

# ARE YOU FAUX REAL? AN EXAMINATION OF ART FORGERY AND THE LEGAL TOOLS PROTECTING ART COLLECTORS<sup>♦</sup>

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## INTRODUCTION

In the first season of the long-running sitcom “Frasier,” the title character purchases a painting and hosts a party to exhibit his new purchase. But he is humiliated when the artist arrives and declares that the painting is a forgery.<sup>1</sup> Frasier hurries to the art gallery to demand a refund, but the owner points to the signature on the painting as proof of its legitimacy. Frasier is appalled because he knows the painting, including the signature, is fake. He tells the gallery owner that the work is a forgery, and the owner laughs, “Well if it is, it’s a damn good one.”<sup>2</sup> When Frasier arrives home defeated he calls the police. His father, a retired officer, suggests calling the Fine Arts Forgery Department but then laughs and says, “The boys downtown have their hands full with murders and robberies. They don’t have time for this artsy-fartsy stuff.” Frasier wants to litigate the matter but is advised against it because it is time-consuming and expensive, possibly costing more than the art itself. He comes to the realization that sometimes life is not fair. At the conclusion of the episode, Frasier’s brother takes justice into his own hands and throws a brick through the gallery’s window. So in the end, Frasier is stuck with his once beloved, but now worthless, painting, which he hangs in the bathroom.

Why is Frasier so outraged? Before the work was revealed as a forgery he was proud to display the painting. But like many who have purchased forgeries,<sup>3</sup> a once admired work becomes the source of shame, embarrassment, and failure. As this article will explore, many buyers of forged works experience the same frustration. However, the number of forgeries on the market has increased during the past few decades.<sup>4</sup> The economics of supply and demand suggest there will be no end to the escalating commercial value for a limited number of exalted works of art. With commercial art market players responsible for assessing the value of art, market prices will continue to soar and art forgery will flourish.<sup>5</sup> What remedies are available to aggrieved buyers? When art market players and attorneys discuss authentication, the question of authorship is the central issue to be examined: was the work created by the identified author, or is the actual creator someone other

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<sup>1</sup> *Frasier: The Crucible* (NBC television broadcast Oct. 21, 1993).

<sup>2</sup> *Id.*

<sup>3</sup> Forgery may be defined as “a work of art presented to a buyer or audience with the intention to deceive.” DENIS DUTTON, *Art Hoaxes*, in *ENCYCLOPEDIA OF HOAXES*, [http://denisdutton.com/art\\_hoaxes.htm](http://denisdutton.com/art_hoaxes.htm).

<sup>4</sup> Patricia Cohen, *A Picasso Online for Just \$450? Yes, It Is a Steal*, *THE NEW YORK TIMES* (Sept. 3, 2012), [http://www.nytimes.com/2012/09/03/arts/design/growth-in-online-art-market-brings-more-fraud.html?\\_r=0](http://www.nytimes.com/2012/09/03/arts/design/growth-in-online-art-market-brings-more-fraud.html?_r=0); Tom Flynn, *Art Forgery: A Crime on the Rise?*, *INTENT TO DECEIVE*, <http://www.intenttodeceive.org/about/art-forgery-a-crime-on-the-rise/> (last visited Feb. 21, 2016).

<sup>5</sup> Joe L. Dolice, *A History of Art Forgery*, *MYSTUDIOS.COM* (2003), <http://www.mystudios.com/gallery/forgery/history/>.

than the one claimed? However, authorship has not always been a major focus in the art market.

## I. BACKGROUND

### A. *Rise in Authorship*

Art historians and scientists now generally agree that the oldest piece of art was created over 40,000 years ago in what is now Spain.<sup>6</sup> There is no identification of the artist; in fact, for the vast majority of art history the identities of artists remained anonymous. This trend is clear throughout history. In ancient Egypt sculptors and painters were not seen as creative individuals, but were paid artisans who worked as part of a team.<sup>7</sup> Even the lead master craftsman remained anonymous, with all credit belonging to the patron who commissioned the work.<sup>8</sup> A rise in signatures and the recognition of authorship began in Ancient Greece with the acknowledgement of exceptional artists like Euphronios.<sup>9</sup> Academics credit Sophilos' signature with being recognized as the first Attic vase painter known by his true name.<sup>10</sup> He was an active potter

<sup>6</sup> This work may have been done by Neanderthals, not modern *Homo sapiens*. Michael Marshall, *Oldest Confirmed Cave Art is a Single Red Dot*, NEW SCIENTIST (June 14, 2012), <http://www.newscientist.com/article/dn21925-oldest-confirmed-cave-art-is-a-single-red-dot.html>. See also Tom Worden, 'The Oldest Work of Art Ever': 42,000-year-old Paintings of Seals Found in Spanish Cave, DAILY MAIL, <http://www.dailymail.co.uk/sciencetech/article-2097869/The-oldest-work-art-42-000-year-old-paintings-seals-Spanish-cave.html> (last updated Feb. 7, 2012, 4:27 PM).

<sup>7</sup> Art, *Artisans, and Artists*, THE ANCIENT NEAR EAST: AN ENCYCLOPEDIA FOR STUDENTS, 1, 75-79 (Ronald Wallenfels & Jack M. Sasson eds., 2000), [http://ic.galegroup.com/ic/whic/ReferenceDetailsPage/ReferenceDetailsWindow?query=&prodId=WHIC&displayGroupName=Reference&limiter=&disableHighlighting=true&displayGroups=&sortBy=&zid=&search\\_within\\_results=&action=2&catId=&activityType=&documentId=GALE%7CCX2897300042&source=Bookmark&u=mmln\\_m\\_highrock&jsid=19a0dad63552b9c98d4b94f2ecb0568a](http://ic.galegroup.com/ic/whic/ReferenceDetailsPage/ReferenceDetailsWindow?query=&prodId=WHIC&displayGroupName=Reference&limiter=&disableHighlighting=true&displayGroups=&sortBy=&zid=&search_within_results=&action=2&catId=&activityType=&documentId=GALE%7CCX2897300042&source=Bookmark&u=mmln_m_highrock&jsid=19a0dad63552b9c98d4b94f2ecb0568a) (last visited Aug. 19, 2015).

<sup>8</sup> SERGIO DONADONI, THE EGYPTIANS 57 (University of Chicago Press 1997), <https://books.google.com/books?id=MCTbJ0VozGQC&pg=PA57&lpg=PA57&dq=anonymity+in+egyptian+art&source=bl&ots=DoWOR4gSIG&sig=-F34HmWRGBUUnSOHi-GMmfogpNc&hl=en&sa=X&ei=JrwJVZGSBKnfATenoKYCA&ved=0CCgQ6AEwAjgK#v=onepage&q=anonymity%20in%20egyptian%20art&f=false>.

<sup>9</sup> Euphronios was active in Athens during the late sixth and early fifth centuries B.C. He was one of the most important artists of the red-figure technique. He was active during the transition from Late Archaic to Early Classical art. Even Euphronios' earliest known works demonstrate a total control of the technical abilities necessary for red-figure vase painting. In addition, he was responsible for introducing a number of technical advances to the red-figure technique. These and his artistic innovations were highly influential. See MICHAEL NORRIS, ET. AL., GREEK ART FROM PREHISTORIC TO CLASSICAL: A RESOURCE FOR EDUCATORS, THE METROPOLITAN MUSEUM OF ART 34, 51 (2000).

<sup>10</sup> Although Sophilos is the earliest known vase painter by his true name, he is not the earliest artist. There is a still earlier name on a krater (a wine mixing bowl) from one of the Greek colonies in Southern Italy, which dates to the middle 7th century B.C. and was found in the city of Cerveteri. It is known as the "Aristonothos krater" because of an inscription among the figures that reads "Aristonothos epoiesen" ("made by Aristonothos"). The word "epoiesen" ("made") is usually used to denote the potter, but in this case it is possible that potter and painter were the

and vase painter in the black-figure style during the 6<sup>th</sup> century B.C.

The rise in authorship during this period may be explained by the fact that Greeks worshipped the aesthetic qualities of great art and wrote extensively on artistic theory.<sup>11</sup> Another reason for signatures relates to the sense of competition among artists.<sup>12</sup> In addition to the competitive spirit, signatures were affixed to works as a means of indicating quality. Just as modern trademarks differentiate between products and guarantee that those sharing the same mark also share the same quality,<sup>13</sup> ancient artists signed their works to signify quality and differentiate their creations.<sup>14</sup> However this practice did not continue consistently throughout art history. Whereas Greek artists were highly revered in Ancient Greek society, most Roman artisans were unidentified and considered tradesmen.<sup>15</sup> In fact, much ancient art was created without recognition going to the artist;<sup>16</sup> modern art historians place names on these works according either to where the objects are found or displayed, like the *Berlin Painter*,<sup>17</sup> or a characteristic of the work, like the *Ampersand Painter*.<sup>18</sup>

Artists practiced uncelebrated for centuries. Through the Middle Ages the main purposes of art were historical reference and religious devotion, and the identity of the artist was of little import.<sup>19</sup>

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same person. Today it is in the Museo del Palazzo dei Conservatori in Rome, Italy. Beth Cohen, *The Literate Potter: A Tradition of Incised Signatures on Attic Vases*, 26 METROPOLITAN MUSEUM JOURNAL 52 (1991).

<sup>11</sup> See Jeremy Tanner, *Social Structure, Cultural Rationalization and Aesthetic Judgment in Classical Greece*, in WORD AND IMAGE IN ANCIENT GREECE 183 (N.K. Rutter & Brian A. Sparks eds., 2000).

<sup>12</sup> THE OXFORD HANDBOOK OF GREEK AND ROMAN ART AND ARCHITECTURE 117–119 (Clemente Marconi ed., 2015) (discussing an amphora from the late 6th century B.C. [today in the Staatliche Antikensammlungen und Glyptotek in Munich, Germany] that speaks to this highly competitive environment. Euthimides, one of the pioneers of the red-figure technique, painted it. Among three figures of dancing men the painter wrote “*hos oudepote Euphronios*,” meaning “as never Euphronios [could have done].” That was quite a boast as Euphronios was one of the foremost painters of his generation.).

<sup>13</sup> J. THOMAS MCCARTHY, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:55 (4th ed. 2007).

<sup>14</sup> DEBORAH BOUCHOUX, INTELLECTUAL PROPERTY: THE LAW OF TRADEMARKS, COPYRIGHTS, PATENTS, AND TRADE SECRETS 19 (4th ed. 2012); Gary Richardson, *Brand Names Before the Industrial Revolution*, NAT’L BUREAU OF ECON. RESEARCH (Working Paper No. 13930, 2008), <http://www.nber.org/papers/w13930>.

<sup>15</sup> DONALD EMRYS STRONG, ROMAN ART 75 (Roger Ling ed., 2d ed. 1995).

<sup>16</sup> *Id.*

<sup>17</sup> *Berlin Painter*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/62185/Berlin-Painter> (last updated Aug. 12, 2014). See also *The Berlin Painter*, THE BRITISH MUSEUM, [http://www.britishmuseum.org/research/search\\_the\\_collection\\_database/term\\_details.aspx?bioId=97436](http://www.britishmuseum.org/research/search_the_collection_database/term_details.aspx?bioId=97436) (last visited Aug. 19, 2015).

<sup>18</sup> *Pyxis (Container for Personal Objects)*, THE ART INSTITUTE OF CHICAGO, <http://www.artic.edu/aic/collections/artwork/40879> (last visited Aug. 19, 2015).

<sup>19</sup> Simon Newman, *Middle Ages Art*, THE FINER TIMES, <http://www.thefinertimes.com/Middle-Ages/middle-ages-art.html> (last visited Aug. 19, 2015).

Accomplished artists were respected and rewarded handsomely, but few knew or cared who they were except perhaps for their patrons—usually the Church, nobility, or the State. During this period it was the norm for artists not to sign their works. However, authorship gained significance during the Renaissance<sup>20</sup> with the rise of Humanism, a philosophical movement that emphasized individuality and the importance of human, rather than divine or supernatural matters.<sup>21</sup> At that point it became commonplace for artists to identify their works,<sup>22</sup> and people began believing that artists injected something of themselves in their works.<sup>23</sup> The concept of the sanctity of individual genius and talent is perhaps best embodied by Michelangelo.<sup>24</sup> “He is the first example of the modern, lonely, demonically impelled artist—the first to be completely possessed by his idea and for whom nothing exists but his idea—who feels a deep sense of responsibility towards his gifts and sees a higher and superhuman power in this artistic genius.”<sup>25</sup>

### B. *The Existence of Forgeries*

With the rise of authorship and the idea of individual creative forces, the market value of works by recognized artists began to rise, not only because of their artistic merit but also their economic worth. Buyers no longer desired art, but an object by a recognized “artist,”<sup>26</sup> and so forgeries began to rise because of economic incentives. During the Renaissance, forgeries entered the market in full force.

Michelangelo himself is well known for committing one of the first recorded instances of forgery.<sup>27</sup> In 1496, Michelangelo sculpted a

<sup>20</sup> *Signed, Sealed, Delivered: A Look at Artists' Signatures in the Courtauld Gallery*, COURTAULD GALLERY (Sept. 25, 2014), <http://galleryblog.courtauld.ac.uk/2014/09/25/signed-sealed-delivered/>.

<sup>21</sup> JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* (Peter Murray, ed., S. G. C. Middlemore, trans. 1995).

<sup>22</sup> ALL ABOUT RENAISSANCE FAIRES, [http://www.all-about-renaissance-faires.com/renaissance\\_info/the\\_renaissance\\_begins.htm](http://www.all-about-renaissance-faires.com/renaissance_info/the_renaissance_begins.htm) (last visited Aug. 19, 2015).

<sup>23</sup> CLAUDIA MOSCOVIC, *ROMANTICISM AND POSTROMANTICISM* 59 (2007).

<sup>24</sup> JESSE McDONALD, *MICHELANGELO* 7 (2001) (“The cult of the artist as an individual genius, rather than craftsman employed for a specific commission, owes its development to Michelangelo and his older contemporary and rival, Leonardo.”).

<sup>25</sup> ARNOLD HAUSER, *THE SOCIAL HISTORY OF ART VOL. 1: FROM PREHISTORIC TIMES TO THE MIDDLE AGES* 95 (3d ed. 2003).

<sup>26</sup> See Caitlin Elizabeth Anderson, *Collectors and Collecting Renaissance Era Patrons, Artists and Spaces*, CONFLUENCE: THE ART MARKET, <https://confluence.cornell.edu/display/tam2011/Collectors+and+Collecting+Renaissance+Era+Patrons,+Artists+and+Spaces> (last updated Jan. 6, 2012). See also *Artists and Patrons*, ITALIAN RENAISSANCE LEARNING RESOURCES, <http://italianrenaissanceresources.com/units/unit-8/essays/isabella-deste-collects/> (last visited Sept. 5, 2015).

<sup>27</sup> JONATHAN KEATS, *FORGED: WHY FAKES ARE THE GREAT ART OF OUR AGE* 8–11 (2013) (Keats suggests the earliest artist to be forged was St. Luke, as the artist who painted the portrait of Mary and Jesus entitled *Hodeghetria*. Because St. Luke’s identity was linked with Jesus Christ, work done by his hand had a priceless and inextricable value. Keats relates this forgery and presents a compelling discussion of fake religious relics, which he compares to forged artwork.).

sleeping cupid and then buried it so that it would appear older.<sup>28</sup> He was advised that the sculpture's apparent age would increase its value and command a higher price.<sup>29</sup> Michelangelo sold the sculpture through a dealer to Cardinal Raffaello Riario, who ultimately discovered that the sculpture was artificially aged.<sup>30</sup> Although the cardinal demanded a refund from the dealer, he allowed Michelangelo to keep his percentage of the sale because he was so impressed with his work.<sup>31</sup> His youthful transgression was overlooked because of his talent, and this incident only added to his fame.<sup>32</sup> Giorgio Vasari admired Michelangelo's ability to convincingly copy the work of ancients, praising it as a "triumph over antiquity,"<sup>33</sup> and the sculpture was eventually displayed in Castello di San Giorgio in Mantua, near another cupid that was deemed to be a genuine antique work by Praxiteles.<sup>34</sup> Its current location is unknown, but scholars believe it to have been destroyed in a fire at Whitehall Palace in 1698.<sup>35</sup> Apparently, Michelangelo had a proclivity for copying other artists' drawings; he is also known for keeping the originals and returning copies in their place.<sup>36</sup>

As the Renaissance ushered in Humanism and placed emphasis on the value of human achievement, an increased value was placed on individual artists. This movement led to an era that was artistically rich and expanded the art market. After the Renaissance the art market continued to grow.<sup>37</sup> The redistribution of the world's wealth after the Renaissance created an explosive demand for art by a prosperous mercantile middle class.<sup>38</sup> Guilds of master artists and their students churned out art to fill this ever-increasing demand.<sup>39</sup> The sale of state and ecclesiastical art collections created new secondary markets in the form of dealers, galleries, and auction houses.<sup>40</sup> For the first time in

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<sup>28</sup> CAROL M. RICHARDSON, LOCATING RENAISSANCE ART 55–57 (2007).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Famous Fake Friday: Michelangelo's Sleeping Cupid*, LOST IN THE LOUVRE (Mar. 22, 2013), <http://lostinthelouvre.wordpress.com/2013/03/22/famous-fake-friday-michelangelos-sleeping-cupid/>.

<sup>32</sup> *Id.*

<sup>33</sup> SÁNDOR RADNÓTI, THE FAKE: FORGERY AND ITS PLACE IN ART 1–3 (1999).

<sup>34</sup> Michelangelo Buonarroti, *Sleeping Cupid*, MEDiateca DE PALAZZO MEDICI (2007), [http://www.palazzo-medici.it/mediateca/en/schede.php?id\\_scheda=81](http://www.palazzo-medici.it/mediateca/en/schede.php?id_scheda=81) (1496) (last visited Sept. 6, 2015).

<sup>35</sup> *Id.*

<sup>36</sup> See THIERRY LENAIN, ART FORGERY: THE HISTORY OF A MODERN OBSESSION (2012).

<sup>37</sup> Jeremy R. Howard, *Art Market*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1557506/art-market> (last updated June 10, 2015).

<sup>38</sup> RICHARDSON, *supra* note 28, at 15.

<sup>39</sup> See generally RICHARD A. GOLDTHWAITE, WEALTH AND THE DEMAND FOR ART IN ITALY, 1300–1600 (1993); see also Dolice, *supra* note 5.

<sup>40</sup> The secondary art market includes all markets in which art is not purchased directly from the artist. See RICHARDSON, *supra* note 28.

history art became a commercial commodity.<sup>41</sup> It was an opportune time to saturate the market with forgeries. This period also witnessed a heightened interest in antiquities, raising the value of these objects.<sup>42</sup> The market was expanding; art objects became commercial items, with the associated values reflected in the identity of the artist. As such, it became the norm for painters to sign their works.

