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October 19, 1993

Ms. Mary B. Regan Executive Director, North Carolina Arts Council Department of Cultural Resources Raleigh, North Carolina 27601-2807

Re: Advisory Opinion; Sound Sculpture Project; Public Records Act, G.S. Chap. 132; Copyright Statutes, 15 USC 101 et seq.

Dear Mary:

The following is submitted in response to your memorandum dated September 16, 1993, in regard to the subject matter referenced above. "The Art Works for State Buildings Act" is set out in Article 47A of Chapter 143 of the General Statutes (N.C.G.S. § 143-408.1 et seq.). Pursuant to that legislation, the N.C. Arts Council (Council) entered into a contract with Mr. Bill Fontana (artist) to create a sound sculpture for the North Carolina Revenue Building. The complex and sophisticated nature of the effort involved in the unique sound sculpture is described in your memorandum and in the "Program" attached thereto and will not be repeated in this opinion. Your memorandum raises two issues. The first issue is stated as follows:

1. The sound sculpture was designed to be heard in the Revenue Building rotunda and surrounding spaces and the artist feels the integrity of the work would be jeopardized if the CDs were played outside of that space using different equipment.

Mr. Fontana is willing to give the Council back-up CDs to have in case those now in the equipment are damaged or deteriorate over time. Also, technology is improving so rapidly the Council may want to upgrade equipment in the future and begin with a new set of CDs.

The artist will not leave the Council back-up CDs unless the Council can assure him that they will be used only for the purpose of replenishing his artwork. For conservation purposes, the Council would need to hold these CDs in a climate-controlled space and the CDs would need to remain sealed and protected. If this space belongs to the State of North Carolina, could the public have access to these back-up CDs through the public records law? If so, what form of access?

It is our opinion that the possession of the back-up CDs by the Council would not subject the CDs to access by the public under the public records laws of North Carolina. While most opinions on the public records laws of North Carolina begin with the threshold question of whether or not the object in question is a "public record," that analysis is not necessary or helpful in addressing your first issue, because the federal law of copyright (15 USC 101 et seq.) controls. Those statutes define the artist's copyright interest, and because of the supremacy of federal law, a state law may not alter or amend the federal statute. Federal law states that the creator of an intellectual work, including sound recordings, is the owner of the copyright unless there is a written transfer of the copyright. Paragraph 13 of the contract between the artist and the Council clearly states that the artist shall retain the copyright to the sound sculpture. Therefore, the State of North Carolina may make copies of the CDs only according to the terms of the contract or with the express agreement of the artist. 15 USC 102(1). This office agrees with the conclusions in the letter opinions received by the Public Affairs Office of the Department of Cultural Resources from Ms. Susan Freya Olive, a Durham attorney specializing in copyright law, dated September 16, 1993, and C. Miller Sigmon, President of the North Carolina Volunteer Lawyers for the Arts, dated September 10, 1993, attached to your memorandum, to the effect that the artist's copyright interest precludes the duplication of the CDs without his permission.

Addendum 5

In addition, an analogy may be drawn in situations where the State has purchased copyrighted computer software with restrictions on its duplication. In the Fall 1990 edition of Popular Government, David M. Lawrence of the Institute of Government discusses the application of the public records law to commercial software purchased by a local government as follows:

Assume, to begin with, that a local government has a large data base on a personal computer that it has created and that it accesses and manipulates through a commercial data-base program. We can assume that the information that the local government has placed in the data base is public record, and, as discussed above, it is probable that a citizen has a right to an electronic copy of the data base. But the data base is of no use unless it can be accessed, and for that task the citizen also will need a copy of the commercial software. That program also will be included within the files of the government's computer system. Does that fact make the commercial program a public record, which the citizen also has the right to copy? Probably not. Such software is usually protected by copyright, and persons who purchase such software promise not to allow general copying of it by others. That the purchaser of the program is a government, subject to public records laws, probably does not lessen the rights of the copyright holder, just as an author does not lose the rights of copyright because his book has been purchased by a public library. David

M. Lawrence, Popular Government, Fall 1990, p.22.

In the commercial software situation discussed above, there is no inappropriate use of the software; nevertheless, copying the software without permission of the owner is a violation of the owner's copyright interest. It is the protection afforded to the owner of the software or the artist by having retained the copyright that prohibits unauthorized duplication, even if the copy were to be used under circumstances that did not affect its integrity. The issues of injury to the integrity of the artwork and of the "fair use" exemption, which are thoroughly discussed by Ms. Olive and Mr. Sigmon, arise between the artist and an individual or organization that, without permission of the artist, either copied or played a recording, e.g., an unauthorized sound recording made in the lobby of the Revenue Building. The Council should not participate or assist in any duplication or reproduction not authorized by the express agreement between it and the artist because to do so would violate the artist's copyright interest. Therefore, the fact that the State possesses back-up CDs does not mean that the CDs can be copied by the State or anyone else except in compliance with the contract or with the permission of the artist, regardless of the circumstances under which a complete or partial copy might be played.

This conclusion is consistent with the general policy of the Public Records Act that, in general, the public has "ownership" of, and should have access to, all information "owned" by the government. Here, the State does not own the sound sculpture. It possesses only a right to play the sound sculpture upon certain terms and conditions. The artist, Mr. Fontana, retains "ownership" of the sculpture through the copyright. The State, therefore, does not have the legal right to provide public access to the sculpture under the Public Records Act.

2. The second issue is whether any problems arise for the Council if it provides the lead-in for the playing of a two-minute segment of the Sound Sculpture, voluntarily provided by the artist for such purpose, by the News and Observer on CITYLINE.

It appears that the playing of the segment will be permitted by an agreement between the artist and the newspaper, and we presume that the Council will consent pursuant to paragraph 13(a) of the contract. Under these circumstances, we perceive no problems with the arrangement.

A clarification of one point should be made in regard to Ms. Olive's letter opinion, a portion of which, if taken out of context, might be interpreted as stating that there is an exemption under the

N.C. Public Records Act based upon the sole fact that a public record is the property of a private person. The

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fact that property belongs to a private person is just one of four factors that must be present for the exemption set out in N.C.G.S. § 132-1.2 to apply. N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

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