S T A T E O F N E W Y O R K

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I N S E N A T E

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Introduced by Sen. LITTLE -- read twice and ordered printed, and when printed to be committed to the Committee on Cultural Affairs, Tourism, Parks and Recreation

AN ACT to amend the arts and cultural affairs law, in relation to consignments of works of art to art merchants by artists, their heirs and personal representatives

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 11.01 of the arts and cultural affairs law, as added by chapter 849 of the laws of 1984, subdivisions 11 and 20 as amended, subdivision 18 as added and subdivisions 19 and 21 as renumbered by chapter 940 of the laws of 1990, is amended to read as follows:

S 11.01. Definitions. As used in this title:

1. "Artist" means the creator of a work of fine art or, in the case of multiples, the person who conceived or created the image which is contained in or which constitutes the master from which the individual print was made.

2. "Art merchant" means a person who is in the business of dealing, exclusively or non-exclusively, in works of fine art or multiples, or a person who by his occupation holds himself OR HERSELF out as having knowledge or skill peculiar to such works, or to whom such knowledge or skill may be attributed by his OR HER employment of an agent or other intermediary who by his OR HER occupation holds himself OR HERSELF out as having such knowledge or skill. The term "art merchant" includes an auctioneer who sells such works at public auction, and except in the case of multiples, includes persons, not otherwise defined or treated as art merchants herein, who are consignors or principals of auctioneers.

3. "Author" or "authorship" refers to the creator of a work of fine art or multiple or to the period, culture, source or origin, as the case may be, with which the creation of such work is identified in the description of the work.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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4. "Creditors" means "creditor" as defined in subdivision twelve of section 1-201 of the uniform [commerical] COMMERCIAL code.

5. "Counterfeit" means a work of fine art or multiple made, altered or copied, with or without intent to deceive, in such manner that it appears or is claimed to have an authorship which it does not in fact possess.

6. "Certificate of authenticity" means a written statement by an art merchant confirming, approving or attesting to the authorship of a work of fine art or multiple, which is capable of being used to the advantage or disadvantage of some person.

7. "Conservation" means acts taken to correct deterioration and alteration and acts taken to prevent, stop or retard deterioration.

8. "Craft" means a functional or non-functional work individually designed, and crafted by hand, in any medium including but not limited to textile, tile, paper, clay, glass, fiber, wood, metal or plastic; provided, however, that if produced in multiples, craft shall not include works mass produced or produced in other than a limited edition.

9. "Fine art" means a painting, sculpture, drawing, or work of graphic art, and print, but not multiples.

10. "HEIR" SHALL HAVE THE MEANING PROVIDED IN THE ESTATES, POWERS AND TRUSTS LAW.

11. "Limited edition" means works of art produced from a master, all of which are the same image and bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples, or are otherwise held out as limited to a maximum number of multiples.

[11.] 12. "Master" when used alone is used in lieu of and means the same as such things as printing plate, stone, block, screen, photographic negative or other like material which contains an image used to produce visual art objects in multiples, or in the case of sculptures, a mold, model, cast, form or other prototype, other than from glass, which additional multiples of sculpture are produced, fabricated or carved.

[12.] 13. "On consignment" means that no title to, estate in, or right to possession of, the work of fine art or multiple that is superior to that of the consignor vests in the consignee, notwithstanding the consignee's power or authority to transfer or convey all the right, title and interest of the consignor, in and to such work, to a third person.

[13.] 14. "Person" means an individual, partnership, corporation, association or other group, however organized.

15. "PERSONAL REPRESENTATIVE" SHALL HAVE THE MEANING PROVIDED IN THE ESTATES, POWERS AND TRUSTS LAW.

[14.] 16. "Print" in addition to meaning a multiple produced by, but not limited to, such processes as engraving, etching, woodcutting, lithography and serigraphy, also means multiples produced or developed from photographic negatives, or any combination thereof.

[15.] 17. "Proofs" means multiples which are the same as, and which are produced from the same masters as, the multiples in a limited edition, but which, whether so designated or not, are set aside from and are in addition to the limited edition to which they relate.

[16.] 18. "Reproduction" means a copy, in any medium, of a work of fine art, that is displayed or published under circumstances that, reasonably construed, evinces an intent that it be taken as a representation of a work of fine art as created by the artist.

[17.] 19. "Reproduction right" means a right to reproduce, prepare derivative works of, distribute copies of, publicly perform or publicly display a work of fine art.

[18.] 20. "Sculpture" means a three-dimensional fine art object produced, fabricated or carved in multiple from a mold, model, cast, form or other prototype, other than from glass, sold, offered for sale or consigned in, into or from this state for an amount in excess of fifteen hundred dollars.

[19.] 21. "Signed" means autographed by the artist's own hand, and not by mechanical means of reproduction, after the multiple was produced, whether or not the master was signed or unsigned.

[20.] 22. "Visual art multiples" or "multiples" means prints, photographs, positive or negative, sculpture and similar art objects produced in more than one copy and sold, offered for sale or consigned in, into or from this state for an amount in excess of one hundred dollars exclusive of any frame or in the case of sculpture, an amount in excess of fifteen hundred dollars. Pages or sheets taken from books and magazines and offered for sale or sold as visual art objects shall be included, but books and magazines are excluded.

