrence is achieved by limiting the policing powers of potential purchasers to wilful violations. To encourage such policing, costs, attorney's fees, and witness fees are provided for. In the case of a wilful violation, the court has no discretion to deny a successful plaintiff these expenses.

A purchaser who is defrauded by a wilful violation of the Act has the option of rescission under Subsection (1) or he may take advantage of the remedies in Section 8, which are either \$1,000 or treble damages. The measure of damages has been modeled after UCC § 2-715 which provides for damages for breach of express warranties. The language has been changed in an attempt to alleviate some of the confusion which the UCC provision has created. The purchase price is the strongest indicia of the value a sculpture would have if it had been as warranted and had been used as the basis from which to measure the actual value of the piece as accepted. The infringer has a choice of electing the price received upon resale of the piece or the value it has as accepted. The value may be established by expert testimony with the burden on the defendant to establish the value. The plaintiff may rebut the value proffered by the defendant with expert witnesses of his own.

The definition of wilful, with respect to a violation consisting of the seller's providing false information, parallels the approach taken in the disclaimer provision. The seller need not know for an absolute fact that the information is false. If the seller pro-

vides information while harboring a reasonable suspicion that the information is false, his behavior may rise to the level of a wilful violation.

FEDERAL SCOPE OF ACT

The commerce clause of the United States Constitution grants Congress the authority to enact legislation affecting commerce.²⁶⁸ This should include legislation regulating the bronze sculpture market. The Supreme Court has delineated a two-part test to determine whether Congress has the authority to enact a statute based on the commerce clause: (1) Did Congress have a rational basis for finding that the regulated activity affected interstate commerce, and if it had such a basis, (2) were the means selected to regulate reasonable and appropriate?²⁶⁹ Great deference is given to Congress' findings of a rational basis.²⁷⁰ It has been held that negotiation and dealing between citizens of different states resulting in interstate movement of goods is commerce within the meaning of the Constitution.²⁷¹ The breadth of Congress' power is illustrated in *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.*,²⁷² where the Court upheld the government's right to regulate radio waves which cannot be kept within state boundaries. In *Federal Power Commission v. Florida Power and Light Co.*,²⁷³ the Court upheld the regulation of a Florida utility selling electricity to another Florida utility which, in turn, sold it to a Georgia utility.

Since the bronze sculpture market is national in scope and affects interstate commerce, Congress has the power to regulate it. The proposed legislation is a reasonable and appropriate method of dealing with the problems of this important national market.

²⁶⁸ U.S. CONST., art. I, § 8, cl. 3.

²⁶⁹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

²⁷⁰ *United States v. Gainey*, 380 U.S. 63 (1965).

²⁷¹ *Progress Tailoring v. Federal Trade Comm'n*, 153 F.2d 103 (7th Cir. 1946).

²⁷² 289 U.S. 266 (1933).

²⁷³ 404 U.S. 453 (1972).