*C. A Robust Art Market Leads to Increasing Prices and the Prevalence of Forgeries*

Fraudulent art appeared on the market because there were not enough works to satiate buyers. A robust marketplace for a valuable class of goods encourages the creation of counterfeits.<sup>43</sup> Before artworks acquired monetary value forgery was not a rampant problem, but once these pieces became more valuable, the number of forgeries rose. Artwork generally derives monetary value from two factors: the aesthetic qualities they embody and their authorship.<sup>44</sup> It is the second of these two factors that comes into play in most cases of forgery.<sup>45</sup> Although common for four centuries, by the nineteenth century the presence of forgeries was recognized as a major phenomenon.<sup>46</sup> By the twentieth century the distinction between an original and a copy became stark.<sup>47</sup>

1. The Current Market is Full of Forgeries

The art market has been on fire since the 1990s. In 1990, the most expensive auction sale was realized with the sale of an 1876 painting of a Paris dance crowd.<sup>48</sup> After adjusting for inflation, the price of the winning bid was \$154 million.<sup>49</sup> Since that record-breaking sale, the art market has continued to thrive. The ten most valuable<sup>50</sup> paintings to be

<sup>41</sup> See Dolice, *supra* note 5.

<sup>42</sup> LYNN CATTERSON, INGANNO – THE ART OF DECEPTION: IMITATION, RECEPTION, AND DECEIT IN EARLY MODERN ART 125–28 (S. Hickson & S. Gregory, eds. 2012).

<sup>43</sup> Patrick E. Murray & Edward A. Woods, *Fighting the Forgers*, FINANCIAL ADVISOR (Jan. 27, 2015), <http://www.fa-mag.com/news/fighting-the-forgers-20581.html>.

<sup>44</sup> G. E. Newman & P. Bloom, *Art and Authenticity: The Importance of Originals in Judgments of Value*, JOURNAL OF EXPERIMENTAL PSYCHOLOGY (2011), <http://minddevlab.yale.edu/sites/default/files/files/art-and-authenticity.pdf>; Eric Matthes, *The Value of Authenticity and Irreplaceability*, The Creativity Post (Feb. 7, 2012), [http://www.creativitypost.com/philosophy/the\\_value\\_of\\_authenticity\\_and\\_irreplaceability](http://www.creativitypost.com/philosophy/the_value_of_authenticity_and_irreplaceability).

<sup>45</sup> See Dutton, *supra* note 3.

<sup>46</sup> Charles Hope, *The Art of the Phony*, NY BOOKS (Aug. 15, 2013), <http://www.nybooks.com/articles/archives/2013/aug/15/forgery-art-phony/>.

<sup>47</sup> See KEATS, *supra* note 27, at 3.

<sup>48</sup> Susan Adams, *How Smart is Investing in Art?*, FORBES (Nov. 27, 2013, 8:00 AM), <http://www.forbes.com/sites/susanadams/2013/11/27/how-smart-is-investing-in-art/>.

<sup>49</sup> *Id.*

<sup>50</sup> When adjusted for inflation.



sold at auction were all sold in 1990 or later.<sup>51</sup> Of the sixty-one most expensive paintings ever sold at auction, only eight were sold prior to 1990, and each was sold in the 1980s.<sup>52</sup> In fact, a graph provided by Forbes Magazine reflects the dramatic trend in which high-priced sales have accelerated during the past quarter-century.<sup>53</sup>

Art has been prized by both experienced collectors and first-time art buyers at auction. In fact, the growing interest in the art world has introduced a new wave of investment products for art objects.<sup>54</sup> Entire companies have developed in the field of art investment consultation, using art as an alternative investment vehicle.<sup>55</sup> Some economists claim that art is a more sound investment than stocks, citing the fact that art outperforms the stock market.<sup>56</sup> Since the Second World War groups of wealthy investors purchased artwork during unstable economic periods.<sup>57</sup> In 2013, a record-breaking sale at Christie's Inc. was such a success that industry representatives have credited the nearly half billion-dollar sale with ushering in a "new era."<sup>58</sup> During this period of high unemployment in the United States, a recession in Europe, and an economic slowdown in China, the wealthy are investing massive amounts of money on luxury items such as art.<sup>59</sup>

Forgeries have been on the rise with the skyrocketing value of art. The phenomenon of blockbuster auctions came into full force towards the end of the twentieth century. As stated by well-known gallerist Larry Gagosian, "[high values for contemporary art] show[] how broad the market is—as in deep pockets."<sup>60</sup> During the past few decades the news has been full of front-page headlines reporting the exorbitant

<sup>51</sup> *List of Most Expensive Paintings*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_most\\_expensive\\_paintings](http://en.wikipedia.org/wiki/List_of_most_expensive_paintings) (last visited Aug. 19, 2015).

<sup>52</sup> *Id.*

<sup>53</sup> *See* FORBES, [http://images.forbes.com/static\\_html/2013/ig\\_art\\_gate\\_2.jpg](http://images.forbes.com/static_html/2013/ig_art_gate_2.jpg) (last visited Sept. 6, 2015).

<sup>54</sup> Victor Ginsburgh & Phillipe Jeanfils, *Long-term Co-movements in International Markets for Paintings*, 39 EUR. ECON. REV. 538, 538–546 (1995).

<sup>55</sup> *See, e.g.*, ART CONSULTANTS GROUP, <http://www.artconsultantsgroup.com/> (last visited Sept. 6, 2015); FINE ART WEALTH MANAGEMENT, <http://www.fineartwealthmgt.com/> (last visited Aug. 19, 2015); TANG ART ADVISORY, <http://www.tangartadvisory.com/> (last visited Sept. 6, 2015); *Welcome to Invest In Art*, SAATCHI ART, <http://www.saatchiart.com/invest-in-art/2015-part-1> (last visited Sept. 6, 2015).

<sup>56</sup> Harry Bradford, *Wealthy's Art Investments Beat Stocks, Real Estate Over Last Decade*, HUFFINGTON POST (May 2, 2012, 12:50 PM), [http://www.huffingtonpost.com/2012/05/02/art-market-is-attractive-investment\\_n\\_1470800.html](http://www.huffingtonpost.com/2012/05/02/art-market-is-attractive-investment_n_1470800.html).

<sup>57</sup> *Id.*

<sup>58</sup> Agustino Fontevicchia, *'New Era' For Art Markets as Collectors Drop Half a Billion at Christies' Contemporary Sale*, FORBES (May 20, 2013, 2:59 PM), <http://www.forbes.com/sites/afontevicchia/2013/05/20/new-era-for-art-markets-as-collectors-drop-half-a-billion-at-christies-contemporary-sale/>.

<sup>59</sup> *Id.*

<sup>60</sup> Carol Vogel, *Christie's Contemporary Art Auction Sets Record at \$495 Million*, N.Y. TIMES (May 15, 2013), <http://www.nytimes.com/2013/05/16/arts/design/christies-art-auction-sets-record-at-495-million.html>.

prices realized at auction: “‘The Scream’ Scares Up \$120 Million and Shatters Records at Sotheby’s Epic Impressionist and Modern Sale”,<sup>61</sup> “Giacometti sculpture sells for record \$104M”,<sup>62</sup> “Relentless Bidding, and Record Prices for Contemporary Art at Christie’s Auction”,<sup>63</sup> and even “Why Francis Bacon deserves to beat The Scream’s Record-Breaking Price Tag.”<sup>64</sup> With headlines like these, it is no wonder that the world’s attention has focused on the art market and valuable paintings. Who can ignore the value of these soaring sales? Clearly, this reality has not escaped the notice of forgers.

From an economic viewpoint the rise in forgeries is logical because they are a response to market demand.<sup>65</sup> As art prices surge, so does the incentive to forge. Selling a forgery for millions of dollars is a windfall. According to well-known art historian Theodore E. Stebbins, Jr., “[t]he art market is tricky, unorganized, and unregulated . . . and in this market it pays very well for people to sell objects that aren’t what they purport to be.”<sup>66</sup> Now the art market is at a juncture where forgeries comprise a significant portion of the market. The number of forgeries is unknown.<sup>67</sup> A sampling of various sources exhibits the difference in number.<sup>68</sup> European law enforcement experts opine that “as much as half the art in circulation on the international market could be forged.”<sup>69</sup> The Metropolitan Museum of Art’s former director, Thomas Hoving, has even stated that 40% of the works at the Met are forged.<sup>70</sup> The Rembrandt Project reached a similar conclusion following the examination of 627 alleged Rembrandt works, with only 267 deemed authentic.<sup>71</sup> Experts opine that over half the market is

<sup>61</sup> Judd Tully, “*The Scream*” Scares Up \$120 Million and Shatters Records at Sotheby’s Epic Impressionist and Modern Sale, BLOUIN ARTINFO (May 3, 2012), <http://www.blouinartinfo.com/news/story/802607/the-scream-scares-up-120-million-and-shatters-records-at>.

<sup>62</sup> Phil Han, *Giacometti Sculpture Sells for Record \$104M*, CNN (Feb. 7, 2010, 10:19 AM), <http://www.cnn.com/2010/WORLD/europe/02/04/world.expensive.art.giacometti/>.

<sup>63</sup> Vogel, *supra* note 60.

<sup>64</sup> Jonathan Jones, *Why Francis Bacon Deserves to Beat The Scream’s Record-Breaking Pricetag*, GUARDIAN (Nov. 12, 2013, 11:32 AM), <http://www.theguardian.com/artanddesign/2013/nov/12/francis-bacon-triptych-lucian-freud-auction>.

<sup>65</sup> Christopher Reed, *Wrong! But a Nice Fake Is Valued Object in a University Museum*, HARVARD MAGAZINE (Sept.–Oct. 2004), <http://harvardmagazine.com/2004/09/wrong.html>.

<sup>66</sup> *Id.*

<sup>67</sup> This is particularly because the inherent nature of a fake is that its true identity is misrepresented and often goes undetected.

<sup>68</sup> David Martindale, *New Show Examines Fine Art of Forgery*, DFW (Mar. 14, 2013, 4:00 PM), [http://www.dfw.com/2013/03/01/762028\\_new-show-examines-fine-art-of.html](http://www.dfw.com/2013/03/01/762028_new-show-examines-fine-art-of.html).

<sup>69</sup> Rob Sharp, *The Counterfeiters: Inside the World of Art Forgery*, THE INDEPENDENT (Dec. 10, 2007), <http://www.independent.co.uk/arts-entertainment/art/features/the-counterfeiters-inside-the-world-of-art-forgery-764032.html>.

<sup>70</sup> This accounts for only the works of which he is aware. See THOMAS HOVING, FALSE IMPRESSIONS: THE HUNT FOR BIG-TIME ART FAKES (1997).

<sup>71</sup> John Gash, *Rembrandt or Not?*, 81 ART IN AM. 56 (Jan. 1993), <http://connection.ebscohost.com/c/articles/9302040268/rembrandt-not>.

comprised of forgeries<sup>72</sup> with some believing that fakes comprise 50–70% of the art market.<sup>73</sup>

## 2. There is a Circular Relationship: The Art Market Thrives, Prices Increase, and Connoisseurship Gains Greater Importance

As the art market expanded so too did the practice of connoisseurship.<sup>74</sup> Collectors turned to experts to lead them to their purchases, advising on quality, rarity, value, and even authorship. Today's conception of art forgery emphasizes the notion that originals possess certain qualities absent in even the best copies. This framework requires the existence of an expert with a unique ability to distinguish between the two. The emergence of professional connoisseurs coincided with the rise of forgeries.<sup>75</sup> The relationship is circular: as prices escalate the need for a connoisseur's opinion rises, and as connoisseurs vouch for works and their authenticity, the works become more coveted and art market prices rise even higher.

Interestingly, the rise of professional connoisseurs increased the value of works on the art market;<sup>76</sup> they helped to broaden the art market, as they laid the foundation for great collections.<sup>77</sup> One well-known connoisseur, Bernard Berenson, collaborated with art dealer Joseph Duveen, who is credited with expanding the market for Renaissance art. He created some of the greatest collections in the United States by selling European works to wealthy Americans interested in enriching their lives through art.<sup>78</sup> As Duveen famously quipped, "Europe has a great deal of art, and America has a great deal of money."<sup>79</sup> With that money Duveen supplied works to William Randolph Hearst, Henry Clay Frick, J.P. Morgan, Andrew Mellon, and John D. Rockefeller, among others.<sup>80</sup> These art collections eventually became the heart of some of America's most significant museums.<sup>81</sup>

Duveen and Berenson had a convenient arrangement beneficial to both their interests.<sup>82</sup> In order for Duveen to sell high-priced paintings to

<sup>72</sup> *Over 50 Percent of Art is Fake*, ARTNET (Oct. 13, 2014), <http://news.artnet.com/in-brief/over-50-percent-of-art-is-fake-130821>.

<sup>73</sup> Tom Sykes, *Are Over Half the Works on the Art Market Really Fakes?*, DAILY BEAST (Oct. 17, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/10/17/are-over-half-the-works-on-the-art-market-fakes.html>.

<sup>74</sup> See Hope, *supra* note 46.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Michael Peppiatt, 'Duveen': *The Art of the Deal*, N.Y. TIMES (Sept. 19, 2004), <http://www.nytimes.com/2004/09/19/books/review/19PEPPIAT.html>.

<sup>78</sup> See MERYLE SECREST, *DUEVEEN: A LIFE IN ART* (2004).

<sup>79</sup> SIMON HOUP, *MUSEUM OF THE MISSING: A HISTORY OF ART THEFT* 27 (2006).

<sup>80</sup> *A Visit to the Frick*, N.Y. SOCIAL DIARY (Dec. 30, 2004), [http://www.newyorksocialdiary.com/socialdiary/2004/12\\_30\\_04/socialdiary12\\_30\\_04.php](http://www.newyorksocialdiary.com/socialdiary/2004/12_30_04/socialdiary12_30_04.php).

<sup>81</sup> See Peppiatt, *supra* note 77.

<sup>82</sup> Barbara Klose-Ullmann, *The Secret Partnership and the Dynamics of Art*, 26 HOMO

collectors, Berenson's authentication served as a stamp of approval allaying fears of investing vast sums of money in artwork.<sup>83</sup> Berenson initially avoided joining Duveen due to his wariness of dealers, but financial considerations eventually led him to join the prosperous dealer.<sup>84</sup> The relationship between Berenson and Duveen was kept secret, although they maintained a thirty-year contract to work together.<sup>85</sup> This was done for the sake of both parties: Berenson did not want to harm his reputation as a connoisseur, and Duveen wanted to provide clients with "independent" appraisals. However, the contract terms do not indicate a disinterested relationship; Berenson was provided with 25% of the profits that Duveen acquired due to his guidance.<sup>86</sup> Not only was Berenson receiving money from Duveen's sales, the dealer also applied pressure, insisting that Berenson provide advice contrary to his beliefs.<sup>87</sup> Sadly, Berenson was not always steadfast in his convictions and caved. During the course of the business relationship Berenson certified some questionable attributions. Later in life he regretted some of his professional opinions and lamented the fact that he had "profaned" the art world.<sup>88</sup> It is important to note that a number of the paintings he sold have turned out to be fakes; but it is uncertain whether he knew this at the time of sale.<sup>89</sup>

## II. HOW THE LAW GRAPPLES WITH AUTHENTICITY

### A. *The First High Profile Authentication Battle in US Courts:* Hahn v. Duveen

Although problematic attributions were discovered only after the passing of Duveen and Berenson, complicated issues surrounding connoisseurship also arose during their lifetimes, most famously in a legal dispute related to a Leonardo da Vinci attribution. Judge Black astutely observed the absurdity of the art market and connoisseurship in *Hahn v. Duveen*.<sup>90</sup> In 1920 Andree Hahn, the owner of a painting, sued Duveen for slander of title, claiming that Duveen's disparaging statements damaged her negotiations with an art museum and several

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OECONOMICUS 1, 41–59 (2009), <http://www.homoeconomicus.org/lib/getfile.php?articleID=180&PHPSESSID=d0c000e40b2f98903ce237acf2491812>.

<sup>83</sup> Rachel Cohen, *Priceless*, THE NEW YORKER (Oct. 8, 2012), <http://www.newyorker.com/magazine/2012/10/08/priceless-2>.

<sup>84</sup> *Id.*

<sup>85</sup> See JOAN M. MARTER, 1 THE GROVE ENCYCLOPEDIA OF AMERICAN ART 259 (2011); COLIN SIMPSON, THE ARTFUL PARTNERS: SECRET ASSOCIATION OF BERNARD BERENSON AND JOSEPH DUVEEN (1988).

<sup>86</sup> Cohen, *supra* note 83.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> SECREST, *supra* note 78.

<sup>90</sup> 234 N.Y.S. 185 (N.Y. Sup. Ct. 1929).

galleries that were considering the purchase of the painting.<sup>91</sup> Ms. Hahn believed the painting was by Leonardo, but when a newspaper called Duveen for his opinion, the dealer stated the work was not by the Renaissance master.<sup>92</sup> This statement triggered a nine-year legal battle and four-week trial. Shockingly, Duveen never saw the work, neither in person nor in a photo before making his initial proclamation. He reasoned that the real work with that title (*La Belle Ferronniere*) was not in the United States, but in the Louvre; therefore, the Hahns could not possibly have an original.<sup>93</sup> Duveen further stated that the Hahns' certificate of authenticity was fake.<sup>94</sup> Based on his opinion the \$250,000 sale of the work to the Kansas City Art Gallery never came to fruition.<sup>95</sup> Duveen's statements rendered the work nearly worthless and unsellable.

Two questions were presented at trial: (1) Were Duveen's statements false? and (2) Were they made with actual malice? To win her case, Hahn needed to prove that Duveen made a false statement with actual malice; therefore, she needed to show that Duveen's statements were false. With Duveen's partner, Berenson, as the leading authority on Renaissance paintings, this was a tremendous hurdle. As the case progressed, both parties relied on expert testimony related to scientific evidence and historical documents. As described in John Brewer's "The American Leonardo," the case exposed the underbelly of the art world, including the contentious relationships between rival connoisseurs, and the ability of Joseph Duveen to sway the museum community.<sup>96</sup> After a drawn out legal battle, the jury was hung. While awaiting retrial the parties settled, with Duveen purportedly paying \$60,000 plus legal fees.<sup>97</sup>

*Hahn v. Duveen* is interesting, not only for its outcome and the media circus surrounding the trial, but also for the judge's insightful observations about valuation, authenticity, and the art market. Judge Black's opinion harshly critiques the art market and the processes used by connoisseurs. He referred to experts as those "who claim to have a sixth sense which enables some of them after they have seen a picture even for five minutes to definitely determine whether it is genuine or not."<sup>98</sup> He also warned the jury, "[a]n expert is no better than his knowledge. His opinion is taken or rejected because he knows or does

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<sup>91</sup> *Id.* at 187.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See JOHN BREWER, *THE AMERICAN LEONARDO: A TALE OF OBSESSION, ART AND MONEY* (2009).

<sup>97</sup> *Sotheby's to Offer Painting that Sparked Debate and Controversy*, ART DAILY, <http://artdaily.com/news/35567/Sotheby-s-to-Offer-Painting-that-Sparked-Debate-and-Controversy> (last visited Aug. 21, 2015).

