

CITY AND COUNTY OF SAN FRANCISCO



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MAY 8, 1998

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*Renne Dirck*

Howard Lazar, Director  
Street Artists Program  
San Francisco Arts Commission  
25 Van Ness Avenue, Suite 240  
San Francisco, California 94102



**Re: Street Artist Certification of Third Party Reproductions**

Dear Mr. Lazar:

**Introduction and Question Presented**

In light of a recent inquiry from one of the street artists in the Street Artists Program, you have asked the following question:

Are the Arts Commission's screening criteria, which permit the certification of certain art and craft items that have been reproduced in limited editions by third parties, inconsistent with the Street Artists Ordinance?

**Short Answer**

No. The Arts Commission is authorized to issue screening criteria under the Ordinance. The screening criteria reflect a reasonable interpretation of the Street Artists Ordinance. As a result, a court is very likely to uphold the Arts Commission's criteria permitting certification of certain art and craft items that have been reproduced in limited editions by third parties.

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## Discussion

### I. The Street Artists Ordinance: Role of the Arts Commission in Examining and Certifying Street Artists

#### A. Role of the Arts Commission and Advisory Committee

The Street Artist Ordinance, San Francisco Police Code Article 24 ("Ordinance"), was enacted to implement an initiative ordinance approved by the voters as "Proposition L" at the November 4, 1975 general election.<sup>1</sup> Under the Ordinance, artists may sell their handcrafted art and craft items on designated San Francisco sidewalks. (S.F. Police Code §2405). The Ordinance establishes a process by which the Arts Commission examines and certifies the creators of "art or craft items" for participation in the Street Artists Program. (S. F. Police Code § 2400, Secs. 3 - 5). The Ordinance gives the Arts Commission the exclusive authority to issue street artists certificates and creates an Advisory Committee of Street Artists and Crafts Examiners (the "Advisory Committee"). The Advisory Committee's function is to "... advise the Arts Commission on matters relating to the wares produced by street artists and ... perform such other functions as shall from time to time be deemed appropriate by the Commission." (*Id.* § 2400, Secs. 2, 5).

#### B. Examination Procedures

The Ordinance provides that the Arts Commission "shall examine representative samples of the applicant's work for the purpose of verifying" whether such work is "of the applicant's own creation or the creation of the applicant's family unit." (*Id.* § 2400, Secs. 3(c), 4).<sup>2</sup> The Arts Commission must also verify that "the applicant neither employs other persons nor is employed by another person in the production of the art or craft item for which applicant seeks certification." (*Id.*). After such examination, the Arts Commission may "visit the studio or workshop of the applicant to view the applicant's facilities and to further verify that the art or craft item for which the applicant seeks certification is his or her own creation or those of his or her family unit." (*Id.*). The Arts Commission, by resolution, currently delegates this examination responsibility to the Advisory Committee. See Arts Commission Resolution #1981-984 (adopted August 3, 1981); see also San Francisco Arts Commission, Street Artists Program 29 (5th ed. 1998) (the "Bluebook"). However, the Arts Commission retains the authority to determine whether a street artist is entitled to certification under the Ordinance. (*Id.* § 2400, Secs. 4 -5; see also § 2408).

The examination procedures enable the Arts Commission, whether acting directly or through the Advisory Committee, to ascertain the extent of the artist's involvement in the

<sup>1</sup> The text of Proposition L is codified as section 2400 of the Ordinance.

<sup>2</sup> Section 2400 defines "Family Unit" as "[t]wo or more persons jointly engaged in the creation or production of an art or craft item, no one of whom stands in an employer-employee relationship to any of the other members thereof, or two or more physically or mentally handicapped persons participating in a formal rehabilitation program[,] a part of which includes activities for the creation of arts and crafts by said persons." (S.F. Police Code, §2400, Sec. 1(d)).

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creation of a particular art or craft item. As part of this examination, the Arts Commission must confront and resolve issues arising out of the use of mass-produced components or third party reproduction services. By requiring the Arts Commission to verify whether an artist's art or craft items are "of his or her own creation," the Ordinance "protects local merchants from competition with mass produced items that bear little or no trace of creative work." (City Attorney Opinion No. 83-61 (1983)). The Ordinance gives the Arts Commission discretion to develop standards under which particular art or craft items that have a mass-produced aspect may qualify for certification. (S.F. Police Code §2400, Secs. 4 -5). The Arts Commission has promulgated these standards in its screening criteria.