[21.] 23. "Written instrument" means a written or printed agreement, bill of sale, invoice, certificate of authenticity, catalogue or any other written or printed note or memorandum or label describing the work of fine art or multiple which is to be sold, exchanged or consigned by an art merchant.

S 2. Section 12.01 of the arts and cultural affairs law, as added by chapter 849 of the laws of 1984 and paragraph (c) of subdivision 1 as added by chapter 675 of the laws of 1995, is amended to read as follows:

S 12.01. Artist-art merchant relationships. 1. Notwithstanding any custom, practice or usage of the trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary:

(a) Whenever an artist or craftsperson, [his] OR THE heirs or personal representatives OF SUCH ARTIST OR CRAFTSPERSON, delivers or causes to be delivered a work of fine art, craft or a print of [his] SUCH ARTIST'S OR CRAFTSPERSON'S own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist or craftsperson, OR THE HEIRS OR PERSONAL REPRESENTATIVES OF SUCH ARTIST OR CRAFTSPERSON, and such art merchant with respect to the said work, and:

(i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work;

(ii) such work is trust property in the hands of the consignee for the benefit of the consignor;

(iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor;

(iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor; provided that, if such work is resold to a bona fide third party before the consignor has been paid in full, the resale proceeds are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full; and

(v) SUCH TRUST PROPERTY AND TRUST FUNDS SHALL BE CONSIDERED PROPERTY HELD IN STATUTORY TRUST AS DEFINED AND CONTEMPLATED BY 11 U.S.C. SECTION 541 AND OTHER RELEVANT BANKRUPTCY LAW, AND no such trust property or trust funds shall BECOME THE PROPERTY OF THE CONSIGNEE OR be subject or

subordinate to any claims, liens or security interest of any kind or nature whatsoever OF THE CONSIGNEE'S CREDITORS.

(b) Waiver of any provision of this section is absolutely void [except that a consignor may lawfully waive the provisions of clause (iii) of paragraph (a) of this subdivision, if such waiver is clear, conspicuous, in writing and subscribed by the consignor, provided:

(i) no such waiver shall be valid with respect to the first two thousand five hundred dollars of gross proceeds of sales received in any twelve-month period commencing with the date of the execution of such waiver;

(ii) no such waiver shall be valid with respect to the proceeds of a work initially received on consignment but subsequently purchased by the consignee directly or indirectly for his own account; and

(iii) no such waiver shall inure to the benefit of the consignee's creditors in any manner which might be inconsistent with the consignor's rights under this subdivision].

(c) [proceeds] PROCEEDS from the sale of consigned works covered by this section shall be deemed to be revenue from the sale of tangible goods and not revenue from the provision of services to the consignor or others, except that the provisions of this paragraph shall not apply to proceeds from the sale of consigned works sold at public auction.

2. IF A CONSIGNEE FAILS TO TREAT THE TRUST PROPERTY OR TRUST FUNDS IDENTIFIED IN PARAGRAPH (A) OF SUBDIVISION ONE OF THIS SECTION IN ACCORDANCE WITH THE REQUIREMENTS OF FIDUCIARIES IN SECTION 11-1.6 OF THE ESTATES, POWERS AND TRUSTS LAW, SUCH FAILURE SHALL CONSTITUTE A VIOLATION OF THIS ARTICLE AND OF SECTION 11-1.6 OF THE ESTATES, POWERS AND TRUSTS LAW AND SHALL BE SUBJECT TO THE PENALTIES PROVIDED THEREIN.

3. ANY PERSON WHO HAS BEEN INJURED BY REASON OF A VIOLATION OF THIS ARTICLE MAY BRING AN ACTION IN HIS OR HER OWN NAME TO ENJOIN SUCH UNLAWFUL ACT, TO RECOVER HIS OR HER ACTUAL DAMAGES, OR BOTH. THE COURT MAY AWARD REASONABLE ATTORNEYS' FEES, COSTS AND EXPENSES TO A PREVAILING PLAINTIFF IN ANY SUCH ACTION. UPON A CONSIGNOR'S ESTABLISHING IN ANY SUCH ACTION A PRIMA FACIE CASE THAT THE CONSIGNOR DELIVERED OR CAUSED TO BE DELIVERED SUCH WORK OF FINE ART, CRAFT OR PRINT TO A CONSIGNEE AS DESCRIBED IN PARAGRAPH (A) OF SUBDIVISION ONE OF THIS SECTION AND MADE A DEMAND FOR RETURN OF THE WORK OR SALE PROCEEDS, THE CONSIGNEE SHALL HAVE THE BURDEN OF PROVING ITS DEFENSES TO THE CONSIGNOR'S CLAIMED RIGHT TO RETURN OF SUCH WORK OR SALE PROCEEDS THEREFROM.

4. Nothing in this section shall be construed to have any effect upon any written or oral contract or arrangement in existence prior to September first, nineteen hundred sixty-nine or to any extensions or renewals thereof except by the mutual written consent of the parties thereto.

S 3. This act shall take effect on the thirtieth day after it shall have become a law.