<sup>98</sup> *Hahn v. Duveen*, 234 N.Y.S. 185, 192 (N.Y. Sup. Ct. 1929).

not know more than one who has not studied a particular subject. . . . Because a man claims to be an expert, that does not make him one.”<sup>99</sup> Judge Black summarized the case: “[T]he real point is whether a dealer or an expert, however famous . . . can, without seeing a picture, declare that it is not the product of a certain master.”<sup>100</sup>

Judge Black’s insights are just as astute today. A sixth sense is unexplainable; it cannot be questioned or cross-examined and lacks any type of definitive and objective standard. How can one disprove the expertise of a well-known connoisseur? Equally qualified experts often disagree on attribution.<sup>101</sup> One troubling result is that experts fear litigation and withhold their opinions, making it difficult to seek an accurate attribution.<sup>102</sup> *Hahn v. Duveen* serves as a cautionary tale to those providing opinions. The case was widely followed and received great publicity since one of the world’s leading dealers was sued for providing his opinion. And although the parties settled before retrial, Duveen faced legal expenses and paid a hefty sum to settle the matter. As for the painting, Duveen was ultimately vindicated after his death; the painting was finally sold for \$1.5 million in 2010, and was attributed to a follower of Leonardo, not the Florentine master.<sup>103</sup>

Since the time of this lawsuit questions have arisen over connoisseurs’ expertise and credibility. Connoisseurship is not a disinterested pursuit of truth, based exclusively on a careful and objective consideration of the evidence, whether visual or documentary.<sup>104</sup> Just as Berenson was coaxed to provide ingenuous opinions, other experts have been sued or accused of acting with ulterior motives, as this article will further explore.

### III. WHAT DOES IT MEAN TO BE “AUTHENTIC”?

#### A. Authenticity as a Three-Legged Stool

In forming authenticity judgments, not all experts rely on a “sixth” sense. Authentication has been likened to a three-legged stool, which relies on three prongs: (1) forensics; (2) provenance; and (3)

<sup>99</sup> *Id.* at 190.

<sup>100</sup> *Id.* at 192.

<sup>101</sup> L. RICHARDSON JR., A CATALOGUE OF IDENTIFIABLE FIGURE PAINTERS OF ANCIENT POMPEII, HERCULANEUM AND STABIAE 18 (2000).

<sup>102</sup> NEW YORK CITY BAR ASSOCIATION, *Report By the Art Law Committee Recommending Amendments to New York’s Arts and Cultural Affairs Law Related to Opinions Concerning Authenticity, Attribution and Authorship of Works of Fine Art*, 3–4 (Dec. 2012), <http://www2.nycbar.org/pdf/report/uploads/ArtAuthenticatorProposalArtLawReportFINAL12.19.13.pdf>.

<sup>103</sup> Carol Vogel, *Mona Lisa She is Not, but Coveted Nonetheless*, N.Y. TIMES (Jan. 28, 2010), <http://www.nytimes.com/2010/01/29/arts/design/29vogel.html>.

<sup>104</sup> Hope, *supra* note 46.

connoisseurship.<sup>105</sup>

The first prong, forensics, uses scientific testing to delve into a work's authorship. This area is in constant flux as it develops with evolving technology; analysis includes testing materials, such as paint samples and canvas fibers. Forensics utilizes tools such as Raman microspectroscopy, x-ray diffraction, scientific photography, radiocarbon dating, thermoluminescence, and fingerprint analysis. Scientists also use histograms to statistically examine paintings based on the composition of pixels in images.<sup>106</sup> Some see forensic analysis as a trustworthy approach to examining hotly disputed works, as its evidence is impartial and unbiased, in the same way clues at a crime scene lead to an answer.<sup>107</sup> The appeal of scientific testing is that technology's ever-changing advancements allow professionals to examine authenticity from an objective vantage point. This, however, is also its limitation. Forgers are aware of testing methods, and they work to find ingenious ways to avoid detection by skilled forensic experts. Likened to an arms race, it is difficult to remain apprised of technology used by forgers and their detectors.<sup>108</sup>

The second authentication prong is provenance, which documents an object's history of ownership. To build a provenance, researchers examine a totality of records, including sales records, catalogs, and any other historical evidence that can trace the work's ownership and location history. To ensure that a work originated with a particular artist, historians create a chronology, supported by documentation and historical records. Some of the work in developing a work's history is serendipitous, as in cases where an object was captured in an old family photograph or a newspaper report. The strongest provenance is that which can be traced back to the artist, without any gaps.

The final authentication prong utilizes the ineffable expertise of a connoisseur. According to Merriam-Webster a connoisseur is "one who understands the details, techniques, or principles of an art[ist] and is competent to act as a critical judge."<sup>109</sup> However those with this skill

<sup>105</sup> John Daab, *Fine Art Authentication: Where Are the Forensic Examiners?*, 19 THE FORENSIC EXAM'R 2 (Summer 2010), <http://www.biomedsearch.com/article/Fine-art-authentication-where-are/228171762.html>.

<sup>106</sup> See *Secrets of the Dead: The Mona Lisa Mystery* (PBS television broadcast July 9, 2014) (discussing the scientific analyses completed on the Mona Lisa and other versions of the same painting).

<sup>107</sup> Paige Cooperstein, *How a Polar Bear Hair Could Solve the Mystery of Jackson Pollock's Final Painting*, BUS. INSIDER (Nov. 25, 2013, 4:41 PM), <http://www.businessinsider.com/polar-bear-hair-and-jackson-pollocks-final-painting-2013-11#ixzz3LeVby8t9>.

<sup>108</sup> James Grundvig, *Knoedler Scandal Head Fake, NY Times Swallows the Bait*, EPOCH TIMES (Aug. 30, 2013), <http://www.theepochtimes.com/n3/blog/knoedler-scandal-head-fake-ny-times-swallows-the-bait/>.

<sup>109</sup> *Connoisseur*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/connoisseur>.

often remark that their ability should be likened to a sixth sense, as they are unable to explain their determinations.<sup>110</sup> This unexplainable aspect of connoisseurs' judgments has become the focus of frustration and legal dramas, and has led some in the art market to question the weight placed on these opinions.<sup>111</sup>

Authentication is established by balancing these three prongs, however many of these tests do not provide definitive results. The three tools may beget different results, with the various disciplines not aligned in their conclusions; specialists often disagree on attribution.

*B. The Vulnerability of Modern Masters Leads to the Shuttering of One of the Most Prestigious American Galleries*

One genre of art that has been plagued by forgery scandals is works by the Modern Masters, such as Jackson Pollock and Andy Warhol. The market for these works is incredibly robust, with nearly half of the top-selling pieces at auction by artists born after 1910.<sup>112</sup> In fact, the market for modern and contemporary art has been outperforming expectations for decades.<sup>113</sup> Modern forgers seem to favor twentieth century abstract and expressionist styles because mimicking Jackson Pollock's drip paintings is easier than imitating old masters such as Rembrandt.<sup>114</sup> The forgery case that has sent the art world into a tailspin, *Lagrange v. Knoedler Gallery*, was filed against the well-known New York gallery in late 2011.<sup>115</sup>

The Knoedler Gallery traces its origins to 1846, when French dealers opened a gallery branch in New York.<sup>116</sup> Michael Knoedler emigrated from Paris to New York in 1852 to take charge of the New York location.<sup>117</sup> By 1889, the gallery was known as "Knoedler's."<sup>118</sup> Although originally specializing in Old Masters, the firm has focused

<sup>110</sup> ERNEST SAMUELS, BERNARD BERENSON: THE MAKING OF A LEGEND 317 (1987).

<sup>111</sup> See Payal Arora & Filip Vermeylen, *The end of the art connoisseur? Experts and knowledge production in the visual arts in the digital age*, 16 INFORMATION COMMUNICATION AND SOCIETY 11–17 (2012).

<sup>112</sup> Mike Boehm, *Report: Super-Rich, Favoring Just a Few Artists, Drive Art Market*, L.A. TIMES (Mar. 18, 2014, 7:34 AM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-art-market-prices-auctions-billionaires-20140316-story.html>.

<sup>113</sup> Georgina Adam, *How Long Can the Art Market Boom Last?*, FIN. TIMES (June 6, 2014, 5:47 PM), <http://www.ft.com/cms/s/2/9f4ff3c-eb27-11e3-bab6-00144feabdc0.html>.

<sup>114</sup> *Fear of Litigation is Hobbling the Art Market*, ECONOMIST (Nov. 24, 2012), <http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers>.

<sup>115</sup> See Complaint, *Lagrange v. Knoedler Gallery, LLC*, No. 11-cv-8757 (S.D.N.Y. Dec. 1, 2011).

<sup>116</sup> Stephanie Cash, *Knoedler Gallery Closes Abruptly*, ART IN AM. (Dec. 1, 2011), <http://www.artinamericamagazine.com/news-features/news/knoedler-gallery-closes-abruptly/>.

<sup>117</sup> *Id.*

<sup>118</sup> *Archives Directory for the History of Collecting in America*, THE FRICK COLLECTION, <http://research.frick.org/directoryweb/browserecord.php?-action=browse&-recid=6006> (last visited Feb. 21, 2016).



increasingly on contemporary art since the late 1970s.<sup>119</sup> The gallery closed in 2011 due to a scandal involving forgers. At the time it was one of the oldest operating commercial art galleries in United States.<sup>120</sup> The gallery had survived the Civil War, but it was brought down by art criminals after a string of lawsuits.

The first lawsuit was filed On December 1, 2011 when well-known Belgian hedge fund manager and financier Pierre Lagrange alleged that the Knoedler Gallery was selling forgeries.<sup>121</sup> The Belgian collector purchased an untitled Jackson Pollock painting from the gallery in November 2007 for \$17 million.<sup>122</sup> The work was not listed in the artist's catalogue raisonné, but the gallery assured Lagrange that the newest supplement would include it.<sup>123</sup> Lagrange had previously attempted to sell the work at auction through Sotheby's and Christie's, however both auction houses rejected the painting citing authenticity concerns, provenance issues, and the work's omission from the catalogue.<sup>124</sup> At that point, Lagrange hired a forensics company to test the painting.<sup>125</sup> The results suggested the work was not by Pollock, as anachronistic elements were found in the painting—there were pigments in the painting that had not been available prior to Pollock's death.<sup>126</sup> Lagrange provided this information to the Knoedler Gallery on November 29, 2011.<sup>127</sup> The next day, the gallery announced its closing. The gallery claimed that the closing was a "business decision" unrelated to the lawsuit.<sup>128</sup>

According to Lagrange's complaint the gallery and its former president, Ann Freedman, knowingly sold multi-million dollar forgeries.<sup>129</sup> Following Lagrange's filing, a stream of other buyers also filed suit against the gallery.<sup>130</sup> The gallery initially claimed the works were real, but through the legal proceedings a complex fraud was uncovered.<sup>131</sup> The FBI was brought in. It was revealed that the gallery

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See* Complaint, *supra* note 115.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Michael Shnayerson, *A Question of Provenance*, VANITY FAIR (May 2012), <http://www.vanityfair.com/culture/2012/05/knoedler-gallery-forgery-scandal-investigation>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Complaint, *supra* note 115.

<sup>130</sup> Other forgery lawsuits against Knoedler include: *White v. Knoedler*, No. 13-cv-1193 (S.D.N.Y. Feb. 21, 2013); *The Martin Hilti Family Trust v. Knoedler*, No. 13-cv-0657 (S.D.N.Y. Jan. 29, 2013); *Howard v. Knoedler*, No. 12-cv-5263 (S.D.N.Y. filed July 6, 2012); *De Sole v. Knoedler*, 974 F.Supp.2d 274 (S.D.N.Y. 2013) (where collectors paid \$8.3 million for a forged Rothko in 2004).

<sup>131</sup> *More Details on the Closing of Knoedler Gallery*, OBSERVER (Dec. 5, 2011, 11:55 AM), <http://observer.com/2011/12/more-details-on-the-closing-of-knoedler-co-art-gallery-12052011/>.

sold approximately forty forged works supplied by Glafira Rosales,<sup>132</sup> who had supplied another twenty-three forgeries to New York dealer Julian Weissman.<sup>133</sup> Mexican-native Glafira Rosales was at the center of an \$80 million dollar scheme, supplying forgeries to various New York galleries. Her story was simple: she was a dealer, selling never-before-seen works for a client who had inherited the paintings from his father and insisted on anonymity.<sup>134</sup>

Once investigators delved into Rosales' past the story unraveled. She was not associated with a major art collector, but rather was working with a forger to create new works. Ms. Rosales commissioned the paintings from Chinese immigrant Pei-Shen Qian. He had come to the United States in 1981, attended art classes in New York, and was discovered by Ms. Rosales's partner and former boyfriend Jose Carlos Bergantinos Diaz in the 1980s.<sup>135</sup> Diaz commissioned Qian's forgeries, which along with fake signatures were treated in order to make them appear older.<sup>136</sup> According to a federal grand jury indictment, Qian made sixty-three forgeries.<sup>137</sup> He purportedly supplied Rosales with the paintings over the course of two decades.<sup>138</sup> Whereas Rosales made millions from this scheme, the artist made as little as a few thousand dollars for each work.<sup>139</sup> On the other hand, one of Knoedler's victims claimed that between 1996 and 2008, the gallery earned approximately \$60 million from works that Ms. Rosales provided on consignment or sold outright to the gallery, and cleared \$40 million in profits.<sup>140</sup> Shockingly, the complaint alleges that the gallery's entire profit from 2002 (\$5.6 million) was made from the sale of Ms. Rosales's works.<sup>141</sup>

Ann Freedman has consistently asserted that she was oblivious to the fact that the works were fake.<sup>142</sup> This claim is suspect because Rosales was supplying the Knoedler Gallery with a steady stream of

<sup>132</sup> Patricia Cohen, *Lawsuits Claim Knoedler Made Huge Profits on Fakes*, N.Y. TIMES (Oct. 21, 2012), <http://www.nytimes.com/2012/10/22/arts/design/knoedler-made-huge-profits-on-fake-rothko-lawsuit-claims.html>.

<sup>133</sup> William K. Rashbaum & Patricia Cohen, *Art Dealer Admits to Role in Fraud*, N.Y. TIMES (Sept. 16, 2013), <http://www.nytimes.com/2013/09/17/arts/design/art-dealer-admits-role-in-selling-fake-works.html>.

<sup>134</sup> *Id.*

<sup>135</sup> Rashbaum & Cohen, *supra* note 133. *See also* Marion Maneker, *Surprise Arrest in Spain of Bergantinos Diaz, \$80M Fraud Mastermind*, ART MKT. MONITOR (Apr. 20, 2014), <http://www.artmarketmonitor.com/2014/04/20/surprise-arrest-in-spain-of-bergantinos-diaz-knoedler-fraud-mastermind/>.

<sup>136</sup> Megan Chuchmach & Brian Ross, *Accused Master Art Forger Tracked Down in Shanghai*, ABC NEWS (July 15, 2014, 9:28 AM), <http://abcnews.go.com/Blotter/accused-master-art-forger-tracked-shanghai/story?id=24558288>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See* Rashbaum & Cohen, *supra* note 133.

<sup>140</sup> *See* Cohen, *supra* note 132.

<sup>141</sup> *Id.*

<sup>142</sup> *See* Michael Shnayerson, *supra* note 128.

high value artwork. Victims of the forgery scheme claim that Freedman is culpable because she was cognizant of problems with the works, but concealed those issues. For example, some claim that Freedman knew of forensic testing results indicating that certain paintings were forgeries, but the gallery rejected the experts' conclusions and failed to disclose that information to potential purchasers.<sup>143</sup> There is proof of willful ignorance; Freedman avoided certain art experts from fear that the works would be rejected. It is alleged that the defendants received a negative report from the International Foundation for Art Research (IFAR), so Freedman and Rosales changed their story about the works' origins, and submitted no other Rosales consignments to IFAR.<sup>144</sup> Even worse is the claim that Freedman actively defrauded clients; the provenance supplied by Rosales was altered over time, sometimes on the basis of suggestions by Freedman.<sup>145</sup> It is contended that Freedman attempted to conceal negative information from potential customers, misrepresented expert opinions, and helped provide fabricated stories about works' provenance histories.<sup>146</sup> In one instance, Rosales claimed that the son of anonymous collector, Mr. X, had inherited the paintings. However Freedman suggested altering this information by naming artist Alfonso Ossorio as the liaison between Mr. X and the other artists.<sup>147</sup> Freedman's court filings state that she "surmised" that Ossorio might have played a role.<sup>148</sup>

Freedman says she attempted to overcome insufficient provenance by placing art in reputable collections.<sup>149</sup> She has claimed her innocence is demonstrated by the fact that she purchased three paintings from Rosales.<sup>150</sup> However, those purchases do not prove anything, particularly because the forgeries were saleable through Knoedler. In fact, the federal district court in Manhattan rejected a motion to dismiss two lawsuits against Freedman, Rosales, and the Knoedler Gallery.<sup>151</sup>

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<sup>143</sup> See Michael A. Bono, *Fraud Cases Against the Knoedler Gallery Move Forward* (NY), WCM LAW BLOG (Oct. 17, 2013), <http://blog.wcmlaw.com/2013/10/art-fraud-cases-knoedler-gallery-move-ny/>.

<sup>144</sup> *Id.*

<sup>145</sup> See Patricia Cohen, *New Details Emerge About Tainted Gallery*, N.Y. TIMES (Nov. 3, 2013), <http://www.nytimes.com/2013/11/04/arts/design/knoedler-gallery-faces-another-forgery-complaint.html>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> James Panero, *'I Am the Central Victim': Art Dealer Ann Freedman on Selling \$63 Million in Fake Paintings*, N.Y. MAG. (Aug. 27, 2013), <http://nymag.com/daily/intelligencer/2013/08/exclusive-interview-with-ann-freedman.html>.

<sup>150</sup> *Id.*

<sup>151</sup> See *De Sole v. Knoedler Gallery*, 974 F. Supp. 2d 274 (S.D.N.Y. 2013); Laura Gilbert, *New York Court Rejects Knoedler and Freedman's Motion to Dismiss Fakes Cases*, THE ART NEWSPAPER (Oct. 2, 2013), <http://old.theartnewspaper.com/articles/New-allegations-in-Knoedler-fakes-case-examine-gallery's-finances/31033>.

Justice Gardephe stated, “[t]he complaints also plead facts more broadly demonstrating that Freedman likely knew . . . that her statements were false.”<sup>152</sup>

The 2011 lawsuit between Pierre Lagrange and the Knoedler Gallery was the first of several legal actions against the once-prominent gallery and its former president. The Lagrange suit settled for an undisclosed amount in October 2012, but not all of the other lawsuits have been resolved.<sup>153</sup> One disturbing aspect of this case is the gallery’s role in the sale, and the concern that this type of behavior is widespread in the art market.<sup>154</sup> How could the gallery have overlooked such glaring problems with provenance? How could collectors blindly believe a dealer, even one at a well-known establishment? Even more troubling is the way in which Ann Freedman, an art market professional with decades of experience, failed to recognize issues with the works, or even worse, assisted in the sale of problematic paintings. Moreover, other forgeries from Qian are most likely still on the market.

Rosales is currently facing criminal charges for her role in organizing this scheme. She admitted that from about 1996 until 2009 she “falsely represented authenticity and provenance” on works sold to Knoedler Gallery and Julian Weissman Fine Art as being works by abstract expressionists, including Mark Rothko and Robert Motherwell.<sup>155</sup> She admitted the works were “actual fakes created by an individual residing in Queens.”<sup>156</sup> She faces the possibility of ninety-nine years in prison.<sup>157</sup> Knoedler Gallery’s ex-director presumably also had a role in these frauds. It is troubling that a director of a well-established and respected New York gallery was duped by Rosales’ story.<sup>158</sup> Rosales provided absolutely no provenance information, not just for one piece, but for dozens of paintings.<sup>159</sup> This seems suspect, and hard to believe, even for the most incredulous of dealers. Either Freedman was knowingly selling forgeries for millions of dollars, or completely oblivious to a simplistic forgery scheme.