### C. Handcrafted Item Requirement

Under the Ordinance, street artists may sell only those "*handcrafted art or craft items created personally* by the street artist or the street artist's family unit for which the artist has been certified." (Id. § 2405(a) (emphasis added)). The Ordinance does not define the terms "art," "craft," or "created personally." The Ordinance simply states that "[t]he terms 'art' or 'craft' do not include any item intended or suitable for human consumption." (S.F. Police Code § 2401(a)). The Ordinance defines "handcrafted item" as "[a]n item *predominantly* created or *significantly* altered in form by the street artist." (Id. §2401(b) (emphasis added)).<sup>3</sup> Thus, by its terms, the Ordinance is not limited to works that are exclusively made by an artist's hands. (See City Attorney Opinion No. 83-61 (1983)). Furthermore, the Ordinance does not mandate that an artist own or rent the machines or tools that he or she uses in creating art or craft items.

While one may contend that the term "handcrafted" means "exclusively handmade," the text of the Ordinance does not support this assertion. Moreover, the Ordinance's definition of "handcrafted item" recognizes that artists regularly use commercially manufactured or machine-made or components in their work, such as paints, ready-made canvases, beads and film, and that artists also often use machines such as cameras, enlargers, photocopiers, computers and laser printers, in producing and replicating their work. In light of the above, the Ordinance vests in the Arts Commission the discretion to establish and apply standards for certifying an artist who does not necessarily create all components or alter all aspects of an art or craft item but who nevertheless predominantly creates or significantly alters it.

## II. Arts and Crafts Criteria: Third party Reproductions

To establish consistent screening guidelines for determining what constitutes a "handcrafted art or craft item," the Arts Commission has adopted regulations entitled Arts and Crafts Criteria ("screening criteria"). The screening criteria cover a broad range of arts and crafts categories. Several categories allow the certification of works that involve third party

<sup>3</sup> This definition of "handcrafted item," which was formally codified in 1983 (Ordinance 41-83), was added for "the purposes of administering Proposition L ...." (S.F. Police Code, § 2401). As a result, this definition clarifies the previously undefined term "own creation" which appears in Proposition L (Id. § 2400, Sec. 3).

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reproductions. As our office has previously stated, “[u]nique and difficult problems are posed by an artist’s work which, though originally a product of creativity, can be easily replicated into many editions. At some point the initial dominant creative aspect of the undertaking becomes secondary to its mass produced aspect.” (City Attorney Opinion No. 83-61 (1983), at 2) (certification of cassette tapes). The Arts Commission has confronted these problems in the screening criteria.

The screening criteria permit artists to use third-party reproduction services as long as the reproductions are limited in number. This is one method, albeit not the only one, of ensuring that a work is “predominantly created or significantly altered in form” by the artist and that its dominant creative aspect is not secondary to its mass produced aspect. The following are examples of the Arts Commission’s criteria regarding reproductions as set forth in the Arts Commission’s 1998 Bluebook:<sup>4</sup>

PHOTOGRAPHY: The artist must do the original shooting of the subject. Self-developing film camera work should be employed in some conceptually unique manner. *If the artist does only the shooting, the number of prints by commercial printers is limited to the following: machine commercial prints limited to 200; machine custom prints limited to 300.* Each print must be signed and consecutively numbered, bearing the letter “s” for street sale, with the edition number . . . . For each numbered edition, a “justification” as required by the California Print Statute<sup>5</sup> must be signed and filed with the Street Artists Program office. (Bluebook, supra, 35) (emphasis added).

PRINTMAKING: The artist must do the original artwork. If prints from the original are also done by the artist, the number of prints allowed for sale is unlimited. *If the printing is not done by the artist, the number of prints allowed for sale is limited to 500 per edition.* Each print must be signed and consecutively numbered . . . . For each numbered edition, a “justification” as required by the California Print Statute must be signed and filed with the Street Artists Program office. (Id. at 36)(emphasis added).

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<sup>4</sup> Although our office has advised the Street Artists Program that the Art Commission may consider self-published literary works for certification, (Memorandum to H. Lazar, Street Artists Program, from M. Stompler, City Attorney’s Office (Jan. 8, 1998)), the Art Commission has yet not issued formal criteria regarding such literary works.

<sup>5</sup> We were unable to locate any law entitled “California Print Statute” in the California Civil Code. However, a California statute, entitled “Sale of Fine Prints,” requires art dealers (including artists) to provide, upon a purchaser or consignee’s request, a “certificate of authenticity” for “fine prints” or “prints” produced in multiples. (Cal. Civ. Code §§ 1740 -1745.5 (1998)). This certificate must contain, among other information, the name of the artist, a description of the medium or process used in producing the multiple, a statement regarding whether the edition is a limited edition, and if so, the maximum number of signed or numbered impressions in the edition. (Id. §1744). The screening criteria’s use of the term “justification” may have been referring to this “certificate of authenticity.” The term “justification” does not appear in the Sale of Fine Prints statute.

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TEXTILE ARTS: . . . If the artist makes the original design (to be applied to the textile), but the design is not reproduced by the artist, limited editions are required (see PRINTMAKING criteria). (Id.)