<sup>152</sup> *De Sole*, 974 F. Supp. 2d at 302 (“Rosales’ shifting stories . . . and her inability to obtain any written corroboration or endorsement from the alleged owner, provide circumstantial evidence that Freedman . . . knowingly made materially false statements to Howard and the De Soles and their agents.”).

<sup>153</sup> *Howard v. Freedman*, et al., 12-CV-5263 (S.D.N.Y.); *De Sole v. Knoedler*, et al., 974 F. Supp. 2d 274 (2013).

<sup>154</sup> Patricia Pierce, *Beware the Illegitimate Art Agent*, NEWSMAX (Aug. 11, 2014, 1:55 PM), <http://www.newsmax.com/PatriciaPierce/Art-Forgeries/2014/08/11/id/588069/>.

<sup>155</sup> Eileen Kinsella, *Glafira Rosales Pleads Guilty in Knoedler Case, Faces Up to 99 Years*, BLOUIN ARTINFO (Sept. 16, 2013), <http://www.blouinartinfo.com/news/story/959059/glafira-rosales-pleads-guilty-in-knoedler-case-faces-up-to-99>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Rashbaum & Cohen, *supra* note 133.

<sup>159</sup> See Indictment, *U.S. v. Rosales*, No. 08 CRIM 855, 2008 WL 10889927 (S.D.N.Y. Sept. 11, 2008).

The Knoedler matter was relatively straightforward. A gallery was involved in a scheme selling high-priced forgeries to well-known clients,<sup>160</sup> the forger was identified, the middleman was caught and placed in police custody, and a list of the forged works has been provided to the FBI. Although shocking that an established gallery played a prominent role in such a scheme, all players have been found, and the works were definitively deemed fake. However, not all forgery cases are so clear.

### C. Sometimes There is No Definitive Answer Regarding Authorship

A recent authenticity dispute illustrates the challenges in making steadfast determinations about artwork; it is sometimes difficult to conclusively authenticate works. The case was featured in the New York Times in November 2013 in an article examining the tensions between sometimes complimentary but often opposing authentication methods.<sup>161</sup> The article focused on a purported Pollock painting, *Red, Black and Silver*, in the collection of Ruth Kligman's estate.<sup>162</sup> Kligman was Jackson Pollock's lover, and Lee Krasner, Pollock's widow, has refused to authenticate the work. The difficulties inherent in this case involve all three methods of authentication analysis.<sup>163</sup> In regard to provenance, a clear chain of ownership cannot be verified with documentation; however, Kligman's relationship with the artist suggests it is possible she was given the painting directly from Pollock. During her life Kligman claimed Pollock had gifted her the painting, which he completed while in her company in the summer of 1956.<sup>164</sup> Yet this story has not been verified; Pollock purportedly did not paint during the summer of 1956—he did not paint during the final year of his life.<sup>165</sup>

To further delve into the past, forensics analysts studied the chemical composition of the paint along with other material clues. Testing can beget surprising results. In this case, a polar bear hair was

<sup>160</sup> See Philip Boroff, *GLG's Lagrange Says Knoedler Sold \$17 Million Fake Pollock*, BLOOMBERG BUS. (Dec. 3, 2011, 12:01 AM), <http://www.bloomberg.com/news/articles/2011-12-02/glg-s-lagrange-says-knoedler-gallery-sold-him-17-million-forged-pollock>; Patricia Cohen, *Sixth Suit Filed by Client Against Former Knoedler Gallery*, N.Y. TIMES (May 9, 2013), <http://artsbeat.blogs.nytimes.com/2013/05/09/sixth-suit-filed-by-client-against-former-knoedler-gallery/>.

<sup>161</sup> Patricia Cohen, *A Real Pollock? On This, Art and Science Collide*, N.Y. TIMES (Nov. 24, 2013, 7:02 PM), <http://www.nytimes.com/2013/11/25/arts/design/a-real-pollock-on-this-art-and-science-collide.html>.

<sup>162</sup> Lesley M. M. Blume, *The Canvas and the Triangle*, VANITY FAIR (Sept. 2012), <http://www.vanityfair.com/culture/2012/09/jackson-pollock-ruth-kligman-love-triangle>.

<sup>163</sup> Martha Holmes, *'Red, Black, and Silver' Just May Be Jackson Pollock's Last Painting*, DAILY BEAST (Jan. 18, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/01/18/red-black-and-silver-just-may-be-jackson-pollock-s-last-painting.html>.

<sup>164</sup> Cohen, *supra* note 161.

<sup>165</sup> *Biography of Jackson Pollock*, JACKSON-POLLOCK.ORG, <http://www.jackson-pollock.org/biography.jsp> (last visited Aug. 19, 2015).

found embedded in the paint.<sup>166</sup> Although unexpected, it turns out that Pollock had a polar bear rug in his home in 1956, which is still in the home's attic.<sup>167</sup> Information such as this assists in strengthening a case for authenticity. Forensics specialist Nicholas D. K. Petraco, a retired New York City detective, has no doubts that the work is by Pollock.<sup>168</sup> Not everyone agrees, however. Pitted against Petraco is connoisseur Francis V. O'Connor, stating that the work does not look like a Pollock.<sup>169</sup> He opines that even if the work was made on Pollock's estate, it wasn't necessarily by Pollock's hand.<sup>170</sup> O'Connor concedes that connoisseurship "can seem mysterious, if not laughable, to the lay person," but he defends the practice by stating that a connoisseur can detect a fake because he has "absorbed into visual memory the artist's characteristic form—his shapes, compositional devices, linear rhythms, typical colors."<sup>171</sup> With disagreement between experts, the work is left in limbo. Even forensics evidence cannot "unequivocally prove who made it."<sup>172</sup>

#### *D. Authenticity Disputes have Altered the Landscape for Art Experts*

Frustrating authentication litigation has made art experts hesitant to provide opinions for fear of facing litigation because of the risk tied to the rising value of art.<sup>173</sup> These individuals recognize the danger of the "opinion-giving business."<sup>174</sup> Dr. Abigail Gerds, director of the Winslow Homer catalogue raisonné, has stated, "The stakes are just too high. I believe we should all get out of the opinion giving business."<sup>175</sup> This concern has led to a diminishing number of connoisseurs, and thus a decline in the quality of connoisseurship.<sup>176</sup>

Some experts smartly include disclaimers, as attorneys advise experts not to provide opinions without a waiver promising not to sue.<sup>177</sup> These clauses are enforceable,<sup>178</sup> but the plaintiff's ability to

<sup>166</sup> Cooperstein, *supra* note 107.

<sup>167</sup> Cohen, *supra* note 161.

<sup>168</sup> Holmes, *supra* note 163.

<sup>169</sup> Jennifer Gould Keil, *Pollock Scholar Rages at New Painting Proof*, N.Y. POST (Nov. 9, 2013), <http://nypost.com/2013/11/09/pollock-scholar-rages-at-new-painting-proof/>.

<sup>170</sup> *Id.*

<sup>171</sup> Cohen, *supra* note 161.

<sup>172</sup> Cooperstein, *supra* note 107.

<sup>173</sup> Theodore E. Stebbins, Jr., *The Art Expert, the Law and Real Life*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 135, 138–39 (Ronald D. Spencer ed., 2004).

<sup>174</sup> *Id.* at 140 (quoting Dr. Abigail Gerds).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Patricia Cohen, *Suits Deter Art Authentication*, CHINA DAILY (July 1, 2012, 8:46 AM), [http://europe.chinadaily.com.cn/culture/2012-07/01/content\\_15539802.htm](http://europe.chinadaily.com.cn/culture/2012-07/01/content_15539802.htm).

<sup>178</sup> *Lariviere v. Thaw*, No. 100627/99, 2000 WL 33965732, (N.Y. Sup. Ct. June 26, 2000) (An owner who sues the expert in breach of the no-sue agreement would be liable for damages for breach of contract. The damages would be the expert's legal fees and costs in defending the

overcome the covenant not to sue in *Whelan v. Andy Warhol Found. for the Visual Arts* caused fear in the art community.<sup>179</sup> Simon-Whelan sidestepped a waiver he had signed by accusing the authentication board of monopolism.<sup>180</sup> Although most such suits fail, experts fear being dragged into court to defend their opinions, suffering harm to their reputations and spending money to defend themselves in court.<sup>181</sup> Whelan's ability to overcome the contractually agreed-upon protection for the authentication board spooked other experts.<sup>182</sup>

*E. Authenticity Disputes Have Altered the Function of Authentication Boards and Artists' Foundations*

Not only are individuals reluctant to provide opinions, but artists' foundations are also hesitant to address authenticity issues.<sup>183</sup> The Board of Directors of The Andy Warhol Foundation for the Visual Arts, Inc. announced the dissolution of its authentication board on October 19, 2011.<sup>184</sup> Although not mentioned on the foundation's webpage, it is presumed that the cost of defending itself in a legal dispute was in part responsible for the board's dissolution.<sup>185</sup> The board was criticized for spending nearly \$7 million defending itself in the Simon-Whelan litigation; however, that was not the only case against the foundation.<sup>186</sup> Similarly, other artist foundations have faced questioning: the Giorgio and Isa de Chirico Foundation (an independent organization launched a legal challenge to the artist's foundation);<sup>187</sup> the Richard Diebenkorn Foundation (the foundation was threatened with legal action for not certifying works);<sup>188</sup> and the Modigliani Institute (the president of the Modigliani Foundation faces allegations that he knowingly

owner's claim.).

<sup>179</sup> *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 CIV. 6423 (LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009); *see also Fear of Litigation is Hobbling the Art Market*, *ECONOMIST* (Nov. 24, 2012, 4:03 PM), <http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers>.

<sup>180</sup> *Fear of Litigation is Hobbling the Art Market*, *ECONOMIST* (Nov. 24, 2012, 4:03 PM), <http://www.economist.com/news/business/21567074-fear-litigation-hobbling-art-market-collectors-artists-and-lawyers>. For further discussion about this case, *see infra* Part III.E.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See supra* note 173.

<sup>184</sup> *Authentication Procedure*, THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, [http://www.warholfoundation.org/legacy/authentication\\_procedure.html](http://www.warholfoundation.org/legacy/authentication_procedure.html) (last visited Sept. 4, 2015).

<sup>185</sup> Jennifer Maloney, *The Deep Freeze in Art Authentication*, *WALL ST. J.* (Apr. 24, 2014), <http://www.wsj.com/articles/SB10001424052702304279904579518093886991908>.

<sup>186</sup> Charlotte Burns, *Warhol Foundation Dissolves Authentication Board*, *PHILANTHROPY NEWS DIGEST* (Oct. 23, 2011), <http://philanthropynewsdigest.org/news/warhol-foundation-dissolves-authentication-board>.

<sup>187</sup> Cristina Ruiz, *Challenge to De Chirico Authentication Board*, *THE ART NEWSPAPER* (Sept. 3, 2013), <http://old.theartnewspaper.com/articles/Challenge%20to%20De%20Chirico%20authentication%20board/30326>.

<sup>188</sup> *ECONOMIST*, *supra* note 114.

authenticated fake works).<sup>189</sup> In the past few years numerous artists' foundations have refrained from authenticating works, including the Estate of Jean-Michel Basquiat as well as the Keith Haring and Roy Lichtenstein Foundations.<sup>190</sup> The fear of litigation has led to the disbandment of many authentication boards; in January 2012, the Courtauld Institute of Art in London cancelled a forum on a controversial set of paintings by Francis Bacon, citing the "possibility of legal action" as the reason.<sup>191</sup>

With regard to the alleged Pollock painting *Red, Black, and Silver*, the artist's authentication board was placed in a difficult position. In 1995 the now-defunct Jackson Pollock authentication board offered to classify the work as a "problematic work," meaning if further studies lead scholars to label the work as authentic, the board would not object. However Kligman was not satisfied.<sup>192</sup> This is the fate of many works in which experts from different disciplines disagree about a work's authenticity. More troubling is that a rash of recent cases has led to the disbandment of many authentication boards. Without these boards there can be no official judgments passed on works, and paintings remain in an indeterminate state. This is exactly what happened in the matter of *Simon-Whelan v. The Andy Warhol Found. for the Visual Arts*.<sup>193</sup>

The lawsuit stems from the 1989 purchase of a silkscreened self-portrait of Andy Warhol for \$195,000. The work was from a series by Warhol that associate Richard Ekstract claimed to have printed the series with the permission of, and under the direction of, Warhol.<sup>194</sup> The Andy Warhol Foundation had authenticated the work prior to Simon-Whelan's purchase, and had gone as far as stamping the painting with Warhol's signature.<sup>195</sup>

Simon-Whelan presented the silkscreen to the authentication Board in 2001, at which time the work was rejected.<sup>196</sup> The Board, which preceded the Foundation, stamped on the back of the work "DENIED."<sup>197</sup> Simon-Whelan resubmitted the silkscreen in 2003, and the Board again denied it. The Board provided him with an explanation: it took issue with the canvas material and the rendering of the

<sup>189</sup> Patricia Cohen, *A Modigliani? Who Says So?*, N.Y. TIMES (Feb. 2, 2014), <http://www.nytimes.com/2014/02/03/arts/design/a-modigliani-who-says-so.html>.

<sup>190</sup> ECONOMIST, *supra* note 114.

<sup>191</sup> Cohen, *supra* note 177.

<sup>192</sup> Cohen, *supra* note 161.

<sup>193</sup> *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 CIV. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

<sup>194</sup> Michael Shnayerson, *Judging Andy*, VANITY FAIR (Nov. 2003), <http://www.vanityfair.com/culture/2003/11/authentic-andy-warhol-michael-shnayerson>.

<sup>195</sup> *Id.*

<sup>196</sup> Alan Feuer, *Warhol Foundation Accused of Dominating the Market*, N.Y. TIMES (July 17, 2007), <http://www.nytimes.com/2007/07/17/arts/design/17warhol.html>.

<sup>197</sup> *Id.*



background colors; it compared the work with a similar Warhol series composed of ten identical works; and it could not confirm that Warhol sanctioned or authorized the canvas.<sup>198</sup>

Simon-Whelan sued in 2007, asserting that the Board restrained trade and violated the Sherman Antitrust Act by attempting to monopolize the market for Warhol works.<sup>199</sup> Simon-Whelan alleged that the Foundation conspired to reject genuine works in an attempt to artificially reduce the number of works on the market to inflate prices.<sup>200</sup> The collector alleged that this scheme would enrich the Foundation, which owns and sometimes sells works.<sup>201</sup> The court deemed the antitrust theory plausible, but never had the opportunity to issue a ruling.<sup>202</sup> After moving through much of the discovery process, Simon-Whelan dropped the case as he could not afford to continue litigation.<sup>203</sup> He stated that he still believed in the work's authenticity.<sup>204</sup> The Warhol Foundation decided to continue pursuing its counterclaims, however, and the parties reached a tentative settlement in 2010: each side would drop its claims, Simon-Whelan would state that he had found no evidence of any wrongdoing by the Foundation, and he agreed not to profit from his claims, such as from film or book royalties.<sup>205</sup>

Although settled before trial, *Simon-Whelan v. Andy Warhol Foundation* underscores the challenges with authentication determinations. It is extremely difficult to receive any type of legal remedy against authentication committees, for courts have held that there is no legal obligation to express an opinion on an artwork.<sup>206</sup> In *Thome v. Calder*, for example, the court found that although an artist's foundation may be the only organization with the power to authenticate works by a particular artist, it does not give the foundation any legal duty to provide an opinion.<sup>207</sup> Freedom of speech considerations under the First Amendment prohibit U.S. courts from requiring experts to opine on authenticity.<sup>208</sup> Furthermore, a court will not engage in the

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<sup>198</sup> *Id.*

<sup>199</sup> See *Simon-Whelan v. Andy Warhol Found. for the Visual Arts, Inc.*, No. 07 CIV. 6423(LTS), 2009 WL 1457177 (S.D.N.Y. May 26, 2009).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Jo Backer Laird, *Joe Simon-Whelan Drops Antitrust Suit Against Warhol Foundation*, LEXOLOGY (Dec. 7, 2010), <http://www.lexology.com/library/detail.aspx?g=f3ab8d17-2333-410c-a35d-41af28babfe0>.

<sup>204</sup> *Id.*

<sup>205</sup> Eileen Kinsella, *The Trouble with Warhol*, ART NEWS (Apr. 1, 2011, 12:00 AM), <http://www.artnews.com/2011/04/01/the-trouble-with-warhol/>.

<sup>206</sup> *Thome v. Alexander & Louisa Calder Found.*, No. 0600823/2007, 2008 WL 1943609 (N.Y. Sup. Ct. Apr. 17, 2008); *aff'd* 70 A.D.3d 88 (N.Y. App. Div. 2009) (holding that an artist's "official" authenticators do not have a duty to examine all works submitted to them).

<sup>207</sup> *Id.*

<sup>208</sup> U.S. CONST. amend. I; see Steven R. Schindler & Katherine Wilson-Milne, *Role of Judges in*

authentication process because it is not equipped to make these determinations.<sup>209</sup> As stated by Judge Saxe in *Thome*, courts are “not equipped to deliver a meaningful declaration of authenticity.”<sup>210</sup> Regardless, the art market itself considers the decision of artists’ foundations and experts to be definitive, not the court’s rulings.<sup>211</sup> This is clearly shown in another case involving a Calder work—a contract dispute over *Rio Nero* in which the buyers of a mobile sued the sellers claiming the work was a forgery.<sup>212</sup> During the course of litigation the generally accepted Calder authority, Klaus Perls, opined that the work was not by Calder. Although the court found the mobile was not a forgery,<sup>213</sup> the work remains unsalable on the art market.<sup>214</sup>

In February 2014 owners of artwork purportedly purchased from friends of Haring filed a case against the Keith Haring Foundation.<sup>215</sup> The works potentially could be worth over \$40 million, if authentic.<sup>216</sup> In 2007, the artist’s foundation rejected the works, and then later rejected to review additional evidence presented by the collectors.<sup>217</sup> The Foundation did not publish a catalogue raisonné of the artist’s works, but would accept applications for review and issues issue opinions on authenticity.<sup>218</sup> Plaintiffs state that the Committee “made its decisions in secret, with little or no explanation, and often without ever physically inspecting the works.”<sup>219</sup> Further, the complaint alleges that the Foundation dissolved its Authentication Committee in September 2012 for the purpose of shirking responsibility for “improper denials of authentic Haring artworks.”<sup>220</sup> According to the plaintiffs, the Foundation harmed Haring’s oeuvre, using “its authentication powers to carefully cultivate Haring’s image and obscure important facts about his working methods (*i.e.*, uncredited collaboration with other artists) and his personal narrative . . .”<sup>221</sup> The plaintiffs raised claims of defamation, unjust enrichment, and tortious interference with prospective business

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*Authenticating Art in the U.S. and Europe; Outside Counsel*, N.Y. L.J. (Sept. 15, 2014).

<sup>209</sup> *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 101.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993), *aff’d*, 36 F.3d 127 (D.C. Cir. 1994).

<sup>213</sup> *Id.*

<sup>214</sup> Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. the Law*, N.Y. TIMES (Aug. 5, 2012), <http://www.nytimes.com/2012/08/06/arts/design/when-judging-arts-authenticity-the-law-vs-the-market.html>.

<sup>215</sup> *Bilinski v. Keith Haring Found. Inc.*, No. 14-1085, 2015 WL 996432 (S.D.N.Y. Mar. 6, 2015).

<sup>216</sup> *Id.* at \*2.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at \*6.

<sup>219</sup> Complaint at 2, *Bilinski v. Keith Haring Found., Inc.*, No. 14-1085, 2015 WL 996423 (S.D.N.Y. Mar. 6, 2015).

<sup>220</sup> *Id.* at 6.

<sup>221</sup> *Id.* at 2.

relations, as well as claims under the federal Lanham Act.<sup>222</sup>

When the purported Haring works were displayed in March 2013, the Haring Foundation claimed that the works were counterfeits and filed a trademark and copyright infringement lawsuit to shut down the exhibition.<sup>223</sup> The show's promoter removed the works, and the collectors alleged that they were unable to sell any of them because auction houses will not sell objects not certified by the Foundation.<sup>224</sup> As with other cases involving foundations, the plaintiffs here alleged that the Foundation acted out of financial self-interest by falsely reducing the number of Haring works on the market in order to inflate the value of the certified works in the Foundation's possession.<sup>225</sup> U.S. District Judge Denise Cote dismissed this lawsuit in March 2015.<sup>226</sup>

#### *F. Legislation was Introduced to Address Lawsuits Against Experts*

Legal actions taken against authentication boards and experts harm the art market. Experts face responsibility for incorrect opinions, even those given in good faith, in addition to legal costs associated with defending themselves.<sup>227</sup> As a result, authenticators are "speaking with silence" by not providing opinions, which is taking a toll on the market.<sup>228</sup> In response to the shuttering of authentication boards and the lack of expert opinions, a bill was introduced to New York State Legislature in the spring of 2014. In an effort by the New York City Bar Association, an addition to § 13.04 of New York's Art and Cultural Affairs Law was introduced to guard experts from baseless legal actions. Under the proposed law claimants must specify the wrong committed by the expert and show there is a significantly higher than 50% chance the allegations contained in the lawsuit are true.<sup>229</sup> The legislation may increase availability of pieces for examination by scholars as they will be more willing to provide opinions about

<sup>222</sup> *Id.*

<sup>223</sup> *Bilinski v. Keith Haring Found. Inc.*, No. 14-1085, 2015 WL 996432, at \*3 (S.D.N.Y. Mar. 6, 2015).

<sup>224</sup> *Id.*

<sup>225</sup> *Bilinski v. Keith Haring Foundation: Art Collectors Sue Street Artist's Estate for \$40 Million Over 80 Fake Works*, CLASSICALITE (Feb. 24, 2014, 6:57 PM), <http://www.classicalite.com/articles/6247/20140224/bilinski-vs-keith-haring-foundation-art-collectors-sue-street-artists-estate-for-40-million-over-80-fake-works.htm>.

<sup>226</sup> Ian Simpson, *Judge Tosses Art Collectors' Lawsuit Over Labeling Haring Works Fakes*, REUTERS (Mar. 6, 2015, 7:26 PM), <http://www.reuters.com/article/2015/03/07/us-haring-lawsuit-idUSKBN0M301020150307>.

<sup>227</sup> Mostafa Heddaya, *Will the Sotheby's Caravaggio Decision Impact the Practice of Authentication?*, BLOUIN ARTINFO (Jan. 29, 2015), <http://www.blouinartinfo.com/news/story/1073843/will-the-sothebys-caravaggio-decision-impact-the-practice-of>.

<sup>228</sup> Julia Halperin, *No More Silence of the Scholars*, THE ART NEWSPAPER (Mar. 14, 2014), <http://old.theartnewspaper.com/articles/No-more-silence-of-the-scholars/31622>.

<sup>229</sup> *Id.*

works.<sup>230</sup>

Though there are only a few cases of plaintiffs suing experts and successfully recovering damages, specialists fear the time and expense in defending lawsuits in addition to reputational harm.<sup>231</sup> “As scholars grow reluctant to give opinions, forgers find it easier to circulate their wares.” Without experts alerting the market to forgeries, buyers are at a disadvantage as crafty forgers fool the public and face little resistance. It has been suggested that “[s]avvy art-buyers have noticed . . . and are spending less than they otherwise would. Less sophisticated ones will soon wise up and do likewise.”<sup>232</sup> The veracity of this statement has not been explored, however the inability of collectors to receive opinions is problematic. The hesitation to speak allows forgeries to remain on the market and circulate amongst collectors. Conversely, it may also keep unattributed works from being recognized.<sup>233</sup> If no one wants to be held financially and legally liable for an opinion, what information is available to a buyer seeking to purchase a work or seller wishing to sell an asset? Furthermore, an owner with any authenticity doubts may hesitate to sell from fear that he will be later sued for circulating a forgery.<sup>234</sup> These collectors may not have any recourse at the time of sale or during a lawsuit. Thus artworks may remain in limbo without the ability to either be definitively authenticated or rejected.<sup>235</sup> In fact even if a court decision is granted, it is uncertain whether the art market will accept its determination.<sup>236</sup>

*G. Authentication Determinations Can Have Shocking Results: Another Case Involving a Da Vinci*

Another legal battle that shocked the art world involved another work alleged to be by Leonardo da Vinci. While living in Italy prior to 1955 art restorer Giannino Marchig purchased a drawing on vellum now known as *La Bella Principessa*.<sup>237</sup> After his death, Marchig’s widow, Jeanne Marchig, consigned the work to Christie’s and informed them that her late husband believed the work originated from the Italian Renaissance.<sup>238</sup> Christie’s expert disagreed. The drawing went to auction in 1998 and was listed in the auction catalogue as “German,

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<sup>230</sup> *Id.*

<sup>231</sup> Cohen, *supra* note 177.

<sup>232</sup> *Id.*

<sup>233</sup> Cohen, *supra* note 177.

<sup>234</sup> Maloney, *supra* note 185.

<sup>235</sup> *Id.*

<sup>236</sup> *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993), *aff’d*, 36 F.3d 127 (D.C. Cir. 1994).

<sup>237</sup> *Marchig v. Christie’s Inc.*, 762 F. Supp. 2d 667 (S.D.N.Y. 2011), *aff’d*, *Marchig v. Christie’s Inc.*, 430 F. App’x 22 (2d Cir. 2011).

<sup>238</sup> Adam Klasfeld, *No Recovery for Missed \$100 Million Da Vinci*, COURTHOUSE NEWS SERV. (Feb. 2, 2011, 12:14 PM), <http://www.courthousenews.com/2011/02/02/33823.htm>.

nineteenth Century.”<sup>239</sup> The buyer, an art dealer, paid \$21,850 for the vellum. In 2007, the work was sold to Peter Silverman for the \$22,000.<sup>240</sup> Silverman suspected the work was by the hand of the Florentine master, so he sent it for newly developed forensics testing, including dating analysis. With the results of the tests, some specialists lent their support to the da Vinci attribution. The specialists included Martin Kemp<sup>241</sup> and Nicholas Turner,<sup>242</sup> two leading da Vinci experts. The work was nicknamed *La Bella Principessa* and, if attributed to Leonardo, may be worth up to \$150 million.<sup>243</sup>

In 2009 Christie’s informed Marchig that some experts had attributed the vellum to da Vinci, at which point Marchig informed the auction house that she held them accountable for misattribution.<sup>244</sup> Christie’s asserted that not all experts were in agreement; the auction house was skeptical of the attribution, which was based on new technology not available at the time of the original attribution. Therefore, Christie’s asserted it was not “legally liable.”<sup>245</sup> In May 2010 Marchig filed suit against the auction house for multiple counts, including negligent attribution.<sup>246</sup> The case was dismissed on statute of limitations grounds, so the authorship issues were never addressed at trial.<sup>247</sup> Although the outcome for Ms. Marchig is heartbreaking, the case was legitimately dismissed.<sup>248</sup> Even if the case had moved forward, however, it is unlikely the court would have found negligence on the part of the auction house. The technology that confirmed the picture’s date of creation was not available until after Christie’s provided an opinion to the widow, so Christie’s could not have acted negligently.<sup>249</sup>

<sup>239</sup> *Id.*

<sup>240</sup> Eileen Kinsella, *Disputed Leonardo Drawing at Center of Legal Battle*, ART NEWS (July 27, 2010), <http://www.artnews.com/2010/07/27/disputed-leonardo-drawing-at-center-of-legal-battle/>.

<sup>241</sup> MARTIN J. KEMP, <http://www.martinjkemp.com/welcome.html> (last visited Sept. 4, 2015) (Martin Kemp is Emeritus Research Professor in the History of Art at Oxford University and one of the world’s foremost da Vinci expert).

<sup>242</sup> Nicholas Turner was formerly Keeper in the British Museum’s Department of Prints and Drawings (1974–94), and Curator of Drawings at the J. Paul Getty Museum (1994–98).

<sup>243</sup> Richard Dormant, *La Bella Princepsa: A £100m Leonardo, or a copy?*, THE TELEGRAPH (Apr. 12, 2010, 5:13 PM), <http://www.telegraph.co.uk/culture/art/7582591/La-Bella-Principessa-a-100m-Leonardo-or-a-copy.html>.

<sup>244</sup> Klasfeld, *supra* note 238.

<sup>245</sup> Kinsella, *supra* note 240.

<sup>246</sup> Complaint, *Marchig v. Christie’s Inc.*, 430 F. App’x 22 (2d Cir. 2011) (No. 10 CV 3624), 2010 WL 184468.

<sup>247</sup> *Marchig v. Christie’s Inc.*, 762 F. Supp. 2d 667, 672 (S.D.N.Y. 2011) *aff’d in part, rev’d in part*, 430 F. App’x 22 (2d Cir. 2011).

<sup>248</sup> *Id.*

<sup>249</sup> Kinsella, *supra* note 240; see also Mary Elizabeth Williams, *Defensive Appraising: Protecting Yourself From Claims of Negligence, Defamation, and Risks of Cultural Patrimony*, UNDERPAINTED (Feb. 6, 2012), <https://underpainted.wordpress.com/2012/02/06/defensive-appraising-protect-yourself-from-claims-of-negligence-defamation-and-risks-of-cultural-patrimony/> (noting “it was only after [Marchig’s] sale that the academic world started examining the piece and scientific examination began to take place.”).

Just as in *Hahn v. Duveen*, a lawsuit would not be able to advance without a definitive determination on the work's true authorship.

Even today there is still no consensus regarding the work's authorship. The provenance of *La Bella Principessa* is intriguing. Although Leonardo was the most famous artist of his time, there are no records that memorialize the creation of the work, or even a mention in Vasari's biography of Leonardo.<sup>250</sup> Experts in support of the attribution point to notes of an inventory of Leonardo's effects taken in the early 1480s.<sup>251</sup> There is mention of two works that might correspond to *La Bella Principessa*: works described as "Una testa in profilo con bella cappellatura" ("A head in profile with beautiful hair") and "Una testa di putta con trezie rannodate" ("A head of a young lady with plaited locks").<sup>252</sup> Some scholars reason that it is impossible for such a work to remain unrecognized for half a millennium,<sup>253</sup> however, the work was hidden in an unexpected place: the National Library of Poland in Warsaw.<sup>254</sup> According to Edward Wright, Emeritus Professor of Art History at the University of South Florida, the vellum was in a volume that reached Poland in the early 1500s, when a member of the Sforza family married a Polish royal.<sup>255</sup> Those in favor of the Leonardo attribution use this fact as a way of providing "indirect" provenance information.<sup>256</sup>

With regard to connoisseurship, although Kemp may support the Leonardo attribution not all scholars agree; some, including Everett Fahy,<sup>257</sup> have vocally disparaged the Leonardo authorship claims.<sup>258</sup> Whereas Kemp points to the left-handed brushwork, this is not definitive proof that the work was done by da Vinci.<sup>259</sup> One expert has stated, "I have not found this drawing to be compatible either in technique or in style with Leonardo."<sup>260</sup> There is concern about the

<sup>250</sup> See GIORGIO VASARI, LIVES OF THE MOST EMINENT ITALIAN ARCHITECTS, PAINTERS, AND SCULPTORS (1851); see also Dorment, *supra* note 213.

<sup>251</sup> *New Leonardo da Vinci Bella Principessa Confirmed*, LUMIERE TECH. (Sept. 28, 2011), <http://www.lumiere-technology.com/discoveries2.html>.

<sup>252</sup> *Id.*

<sup>253</sup> Dorment, *supra* note 243.

<sup>254</sup> Pascal Cotte & Martin Kemp, *La Bella Principessa and the Warsaw Sforziad*, LUMIERE TECH., [http://www.lumiere-technology.com/news/Study\\_Bella\\_Principessa\\_and\\_Warsaw\\_Sforziad.pdf](http://www.lumiere-technology.com/news/Study_Bella_Principessa_and_Warsaw_Sforziad.pdf) (last visited Sept. 18, 2015).

<sup>255</sup> Tom O'Neill, *A Chalk-And-Ink Portrait May Be a \$100 Million Leonardo*, NAT'L GEOGRAPHIC (Jan. 25, 2012), <http://ngm.nationalgeographic.com/2012/02/lost-da-vinci/o-neill-text>.

<sup>256</sup> *Id.*

<sup>257</sup> Everett Fahy is the John Pope-Hennessy Chairman of the Department of European Paintings at the Metropolitan Museum of Art, and Carmen C. Bambach Curator of Drawings and Prints at the Met.

<sup>258</sup> Dorment, *supra* note 243.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

vellum base, the stroke, the monotonously drawn details, and other features. One museum director asserted that the work is a twentieth century fake made from a “compilation of obviously Leonardesque elements that is not even close to Leonardo himself.”<sup>261</sup> To add another twist, famous forger Shaun Greenhalgh claimed to have created the work in 1978.<sup>262</sup>

One of the most interesting aspects of this dispute relates to the forensics, the core of the Christie’s argument for dismissal.<sup>263</sup> The auction house stated that it was not negligent in its attribution because the technology used to date the vellum to Leonardo’s era was not available prior to the 1998 auction.<sup>264</sup> But are today’s forensics reliable? Those claiming a Leonardo attribution cite to analyses that support their contention; however, other forensics experts have reached different conclusions.<sup>265</sup>

#### H. *One of the Difficult Aspects of Authentication Determinations is Whom to Trust*

One of the scientists supporting the Leonardo attribution is the now-infamous Peter Paul Biro, a man who once used a fingerprint to authenticate a Jackson Pollock painting that was a forgery. Biro has been accused of tampering with testing results by planting evidence on artworks.<sup>266</sup> Biro is an innovator in the art forensics world for developing authentication technology; he examines works for traces of fingerprints embedded in paint or impressed on canvases. He uses a multispectral camera, a device of his own invention and the only one of its kind that is able to detect extraordinary levels of detail.<sup>267</sup> He has also earned a notorious reputation; he has been accused of unethical and illegal behavior. The *New Yorker* devoted a 16,000 word exposé, “The Mark of a Masterpiece: The man who keeps finding famous fingerprints on uncelebrated works of art,” to Biro’s work.<sup>268</sup> The July 2010 article

<sup>261</sup> *Id.* See also Marion Maneker, *Doubting Leonardo*, ART MKT. MONITOR (Apr. 13, 2010), <http://www.artmarketmonitor.com/2010/04/13/doubting-leonardo/>.

<sup>262</sup> See Lorena Munoz-Alonso, *Forger Claims Leonardo da Vinci’s La Bella Principessa Is Actually His Painting of a Supermarket Cashier* (Nov. 30, 2015), <http://news.artnet.com/art-world/forger-leonardo-da-vinci-bella-principessa-373451>.

<sup>263</sup> Reply Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs’ Amended Complaint, *Marchig v. Christie’s Inc.*, 762 F. Supp. 2d 667 (S.D.N.Y. 2011) (No. 10-3624), 2010 WL 4952435.

<sup>264</sup> *Id.*; see also Kinsella, *supra* note 240.

<sup>265</sup> *Mystery of a Masterpiece* (PBS television broadcast Jan. 25, 2012), <http://www.pbs.org/wgbh/nova/tech/mystery-masterpiece.html>.

<sup>266</sup> M.H. Miller, *Peter Paul Biro, Art Authenticator, Expands His Defamation Lawsuit Far Beyond ‘The New Yorker’*, *The Observer* (Dec. 13, 2011 10:32 AM), <http://observer.com/2011/12/peter-paul-biro-expands-defamation-lawsuit-12132011/>.

<sup>267</sup> David Grann, *The Mark of a Masterpiece*, *THE NEW YORKER* (July 12, 2010), <http://www.newyorker.com/magazine/2010/07/12/the-mark-of-a-masterpiece>.

<sup>268</sup> *Id.*

by David Grann traces Biro's career and work in forensics authentication, taking up the issue of whether Biro's findings assist in authenticating a work or just add confusion and muddy the process further. In response to an instance where Biro found Pollock's fingerprints on a collection of works, paintings made with materials that post-date Pollock's death, an attorney for the Pollock-Krasner Foundation stated, "Biro can find all the fingerprints he wants. But, in terms of the marketplace, the [] paintings are *done*."<sup>269</sup> According to forensics experts Biro's findings are unreliable and he does not provide information that allows his work to enter the process of peer-review.<sup>270</sup> Thus even Biro's in depth forensics "evidence" cannot be validated as scientific proof on which to rely, particularly in light of an authenticator's motives. As described in the *New Yorker* article, Biro's past was examined, illuminating a history of lawsuits and accusations of fraud and missing paintings.<sup>271</sup> Troubling is the situation in which dealers rely upon expertise from suspect authenticators to confirm veracity and sell works to unsuspecting buyers.

Biro's history and reputation understandably affect the reliability of his statements, adding more to the debate about *La Bella Principessa*. He is not the only authenticator to be accused of dishonest behavior.<sup>272</sup> The market must consider the reliability of an expert and whether the person supplying the opinion is an uninterested party, presenting a broader question to the art market: how can we settle disputes between experts, whether within the same area of expertise or working in related fields? Expert opinions are not always in accord<sup>273</sup> and one of the most challenging legal situations for litigators is a battle of experts. When two equally qualified experts disagree on an attribution, the market determines the outcome.<sup>274</sup> Without a definitive answer, uncertainty prevails.<sup>275</sup>

Tellingly, even the most qualified and honest experts have been fooled; some forgeries are so great that they hoodwink nearly everyone. When the quality of a forgery is very high, it makes proving its falsity more difficult. Although scientific analysis has improved and we have advanced tools at our disposal, forgers have also evolved and are now better equipped to create convincing fakes. Forgers have ingenious

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<sup>269</sup> *Id.*

<sup>270</sup> Paddy Johnson, *Making the Mark of a Masterpiece*, ART F CITY (May 18, 2011), <http://artfcity.com/2011/05/18/making-the-mark-of-a-masterpiece/>.

<sup>271</sup> Grann, *supra* note 267.

<sup>272</sup> See Cohen, *supra* note 189 (Cristian Parisot, the author of a Modigliani catalog, faced charges for authenticating known fakes.).

<sup>273</sup> Heddaya, *supra* note 227.

<sup>274</sup> See *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167, 174 (D.D.C. 1993).

<sup>275</sup> Cohen, *supra* note 189.



ways to create forged works. As discussed below in Part J.1, famous forgers have created false provenance records, used era-appropriate materials to create convincing works, and falsely aged works in order to create more saleable fakes.