PAINTING AND DRAWING: All traditional and experimental works are acceptable, as long as the artist is the instigator, maker or collaborator on work containing his own signature. (For multiples, see criteria for PRINTMAKING) (Id. at 35)

With respect to cassette tapes, the screening criteria do not refer to limited editions but rather require the artist/performer to register his or her copyright in such recording and provide a photocopy of the copyright forms filed in connection with such work to the Street Artists Program to keep as part of the artist's file. (Id. at 32-33)

The Arts Commission, as the agency responsible for determining what degree of artist involvement is necessary for a work to be of the artist's "own creation," has concluded that certain uses of third-party reproductions are permissible under the Ordinance and has regulated them accordingly.

### III. Validity of Arts Commission's Screening Criteria

#### A. Interpretation of Ordinance

In interpreting statutes, courts "follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . ." (People v. Loewen, 17 Cal.4th 1, 9 (1997), petition for cert. filed, (April. 6, 1998) (No. 97-8601) (citations and internal quotations omitted)). When the language is clear and unambiguous, the "plain meaning of the language governs," and courts do not need to engage in further construction. (Id.) However, when the language is subject to multiple reasonable interpretations, courts "... look to a variety of extrinsic aids, including the . . . objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is part." (San Bernardino Valley Audubon Society v. City of Moreno Valley, 44 Cal.App.4th 593, 600 (1996)).

In this case, the Ordinance is not ambiguous. Under the Ordinance, the Arts Commission is responsible for administering and enforcing the Street Artists Program (S.F. Police Code §§ 2400, 2401(f)-(h), 2404, 2404.1.1, 2404.2, 2404.3, 2406, 2408) and for examining and certifying street artists. (Id. at § 2400, Secs. 4-5). The Ordinance does not expressly state that the Arts Commission may issue screening criteria. Nevertheless, by vesting the Arts Commission with authority over examinations and certification decisions, (Id. at 2400, Secs. 4-5), the Ordinance clearly contemplates that the Arts Commission will develop such criteria. Indeed, the ability to issue screening criteria is a logical and necessary extension of the Arts Commission's role in examining and certifying street artists. As discussed above in Part I, the broad definition of "handcrafted item," gives the Arts Commission discretion to issue criteria that allow the

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certification of works which contain a mass-produced or third-party reproduction element. As a result, the Ordinance is not ambiguous with respect to the Arts Commission's authority to establish certification standards for works involving third-party reproductions.

### **B. Judicial Deference Given to Administrative Agency Interpretation**

Even if a court finds the Ordinance ambiguous, it is likely to defer to the Arts Commission's interpretation of the Ordinance. The law is clear that "[l]ong-standing and consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to *great weight* and should not be disturbed unless clearly erroneous." (*Rizzo v. Bd. of Trustees*, 27 Cal.App.4th 853, 862 (1994) (emphasis added); *De Young v. City of San Diego*, 147 Cal.App.3d 11, 18 (1983)). The Arts Commission has consistently and expressly permitted the use of third-party reproductions in limited circumstances since at least April 1977.<sup>6</sup> Consequently, this practice constitutes a long-standing and consistent administrative construction of the Ordinance. Furthermore, although the Ordinance has been amended several times, neither the Board nor the voters have initiated formal legislative efforts to bar the use of third party reproductions. This acquiescence further supports the validity of the Arts Commission's interpretation. In light of the above, a court will give the Arts Commission's interpretation of the Ordinance great weight unless clearly erroneous.

### **C. Standard of Judicial Review for Administrative Agency Regulations**

Here, where the Arts Commission's interpretation is codified in formal regulations, an even more limited standard of judicial review applies. According to the Supreme Court of California, when a court reviews the "legality of a regulation adopted pursuant to a delegation of legislative power," the court's inquiry is "necessarily . . . confined to the question whether the [regulation] is 'arbitrary, capricious or [without] reasonable or rational basis.'" (*Wallace Berrie*

<sup>6</sup> Despite other changes to the Ordinance, the criteria regarding multiples printed by parties other than the artist have remained relatively unchanged since the inception of the Street Artists Program. For example, the Screening Guidelines adopted on April 19, 1977 include the following provisions:

PHOTOGRAPHY: The Artist must do the original shooting of the subject. *If only the shooting is done then a limit to the number of prints may be set . . .*

PRINTS: *If printing is not done by the artist, limited editions (for street-selling) are required. The limits set on editions will vary depending on the size and cost of prints. However, no multiples printed by someone other than the street artist will exceed an edition of 500 for sale on the street.*

(Street Artist Program Screening Guidelines (April 19, 1977) (emphasis added)).

These long-standing criteria regarding works in multiples reveal the Art Commission's interpretation that items of an artist's "own creation" may, under certain circumstances, include works reproduced by third-parties. Moreover, the consistent and ongoing certification of third-party reproductions also suggests that the Art Commission has never taken the position that using a printing service constitutes "employ[ment of] other persons . . . in the production of the art or craft item . . ." (S.F. Police Code §2400, Sec. 3(c)).