*I. Perhaps the Job of a Connoisseur is Difficult Because it is Difficult to Identify Fakes, Particularly "Mixed" Works*

Although some connoisseurs are highly skilled, conscientious, and discerning, detection of a forgery is not guaranteed. "Mixed" works, ones that include elements by the attributed artist and portions by another artist, are especially challenging. Take the case of a heavily restored work. To make a preliminary study painted by Monet that was not as attractive as a completed painting more marketable, a "conservator" (or "forger," depending on your perspective) opted to "improve" the painting. He added trees, flowers, and clouds. Is this still a work by Monet? If not, then when does the work cease to be the "original"? When does a work lose its authorship? If the painting is still considered to be by Monet, is it valuable simply because the artist's hand touched the canvas at some point in time? An owner or seller would probably argue that the work is still the product of Monet. However, the "original" may no longer emit the same essence. Is this just a plea to be connected with the artist?

Should the "reworked" Monet be classified as a forgery? If so, could a seller be liable for selling this work? What would happen to a disappointed buyer who later discovers that the Monet landscape was vastly reworked and altered by a "conservator" in an attempt to increase the value of a study? A forensics analyst may conclude that the work was by Monet because the canvas dates to his time, the original layers of paint were appropriate with the artist's materials, and the painting exhibits age. The investigator may have determined that the work was restored. A provenance investigator may also find that the work is genuine and can be traced back to Monet. A reference to the work could have been discovered in the artist's journal or in a correspondence, tracing the ownership back to the hand of Monet. In fact, even if a connoisseur noted the retouching, the work may still be labeled as a "restored" Monet. There comes a point when many would consider the work to be by someone other than the Impressionist artist, no matter how resistant the owner or seller. This is exactly what happened in 1997 with a purported portrait by Modigliani; the author of his catalogue raisonn  refused to include a particular painting because it had been extensively overpainted.<sup>276</sup>

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<sup>276</sup> Cohen, *supra* note 189.

### *J. Psychological Analysis of Forgers and Buyers*

Should blame be placed on the market or the owners for zealously wanting to believe in the veracity of an attribution? We want to fool ourselves: in a world in which most people, whether from ambition or greed, want to discover originals rather than forgeries, connoisseurs and scientists can often be a forger's best friends.

#### 1. A Brief History of a Few Notable Forgers

The public has a fascination with forgers. There is a long history of art deception: including works that fooled experts for generations. The nineteenth and twentieth centuries were witness to many famous forgeries and the 21<sup>st</sup> century is on the same path. In the 1900s exceptional forgers became well known for their clever deceptions, and some forgers were so successful they became famous in their own right. One of the most famous forgers was recognized for his ability to deceive the Nazis and has thus become known as the boldest forger of Old Masters. The Dutch Hans Van Meegeren worked as an artist and was recognized as a popular painter in his native Netherlands. Yet he was criticized for being derivative, with a famous critic stating that Van Meegeren was "[a] gifted technician who has made a sort of composite facsimile of the Renaissance school, he has every virtue except originality."<sup>277</sup> The painter set out to prove his talents by forging famous artists. Like many famous forgers, the Dutch artist's motivation was to exact revenge on critics.<sup>278</sup> Eventually one of his Vermeer forgeries made its way into the collection of Nazi Reichsmarschall Hermann Goering.<sup>279</sup> After the Second World War, the work was discovered in Goering's collection and van Meegeren was arrested as a collaborator for selling Dutch cultural property to the Nazis.<sup>280</sup> This would have been an act of treason punishable by death.<sup>281</sup> With the risk of death, the artist confessed to creating the forgery.<sup>282</sup> On November 12, 1947, after a

<sup>277</sup> Frank Wynne, *The Forger Who Fooled the World*, THE TELEGRAPH (May 8, 2006, 12:01 AM), <http://www.telegraph.co.uk/culture/art/3654259/The-forger-who-fooled-the-world.html>.

<sup>278</sup> *Id.*

<sup>279</sup> *The Art Forger Who Became a National Hero*, PRICEECONOMICS (Sep. 24, 2014), <http://priceconomics.com/the-art-forger-who-became-a-national-hero/>.

<sup>280</sup> *Id.*

<sup>281</sup> See Jean-Marie Henchaerts and Louise Doswald-Beck, *International Committee of the Red Cross*, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 2 1062, n.394 (Jean-Marie Henchaerts & Louise Doswald-Beck eds., 2005). (Art. 27[a] of the Decree extraordinary on criminal law (BBS), was enacted in response to WWII. "The Extraordinary Penal Law Decree as amended of the Netherlands punishes whoever 'during the time of [the Second World War] intentionally makes or threatens to make use of the power, opportunity or means, offered him by the enemy or by the fact of the enemy occupation, unlawfully to injure another in his possessions or unlawfully benefit himself or another.'").

<sup>282</sup> *Vermeer: Erroneous Attributions and Forgeries*, ESSENTIAL VERMEER 2.0, [http://www.essentialvermeer.com/fakes\\_thefts\\_school\\_of\\_delft\\_lost\\_sp/erroneously\\_attributed\\_vermeers\\_two.html#.Vso2UJMrI\\_U](http://www.essentialvermeer.com/fakes_thefts_school_of_delft_lost_sp/erroneously_attributed_vermeers_two.html#.Vso2UJMrI_U) (last visited Feb. 21, 2016).

brief but highly publicized trial, he was convicted of falsification and fraud charges and was sentenced to one year in prison. He never served his sentence; before he could be incarcerated, he suffered a heart attack and passed away. Early in 1947, a newspaper poll found van Meegeren was the second most popular man in the Netherlands, after the newly elected Prime Minister.<sup>283</sup>

Another forger, Elmyr de Hory, received the red-carpet treatment with a documentary based on his life—Orson Wells' *F is for Fake*. Facts about his life were shrouded in mystery; he used a pseudonym and created an alternate history about his background, claiming that his father was a Roman Catholic diplomat.<sup>284</sup> In fact, he was born Elemer Albert Hoffman, to a Jewish merchant in Hungary in 1906.<sup>285</sup> After escaping a Berlin prison hospital, de Hory made his way to France and made a living selling art.<sup>286</sup> He approached art galleries with his forgeries, claiming that the works were from a Hungarian family estate.<sup>287</sup> He was a master forger, able to mimic the style of many artists<sup>288</sup> and pleased to discover that his forgeries were featured in art books among artists' original works.<sup>289</sup> Some of his works were identified as fakes and there were lawsuits brought against him.<sup>290</sup> Yet de Hory's business of fakes continued to thrive and he prospered financially.<sup>291</sup> However his work eventually became sloppy, leading the FBI and Interpol to follow his trail. Problems began snowballing, de Hory eluded the police, and he finally returned to his home on Ibiza to bide his time.<sup>292</sup> With the authorities on his trail, and his newfound fame from the biography and documentary, he returned to painting.<sup>293</sup> He hoped his fame would boost his sales and he attempted to sell original

<sup>283</sup> Peter Schjeldahl, *Dutch Master: The Art Forger Who Became a National Hero*, THE NEW YORKER (Oct. 27, 2008), <http://www.newyorker.com/magazine/2008/10/27/dutch-master>.

<sup>284</sup> Eve M. Kahn, *Gleaning the True Identity of an Enigmatic Forger*, N.Y. TIMES (Apr. 7, 2011), <http://www.nytimes.com/2011/04/08/arts/design/elmyr-de-horys-real-identity-its-becoming-less-of-a-mystery.html>.

<sup>285</sup> *Id.*

<sup>286</sup> Andrea Fernandes, *Master Forger: Elmyr de Hory*, MENTAL FLOSS (Aug. 9, 2008, 9:00 AM), <http://mentalfloss.com/article/19306/master-forger-elmyr-de-hory>.

<sup>287</sup> Preben Juul Madsen, *Elmyr de Hory Cheated the World's Most Famous Auction Houses*, ART FAKES, <http://www.artfakes.dk/hory.htm> (last visited Sept. 4, 2015).

<sup>288</sup> Jesse Hamlin, *Master (Con) Artist / Painting Forger Elmyr de Hory's Copies are Like the Real Thing*, SF GATE (July 29, 1999, 4:00 AM), <http://www.sfgate.com/entertainment/article/Master-Con-Artist-Painting-forger-Elmyr-de-2917456.php>.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* See also Andrea Fernandes, *Master Forger: Elmyr de Hory*, (Aug. 9, 2008), <http://mentalfloss.com/article/19306/master-forger-elmyr-de-hory>.

<sup>291</sup> See *id.*

<sup>292</sup> *Elmyr de Hory: A Master of Deception*, INTENT TO DECEIVE, <http://www.intenttodeceive.org/forger-profiles/elmyr-de-hory/> (last visited Feb. 21, 2016).

<sup>293</sup> *Id.*

works.<sup>294</sup> He was devastated when France attempted to extradite him for forgery.<sup>295</sup> “In 1976, while under investigation for art fraud, he committed suicide by overdosing on sleeping pills.”<sup>296</sup>

Another fascinating tale of forgery is recounted in *Provenance*, a book that recounts details of a forgery ring mastermind by the name of John Drewe.<sup>297</sup> Drewe (born John Cockett) was charismatic and spun tall tales about his credentials, claiming to have a Ph.D. although he was actually a high school dropout.<sup>298</sup> In 1985 he placed an advertisement in the newspaper seeking an artist. Drewe commissioned a starving artist, John Myatt, to copy paintings to decorate Drewe’s home.<sup>299</sup> Eventually he convinced the artist to paint forgeries, which Drewe then sold to dealers and placed in auction houses and galleries, and he even donated to a fundraising auction.<sup>300</sup> The most astonishing aspect of this scam is that Drewe duped experts by falsely aging works with vacuum dust, varnish, and rusted picture frames.<sup>301</sup> He also created provenances for the works by forging certificates of authenticity, invoices, and documents from previous “owners”—using records of the deceased to build convincing stories about the art.<sup>302</sup> He infiltrated archives by introducing false records into them, replacing old records with new pages that included Myatt’s forgeries.<sup>303</sup> This allowed Drewe to alter catalogues and strengthen the works’ provenance histories. Experts opine that correcting the catalogues will require years of work.<sup>304</sup> One of the amazing aspects of the Drewe/Myatt fraud was Drewe’s ability to convince people in the art world of his expertise.

Myatt was arrested by Scotland Yard in 1995 and he agreed to cooperate and provide information about Drewe.<sup>305</sup> Myatt served time for his role in the scheme but gained fame for his high quality paintings,

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See Kahn, *supra* note 284.

<sup>297</sup> LANEY SALISBURY & ALY SUJO, *PROVENANCE: HOW A CON MAN AND A FORGER REWROTE THE HISTORY OF MODERN ART* (2010).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> Falsely aging works was also a scam used by Rosales, Qian, and Diaz in the Knoedler Gallery forgery. Randee Silv, *Magnifying Fakes*, ARTEIDOLIA (Dec. 2013), <http://www.arteidolia.com/magnifying-fakes-situation3-randee-silv/> (“Neighbors reported that they would see a man picking up paintings from Qian’s garage. The court papers specified that Diaz aged these paintings by ‘heating them, cooling them, and exposing them to the elements outdoors, in an attempt to make the fake works seem older than, in fact, they were.’”).

<sup>302</sup> LANEY SALISBURY & ALY SUJO, *PROVENANCE: HOW A CON MAN AND A FORGER REWROTE THE HISTORY OF MODERN ART* (2010).

<sup>303</sup> Peter Landesman, *A 20<sup>th</sup>-Century Master Scam*, N.Y. TIMES (July 18, 1999), <http://www.nytimes.com/1999/07/18/magazine/a-20th-century-master-scam.html>.

<sup>304</sup> *Id.*

<sup>305</sup> John M. Taylor, Review of *PROVENANCE* (OCT. 11, 2009), <http://www.washingtontimes.com/news/2009/oct/11/books-provenance/>.

partly due to his role in the fraud.<sup>306</sup> Although a mountain of evidence was supplied against Drewe, he maintained his innocence during prosecution. He was released on bail and disappeared, but was recaptured. He was charged and he defended himself at trial.<sup>307</sup> Unlike Van Meegeren and de Hory, Drewe served jail time.<sup>308</sup> Although sentenced to six years in prison for conspiracy to defraud, two counts of forgery, one count of theft, and one count of using a false instrument with intent, he only served two years; but that wasn't the end of his legal troubles.<sup>309</sup> In 2012 Drewe was convicted of defrauding a 71-year-old woman of her life savings.<sup>310</sup> He was sentenced to 10 years in jail by a judge who told him, "[i]n my view you are about the most dishonest and devious person I have ever dealt with, even through the trial you were fabricating documents."<sup>311</sup>

Some forgers have become so well known that they are celebrated today. In February 2014, *60 Minutes* featured a man commonly known as the most "successful" forger (at least from a financial perspective), Wolfgang Beltracchi.<sup>312</sup> After forty years of forging, Beltracchi eventually faced six years in prison and \$27 million in lawsuits.<sup>313</sup> He claims to be one of the most "exhibited painters in the world," and his work has even donned the cover of a Christie's auction catalog.<sup>314</sup> Beltracchi is famous for audaciously stating that his motives come from fulfilling the desire of the forged artist, "[i]n my thoughts, I created an original work, an unpainted painting by the artists of the past. . . . I painted works that really should have been in the artist's *oeuvre*."<sup>315</sup> This contention that Beltracchi is channeling dead artists is a familiar story.

<sup>306</sup> Tom Flynn, *An Impregnable, Alienating, Self-Regarding Elite: The Art World According to Art Forger John Myatt*, TOM FLYNN BLOG (July 18, 2014, 10:58 PM), <http://tom-flynn.blogspot.co.uk/2014/07/an-impregnable-alienating-self.html>.

<sup>307</sup> Andrew Levy, *The most devious person I've dealt with: Judge hits out at conman who tricked widow out of £700,000*, DAILYMAIL.COM (Mar. 13, 2012), <http://www.dailymail.co.uk/news/article-2114441/John-Drewe-trial-Judge-hits-conman-tricked-widow-700k.html>.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Christine Cunningham, *Businessman John Drewe Jailed for Eight Years Following Fraud Trial at Norwich Crown Court*, EASTERN DAILY PRESS (Mar. 12, 2012, 2:12 PM), [http://www.edp24.co.uk/news/businessman\\_john\\_drewe\\_jailed\\_for\\_eight\\_years\\_following\\_fraud\\_trial\\_at\\_norwich\\_crown\\_court\\_1\\_1234548](http://www.edp24.co.uk/news/businessman_john_drewe_jailed_for_eight_years_following_fraud_trial_at_norwich_crown_court_1_1234548).

<sup>311</sup> *Id.*

<sup>312</sup> Paraic O'Brien, *Portrait of the Artist as a Conman*, CHANNEL 4 NEWS (Apr. 16, 2014), <http://www.channel4.com/news/art-forgery-beltracchi-wolfgang-ernst-picasso-paraic-obrien>.

<sup>313</sup> Bob Simon, *The Con Artist: A Multimillion Dollar Art Scam*, CBS NEWS (Aug. 3, 2014), <http://www.cbsnews.com/news/con-artist-wolfgang-beltracchi-on-multimillion-dollar-scam/>.

<sup>314</sup> *Id.*

<sup>315</sup> Kate Deimling, *In Germany's Largest Art Forgery Trial, Master Swindler Laments Only That His Fakes Were "Too Good"*, BLOUIN ARTINFO (Sept. 28, 2011), <http://www.blouinartinfo.com/news/story/749199/in-germanys-largest-art-forgery-trial-master-swindler-laments>.

## 2. Forgers' Psychological Rationales for Duping the Marketplace

One of the common threads between forgers is the way they defend their illegal behavior with psychological justifications. These individuals are often admired by the public who are pleased to inflict embarrassment upon the rich elite of the art world.<sup>316</sup> Van Meegeren claimed that he intended his forgeries to be a tool to exact revenge upon critics who had humiliated him. He planned to wait until the painting attracted critical acclaim, and then he would reveal its true nature.<sup>317</sup> In 1945 he stated, “[d]riven into a state of anxiety and depression due to the all-too-meager appreciation of my work, I decided, one fateful day, to revenge myself on the art critics and experts by doing something the likes of which the world had never seen before.”<sup>318</sup>

Once he had achieved financial success from his criminal behavior, the temptation was too great and he continued to forge works.<sup>319</sup> Similarly, forger Eric Hebborn expressed his motivation as a desire for revenge against the British class establishment and art dealers.<sup>320</sup> (Still unsolved, Hebborn was murdered in 1996, mere weeks after publishing *The Faker's Handbook*, a set of instructions on ways to forge artworks. His body was discovered on a street in Rome, his skull broken.<sup>321</sup>) A living artist-forgery who has recently attracted attention is Ken Perenyi. For nearly thirty years Perenyi forged works by select eighteenth and nineteenth century artists. Like other famous forgers who enjoyed fooling experts, Perenyi grew dependent on the revenue he received from the fakes.<sup>322</sup> But eventually the FBI began investigating his sales.<sup>323</sup> Under the scrutiny of federal agents the forger realized he could not continue selling forgeries. He started a “new business model” in which he openly sold fake oil paintings as reproductions of masterpieces.<sup>324</sup> Perenyi is able to sell his paintings, but only if he clearly advises customers that they are reproductions.<sup>325</sup> Perenyi now has a successful business selling these works, and he boasts about his

<sup>316</sup> Dutton, *supra* note 3.

<sup>317</sup> Emily Upton, *The Revenge of Han Van Meegeren, One of the Great Art Forgers of All Time*, TODAY I FOUND OUT (Sept. 10, 2013), <http://www.todayifoundout.com/index.php/2013/09/the-revenge-of-han-van-meegeren-one-of-the-great-art-forgers-of-all-time/>.

<sup>318</sup> *Id.*

<sup>319</sup> Dutton, *supra* note 3.

<sup>320</sup> Denis Dutton, *Death of a Forger*, UNIV. OF SASKATCHEWAN, <http://www.usask.ca/art/a406/forger.htm> (last visited Sept. 4, 2015).

<sup>321</sup> *Id.*

<sup>322</sup> Colette Bancroft, *Art Forger Lived High Life by Mastering Fakes to Foist on Collectors*, TAMPA BAY TIMES (Sept. 14, 2012, 4:30 AM), <http://www.tampabay.com/features/books/babrt-forger-lived-high-life-by-mastering-fakes-to-foist-on-collectors/1251010>.

<sup>323</sup> KEN PERENYI, CAVEAT EMPTOR: THE SECRET LIFE OF AN AMERICAN ART FORGER (2014).

<sup>324</sup> *Id.*

<sup>325</sup> As explained later in Part IV (A) of this Article, fraud occurs only when an individual knowingly misrepresents a copy as an original.

skills, claiming “[t]here’s no one who does what I do.”<sup>326</sup> He even has a website that brazenly welcomes visitors with the statement: “Welcome to Americas [sic] #1 Art Forger Website.”<sup>327</sup> Similar to Beltracchi, Perenyi opines that he is fulfilling the wishes of the artists he forged. “I’m convinced that if these artists were alive today, they would thank me,” he has said, “I’m somebody that understands and appreciates their work.”<sup>328</sup>

### 3. The Psychology of Art Buyers

Just as forgers are motivated by psychological desires to wreak havoc on the art establishment, art collectors and the art world are spurred into believing in the veracity of forged works by their own cognitive motivations. Owners want works by famed artists and are willing to be deceived. It can be argued that the excessive number of fakes on the market reflects the willingness of the market and market players to believe in the veracity of fakes.

#### a. An Owner Becomes Part of the Art’s History

Buying a work by an established artist links the owner to the artist. The owner has a manifest physical connection to the artist; he owns an object that was once in the artist’s hands. The owner is in a unique position—one in which he possesses a single work from an artist’s *oeuvre*—and he has the ability to own and enjoy the object to the exclusion of all others. Furthermore, that owner becomes part of the work’s provenance, inextricably linked to the history of the object. The art world and future generations will always link the object to the current owner, allowing buyers to insert themselves into the annals of art history.

#### b. Owners Believe in the Veracity of the Work Due to Economic and Aesthetic Values

Owners allow themselves to be deceived because it serves their own interests. Not only do owners reap the psychological benefits of owning an original, but they also gain financial benefits by possessing a work by a famous artist. Attribution to a master or well-known painter brings value to the owner’s collection and higher prices when the object is resold. This phenomenon is not only true for art connoisseurs, but also for the general public and its fascination with attribution.

For a blatant example of the attribution affecting value, street artist

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<sup>326</sup> *Id.*

<sup>327</sup> Ken Perenyi, KEN PERENYI, [www.kenperenyi.com](http://www.kenperenyi.com) (last visited Sept. 4, 2015).

<sup>328</sup> Patricia Cohen, *Forgeries? Call ‘Em Faux Masterpieces*, N.Y. TIMES (July 17, 2012), <http://www.nytimes.com/2012/07/19/arts/design/ken-perenyi-art-forger-now-sells-his-work-as-copies.html>.

Banksy recently demonstrated this scenario on the unsuspecting public. In October 2013 Banksy held a month-long residency in New York City.<sup>329</sup> During the course of the month he created street art around the metropolis. Residents were thrilled to have Banksy call the city his playground, and hunting for new works by the artist became sport for New Yorkers from all walks of life. While the Banksy craze was in full swing, a small art stall was set up in Central Park. The stall was run by an older man selling works in the style of, and signed by, Banksy (some of which included figures commonly featured in Banksy graffiti). Over the course of seven hours, only eight canvases were sold. But as stated by this headline, “Banksy Has Unannounced Art Sale with Genuine Signed Canvases in Central Park, Sells Almost Nothing,” this was another instance of Banksy’s playfulness—the art was genuine.<sup>330</sup> Works attributed to Banksy can sell for hundreds of thousands or millions of dollars,<sup>331</sup> and people are so desperate to get his works that they remove walls from building structures to gain possession of it.<sup>332</sup> But when dozens of works were available for a paltry \$60, the vast majority of them went unsold. This was Banksy’s way of drawing attention to the fickle nature of the art world and demonstrating that the public is more interested in his name than in the artistic qualities of his works.

c. The Belief in an Attribution Has Physical Manifestations on Viewers

We believe that works by master artists are inherently superior to copies. The notion of authorship is so strong that the psychological implications physically manifest themselves. One group of researchers examined the way in which perceptions of art affect the brain’s response to it.<sup>333</sup> Fourteen volunteers, familiar with Rembrandt but without formal art history training, were put into an fMRI machine and given

<sup>329</sup> Chris Boyette, *Banksy Bids Farewell to New York with Balloons*, CNN (Nov. 1, 2013, 4:05 PM), <http://www.cnn.com/2013/10/31/us/new-york-banksy-residency-ends/>.

<sup>330</sup> Christopher Jobson, *Banksy Has Unannounced Art Sale with Genuine Signed Canvases in Central Park, Sells Almost Nothing*, THIS IS COLOSSAL (Oct. 13, 2013), <http://www.thisiscolossal.com/2013/10/banksy-art-sale/>.

<sup>331</sup> Lowpro, *Viewpoints: Top 25 Most Expensive Banksy Works Ever*, ARRESTED MOTION (Sept. 21, 2011), <http://arrestedmotion.com/2011/09/banksy-top-25-most-expensive-works-ever/>.

<sup>332</sup> See, e.g., *Banksy’s Kissing Coppers—Taken From a Pub Wall in Brighton—Sells for \$575,000 in US*, THE GUARDIAN (Feb. 19, 2014, 2:40 AM), <http://www.theguardian.com/artanddesign/2014/feb/19/banksy-mural-kissing-coppers-sells-us>; Christopher Hooton, *New Banksy Art ‘Mobile Lovers’ Removed With Crowbar, Hoarded in Youth Club*, THE INDEPENDENT (Apr. 16, 2014), <http://www.independent.co.uk/arts-entertainment/art/news/new-banksy-art-phone-lovers-removed-with-crowbar-as-artist-is-caught-on-cctv-9263740.html>; Melena Ryzik, *Another Banksy Mural to Go From Wall to Auction*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/14/arts/design/another-banksy-mural-to-go-from-wall-to-auction.html>.

<sup>333</sup> Jonah Lehrer, *How Does the Brain Perceive Art?*, WIRED (Dec. 14, 2011, 12:15 AM), <http://www.wired.com/2011/12/how-does-the-brain-perceive-art/>.



the following instructions, “You will see a sequence of 50 Rembrandt paintings. Before each image appears, an audio prompt will announce whether the upcoming painting is ‘authentic’ or a ‘copy.’ A blank screen will appear for a few seconds after each image to allow you to relax your gaze.”<sup>334</sup> The portraits were equally divided between Rembrandt and “school of Rembrandt.” While the subjects were staring at the paintings, the scanner recorded changes in cortical blood flow. The catch was that the researchers reversed half of the attributions, so that half of the subjects were told that the real Rembrandts were copies.<sup>335</sup>

There was no detectable difference in the response of visual areas to Rembrandt and “school of Rembrandt” works. This is not surprising since it would take years of training before critics can reliably discern real Rembrandt from copies. But astonishing results relate to works falsely labeled as authentic. Scientists located an activity pattern that appeared whenever a painting was deemed to be authentic, regardless of whether or not it actually was. In those instances, subjects experienced a spike in activity in the orbitofrontal cortex, an area of the brain behind the eyes that is often associated with perceptions of reward, pleasure and monetary gain.<sup>336</sup> Tellingly, there was no difference in orbitofrontal response when the Rembrandt attribution was applied to a fake work, as the brain responded identically. The quality of art was irrelevant; it was merely the label of authenticity that induced the physical reaction. The results were astonishing, “[w]e only see the beauty because we are looking for it.”<sup>337</sup> We all want to be duped.

*K. Forgeries Harm the Art Market, the Understanding of Art History,  
and our Perception of Artists*

Art forgery not only leads to economic losses, but also harms our understanding of art history by transforming our perception of artists. Fakes and forgeries defraud art scholarship and dilute an artist’s body of work. In the case of van Meegeren, his fakes were impressive enough to fool some Vermeer experts. However, the paintings also included unmistakable elements of the forger’s own style.<sup>338</sup> With the wide praise of the Vermeer paintings, the van Meegeren aspects of the work became accepted as artistic features of Vermeer, thus distorting history’s perception of the artist.<sup>339</sup> In his next Vermeer forgery, van Meegeren

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* (According to the researchers, this reflects “the increase in the perceived value of the artwork.”).

<sup>337</sup> *Id.*

<sup>338</sup> Dutton, *supra* note 3.

<sup>339</sup> See *How Mediocre Dutch Artist Cast ‘The Forger’s Spell’*, NPR BOOKS (July 12, 2008, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=92483237>.

included more of himself and less of Vermeer, and so on, gaining more acceptance with each forgery as his own style overtook Vermeer's.<sup>340</sup> His last forgeries, in fact, were hardly anything like authentic Vermeers; "[b]ecause curators and buyers had their understanding of the Vermeer style warped by the earlier forgeries, van Meegeren was able to get away with it."<sup>341</sup> If his forgeries had remained undiscovered, today we would have a wildly distorted view of Vermeer's art. In this case we are fortunate, but often we do not discover the forgery and the artist's portfolio is affected. Forgers harm artists by misattributing works that are representative of the artists' style.

Some argue that copies are not inferior to originals because they are equally beautiful, but copies lack the innovation of their original models.<sup>342</sup> What many admire in a work of art includes more than what simply meets the eye. If we listen to a recording of a piano prodigy and later learn that the recording was digitally enhanced, altered, sped-up, and patched together, then we would be disappointed. Our perception of an artwork is partially determined by what we know about its production.<sup>343</sup> El Greco's dramatic compositions of elongated and distorted figures became an inspiration for the Expressionist and Cubist movements, however no El Greco forgery could be credited as "ahead of its time." Part of what we admire about great artists is their originality, and forgers, by their very process, are derivative and unoriginal.<sup>344</sup>

#### IV. WHAT LEGAL REMEDIES ARE AVAILABLE?

As has been argued in this Article, there are challenges in asserting and definitively proving that a work is a forgery.<sup>345</sup> Once a work is proven as such, the victim of an art forgery, whether it be a private collector, museum, or organization, has legal remedies at his or her disposal. Under state and federal law, a forger is criminally liable for his acts. As discussed above, determining that a work is fake is an obstacle, and proving its falseness in a court of law is even more challenging. Even if buyers can definitively prove that a work is a fake, there are additional hurdles.

##### A. *Fraud*

If there is a smoking gun and the forger is identified, as in the case

<sup>340</sup> See Serna Davies, *The Forger Who Fooled the World*, THE TELEGRAPH (Aug. 5, 2006), <http://www.telegraph.co.uk/culture/art/3654259/The-forger-who-fooled-the-world.html>.

<sup>341</sup> Dutton, *supra* note 3.

<sup>342</sup> Ross Bowden, *What is Wrong with Art Forgery?: An Anthropological Perspective*, 57 J. OF AESTHETICS AND ART CRITICISM 333, 339-43 (1999).

<sup>343</sup> Dutton, *supra* note 3.

<sup>344</sup> *Id.*

<sup>345</sup> Cohen, *supra* note 161.

of the Knoedler Gallery, then a buyer may assert charges for fraud.<sup>346</sup> However, holding a seller accountable for a forgery is more difficult. To assert fraud in a U.S. court, the damaged buyer must prove five elements: (1) a false statement of material fact; (2) knowledge on the part of the defendant that the statement was not true; (3) the intent to deceive by making the false representation; (4) the reasonable reliance by the victim; and (5) actual loss suffered by the victim.<sup>347</sup> In the case of a fraudulent sale, this last factor usually relates to monetary loss.

Of the five elements, the most difficult to prove is that the seller had scienter (knowledge) that the work was a forgery.<sup>348</sup> The difficulty involved in proving scienter is obvious. If the record demonstrates that the seller genuinely believed in the veracity of the representation, then the plaintiff will be unable to prove the scienter necessary to sustain a fraud claim.<sup>349</sup> In the case of a high-quality and convincing forgery, a dealer may successfully assert the defense that he, too, was deceived.<sup>350</sup> Since the beginning of modern legal jurisprudence, courts have held that a dealer cannot be guilty of fraud for representing information that he himself believed.<sup>351</sup>

Courts have, however, recently demonstrated a willingness to impute knowledge on dealers—even amateur ones. In April 2014 Kevin Sutherland, a Florida pastor who dabbled in art sales, was found guilty of fraud.<sup>352</sup> At trial the jurors were asked to determine whether Sutherland knew that the work he was selling was fake and whether he hid that knowledge from an officer purchasing the work undercover.<sup>353</sup> The work sold by Mr. Sutherland was previously rejected by Sotheby's.<sup>354</sup> After learning of the auction house's rejection, Sutherland opted not to present the painting to another expert or share this information with the potential buyer; rather, he attempted to quickly sell the painting via private sale.<sup>355</sup> With this knowledge, the court determined that Sutherland had committed fraud.<sup>356</sup>

In the case of fraud against the Knoedler Gallery, Ann Freedman insisted that she had no idea that the works were fake.<sup>357</sup> However, is it

<sup>346</sup> Rashbaum & Cohen, *supra* note 133.

<sup>347</sup> *Fraud*, THE FREE DICTIONARY (2015), <http://legal-dictionary.thefreedictionary.com/fraud>.

<sup>348</sup> See *Krahmer v. Christie's Inc.*, 911 A.2d 399, 405–06 (Del. Ch. 2006).

<sup>349</sup> *Krahmer*, 911 A.2d. at 405.

<sup>350</sup> *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 313–14 (S.D.N.Y. 2013) (Ann Freedman, former president of the Knoedler Gallery, argued that she was herself deceived).

<sup>351</sup> *Jendwine v. Slade*, 170 Eng. Rep. 459, 460 (H.L. 1797).

<sup>352</sup> James C. McKinley Jr., *Pastor Is Convicted of Trying to Sell Counterfeit Art*, N.Y. TIMES (Apr. 8, 2014), <http://www.nytimes.com/2014/04/09/nyregion/florida-pastor-is-convicted-of-trying-to-sell-fake-damien-hirst-paintings.html>.

<sup>353</sup> See *id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> Cohen, *supra* note 145.

credible that the gallery's director never took any actions to investigate or delve into Rosales' past or the true nature of the works for sale? Victims of the forgery scheme claim that the gallery's director was culpable because she was cognizant of problems with works sold at the gallery and concealed them.<sup>358</sup> Some also claim that there is proof of willful ignorance; Freedman avoided certain art experts out of fear that the works would be rejected. Even worse is the assertion that Freedman actively participated in the fraud.<sup>359</sup> Counsel for the Knoedler Gallery asserted that the gallery and its director had no knowledge of the fraud, although one federal judge in the Southern District of New York, Judge Gardephe, did not believe that defense. The court rejected a motion to dismiss two lawsuits against Freedman, Rosales, and the Knoedler.<sup>360</sup> Gardephe stated, "[t]he complaints also plead facts more broadly demonstrating that Freedman likely knew . . . that her statements were false."<sup>361</sup>

*B. States, such as New York, Have Passed Legislation that Places Some Responsibility on Dealer-Sellers*

Although the plaintiff-buyer has a difficult task to overcome in proving that a seller had scienter in committing fraud, some state legislation carves out a way to protect buyers in the instance that a forgery was purchased from a dealer. As New York is the center of the art market in the United States (if not the world), state representatives deemed it necessary to protect buyers who purchase works within the state.<sup>362</sup> Legislators reasoned that dealers are in the best position to protect consumers.<sup>363</sup> *Dawson v. G. Malina* was the first case to interpret breach of warranty under New York Arts and Cultural Affairs Law § 13.01.<sup>364</sup> The law establishes that when an art merchant<sup>365</sup> attributes an artwork to an author in writing, it is presumed to be part of the basis of the sale and is deemed to be an express warranty of authenticity.<sup>366</sup> This warranty applies only in the case in which a written

<sup>358</sup> See Bono, *supra* note 143.

<sup>359</sup> Cohen, *supra* note 145.

<sup>360</sup> *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 311, 313 (S.D.N.Y. 2013).

<sup>361</sup> *Id.* at 302.

<sup>362</sup> Leslie Kaufmann Akst, *Regulation of the New York Market: Has the Legislature Painted Dealers into a Corner?*, 46 FORDHAM L. REV. 939, 961–62 (1978).

<sup>363</sup> *Id.* at 941.

<sup>364</sup> *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461 (S.D.N.Y. 1978).

<sup>365</sup> N.Y. ARTS & CULT. AFF. LAW § 11.01(2) (Consol. 1984) ("Art Merchant" is defined as "a person who by his occupation holds himself out as having knowledge or skill peculiar to such works, or to whom such knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having such knowledge or skill.").

<sup>366</sup> *Levin v. Gallery 63 Antiques Corp.*, No. 04 CV 1504 KMK, 2006 WL 2802008, at \*10 (S.D.N.Y. Sept. 28, 2006) (quoting *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461, 465 n.3 [S.D.N.Y.1978]) ("[T]he relevant provision of the New York Arts Law 'provides that where an art merchant states to a lay person that a piece is by a specific author or can be attributed to a

statement is made by an art merchant and provided to a non-art merchant.<sup>367</sup> In *Dawson v. G. Malina*, the court found that the appropriate standard for determining breach of warranty of authenticity is whether the art merchant's representations had a "reasonable basis in fact" at the time that the representations were made.<sup>368</sup> Sellers must have a "reasonable basis in fact" for believing that the items sold are authentic.<sup>369</sup> The plaintiff must prove by a preponderance of the evidence that the seller did not have a reasonable basis in fact,<sup>370</sup> which is measured by expert testimony.<sup>371</sup> However, a merchant will not be held responsible for a misrepresentation if he reasonably believed in the veracity of the statement.<sup>372</sup>

In *Levin v. Dalva Bros., Inc.*,<sup>373</sup> the First Circuit applied the § 13.01, reasoning that the primary contacts occurred in New York, and determined that the New York fine art statute trumps § 2-313 of the U.C.C.<sup>374</sup> The court reasoned that the U.C.C. only creates an express warranty for a seller's affirmation of fact and therefore under the U.C.C. an art dealer could submit an affirmation of authenticity, and then later claim that the attribution was only an opinion and not a warranty.<sup>375</sup> The New York state statute does not differentiate between an affirmation and an opinion, but instead examines only whether the written statements were based on a reasonable basis in fact.<sup>376</sup>

### *C. Contract Law May Help to Resolve Issues Related to Sales of Forgeries*

If buyers are not safeguarded under specific state laws, they may find protection under contract law. A buyer will typically sue for rescission of the contract—repayment of the purchase price in exchange for the return of the artwork. Equitable considerations require that an aggrieved buyer fooled into purchasing an item not conforming to his reasonable expectations be afforded a remedy under contract law.

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specific period, the statement 'shall create an express warranty.'").

<sup>367</sup> N.Y. GEN. BUS. LAW § 291-C (Consol. 2015) (codified as N.Y. ART & CULT. AFF. LAW § 13.01).

<sup>368</sup> *Dawson*, 463 F. Supp. at 467.

<sup>369</sup> *Christie's Inc. v. SWCA, Inc.*, 867 N.Y.S.2d 650, 657 (Sup. Ct. 2008); *Upper Deck Authenticated, Ltd. v. CPG Direct*, 971 F. Supp. 1337, 1347 (S.D. Cal. 1997).

<sup>370</sup> N.Y. GEN. BUS. LAW § 291-C (Consol. 2015) (codified as N.Y. ART & CULT. AFF. LAW § 13.01).

<sup>371</sup> *Dawson*, 463 F. Supp. at 467.

<sup>372</sup> *See id.*

<sup>373</sup> 459 F.3d 68 (1st Cir. 2006) (Art collectors hired a designer to find and purchase antiques for their collection, and later learned that the pieces were not in conformity with the attributions given at the time of purchase.).

<sup>374</sup> *Id.* at 77.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

### 1. Express and Implied Warranties Under the Uniform Commercial Code

It is reasonable to assert that the identity of an artist is a material aspect of a contract and should be captured in a warranty. Because of the nature of a work of art, authorship is part of the basis of the bargain. An express warranty is created through an affirmation or promise,<sup>377</sup> the description of the art object,<sup>378</sup> or a seller's statements of opinion about the work.<sup>379</sup> These statements by a seller comprise the core description of an artwork, and become a part of the "basis of the bargain."<sup>380</sup> If the artwork fails to conform to the seller's affirmations or promises the warranty is breached, and the buyer can demand rescission. If a buyer purchases a work identified as a Pollock, then that attribution is an important aspect of the sale and should be included as a warranty. Art purchasers claim warranties under U.C.C. Article 2, most often arguing that an express warranty had been breached if an art object is inauthentic.<sup>381</sup> This is similar to the argument that § 13.01(1)(b) of the New York State Consolidated Laws Services Arts and Cultural Affairs Law creates an express warranty when a certificate of authenticity, or a similar written instrument, is provided by an art merchant seller and a non-art merchant buyer. Buyers could arguably assert rights under the implied warranty provision of the U.C.C. The provision states:

(1) [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and . . . (f) conform to the promise or affirmations of fact made on the container or label if any. (3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.<sup>382</sup>

However, courts have been unclear about the application of this

<sup>377</sup> See *Tunick v. Kornfeld*, 838 F.Supp. 848 (S.D.N.Y. 1993).

<sup>378</sup> See *Weber v. Peck*, No. 97 CIV. 7625, 1999 WL 493383, at 2\* (S.D.N.Y. July 9, 1999).

<sup>379</sup> See *Levin v. Gallery 63 Antiques Corp.*, No. 04 CV 1504 KMK, 2006 WL 2802008 (S.D.N.Y. Sept. 28, 2006).

<sup>380</sup> U.C.C. § 2-313 (1)(a) (1977).

<sup>381</sup> *Id.* ("(1) Express warranties . . . 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 . . . (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.").

<sup>382</sup> U.C.C. § 2-314 (1977).

provision. In *Balog v. Center Art Gallery-Hawaii, Inc.*, the District of Hawaii determined that the implied warranty of merchantability does not apply to art because forged art is as merchantable as authentic works because its fundamental use is its aesthetic value and display, not its authorship.<sup>383</sup> On the other hand, the Northern District of Illinois did find an implied warranty of merchantability under U.C.C. § 2-314 for an authentication and appraisal report.<sup>384</sup> The court explained that goods are merchantable if they “conform to the promises . . . made on the container or label” within the meaning of U.C.C. § 2-314(2)(f).<sup>385</sup> Additionally, if a painting does not correspond to statements in an authentication document, then it does not satisfactorily match the description, thus deeming it unmerchantable under U.C.C. § 2-314(2)(a).<sup>386</sup>

## 2. Breach of Contract

It is reasonable to assert that the identity of an artist is a material aspect of an agreement. In contract law, a material term is a contract provision that concerns significant issues, such as subject matter, price, quantity, or payment.<sup>387</sup> A reasonable contracting party would recognize that authorship is an important provision of a sales agreement. If a buyer purchases a multi-million dollar painting advertised as a Pollock, that person has a reasonable expectation that he is purchasing a correctly attributed Pollock. Selling falsely attributed works should be classified as a “fundamental breach,” arguably allowing the aggrieved party to terminate the sales agreement.<sup>388</sup> Article 25 of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) states that a contract breach is “fundamental” if it results in “such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”<sup>389</sup> In analyzing whether a breach is fundamental, the core element is “detriment.”<sup>390</sup> Economic loss is classified as a detriment, if it is substantial and deprives the party of what he or she is “entitled to expect.”<sup>391</sup> No

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<sup>383</sup> *Balog v. Ctr Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1564 (D. Haw. 1990).

<sup>384</sup> *McKie v. R.H. Love Galleries, Inc.*, No. 90. C 0212, 1990 WL 179797, at 2\* (N.D. Ill. Nov. 2, 1990).

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Material Term*, BLACK’S LAW DICTIONARY (7th ed. 1999).

<sup>388</sup> *Fundamental Breach Law & Legal*, US LEGAL, <http://definitions.uslegal.com/f/fundamental-breach/>.

<sup>389</sup> *Guide to Article 25, CISG*, <http://www.cisg.law.pace.edu/cisg/text/peclcomp25.html> (last updated Jan. 5 2007).

<sup>390</sup> *Id.*

<sup>391</sup> Cem Veziroglu, *The Concept of ‘Fundamental Breach’ in the CISG*, ACADEMIA,

reasonable person would willingly pay millions of dollars for a work resembling a Pollock, but not by Pollock's hand. Paying the price of an authentic Pollock, but only receiving a copy, is a detriment.

### 3. Mutual or Unilateral Mistake

In a similar way, a contract may be voided if based upon a mutual mistake. A mutual mistake occurs when both parties to a contract are mistaken about the same *material* fact within their contract.<sup>392</sup> It is reasonable to assert that the correct attribution, the actual identity of the artist, is a material fact. Historically courts have agreed to void contracts based on mutual mistake.<sup>393</sup> The Restatement (Second) of Contracts states:

Where a mistake of both parties at the time of contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in Section 154.<sup>394</sup>

Section 154 provides exceptions for this mutual mistake and outlines circumstances under which a party bears the risk of mistake:

(1) [when] the risk is allocated to him by agreement of the parties, or  
(2) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (3) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.<sup>395</sup>

Essentially, if the mutual mistake significantly changes the subject matter or the purpose of the contract, the court will not enforce the agreement when the aggrieved party has not assumed the risk.<sup>396</sup>

The party claiming mutual mistake must show “that the mistake in question is mutual, substantial, material and exists at the time the contract is entered.”<sup>397</sup> “[T]he mistake must be ‘so material that . . . it

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[http://www.academia.edu/2537514/The\\_Concept\\_of\\_Fundamental\\_Breach\\_in\\_the\\_CISG](http://www.academia.edu/2537514/The_Concept_of_Fundamental_Breach_in_the_CISG) (last visited Sept. 4, 2015).

<sup>392</sup> Ian Ayres & Eric Rasmusen, *Mutual and Unilateral Mistake in Contract Law*, 22 J. LEGAL STUD. 309 (1993), <http://islandia.law.yale.edu/ayres/mutual.htm>.

<sup>393</sup> *Id.*

<sup>394</sup> RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).

<sup>395</sup> *Id.* at § 154.

<sup>396</sup> *See id.*

<sup>397</sup> *Rodriguez v. Mower*, 866 N.Y.S.2d 815, 817 (N.Y. App. Div. 2008) (citing *Cnty. of Orange v. Grier*, 817 N.Y.S.2d 146, 147–48 (N.Y. App. Div. 2006)).



goes to the foundation of the agreement.”<sup>398</sup> However, there are limitations: for example, the mutual mistake doctrine “may not be invoked by a party to avoid the consequences of its own negligence.”<sup>399</sup> Mutual mistake is not available to a disappointed buyer who did nothing prior to the sale to protect his purchase. In *ACA Galleries, Inc. v. Kinney*, the court ruled that a buyer could not rescind an agreement based on mutual mistake because he failed to investigate authenticity prior to purchase.<sup>400</sup> The buyer, a gallery, was informed that the artist’s authentication board was available to inspect the work. The gallery declined a consultation, opting to present the work for inspection after the purchase. The buyer was aware that its self-conducted pre-purchase inspection provided it with “only limited knowledge with respect to the facts to which the mistake relates but treat[ed its] limited knowledge as sufficient.”<sup>401</sup> Under Section 154, the gallery assumed the risk and thus was prevented from demanding rescission based upon mutual mistake.<sup>402</sup> The contract was not voidable because of the buyer’s consciously accepted risk.<sup>403</sup> From these rulings, it is evident that the mutual mistake doctrine is used in narrow circumstances, only where the buyer was not negligent in his purchase: *i.e.*, where the purchaser had completed a reasonable amount of due diligence.<sup>404</sup>

Buyers may also be able to rescind a contract under unilateral mistake where the error is held by only one party and not shared by the other.<sup>405</sup> Where only one party has erred, it could lead to an unfair advantage in bargaining power;<sup>406</sup> therefore, remedies such as rescission

<sup>398</sup> *Simkin v. Blank*, 19 N.Y.3d 46, 52 (2012) (quoting *Da Silva v. Musso*, 53 N.Y.2d 543 [1981]).

<sup>399</sup> *Gitelson v. Quinn*, 987 N.Y.S.2d 329, 330 (N.Y. App. Div. 2014) (quoting *P.K. Dev. v. Elvem Dev. Corp.*, 987 N.Y.S.2d 558, 560 [N.Y. App. Div. 1996]); accord *De Sole v. Knoedler Gallery, LLC*, 974 F.Supp.2d 274, 320 (S.D.N.Y. 2013); accord *Gitelson*, 118 A.D.3d at 404 (quoting *Da Silva v. Musso*, 53 N.Y.2d 543, 551 [1981] [“Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible.”]).

<sup>400</sup> *ACA Galleries, Inc. v. Kinney*, 552 F. App’x 24, 25 (2d Cir. 2014).

<sup>401</sup> RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981); see also *Rose Inn of Ithaca, Inc. v. Great Am. Ins. Co.*, 905 N.Y.S.2d 318, 321 (N.Y. App. Div. 2010).

<sup>402</sup> See *ACA Galleries, Inc.*, 552 F.App’x at 24.

<sup>403</sup> See *id.*

<sup>404</sup> *Rose Inn of Ithaca, Inc.*, 75 A.D.3d at 739.

<sup>405</sup> See *Donovan v. RRL Corp.*, 27 P.3d 702 (Cal. 2001) (holding that rescission may be appropriate for mistake of fact if it is material to the contract and was not the result of neglect of a legal duty, if enforcement of the contract as made would be unconscionable, and if the other party can be placed in status quo); see also RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) (authorizing rescission for a unilateral mistake of fact where “the effect of the mistake is such that enforcement of the contract would be unconscionable.”).

<sup>406</sup> See GEORGE SPENCER BOWER, THE LAW OF ACTIONABLE MISREPRESENTATION 440–41 (2d ed. 1927) (discussing the relevant passage from Cicero’s *De Officiis*); GEORGE E. PALMER, THE LAW OF RESTITUTION § 12.3 (1978); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 106 (4th ed. 1971); W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 31–37 (1937).

or contract reformation may be reasonable. To rescind a contract under this doctrine, the error must have had a material effect on the outcome of the contract.<sup>407</sup> In addition, the effect of the mistake is such that enforcement of the contract would be unconscionable, and the other party had reason to know of the mistake or that his fault caused the mistake.<sup>408</sup> However, to show that the buyer entered into an agreement due to an error on his part, the buyer would have to prove that the seller did not make an error. To do so, the buyer would need to prove that the seller knew the correct attribution, essentially proving that the seller committed fraud.<sup>409</sup> Proving this requires a showing of scienter, the great hurdle in a fraud case, thus making this remedy as difficult as proving fraud.<sup>410</sup>

#### *D. RICO Provides Criminal Penalties for Art Forgery Schemes*

Under the federal racketeering law, aggrieved buyers may have remedies. The Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),<sup>411</sup> often used against white collar crime, provides for extended criminal penalties and civil actions for multiple acts performed as part of an ongoing or active criminal organization. Fraud is included in the actionable crimes under its list of predicate acts.<sup>412</sup> Where a RICO violation is predicated on fraudulent acts, a plaintiff must allege that a defendant's acts were not only the "but for" cause of plaintiff's injury, but the proximate cause as well, necessitating "some direct relation between the injury asserted and the injurious conduct alleged. . . . A link that is too remote, purely contingent, or indirect is insufficient."<sup>413</sup> Although RICO is rarely used in art forgery matters, the plaintiffs in *De Sole v. Knoedler* alleged RICO violations.<sup>414</sup> The defendants in that case filed a motion to dismiss, which was denied by the court when the judge determined the plaintiffs had adequately pleaded a substantive RICO claim.<sup>415</sup> Denied in many cases,<sup>416</sup> the applicability of RICO has rarely been applied in art forgery matters. In *Galerie Furstenberg v. Coffaro* RICO was applied to recover damages arising from the defendant art

<sup>407</sup> RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981).

<sup>408</sup> *Id.*

<sup>409</sup> *Creative Waste Mgmt., Inc. v. Capitol Envtl. Servs., Inc.*, 429 F. Supp. 2d 582, 607 (S.D.N.Y. 2006), citing *Travelers Indem. Co. of Ill. v. CDL Hotels USA, Inc.*, 322 F.Supp.2d 482, 498 (S.D.N.Y. 2004) (stating that a unilateral mistake must be "coupled with some fraud." (citations omitted)).

<sup>410</sup> *See May Dep't Stores Co. v. Int'l Leasing Corp., Inc.*, 1 F.3d 138, 141 (2d Cir. 1993).

<sup>411</sup> 18 U.S.C.A. §§ 1961–1968 (West 2013).

<sup>412</sup> 18 U.S.C.A. § 1961 (West 2013).

<sup>413</sup> *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 2 (2010) (citations omitted).

<sup>414</sup> *De Sole v. Knoedler Gallery, LLC*, 974 F. Supp. 2d 274, 300 (S.D.N.Y. 2013).

<sup>415</sup> *Id.* at 311 (hopefully the final decision in this matter will provide greater insight to the court's treatment of RICO cases related to art crimes).

<sup>416</sup> *See, e.g., Schlaifer Nance & Co. v. The Estate of Andy Warhol*, 119 F.3d 91 (2d Cir. 1997).

merchants' creation and dissemination of counterfeit Salvador Dalí works.<sup>417</sup> The plaintiff's complaint identified eight Dalí works which defendants reproduced without permission. The court affirmed this was a RICO violation, which required a "pattern of racketeering activity."<sup>418</sup> RICO has tremendous potential for prosecuting and preventing art crimes and for compensating art crime victims.<sup>419</sup> It allows private parties to sue an enterprise and file for damages that are triple the amount suffered.<sup>420</sup>

*E. The Federal Trade Commission Recognizes Art Crimes as Unfair Trade Practice*

The Federal Trade Commission ("FTC") has used the FTC Act to battle unfair trade practices in the art world. In *FTC v. Magui Publishers, Inc.*, the FTC brought an action "under sections 5 and 13(b) of the FTC Act, 15 U.S.C. §§ 45 and 53(b), for injunctive relief and disgorgement of earnings on account of deceptive practices in the sale of art prints."<sup>421</sup> Section 45 of the FTC Act protects consumers against "unfair or deceptive acts or practices in or affecting commerce."<sup>422</sup> Deception is found "if there is a representation, omission or practice that is *likely* to mislead the consumer acting *reasonably* in the circumstances . . . ."<sup>423</sup> The sale of a forged work to an unsuspecting buyer is a deceptive act, as an art collector would not knowingly spend large amounts of money on a forged work if he were aware of its true origins. Beginning in the early 1980s, Magui Publishers and its owner distributed limited edition etchings and lithographs that were reproductions of works by Salvador Dalí.<sup>424</sup> The works were reproduced on paper Dalí had purportedly pre-signed, and were accompanied by a certificate of authenticity falsely identifying the artist as Salvador Dalí. In *FTC v. Magui*, the court ruled against Magui, permanently enjoining the gallery from fraudulent activity and ordering the gallery to restore \$1.96 million in ill-gotten profits.<sup>425</sup> The court reasoned that the gallery illegally misrepresented attribution "both as a matter of common sense

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<sup>417</sup> *Galerie Furstenberg v. Coffaro*, 697 F.Supp. 1282 (S.D.N.Y. 1988).

<sup>418</sup> 18 U.S.C.A. § 1962(c).

<sup>419</sup> Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud*, 8 CRIM. JUST. 16, 16–20 (1993).

<sup>420</sup> Carli McNeill, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 NOTRE DAME L. REV. 1231 (2010).

<sup>421</sup> *F.T.C. v. Magui Publishers, Inc.*, No. 91-55474, 1993 WL 430102, at \*1 (9th Cir. Oct. 22, 1993).

<sup>422</sup> 15 U.S.C.A. § 45(a) (West 2006).

<sup>423</sup> *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986) (emphases in original), *cert. denied*, 479 U.S. 828 (1986).

<sup>424</sup> *Magui*, 1993 WL 430102, at \*1.

<sup>425</sup> *Id.*

and under the definition of ‘artist’ . . . .”<sup>426</sup> Labeling a work that was not actually created by the artist as being from an artist’s collection misled consumers.<sup>427</sup>

#### *F. Buyers May Pursue Claims Unrelated to Authenticity*

Another avenue for resolving forgery claims relates to international cultural heritage or customs laws. Some items are not eligible for sale abroad if they are classified as cultural heritage objects.<sup>428</sup> For example, in France, a painting over 100 years old may be classified as an object of cultural significance.<sup>429</sup> Under European Union law, a work may be prohibited from export outside of a nation state’s borders.<sup>430</sup> In order to sell and ship artwork outside of borders, a seller may be required to obtain an export license from the source nation’s ministry of culture.<sup>431</sup> It is necessary for art sellers to obtain the required permission and necessary licenses to export a cultural heritage object from its source nation. If a license was not granted, then the sale may be illegal.

Buyers generally are not successful in demanding rescission on grounds of illegal export, because courts have not discharged contract responsibilities for customs requirements. Rather, courts have found that illegal export does not deem a work unsalable because there are alternative markets in which to sell goods.<sup>432</sup> In the case of cultural heritage, alternate markets are not available because the illegal export and lack of license affect the object itself. A cultural object entering into a foreign market without the proper accompanying documents does not have clean title. This makes it nearly impossible for any purchaser to resell the object, as due diligence will expose the illegality.

#### *G. Non-Legal Considerations*

The art market often operates in a different manner than other markets. Dealers rely on their reputations, and clients can use this susceptibility for additional leverage. One aspect of due diligence is the investigation of a seller’s background. Buyers and attorneys today can ascertain information about dealers by conducting a simple online

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<sup>426</sup> *Id.* at 2.

<sup>427</sup> *See id.*

<sup>428</sup> *See Prohibited and Restricted Items*, U.S. CUST. AND BORDER PROTECTION, <http://www.cbp.gov/travel/international-visitors/kbyg/prohibited-and-restricted-items> (last visited Sept. 5, 2015).

<sup>429</sup> Law No 92-1477 of 31 December 1992, as amended by Law No 94-679, Law No 2000-643 on the protection of national treasures, Law No 2002-5 and Order No 2004-178.

<sup>430</sup> 2008 O.J. (L 39) 1–2.

<sup>431</sup> *Id.*

<sup>432</sup> *See, e.g.,* *McMaster & Co. v. Cox McEuen & Co.*, 921 SC (HL) 24 (1920); *Congimex SARL v. Continental Grain Export Corp.*, 2 Lloyd’s Reports 346 (1979).

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search. Since the case that took down the Knoedler Gallery, other dealers have become very much aware of the precarious nature of their businesses. As many art collectors share information about their purchases and socialize in elite groups of collectors, sellers' reputations are valuable, and thus they should accurately represent art for sale. Buyers do have some control over the market and the demand of works from particular dealers.

## CONCLUSION

In *Hahn v. Duveen*, Judge Black expressed his frustration with authentication in the art market.<sup>433</sup> He recognized that there may not be an absolute truth, and there may not be a consensus for particular works of art, writing:

A new situation exists in the world of art. . . . Frequently, as antiques passed from family to family or from government to government, their authenticity was frequently questioned. Finally, the pendulum of artistic criticism swung slower and slower, until it usually stopped at [a]n opinion which remained practically standard. But it was always subject to a renewal of criticism in books or in the press whenever a critic leveled his attacks at a certain work.<sup>434</sup>

Sadly, this still holds true today. Whether it is a human desire to believe in the authenticity of objects linking us to a famed artist or the high level of skills possessed by gifted forgers, the art market is full of high-priced fakes fooling the masses.

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<sup>433</sup> *Hahn v. Duveen*, 234 N.Y.S. 185, 189–90 (N.Y. Sup. Ct. 1929).

<sup>434</sup> *Id.* at 189.